CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART C

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ENOCK FONTILME,
Petitioner,

Index No. HP 145/21

-against-

DECISION/ORDER UPON MOTIONS & AFTER TRIAL

LISA ATZMON,
Respondent,

-and-

NYC DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,
Respondent.

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Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent Lisa Atzmon's motion to dismiss the petition, for disclosure, for a summary determination, and for an order of eviction, and petitioner's cross-motion for summary judgment and civil penalties:

Papers	**Numbered**
Notice of Motion & All Documents Annexed	1 (NYSCEF #75-81)
Notice of Cross-Motion & All Documents Annexed	2 (NYSCEF #82-84)
Affirmation & Affidavit in Reply & in Opposition	3 (NYSCEF #85-86)

Upon the foregoing cited papers, the decision and order on respondent's motion and petitioner's cross-motion (consolidated for determination herein) will follow. This Decision/Order also contains this court's trial findings and determinations.

PROCEDURAL HISTORY

This harassment HP action was commenced in March 2021. By Decision/Order dated July 29, 2021, Judge Maria Ressos denied a motion by respondent Lisa Atzmon for summary

judgment and dismissal but granted respondent's request to supplement and amend the answer. Thereafter, this court denied a motion by respondent to consolidate this HP action with a summary holdover proceeding by Decision/Order dated April 15, 2022 (*see Fontilme v. Atzmon*, 74 Misc 3d 1232[A], 2022 NY Slip Op 50272[U] [Civ Ct, Queens County 2022]). This court conducted a trial on petitioner's harassment claims on May 3, 2022, May 19, 2022, June 7, 2022, and July 26, 2022. Prior to the final trial date, both parties filed motions (the instant motions being determined herein); the court heard argument on them and concluded the trial on July 26, 2022. Decision was reserved on the motions and after trial.

RESPONDENT'S MOTION

Respondent requests a variety of relief in her notice of motion. However, in the motion itself, the primary remedies sought are dismissal of the petition based on destruction of evidence and alleged improper discussions by petitioner with his attorney about petitioner's testimony and, in effect, summary judgment on respondent's counterclaims. To the extent that the notice of motion requests disclosure pursuant to CPLR § 408, nothing contained in the motion itself sets out a basis for this relief. In the absence of a showing of "ample need" for discovery in a special proceeding, it is unwarranted under CPLR § 408. *See Georgetown Unsold Shares, LLC v. Ledet*, 130 AD3d 99, 106-107 [2d Dept 2015]; *New York University v. Farkas*, 121 Misc 2d 643, 647 [Civ Ct, NY County 1983, Saxe, J.]. Accordingly, the request for disclosure is denied.

In conjunction with respondent's assertion that petitioner and/or his attorney have destroyed or engaged in the spoliation of evidence, respondent seeks dismissal as a sanction pursuant to CPLR § 3126. The destruction/spoliation charge stems from statements during the litigation by petitioner's attorney about the number of videos that petitioner possessed vis-à-vis the number actually introduced at trial. Respondent's attorney annexes letters that he sent

petitioner's attorney (dated July 30, 2021, September 9, 2021, January 20, 2022, and March 1, 2022), which requested production of videos (among other items) and the preservation of evidence. Respondent argues that because not all the videos mentioned by petitioner's attorney over the course of the proceeding were produced or introduced at trial, the court should infer the destruction/spoliation of evidence. Petitioner opposes the charge of destruction/spoliation of evidence and asserts (via his attorney's affirmation) that petitioner "did nothing to hide any evidence and presented what he had" (Glasser Aff., ¶ 7). In reply, respondent's attorney highlights the fact that petitioner did not deny (by affidavit) the spoliation charge and discounts petitioner's attorney's denial as being unduly circumspect and untrue.

The Court of Appeals has held that "[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.'" *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal citations omitted]; *see also Franco v. Half Moon Riv. Club, LLC*, 214 AD3d 956 [2d Dept 2023]. Additionally, "[w]here the evidence was intentionally or wilfully destroyed, its relevance is presumed....[h]owever, where the evidence was destroyed negligently, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense." *Franco*, 214 AD3d at 958 [internal citations omitted]. However, "gross negligence" will also create a presumption of relevance. *See Parauda v. Encompass Ins. Co. of Am.*, 188 AD3d 1083, 1086 [2d Dept 2020].

Here, respondent does not precisely argue intentionality or gross negligence, although this is implied. However, the court must deny this portion of respondent's motion because there

is no showing either that evidence was destroyed or that petitioner had an obligation to produce it. At most, the motion establishes that petitioner made a strategic decision as to which evidence would be introduced at trial. There is no automatic production of documents nor discovery generally in special proceedings. Discovery, except for a narrow statutory allowance for notices to admit, is only permitted by leave of court in special proceedings. *See* CPLR § 408; *Ledet*, 130 AD3d at 106-107; *Farkas*, 121 Misc 2d at 647. There is no record that respondent sought, or that the court granted, discovery in the form of production of videos before the trial commenced. Although respondent's attorney's reply affirmation asserts that production of the videos was compelled by subpoena (Dembia Reply Aff., ¶ 2(c)), no copy of a subpoena is annexed to the motion, nor can one be found in the court file or on NYSCEF. To the extent that respondent's attorney's letters requesting production of the videos are relied upon, they do not constitute discovery requests, insofar as discovery was only permitted by leave of court. *See e.g. Blanca Realty Corp v. Espinal*, 2006 NYLJ LEXIS 1785, *4-5 [Civ Ct, NY County, Apr. 5, 2006] [Notice to produce served without leave of court was stricken]; *Farkas*, 121 Misc 2d at 647.

Respondent also argues that the case should be dismissed because of alleged improper discussions about petitioner's testimony between petitioner and his attorney. Specifically, respondent references this court's instructions to petitioner that he not discuss his testimony between court dates and statements by petitioner's attorney in an affidavit about reviewing videos with petitioner before one of the trial dates that suggested that petitioner had improperly discussed testimony with his attorney. Petitioner does not specifically oppose this allegation in the opposition papers. As discussions regarding witness preparation are not generally subject to attorney-client privilege, "coaching" of witnesses is generally subject to cross-examination and impeachment. *See Estate of Antonio Nigro*, 2004 NYLJ LEXIS 4222 [Sur Ct, Nassau County,

October 5, 2004] [citing *Geders v. United States*, 425 U.S. 88-90 [1976]]. While the court does not condone any discussions that potentially occurred between petitioner and his attorney that may have touched on petitioner's testimony after the court gave its instruction, the United States Supreme Court has recognized that:

> "There are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel…The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. [An attorney] may cross-examine a [party] as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court." *Geders*, 425 U.S. at 89.

Respondent's attorney had ample opportunities to question petitioner about the subject of any preparations with his attorney at trial. Accordingly, the court does not find that the implied discussions between petitioner and his attorney about testimony and evidence are a sufficient basis for dismissal of this proceeding.

Finally, as to respondent's request for summary judgment, the court previously denied a motion for summary judgment by respondent at the close of petitioner's testimony (*see* NYSCEF Doc. 74). The court concluded the trial on petitioner's harassment claims on July 26, 2022. The court finds that issues of fact required disposition at trial and the court will issue the trial decision on the harassment claims later in this Decision/Order. The court does not find that the harassment claims were subject to summary determination; thus, the trial on those claims was held and concluded (*see* CPLR § 410). As for respondent's counterclaims, the court does not find that respondent's motion or the "pleadings, papers, and admissions" before the court (CPLR § 409(b)) support a finding of summary judgment in respondent's favor on any of the counterclaims. While respondent attempts to effectuate a summary determination of her claims in Index No. 305160/21 via a Notice to Admit served in this proceeding (NYSCEF Doc. 61), the

court has denied respondent's motion to consolidate Index No. 305160/21 with this proceeding. To permit a summary determination in a collateral proceeding over which this court has no jurisdiction would be an improper end-run around the law of this case. *See Martin v. Cohoes*, 37 NY2d 162, 165 [1975].

The court has considered the remaining arguments in respondent's motion and finds them to be without merit. Accordingly, respondent's motion is denied in its entirety.

PETITIONER'S CROSS-MOTION

Petitioner's cross-motion seeks denial of respondent's motion, a finding of summary judgment, and dismissal of respondent's counterclaims. The court has denied respondent's motion on the merits, so the court denies the portion of petitioner's motion seeking the same as academic. The court also denies the motion to the extent that it seeks (at least by implication) summary judgment on petitioner's harassment claims. The court previously held in its denial of petitioner's motion that there were issues of fact related to petitioner's harassment claims that required determination at trial. The trial on petitioner's harassment claims is concluded and the court will make a trial determination in this Decision/Order (*see* CPLR § 410).

As for petitioner's request to dismiss respondent's counterclaims for lack of jurisdiction, the court starts with the basic observation that the NYC Civil Court Act (specifically Sections 110 and 203) codifies the subject matters over which the Housing Part has jurisdiction. The Appellate Term, Second Department has held that "[t]he purpose of [Civil Court Act § 110] and subdivisions (k) through (o) of [Civil Court Act § 203] was to create a Housing Part of the Civil Court and to consolidate all of the necessary powers to enforce specific housing laws and collect penalties for their violation in the Civil Court, not to provide the court with general equity jurisdiction." *Washington v. Culotta*, 13 Misc3d 18, 21 [App Term, 2d Dept, 2d & 11th Jud

Dists 2006] [internal citation omitted]. Accordingly, the Housing Part (and housing court generally) is a court of limited jurisdiction. *See e.g. Wheeler v. Linden Plaza Preserv. LP*, 172 AD3d 608, 609 [1st Dept 2019]; *Topaz Realty Corp. v. Morales*, 9 Misc 3d 27, 28 [App Term, 2d Dept, 2d & 11th Jud Dists 2005]. To that end, the types of claims over which the court has jurisdiction are enumerated by statute; furthermore, the injunctive powers possessed by this court are limited to the "enforcement of housing standards." *See Topaz*, 9 Misc 3d at 29; *Waxman v. Patabbe, Inc.*, 42 Misc 3d 142[A], 2014 NY Slip Op 50221[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014].

The counterclaims set forth in respondent's amended answer are breach of contract related to alleged substantial interference with respondent's comfort and safety (citing to NYC Admin. Code § 27-2009(2)), breach of a substantial obligation of petitioner's tenancy, a claim for use and occupancy and past-due rent, private nuisance, assault, and trespass.[1] Notwithstanding an earlier order permitting amendment of the answer to include these counterclaims, the court finds that petitioner has demonstrated that the court unequivocally lacks subject matter jurisdiction over the assault and trespass claims. While respondent cites *Steinberg v. Parkash*, 71 Misc 3d 1225[A], 2021 NY Slip Op 50497[U] [Civ Ct, Bronx County 2021] for the proposition that this court has expansive jurisdiction under Civil Court Act § 110(c), the court there nonetheless stressed that the powers incorporated in the statute were related to the "enforcement and maintenance of housing standards." To that end, the court in *Steinberg* permitted enforcement of Department of Buildings (DOB) Environmental Control Board (ECB) violations in an HP action. *Steinberg*, 2021 NY Slip Op 50497[U], *1-2. However, private

[1] The amended answer purports to delineate 34 separate counterclaims, but 29 of these relate to specific alleged instances of assault.

nuisance, assault, and trespass, which are torts, do not constitute claims that relate to the enforcement of housing standards that would invoke Housing Court's jurisdiction. *See Wheeler*, 172 AD3d at 609 ["[R]equiring the housing court to hear any manner of claim merely because they arise, however tangentially, out of the same facts as a [summary eviction] proceeding would turn the housing court into a court of general jurisdiction."].

As for the breach of a substantial obligation of the tenancy, use and occupancy/past-due rent, and substantial interference with respondent's comfort and safety counterclaims, the court also does not find that they are cognizable in this HP harassment proceeding. The substantial interference claim is grounded in NYC Admin. Code § 27-2009(2), which provides a ground for a summary eviction proceeding upon "conviction" of a tenant for a violation of the code that, inter alia, "substantially interferes with the comfort and safety of another person." However, there is no enforcement mechanism for this provision in the Housing Maintenance Code and the requirement of a "conviction" assumes a criminal or quasi-criminal agency determination. Accordingly, the court does not find that it possesses the jurisdiction to issue the requested relief under NYC Admin. Code § 27-2009(2). The use and occupancy and past-due rent claims are properly the subject of a summary eviction proceeding. Respondent is already pursuing a summary eviction proceeding against petitioner and this court has set forth the reasons why consolidation of the eviction proceeding with this HP proceeding was unwarranted (2022 NY Slip Op 50272[U], *2-3). To permit respondent to seek use and occupancy and/or rent (as well as the eviction of petitioner, which is requested in the amended answer) herein would improperly permit consolidation, only by another name. Finally, the breach of a substantial obligation of petitioner's tenancy claim seeks monetary and possessory remedies (based on breach of contract)

that are nowhere to be found in the Housing Maintenance Code, nor do they relate to the enforcement of housing standards. *See Topaz*, 9 Misc 3d at 29.

For each of these reasons, petitioner's motion is granted to the extent of dismissing each of respondent's counterclaims without prejudice to respondent asserting and/or prosecuting them in a court of competent jurisdiction or in the pending holdover proceeding (Index No. 305160/21).

TRIAL DETERMINATION

I. Trial testimony/evidence

Petitioner Enock Fontilme testified first. Mr. Fontilme stated that he moved into the subject premises in July 2020. He described the premises as an apartment having 3 floors, with a living room and kitchen on the first floor, 3 bedrooms on the second floor, and a room in the basement. When he moved in, it was respondent (Lisa Atzmon), another roommate named Elena, and him living in the apartment. He stated that his bedroom was closest to the bathroom and was 15 feet away from Ms. Atzmon's room. He recalled finding the room on Craigslist and had a conversation with Ms. Atzmon about it; afterwards, he met with her and toured the apartment. Ms. Atzmon told him to pay $875.00 as a deposit, and $1,700.00 as the first month's rent. He testified that he paid a part of the requested amounts to reserve the room, and then paid the remainder when he moved in.

Mr. Fontilme testified about an event in February 2021. He stated that he came back from a walk. As he was taking his shoes off, there was banging on his door. He stated that Ms. Atzmon was saying "it's all your fault." He took out his phone to record a video of the incident. The video (admitted as petitioner's Exhibit 1) showed Ms. Atzmon screaming at Elena, the other roommate, while standing in Elena's room. In the video, Ms. Atzmon comes into Mr. Fontilme's

room and states, "I could go into any room I want"; the video also captures Ms. Atzmon telling Elena to "get out of America." Mr. Fontilme testified that Elena moved out shortly after the incident depicted in the video.

Mr. Fontilme next testified about events occurring on May 30, 2021. Mr. Fontilme stated that he was using the bathroom around 5:00-6:00 PM. He took a video of the incident that followed. The video was admitted as petitioner's Exhibit 2. In the video, Ms. Atzmon states that Mr. Fontilme is "trying to jump in [her] face," although this is not depicted. She also states, "call the police on me, I don't care." Mr. Fontilme testified that at 11:30 PM on the same date, Ms. Atzmon followed him outside and ran after him. The court admitted a video as petitioner's Exhibit 3, which Mr. Fontilme depicted the events of around 11:30 PM on May 30, 2021. The video shows Ms. Atzmon using her phone to record Mr. Fontilme (while he was recording her). The parties are shown in close proximity to each other and after a brief altercation, Ms. Atzmon states "that would've been arrest" multiple times.

The next event that Mr. Fontilme testified about occurred on July 17, 2021. Mr. Fontilme testified that he came home on that date and Ms. Atzmon started screaming at him. The court admitted petitioner's Exhibit 4, a video of the incident. The short video shows Mr. Fontilme trying to access stairs and saying, "excuse me," followed by Ms. Atzmon screaming unintelligibly and running away. Mr. Fontilme then testified about an incident on August 8, 2021. The court admitted a video of the incident as petitioner's Exhibit 5. In the video, Ms. Atzmon is depicted speaking on her phone to someone (Mr. Fontilme testified that she was speaking to her attorney). Ms. Atzmon can be heard talking about a person's upbringing and family and stating that her friends from Trinidad and Barbados not understanding "it at all." She

also comments on Mr. Fontilme taking pictures of her. Mr. Fontilme testified that he understood Ms. Atzmon to be speaking about him.

Next, Mr. Fontilme testified about a video recorded on August 11, 2021 (admitted as petitioner's Exhibit 6). The video depicts Ms. Atzmon speaking into her phone and apparently videotaping Mr. Fontilme as he is in the bathroom; she states that "he needs to talk to Jack" and states that "he's a thug and I'm afraid of him." Another video, petitioner's Exhibit 7, was admitted. Mr. Fontilme testified that the events it depicted occurred on August 13, 2021. In the video, Ms. Atzmon is speaking to someone on the phone (she refers to the person as being her mother) and says that "he's harassing me" and says that "you saw him pick up the dog." Mr. Fontilme testified that while he took the video, Ms. Atzmon was facing him in his room, after she had followed him there. The court next admitted petitioner's Exhibit 8, which Mr. Fontilme testified depicted events of the same date (August 13, 2021). In the video, Ms. Atzmon holds up her phone while on the stairs; someone on speakerphone can be heard stating that "[someone] never came from anything nice, never had anything nice."

Mr. Fontilme testified that the next day, August 14, 2021, he was in the bathroom around 11:00 PM and Ms. Atzmon started screaming at him. The court admitted petitioner's Exhibit 9, which was a video depicting the events that occurred that date. Ms. Atzmon can be heard saying, "you don't have to live here if you don't want to, you can still sue me if you don't live here." Additional videos from the same date were admitted as petitioner's Exhibits 10 and 11. In Exhibit 10, Ms. Atzmon can be heard saying the name, "Jack," repeatedly. In Exhibit 11, Ms. Atzmon states, "Jack Glasser [petitioner's attorney], and I can't believe you went to a white Jewish guy to be your lawyer. Interesting. And you live with a white woman. Interesting."

Mr. Fontilme testified that on September 1, 2021, Ms. Atzmon called him "penis head" and started screaming at him. The court admitted a video (petitioner's Exhibit 12) that depicted those events. In the video, Mr. Fontilme walks into the apartment, turns on the light, and then Ms. Atzmon states, "hey penis head, you got served today, yes [clapping hands]!" The next event Mr. Fontilme testified about occurred on November 14, 2021. He stated that Ms. Atzmon screamed at him about using her belongings. The court admitted a video as petitioner's Exhibit 13, which depicted events of that date. The video shows Ms. Atzmon in the kitchen stating, "you're not supposed to use my stuff, you're not supposed to use my stuff at all…and you're harassing me; Jack, what is he doing? He's harassing me." Mr. Fontilme testified that Ms. Atzmon also took his eggs and tossed them in the sink on that date.

Mr. Fontilme testified that on January 19, 2022, he was listening to music and Ms. Atzmon accused him of harassing her. The court admitted petitioner's Exhibit 14, a video that depicted the events of that date. Banging can be heard before Ms. Atzmon says, "harassing me, now we all got it."

Mr. Fontilme testified that he was present during the events depicted in each of the admitted videos. He testified that the interactions with Ms. Atzmon caused him to lose sleep. He further testified that he could not bring friends and visitors to the apartment because of Ms. Atzmon's conduct.

Cross-examination of Mr. Fontilme followed. When asked if he took "dozens" of videos, he replied in the negative and testified that he only took 15 videos. Mr. Fontilme was also asked about the allegations in the petition. As the petition describes the incident on February 24, 2021, Mr. Fontilme was asked whether the events coinciding with the videos taken after February 24, 2021 were included in the petition. Mr. Fontilme confirmed that the later events were not

included in the petition but that was because the "harassment kept going" after the petition was filed.

Mr. Fontilme was asked if he had gone over the videos in his attorney's office since the last court date. He replied in the negative. Next, when asked how he found this apartment, Mr. Fontilme testified that he found it on Craigslist "easily" in July 2020. He confirmed that since February 24, 2021, Ms. Atzmon had made his life "miserable," he could not sleep, and he could not have friends over. He was asked if he had made any attempts to find alternative living arrangements, considering the "unbearable" conditions, Mr. Fontilme replied, "no, I live there."

Mr. Fontilme was questioned about the incident on February 24, 2021, specifically his allegation in the petition that he was hit in the head by Ms. Atzmon. He testified that he did not check for bruises or go to the hospital, but that he knew that he was hit in the head. Mr. Fontilme was then asked if he had videos for any incident in March 2021. He replied that he did not. He stated that Ms. Atzmon was "always in my face." Mr. Fontilme was also asked if he had no videos from April 2021. His response was that Ms. Atzmon was "screaming" at him all the time. At the conclusion of cross-examination, Mr. Fontilme was questioned about a notice of termination and notice to cure (respondent's Exhibit 4). He confirmed that he found the notices on his door and that he looked at them. He also testified that he was "sure" that Jack (Glasser) received the same.

After the conclusion of cross-examination, Mr. Fontilme's attorney made an application to present additional videos. The request was granted by the court. Mr. Fontilme first testified June 2, 2022, when he was inside his apartment and started recording an incident with Ms. Atzmon. The recording, which was admitted as petitioner's Exhibit 16, depicts Ms. Atzmon in her kitchen. She states, "you're a thug, you're a piece of garbage…from Haiti." Mr. Fontilme

testified about another video, which was taken directly after the video in evidence as petitioner's Exhibit 16, which he stated showed Ms. Atzmon throwing a bell pepper at him. The video, petitioner's Exhibit 17, indeed depicts Ms. Atzmon throwing a red object towards the camera; she then says, "you threw that at me, you piece of shit…why are you spitting in my face?" Mr. Fontilme testified that after the incident, seven (7) police officers responded to the subject premises. He stated that the police were there for about 10 minutes, but that no arrests, tickets, or citations were given.

Mr. Fontilme next testified that Ms. Atzmon had followed him to work the Friday before the relevant court date (which was June 7, 2022). He testified that he took a video near 3rd Avenue and 60th Street in Manhattan, near Bloomingdales. The video was admitted as petitioner's Exhibit 18. Then, Mr. Fontilme testified about petitioner's Exhibit 19, another video, which depicts Ms. Atzmon in the kitchen. In the video, Ms. Atzmon states, "trying to scare me and harass me…Jack, you see what he's doing, he's in the kitchen at the sink when I'm doing my thing." Mr. Fontilme testified that as soon as he walked into the kitchen, Ms. Atzmon started talking to him. Finally, in a video admitted as petitioner's Exhibit 20, which immediately followed the events in Exhibit 19, Ms. Atzmon starts screaming, "you're harassing me" as Mr. Fontilme is using the sink in the kitchen.

At the conclusion of Mr. Fontilme's redirect testimony, the court took judicial notice of a summons and complaint from Queens County Supreme Court (Index No. 710594/22), in which Ms. Atzmon is named as plaintiff and Mr. Fontilme is named as defendant.

On recross, Mr. Fontilme was asked if the video admitted as petitioner's Exhibit 17 shows him spitting at Ms. Atzmon. He replied that it did not. He was then asked if Ms. Atzmon states that he was spitting at her in the video. He confirmed that she did. Mr. Fontilme was then

questioned as to whether he takes videos of his roommate (Ms. Atzmon). He replied in the affirmative, when she assaulted him. He was asked if his camera shined a bright light. He confirmed that it did, at night.

During a final redirect, Mr. Fontilme was asked if he did anything to agitate with Ms. Atzmon. He replied that "she's the agitator." When asked why he had not moved, he replied that he lives there. On final recross, Mr. Fontilme again testified that he had never done anything to agitate Ms. Atzmon.

Thereafter, petitioner rested. The court denied an oral motion to dismiss by respondent's attorney and respondent's case began. Respondent called Mr. Fontilme as her first witness. He was asked if he was afraid of Ms. Atzmon. He replied no. He was asked what his height and weight were. He responded that he was 6'2" and 210-215 pounds. Mr. Fontilme was then asked if he ever came close to Ms. Atzmon. He testified that she came close to him, on February 24, 2021. He further explained that Ms. Atzmon ran into his room on that date. He also testified that after that date, he put a lock on his door. Thereafter he described his room and testified that his bed took up half his room.

Mr. Fontilme was asked about his usage of common areas in the apartment. He confirmed that he stopped going to the living room but that he used the bathroom and kitchen. He testified, though, that Ms. Atzmon interfered with his use of the shower. Finally, he was asked if he had any videos that were not shown; he replied that he did not.

Next, Selma Dsilva was called as a witness for respondent. Ms. Dsilva testified that she had known Ms. Atzmon for 30 years. She testified that she had visited Ms. Atzmon's apartment and had seen Mr. Fontilme. She recalled that he took Ms. Atzmon's picture and walked away while she and Ms. Atzmon were talking. She stated that he took the picture with a cellphone

(with a flash). Ms. Dsilva testified that Ms. Atzmon had lost a lot of weight after the date when Mr. Fontilme had taken the picture, and that she was nervous and scared (at the time that she was testifying).

Ms. Atzmon was called as the final witness for respondent. She was asked about the video admitted as petitioner's Exhibit 1. She recalled that she told Elena (another renter at the time) that she did not go into her room. She denied ever striking Mr. Fontilme or making a fist at him on February 24, 2021.

Ms. Atzmon was asked about the events of May 30, 2021. She could not recall the events independently, but she referenced notes that she took at the time of the events. Over petitioner's objection, the court admitted Ms. Atzmon's notes as respondent's Exhibits A and B (pre-marked Exhibits 9 and 10). Upon refreshing her recollection with the notes, Ms. Atzmon testified that she was sleeping in the living room on May 30, 2021. At around 11:00 PM, Mr. Fontilme entered and called her a "fucking bitch whore."

Next, Ms. Atzmon refreshed her recollection as to the events of August 8, 2021 with her notes. She testified that on that date, around 4:00 PM, Mr. Fontilme came into the apartment, ran upstairs, and blew his breath into her face. She further testified that he tried to push her down the stairs and that she was crying and screaming, and called the police. Ms. Atzmon then refreshed her recollection as to the events of August 11, 2021. She stated that Mr. Fontilme was videotaping her, calling her a "fucking bitch whore" again. She testified that at the time, she was afraid that she would die, in light of the fact that she weighs only 113 pounds and is a woman, while Mr. Fontilme is 6'2".

Thereafter, Ms. Atzmon testified (upon her recollection being refreshed) about August 13, 2021 and August 14, 2021. She testified that on August 13, 2021, she was taking a shower.

The shower wall adjoins Mr. Fontilme's bedroom wall. She testified that she heard banging on the wall and Mr. Fontilme saying that he was going to have a friend in Africa kill her. She testified that on August 14, 2021, Mr. Fontilme came into her bedroom and took pictures and videos. She stated that he called her a "fucking bitch whore" and told her that he was going to "get all [her] stuff." She testified that she was shaking after this incident. Upon refreshing her recollection, Ms. Atzmon testified that Mr. Fontilme also called her a "fucking white, fucking bitch whore" on September 1, 2021.

Ms. Atzmon testified next, upon refreshing her recollection, that on November 14, 2021, Mr. Fontilme came into the kitchen and spit in her face. When he was videotaping her, she acknowledged that she started screaming Jack Glasser's name. Ms. Atzmon concluded her direct testimony by describing the events of January 19, 2022 (again, upon refreshing her recollection). She stated that she was eating dinner in the living room when Mr. Fontilme called her a "fucking bitch whore" and told her that she was going to jail.

On cross-examination, Ms. Atzmon confirmed that she had been living in the subject apartment since she was 23 years old. Ms. Atzmon testified that she did not know how to take videos. She also confirmed that she started sleeping in the living room after the encounters that she had with Mr. Fontilme. When asked about February 21, 2021, she testified that she was terrified and that her arms were up. She also confirmed that she has called the police 3-4 times about Mr. Fontilme.

Upon the conclusion of Ms. Atzmon's testimony, the trial on the harassment claims ended.

II. Determination & conclusion

The trial testimony and evidence established that respondent Lisa Atzmon engaged in

harassment against petitioner in violation of NYC Admin. Code § 27-2005(d). The evidence established that petitioner rented a room from Ms. Atzmon after finding it on Craigslist. The evidence established and Ms. Atzmon did not refute that she is an "owner" of the subject apartment, as defined by the Housing Maintenance Code. So defined, an "owner" is "the owner or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, *lessee*, agent, *or any other person*, firm, or corporation, *directly or indirectly in control of a dwelling.*" NYC Admin. Code § 27-2004(a)(45); *see also Leung v. Zi Chang Realty Corp.*, 74 Misc 3d 126[A], 2022 NY Slip Op 50034[U] [App Term, 1st Dept 2021]. The testimony and evidence demonstrated acts corresponding with NYC Admin. Code §§ 27-2004(a)(48)(ii)(a) ["[U]sing force against, or making express or implied threats that force will be used against, any person lawfully entitled to occupancy of such dwelling unit."], 27-2004(a)(48)(ii)(f-5) ["[T]hreatening any person lawfully entitled to occupancy of such dwelling unit based on such person's actual or perceived…national origin[.]"], and 27-2004(a)(48)(ii)(g) ["[O]ther repeated acts or omissions of such significance as to substantially interfere with the or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy[.]"]. While only the February 24, 2021 incident is described in the petition, pursuant to CPLR § 3025(c), the court conforms the petition to the trial proof and deems it amended accordingly, as the evidence exhibited a furtherance of the allegations in the petition. *See Dinizio & Cook, Inc. v. Duck Cr. Mar. at Three Mile Harbor, Ltd.*, 32 AD3d 989, 990 [2d Dept 2006].

One video admitted into evidence (petitioner's Exhibit 17) specifically depicts Ms.

Atzmon throwing a red object (which he testified was a pepper) directly at the phone held by Mr. Fontilme. This evinced actual physical force by Ms. Atzmon. The evidence also captured Ms. Atzmon threatening petitioner because of his actual or perceived national identity. In one video, Ms. Atzmon called petitioner a thug and a "piece of garbage from Haiti." In another, while on the phone, she openly spoke about Mr. Fontilme's family and upbringing, and commented on how her friends from other Caribbean countries did not understand it. These statements clearly singled petitioner out for his actual or perceived national identity and constituted threats in the context of the rental relationship between the parties.

Finally, the provocations, demeaning statements, aggressive actions by Ms. Atzmon that are depicted in the videos are of such significance as to substantially interfere with and disturb petitioner's comfort, repose, peace and quiet in the subject premises and were intended to cause petitioner to vacate and/or surrender his rights in the apartment. In summary, the videos show: Ms. Atzmon running into petitioner's bedroom; Ms. Atzmon calling petitioner a "penis head" unprovoked; Ms. Atzmon making repeated remarks about petitioner's attorney (including referencing the fact that he was Jewish); Ms. Atzmon calling petitioner a "piece of shit"; and Ms. Atzmon blocking a stairway as petitioner tried to pass. While Ms. Atzmon testified about petitioner calling her names and harassing her, there was no corroboration of this with evidence, other than her notes. Overall, the court did not find that Ms. Atzmon rebutted the evidence put forth by petitioner.

As the subject premises here is limited only to one apartment, the court finds that it is a private dwelling where the rebuttable presumption that the aforementioned acts of harassment were intended to cause petitioner to vacate or otherwise surrender or waive her rights does not apply (*see* NYC Admin. Code § 27-2004(a)(48)(ii); *Berg v. Chelsea Hotel Owner, LLC*, 203

AD3d 484, 485 [1st Dept 2022]). Nonetheless, the trial evidence established the requisite intent. In one video (petitioner's Exhibit 9), Ms. Atzmon says to petitioner, "you don't have to live here if you don't want to, you can still sue me if you don't live here." In addition, the accumulated actions that were described in the preceding paragraph evince an intent to have petitioner vacate or otherwise give up on protecting his rights under the laws of New York City.

Having determined that Lisa Atzmon engaged in harassment against petitioner under the Housing Maintenance Code, the court hereby ORDERS following relief pursuant to NYC Admin. Code §§ 27-2115(m) and § 27-2115(o):

(A) The court finds that a class "C" violation existed as a result of the harassment and that such violation existed at the time that the trial concluded (July 26, 2022). The court further finds that the violation is not deemed a continuing class "C" violation and that the violation is placed only against respondent Lisa Atzmon and shall not be cause for any liability on the part of the subject building's registered owners;

(B) The court restrains Lisa Atzmon from violating NYC Admin. Code §§ 27-2005(d) and 27-2004(a)(48), and is directed to ensure that no further violation occurs;

(C) The court imposes a civil penalty against Lisa Atzmon in the amount of $3,000.00, which shall be subject to a judgment in favor of DHPD;

(D) The court awards statutory compensatory damages in the amount of $1,000.00 to petitioner, which shall be subject to a judgment in favor of petitioner and against Lisa Atzmon; the court does not find that petitioner established any losses that would exceed the statutory damages amount; the court declines to impose statutory punitive damages; and

(E) The court will award petitioner reasonable attorneys' fees, in accordance with NYC Admin. Code § 27-2115(o). The fees hearing will be scheduled for July 24, 2023 at 10:00 AM,

in Part O, Room 202, 89-17 Sutphin Boulevard, Jamaica, New York 11435. Any pre-marked exhibits for the fees hearing shall be emailed to the court (qn-housing-202@nycourts.gov) on or before July 20, 2022.

This Decision/Order will be filed to NYSCEF. A copy will also be emailed to the supervising attorney for DHPD. The parties are directed to pick up their exhibits within 35 days or they may be destroyed at the court's discretion in compliance with DRP-185.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
June 13, 2023

HON. CLINTON J. GUTHRIE, J.H.C.

ORDERED - HON. CLINTON J. GUTHRIE

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