

515 E. 81st LLC v Weston

2024 NY Slip Op 30758(U)

February 2, 2024

Civil Court of the City of New York, New York County

Docket Number: Index No. LT-059071-18/NY

Judge: Daniele China

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NY, PART N/P, ROOM 855

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515 EAST 81ST LLC,

Petitioner,

Index No. LT-059071-18/NY

- against -

Decision/Order
AFTER TRIAL ON COUNTERCLAIMS

DIANE WESTON,

Respondent-tenant,

"JOHN DOE" & "JANE DOE"

Respondents-occupants.
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Present: Hon. Daniele Chinae
Judge, Housing Court

DECISION:

After trial conducted on March 29, 2023, June 7, 2023, June 8, 2023, and July 14, 2023, regarding Respondent-Diane Weston's counterclaims for breach of warranty of habitability and harassment, the Court finds for the Respondent. Respondent sufficiently proved her claims after trial. Petitioner presented no evidence to undermine or overcome that presented by Respondent.

The Court issues a Class C, immediately hazardous, violation for harassment, Respondent is entitled to an award of compensatory and punitive damages after hearing resulting from Petitioner's long standing harassment; the Court abates the rent that came due for the period of December 26, 2017¹- July 14, 2023², as set forth below, which shall be applied to offset any arrears balance currently carried and as an on-going rent credit until exhausted once any arrears are satisfied. In no event, shall this abatement be applied to the payment of legal fees or any ancillary/non-rent charges, pursuant to RPAPL §702.

The Court also issues an on-going abatement of Respondent's rent commencing August 2023, and continuing until such time as all debris left in the Premises by Petitioner, or its workers, is removed from the Premises in a safe and professional manner and in compliance with NYC Local Law 61/2018, and all open violations are resolved. As the prevailing party, Respondent is entitled to an award of legal fees in an amount to be decided after hearing.

HISTORY:

Petitioner commenced this holdover against Respondent on April 9, 2018, seeking to recover possession of the subject Premises: 515 East 81 Street, Apt 2C, Manhattan, claiming Respondent refuses to provide Petitioner access to the Premises to correct violations placed by the Department of Housing Preservation and Development (HPD). Specifically, the Notice to Cure and Notice of Termination cite Respondent's failure to give access "on or about January 10, 2018, and/or January 22, 2018," February

¹ The date Petitioner was to correct the mold condition pursuant to the NOV annexed to the Petition.

² The date trial concluded.

2, 2018, and February 14, 2018. The petition annexes the HPD Notice of Violation (NOV) served upon Petitioner requiring an immediately hazardous mold condition in the Premises be corrected by December 26, 2017; letters seeking access on February 2 and February 14, 2018; and copies of the certified mailing receipts for those letters.

Respondent answered on June 18, 2018. Among other defenses, Respondent denies refusing Petitioner access. She alleges Petitioner did not notify her of the alleged access dates. Upon a search of the certified mail tracking numbers, one finds the notice was never delivered to Respondent but “to sender.” The answer also interpleads three counterclaims alleging breach of the warranty of habitability, harassment, and attorney’s fees.

Petitioner withdrew its petition on May 25, 2022 (NYSCEF 16). Respondent reserved her counterclaims for trial. Petitioner never answered Respondent’s counterclaims. Its answer was deemed a general denial by this Court. The Court also takes judicial notice of the Petition, the Notice to Cure and the Notice of Termination and all exhibits annexed thereto. Trial commenced on March 29, 2023.

TRIAL:

Respondent’s case:

Respondent is represented by Counsel. Respondent presented three witnesses, including herself; and several documents and photographs (Resp Exhs A-M).

Respondent credibly testified to a history of issues with mold and other conditions, including infestation of roaches and mice, in the Premises. She also testified to a long history of litigation commenced by Petitioner, which were all resolved with either or both abatements and requests for repairs. Access dates were provided in each. Respondent testified that she gives reasonable access to Petitioner. Petitioner sends unqualified, unskilled workers and the repairs are poor and ineffectual. Respondent entered evidence of the HPD violations in her building, including the Premises (Resp Exh A & E) and for all buildings managed by the Petitioner’s managing agent – Mark Scharfman (Resp Exh B). Respondent offered photographs of the mold condition in the Premises taken on January 31, 2019 (Resp Exh C). The conditions depicted therein are horrendous.

Petitioner has resided in the Premises since June 1976. She testified that when Petitioner purchased the building in the 1990’s, building maintenance took a decline. She also testified to near endless litigation with Petitioner since 2004. The Court took judicial notice of prior case files; LT-054345-04/NY (Resp Exh F), LT-090447-05/NY (Resp Exh G), LT-050411-08/NY (Resp Exh H), LT-059712-08/NY (Resp Exh I) & LT-052655-14/NY (Resp Exh J) (NYSCEF 17-Excerpts of these files). In 2004, the parties settled the non-payment proceeding with an abatement, no judgment or warrant. In 2006, Respondent settled a non-payment proceeding with an abatement and Respondent agreed to withdraw pending litigation at Department of Homes and Community Renewal (DHCR), no judgment or warrant issued. In 2008, Respondent settled two non-payment proceedings by reissuing a check previously returned to settle the open balance on one month; Respondent agreed to provide access and agreed HPD violations (including one for mold) had been corrected. Then, in 2015, the parties settled yet another nonpayment proceeding with Respondent paying all rent due in court and requesting many repairs, including mold, infestations, leaking windows and radiators – the exact conditions which remain an issue to date. Access dates were arranged. That stipulation also references that Respondent receives a Disabled Rent Increase Exemption (DRIE) credit on her rent due to her status as a disabled individual. Thus, Petitioner is on

notice of Respondent’s physical limitations. Respondent is approximately 77 years old at the time of trial.

During this proceeding alone, the parties arranged access on January 31, 2019, February 4 – 6, 2019, March 25, 2019, April 1, 2019, April 2-5, 2019, May 6, 2019, May 7-10, 2019, May 18 – 14, 2019, October 28, 2019, through November 31, 2019, and September 1, 2022, through May 1, 2023 (NYSCEF 16; and Resp Exh K – emails between counsels re access).

Petitioner did not keep the access dates in April 2019, but did send the mold remediator on April 1 to assess. On May 1, 2019, Petitioner informed Respondent of the dates for remediation, May 6-14, 2019; and that she would need to relocate during the work. Respondent could not relocate on short-notice and remediation did not occur. Motion practice ensued. On July 31, the Court denied Respondent’s application to have Petitioner relocate her at their expense (NYSCEF 16).

In September 2019, parties agreed to access for repairs, including mold remediation, from October 28, 2019, through November 3, 2019. On October 23, Respondent informed Petitioner that she could not give access for mold remediation, as agreed, because she had not yet retained public assistance to move and store her property. Though other work remained necessary, Petitioner did not appear for any repairs in October 2019. Respondent filed a motion to dismiss, and Petitioner filed a motion for contempt. It is unclear from the record what happened with these motions, but the matter was scheduled for trial in March 2020. The Covid-19 Pandemic caused the Courts to reduce operation to only emergencies and this case was marked off-calendar. The case was restored to that calendar by the Court on or around January 18, 2022.

While the case was off-calendar, Respondent vacated the Premises on August 31, 2021. She removed all property she intended to keep and left the Premises unlocked. Petitioner had unfettered access to the Premises through May 1, 2022, for the purpose of correcting all conditions. During this prolonged relocation, Respondent rented space elsewhere. When Respondent moved back into the Premises, she found moldy materials stacked in her kitchen and blocking her use thereof. She also found several of the conditions in her apartment had not been corrected. Respondent’s guardian ad litem (GAL) emailed Petitioner’s attorney (Resp Exh K) in June 2022, providing photos (Resp Exh D), and expressing an urgency to resolve the remaining debris in Respondent’s apartment. An HPD inspection conducted on June 8, 2022, failed to remove the existing mold violations - in place since 2016 - and placed several new violations, though none having to do with mold (NYSCEF 20).

Respondent testified that the mold remediation plan required all items in the Premises to be discarded or removed. She believed that anything remaining in the Premises after she vacated on August 31, 2021, would be thrown away. In support of her position, Respondent points to the March 21, 2019, stipulation, in which Petitioner agreed to conduct mold abatement in accordance with Local Law 61/2018³ (NYSCEF 16). The only remediation plan in evidence is that sent to Respondent’s counsel after the mold assessment conducted on April 1, 2019 (Resp Exh K). That plan states: “Please note that no one should be sleeping in the apartment before or during abatement. All items will be discarded as per proposal. Due to the amount of mold and amount of time, all porous materials such as mattresses and clothing will need to be disposed of as per mold report. *Any non-porous items that the Tenant would like to keep, should be removed prior to the crew arriving to perform abatement. For remediation, we will be running negative air machines on site and disposing of all items. Once disposal is complete, we will clean and treat the walls and ceiling*” (emphasis added). Respondent further testifies that, to date, Petitioner

³ Local Laws of the City of New York for the Year 2018, No. 61; eff. 1/1/2019

has refused to remove the contaminated items. She sleeps on an air mattress because she fears any new furniture brought into the Premises because will become moldy. She also testified to the recurrence of mold spores since returning to the apartment in May 2022.

In addition to the remaining mold condition, Respondent testified that when she returned on May 1, 2022, her toilet was leaking and unusable, among other issues. She had to use plastic containers in place of a toilet. Other conditions consisted of a generally unclean environment, shoddy paint job, damaged cabinets, the radiator cover missing, electrical outlets not properly installed, a moldy circuit breaker, broken or missing molding and baseboards throughout, and the presence of molded and unclean garbage left in the Premises. The photos of the Premises taken on June 30, 2022, depict these conditions.

On Cross, Petitioner questioned Respondent about refusing access, which she vehemently denied. She argued Petitioner is a poor landlord that does shoddy repairs. Petitioner unsuccessfully attempted to make Respondent seem unreasonable and forgetful. Though Respondent is elderly and sometimes confused or could not recall dates, the Court found Respondent a highly credible witness. The documentary evidence is sufficient to provide the specifics.

Respondent's GAL and Respondent's social worker from Adult Protective Services (APS) testified in support of her position. Both had been in the premises after Respondent moved back after being out of possession between September 2021 and May 2022; both described the conditions as unacceptable.

Respondent's GAL visited the Premises in 2019 and 2020, after her appointment. She described horrendous conditions in the Premises; a gray, green, and brown substance that covered the apartment. During her visit, she needed to step out of the apartment to catch her breath because the apartment was so damp and moldy (Resp Exh C -photos). She described the condition as nothing she had ever seen before. The photos in evidence plainly show the mold on the walls and ceiling, as well as the light switch and radiator (Resp Exh C1, C2, C3, C9, C10, C14). These photos also depicted ice around Respondent's window (Resp Exh C7, C8).

On Cross, the GAL could not recall if the windows were open or closed during her visits to the Premises. She only remembered assisting with access in 2021, when Respondent moved out. She also stated that when Respondent moved, she understood the work would take four days, but it took at least three weeks. She also testified that she understood none of Respondent's property was removed by Petitioner, which was the plan.

The court took judicial notice of the HPD website on June 23, 2023, indicating overdue mold violations issued February 25, 2016 (a hazardous violation), December 14, 2017 (the violation annexed to the Petition in this case); June 6, 2018, and October 5, 2019 (all immediately hazardous violations). On June 8, 2022, new hazardous violations were placed for leaky bathroom sink faucets, defective electrical outlets, a broken/defective window, and non-hazardous violations for broken/defective cabinet in bathroom, and ill-fitting radiator cover. All are overdue for correction.

Petitioner's case:

Petitioner is also represented by counsel. Petitioner presented three witness and documents (Pet Exhs 1-5; NYSCEF 28-34).

Petitioner offered no evidence to refute that it was aware of the conditions in the Premises. Petitioner annexed the subject mold violation to its petition. Petitioner's witness, Mitchel Rothken, testified that in his capacity as managing agent for the building he has general knowledge of HPD violations and certifications. He also claimed to have knowledge of HPD violations specific to the building.

Mr. Rothken testified that had he been given proper access to the Premises, the conditions would have been timely corrected. He presented purported work orders as evidence of Petitioner's attempts to address conditions (Pet Exh 2). The Court discredits these self-serving documents because they are not corroborated by any testimony or other evidence. The witness also failed to explain why the access dates referenced in the Notice of Termination all post-date December 26, 2017 - the date set for correction of that violation.

Mr. Rothken's testimony is belied by Petitioner's failure to correct the conditions despite the many times Respondent provided access in this proceeding alone, including vacating the Premises from September 2021 through April 2022. Surely, the eight months of unfettered access was sufficient to make repairs and remove violations. Yet, Petitioner did not. Mr. Rothken's testimony that the work was completed is undercut by photographs of the Premise taken in June 2022, offered by both parties (Resp Exh D; Pet Exh 3). Moreover, the mold violations remain unresolved, and new violations were placed in June 2022, after the eight-month vacancy. Open HPD violations are presumptive evidence of conditions in need of repair and Petitioner provides nothing to overcome that presumption.

Petitioner's witness, Issac Hersko, testified that, in his capacity as the owner of the mold inspection company, he completed physical assessment and filed a report as guidance for a mold remediator at the Premises (Pet Exh 1(b)). However, Mr. Hersko was not present during the remediation, nor did he conduct any mold remediation himself. Mr. Hersko testified that he went to the Premises to complete an assessment after the mold remediation work was complete. He testified that the walls were open at this inspection, no new drywall yet hung (Pet Exh 3). He testified that he observed continued discoloration and debris on the wood beams that could have been mold. He could not be sure without testing. He did not test, however, because it was not required. Moreover, Mr. Hersko acknowledged that the mold violations remain unresolved with HPD despite his filing all necessary paperwork to remove such violations.

Mr. Hersko's testimony regarding his failure to test potential mold after "completion" of remediation and permitting new dry wall to be installed over it without testing provides evidence that the mold may still be present behind the drywall. This potential is bolstered by Respondent's testimony that she recently observed new mold spores emerging on her walls. Moreover, Pet Exh 1 - the Mold Remediation Plan - calls for a mold resistant coating to be applied to all new dry wall. There is no testimony that that occurred. Based upon the amount of filthy, moldy refuse left in the Premises, the presence of visible mold on some surfaces after "remediation," and the general dirty and unfinished condition in which the Premises was returned to Respondent, the Court finds Petitioner did not properly remediate the mold condition or comply with its own Remediation Plan.

Petitioner also called witness Tuli Moscovits, in his capacity as the owner of Abatement Solutions, a mold remediation company, to testify as to the remediation work on the subject premises and the paperwork submitted to HPD (Pet Exh 1). However, Mr. Moscovits did no remediation work on the subject premises, and was not even in the apartment during the remediation. Mr. Moscovits' knowledge of the conditions in the subject premises came solely from photographs. Mr. Moscovits testified that a former employee in his company worked in the Premises on September 15, 2021.

This testimony, along with documentary evidence from the mold remediation plan, established that some work was done in the Premises, but not enough to satisfactorily correct of mold violations under HMC § 27-2017.9. Petitioner has yet to certify these violations under HMC § 27-2017.9(c), remove all mold spores from the premises, and other the hazardous conditions remain. There are dirty dust-covered tables, furniture, a TV, moldy wood, and a moldy mattress piled in Respondent's tiny kitchen depriving her use thereof. Petitioner knew or should have known that it was Petitioner's responsibility to remove all the abandoned material in the Premises; and that there was no way Respondent could remove it herself (or she would have prior to vacating in September 2021). These failures are indicative of Petitioner's pattern of harassment of Respondent.

Although Petitioner implied that Respondent somehow caused the mold issue herself by leaving windows open, the only evidence of this claim is Alfredo Cano's testimony. Mr. Cano is one of Petitioner's contractors, who has done repair work in the Premises. He testified about inspecting a humidity and condensation condition complained of by Respondent in mid-winter 2020 (after this proceeding was pending for over one year). He described condensation all over the walls and ceilings in the Premises. Mr. Cano supposed that the condensation was caused by a single open window in the winter. He could not explain how visible blocks of ice form on and around the window, as depicted in Resp Exh D. A single instance of finding an open window in winter does not explain the condition of this apartment, and certainly not Petitioner's bold claim that Respondent herself caused a level of mold that warranted Class C HPD Violations. Moreover, Mr. Cano testified that Respondent was not in the Premises in September of 2021, and he acknowledged he had access without interference to do repairs.

Petitioner's own witnesses and documentary evidence prove that necessary repairs were either not done or done poorly despite years of notice and access to the Premises. Without evidence of his own, Petitioner attacked Respondent's testimony because she couldn't recall specific dates from over four years ago. Her testimony is supported by the testimony of other witnesses and documentary evidence. Meanwhile, Petitioner offered no evidence to refute Respondent's testimony or her documents. Petitioner's own witnesses also suffered memory lapses and were permitted to refresh their recollections; but provided no documentary evidence to bolster their testimony.

Petitioner's evidence pulled from the HPD website (Pet Exhs 4 & 5) explaining the process for removing violations is unpersuasive. The argument appears to be that to remove the violations for mold, an inspection would need to take place and HPD has not conducted a dismissal inspection. But this excuse begs the question - Why did Petitioner fail to schedule an inspection during the eight months of unfettered access?

Petitioner offered no convincing evidence to refute the uninhabitable and hazardous conditions in the Premises. Petitioner did not refute Respondent's claim that all access notice alleged in the Notice of Termination was returned to sender. Petitioner failed to establish that any requested access was unreasonably refused. The Court finds that Respondent's failure to provide vacant access in May of 2019 excusable. Respondent was given 5 days' notice that she would need to relocate for two weeks.

Respondent does not have the means or ability to make such quick adjustments. Additionally, the Court finds Respondent's failure to give access in October 2019 excusable. The primary reason for that failure was Respondent's need to rely on third party assistance to move. She is poor and disabled and could not move herself. She sought assistance from Petitioner, and it refused.

DECISION & ORDER:

Respondent has established her claims for breach of warranty of habitability and abatement. She has also established her claim for harassment. That the Premises was returned to Respondent in May 2022, after eight-months of unfettered access, in such poor condition is evidence of harassment. Additionally, Respondent provided evidence of several non-payment proceedings, all settled without a judgment and warrant, and nearly all providing for a rent abatement and/or requests for repairs and scheduled access dates. Petitioner failed to establish that the condition of the Premises was caused by the actions or inaction of Respondent. The only inaction proven in this proceeding is that of the Petitioner.

Based upon the foregoing, Respondent is entitled to a 30% abatement of her rent commencing January 1, 2018 – first month after the date the C Violation for mold was due to be corrected - - December 26, 2017 - according to the NOV annexed to the Petition. The Notice of Termination establishes Petitioner did not seek access to correct that condition until after the date for correction had passed.

The abatement shall continue through July 31, 2023. Respondent credibly testified that, over one-year after she moved back into the Premises, the moldy debris remains piled in her kitchen and none of the other repairs or violations have been addressed. She testified that she has not had use of her kitchen in all this time. She also testified that she sleeps on an air mattress so as not to expose new furniture to mold infestation. She cannot afford to throw her furniture away again. Petitioner provided no evidence to undermine Respondent's claims of reduced use of the Premises.

It is **ORDERED**: Petitioner has harassed Respondent in violation of NYC Admin Code §27-2005(d); an immediately hazardous C violation is entered against Petitioner; a hearing will be held to determine the amount of compensatory and punitive damages owed to Respondent.

It is **FURTHER ORDERED**: Respondent is awarded an abatement in the amount of 30% of her rent for months of January 2018 through August 2021, and May 2022 through July 2023; and a 100% abatement of her rent for the months of September 2021 through April 2022; as Respondent was constructively evicted during this period. The abatement shall be applied to Rent only.

It is **FURHTER ORDERED**: Respondent's rent remains abated by 30% per month commencing August 2023 and continuing until such time as all debris left in the Premises by Petitioner, or its workers, is removed in a safe and professional manner and in compliance with NYC Local Law 61/2018, **and** all open violations are resolved; Petitioner may seek rent restoration by Order to Show Cause with proof of compliance with this Order.

It is **FURTHER ORDERED**: All access shall be arranged in writing through counsel on dates and times that are mutually convenient to the parties; all repairs shall be made expeditiously and in a workmanlike manner. Respondent is responsible to provide reasonable access for repairs on weekdays, between 9am

and 5pm. Both parties may photograph or video conditions before, after, and during work; images shall be limited to the conditions and repair-work only.

It is **FURTHER ORDERED**: The case is restored to the Court's calendar for a hearing on damages and legal fees to be awarded Respondent on **March 14, 2024, at 2:30**. This Order is without prejudice to HPD's claims for civil penalties; HPD is not a party to this action.

Any settlement of the remaining claims reached prior to hearing shall be uploaded through NYSCEF with courtesy copy emailed to NY-HOUSING-855@nycourts.gov. The parties should presume a hearing will go forward unless otherwise indicated by the Court.

This is the decision and order of the Court, a copy of which will be uploaded to NYSCEF. The parties may retrieve exhibits from the Court within 30 days of the date of this Order or they will be disposed of in accordance with Court directives.

DATED: February 2, 2024

SO ORDERED



Hon. Daniele China

HON. DANIELE CHINEA
JUDGE, HOUSING COURT