294 5th Ave. Realty Partners LLC v Jimenez
2024 NY Slip Op 31984(U)
June 3, 2024
Civil Court of the City of New York, Kings County
Docket Number: LT-327208-23/KI
Judge: Karen May Bacdayan

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART G

294 5TH AVENUE REALTY PARTNERS LLC
Petitioner,

-against-

YOLANDA JIMENEZ, ET AL
Respondents,

LT-327208-23/KI

DECISION AND ORDER

Motion Seq. No. 3

HON KAREN MAY BACDAYAN, JHC

Kucker Marino Winiarsky & Bittens, LLP (Lisa Faham, Esq.), for the petitioner
Brooklyn Legal Services (Andrew Sexton, Esq.), for the respondent Yolanda Jimenez

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 27-51.

PROCEDURAL POSTURE AND ARGUMENTS

This is a non-payment proceeding commenced against Yolanda Jimenez ("respondent") the rent-controlled tenant of record. Petitioner seeks rent in the amount of $152.00 per month from October 2019 through August 2023. (NYSCEF Doc No. 1, petitioner ¶ 7.) Respondent's statutory successor tenancy vested on or about April 17, 2004, when her mother passed away. Four generations of respondent's family have resided in Apartment 4L at 294 5th Avenue, Brooklyn, New York. Respondent herself has resided in the subject apartment her whole life. (NYSCEF Doc No. 29, Jimenez affidavit ¶ 2.) Apartment 4L is one of two remaining rent controlled units in this building. The tenant of record of Apartment 4R, the other remaining rent-controlled apartment, is respondent's mentally and physically disabled cousin, Alberto Jimenez. (*Id.* ¶ 22.)

In August 2017, petitioner acquired the building in foreclosure. (NYSCEF Doc No. 30 at 5-14, respondent's exhibit B, deed.)[1] Three months later, petitioner commenced a squatter holdover proceeding against respondent's children, Naija Vargas and Anthony Lucero, and Jane Doe and John Doe, pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 713

[1] The court takes judicial notice of the deed obtained from ACRIS pursuant to Multiple Dwelling Law § 328 (3).

(7). This proceeding was dismissed "with prejudice" as to the claim that the named respondents were squatters.[2] Respondent appeared in that proceeding and submitted an affidavit in her name in support of dismissal. The order states that the named respondents "are not licensees or squatters as acknowledged by petitioner through counsel."[3] The court reserved petitioner's right "to commence a *good faith* proceeding (emphasis added)."[4] It is strongly implied by the court's plain words that the court found commencement of that holdover proceeding not to have been in good faith. Respondent was represented by the same legal services organization as represents her herein. Petitioner was represented by Tenenbaum Berger & Shivers LLP.

On February 28, 2018, respondent commenced a "Housing Part (HP) proceeding" to obtain repairs.[5] The proceeding was ultimately settled on September 5, 2019, for a waiver of all rent owed through September 2019. The stipulation also provided for a $10,000 payment of "damages" to "each tenant of record in Apartment 4L and Apartment 3R." (NYSCEF Doc No. 30 at 18-20, respondent's exhibit D, so-ordered stipulation of settlement in *Yolanda Jimenez, et al. v 294 5th Ave. Realty Partners LLC, DHPD*, Civ Ct, Kings County, index No. LT-000943-18/KI.)

A transcript of a deposition provided by respondent from a 2020 personal injury proceeding brought against petitioner by Angel Montalvo (the tenant in Apartment 3R who was a petitioner in the previously mentioned HP proceeding, along with respondent herein) indicates that on the date of the deposition, December 16, 2022, petitioner was aware that respondent resided in the premises.[6] Specifically, the deponent testified that his "cousin, Yolanda Jimenez, could testify" to relevant facts.[7] When asked if respondent resides in the same building as the

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[2] *294 5th Ave. Realty Partners LLC v Naija Vargas; Anthony Lucero; et al.*, Civ Ct, Kings County, Apr. 23, 2018, Poley, J., index No. LT-093805-17/KI.

[3] *See* n 2, *supra*.

[4] *Id.*

[5] *Yolanda Jimenez; Angel Montalvo; Naja Vargas v 294 5th Ave. Realty Partners LLC; DHPD*, Civ Ct, Kings County, index No. LT-000943-18/KI. The court records for the HP proceeding reflect petitioner Angel Montalvo was the tenant of record of Apartment 3R in the subject building.

[6] NYSCEF Doc No. 30 at 84-85, respondent's exhibit F, most relevant pages of transcript of deposition in the case of *Montalvo v 295 5th Avenue Realty Partners*, Sup Ct, Kings County, index No. 523217/2020.)

[7] *Id.* at 84.

deponent – who had previously testified that he resided at 294 5th Avenue, Apartment 3R – the deponent answered, "Yes, she does." When asked which apartment respondent resides in, the deponent answered, "4L. I was trying to say she's been here longer than I have been here."[8]

On January 9, 2023, petitioner commenced a second squatter holdover proceeding for the subject premises, only naming a fictitious "Janice Smith," "John Doe," and "Jane Doe."[9] Respondent was represented by the same legal services provider that represents her herein; she raised harassment, violation of the warranty of habitability, order to correct for repairs, and attorney's fees as counterclaims in her answer.[10] Petitioner was represented in that proceeding by Kucker Marino Winiarsky & Bittens, LLP, a different law firm from that which represented petitioner in the prior squatter holdover proceeding, but the same law firm that represents petitioner in the immediate proceeding. The proceeding was transferred in July 2023 for trial on respondent's counterclaim for harassment; petitioner represented it was not seeking to move forward with its claim.[11] Two months later, while that proceeding was still pending, petitioner commenced the instant proceeding. The parties discontinued the second squatter holdover proceeding in February 2024, whereby respondent withdrew her counterclaims without prejudice to pursuing them in the instant proceeding, and petitioner consented to respondent filing an amended answer in the instant proceeding, including her harassment counterclaim that was raised in the second squatter holdover proceeding.[12] Respondent filed her amended answer and counterclaims in the instant proceeding on March 6, 2024. (NYSCEF Doc No. 19.)

On April 17, 2024 the parties entered into a stipulation, whereby respondent was to file an amended motion (having previously moved for, *inter alia*, dismissal of the petition pursuant to CPLR 3212, civil penalties, injunction against harassment, and sanctions) to allow for the additional relief sought of, *inter alia*, a 100 percent rent abatement pursuant to Multiple Dwelling

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[8] *Id.* at 84-85.

[9] *294 5th Ave. Realty Partners LLC v Janice Smith; John Doe; Jane Doe*, Civ Ct, Kings County, index No. LT-301688-23/KI.

[10] NY St Cts Elec Filing [NYSCEF] Doc No. 6, answer, in *294 5th Ave. Realty Partners LLC v Janice Smith; John Doe; Jane Doe*, Civ Ct, Kings County, index No. LT-301688-23/KI.

[11] *Id.* at 12, transfer order.

[12] *Id.* at 17, two-attorney stipulation.

Law ("MDL") § 302-a (3) (c). (NYSCEF Doc No. 34, stipulation with briefing schedule.) The stipulation reflects respondent's tender to petitioner of checks totaling $7,144.00, "earmarked for the alleged arrears sought in the petition," and that petitioner is to hold the checks in petitioner's escrow account as an "alternative" to the requirement under MDL § 302-a (3) (c) that the respondent deposit the monies into court. (*Id.* ¶ 2.) Petitioner reserved defenses "with regard to the deposit," but has nowhere advanced any quarrel regarding the timing or amount of the deposit. Accordingly, the court deems the deposit timely made pursuant to MDL § 302-a (3) (c).[13]

Now before the court is respondent's motion seeking (1) summary judgment to dismiss the petition due to the rent-impairing violations pursuant to MDL § 302-a, and due to petitioner heretofore disavowing respondent's tenancy; (2) issuing a 100 percent rent abatement for the period of October 2019 through the present pursuant to MDL § 302-a; (3) an injunction against future harassment and imposing civil penalties pursuant to Sections 27-2005 and 27-2115 (m) (2) of the New York City Administrative Code; (4) sanctions against petitioner for frivolous conduct; and (5) attorneys' fees, costs and disbursements. (NYSCEF Doc No. 27, notice of motion [sequence 3].)

Respondent argues that petitioner should be precluded from seeking rent from her until petitioner recognizes her as a tenant, and that she had no obligation to pay rent "for a period in which [petitioner] failed to recognize [her] tenancy." (NYSCEF Doc No. 28, respondent's attorney's affirmation ¶ 43.) Respondent cites to several distinguishable appellate cases involving *rent stabilized* successors in interest, and one Appellate Term, First Department decision involving a *rent controlled* successor, *Edelstein & Son, LLC v Levin*, 8 Misc 3d 135 (A), 2005 NY Slip Op 51190 (U) (App Term, 1st Dept 2005), which does not support her position. *Edelstein & Son, LLC* simply stands for the proposition that a successor to a statutory tenancy is

[13] Even if petitioner had raised an issue, the court would have rejected the argument. This is especially true given that the stipulation dated April 17, 2024 acknowledged the amount deposited was the full amount claimed in the petition, that it was deposited in anticipation of a motion for summary judgment based on rent impairing violations, and specifically referenced MDL § 302-a (3) (c). *See Eleven Eleven Realty Assoc. v Elizabeth*, 82 Misc 3d 1212 (A), 2024 NY Slip Op 50288 (U) (Civ Ct, Kings County 2024), in which the court rejected petitioner's objection to the propriety of a rent deposit because "1) the [p]arties agreed to the deposit amount before the [o]rder dated Oct 10, 2023 was issued; and 2) MDL 302 requires a deposit of the 'rent sought' which has been interpreted to be the [p]etition amount." *Eleven Eleven Realty Assoc.*, 2024 NY Slip Op 50288 (U), *2, n 4.

not responsible for the arrears accumulated by the previous statutory tenant prior to that tenant's death. That case is not apropos the facts of this case.

Respondent argues that she is entitled to a finding of harassment based on the two prior squatter holdover proceedings in which respondent was not named, despite petitioner knowing her name, and knowing that she is a rent controlled tenant. This also forms the basis for respondent's motion for sanctions against petitioner.[14, 15]

In support of her motion for a 100 percent rent abatement from October 2019 – the month immediately following the stipulation in the HP proceeding, whereby petitioner (named as a respondent in that proceeding) waived arrears through September 2019 – to present, based on the existence of rent impairing violations, respondent advances that "[m]ultiple rent impairing conditions have existed at the building for years." (NYSCEF Doc No. 28, respondent's attorney's affirmation ¶ 15.) In support, respondent attaches as Exhibit K an HPD violations report dated April 18, 2023, which indicates that there are rent impairing violations, denoted by an asterisk (*) next to the violation's three-digit order number, that have not been certified as corrected.[16] (NYSCEF Doc No. 30 at 215-224.)[17] More specifically, the HPD violations report shows there are two (2) rent impairing violations in the common areas of the building (Violation Number 11207130, Order Number 567*[18]; Violation Number 12496122, Order Number 176*[19]), and two (2) rent impairing violations in respondent's apartment (Violation Number 13710758,

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[14] Respondent solely seeks sanctions against petitioner and not against petitioner's current attorney.

[15] To the extent respondent claims that the instant lawsuit is frivolous, the court finds that petitioner has pleaded a cause of action. However, this does not dispose of the defenses raised by respondent.

[16] *See Fed. Home Loan Mortg. Corp. v Quezada*, 1994 NYLJ LEXIS 9377, *3-5 (Civ Ct, New York County 1994).

[17] The court takes judicial notice of this exhibit, as well as of the HPD website. NY Multiple Dwelling Law § 328 (3) (establishes that the "visually displayed" or "printed computerized violation files" of HPD are "prima facie evidence of any matter stated therein" and requires court to take judicial notice of those violation files "as if same were certified as true under the seal and signature of the commissioner of" HPD.)

[18] This violation was issued on April 25, 2016, and is described as "§ 27-2018 adm code abate the nuisance consisting of rodents 'evidence of rat' at cellar[.]" NYSCEF Doc No. 30, respondent's exhibit K at 223.

[19] This violation was issued on July 31, 2018, and is described as is described as "§ 53,187,231 m/d law & dept rules & reg. provide means of egress from yard to street by fireproof passageway for which application must be filed for approval, or by unlocked door or gate in fence to adjoining premises with consent of adjacent owner." NYSCEF Doc No. 30 at 222.

Order Number 507*[20]; Violation Number 13710746, Order Number 507.*[21]) Respondent's allegations regarding "serious HMC violations" that petitioner allowed to "go uncorrected for years at a time" also form the basis of respondent's claim of harassment for repeated failure to correct hazardous or immediately hazardous violations. (NYSCEF Doc No. 28, respondent's attorney's affirmation ¶ 62.)

Petitioner opposes a 100 percent rent abatement premised on rent impairing violations, on the basis that the violations of record that constitute rent impairing violations have all, in fact, been remediated since June 2023, notwithstanding that the violations of record have not been certified as corrected with HPD. (NYSCEF Doc No. 35, Shapiro affidavit ¶¶ 9-14.) In reply, respondent argues that, based upon this acknowledgement, "there is no dispute that [r]espondent is entitled to a 100% rent abatement for the months [of] October 2019 through June 2023, constituting forty-four out of the total forty-six months sought in the [p]etition." (NYSCEF Doc No. 50, respondent's attorney's reply affirmation ¶ 6.) Respondent further notes that the rent impairing violations have not been certified as corrected. (*Id.* ¶ 7.) This is only partially true. The roof violations were "deemed complied" as of July 10, 2024; the violation for infestation of rodents in the cellar remains uncertified.

Specifically, petitioner avers that HPD Violation 12496122, regarding the need for a fireproof egress from the yard to the street, was "fully remediated on or about June 1, 2023, when [p]etitioner's contractor completed renovating a first-floor unit in the [b]uilding . . . ." (NYSCEF Doc No. 35, Shapiro affidavit ¶¶ 9-10.) Petitioner provides an unauthenticated "record" from Innovated LLC, which describes the proposed scope of work for Apartment 1R and a "total cost to complete project" of $40,000. (NYSCEF Doc No. 42, petitioner's exhibit G.) The "record" makes no mention of fireproofing material, and petitioner does not explain how the alleged renovation of Apartment 1R would have remediated the lack of a fireproof egress from the yard to the street. Neither does the "record" evince that a contract for renovation was

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[20] This violation was issued on July 2, 2020, and is described as "§ 27-2005 adm code repair the roof so that it will not leak over ceiling in the 3rd room from east located at apt 4l, 4th story, 1st apartment from north at east[.]" NYSCEF Doc No. 30 at 220.

[21] This violation was issued on July 2, 2020, and is described as "§ 27-2005 adm code repair the roof so that it will not leak over ceiling in the kitchen located at apt 4l, 4th story, 1st apartment from north at east[.]" NYSCEF Doc No. 30 at 219.

subsequently signed, or that the work was completed. (NYSCEF Doc No. 50, respondent's attorney's reply affirmation ¶¶ 8-9.)

Regarding HPD Violation 11207130, petitioner avers that the infestation of pests in the building's cellar was remediated by a "licensed pest control service provider." (NYSCEF Doc No. 35, Shapiro affidavit ¶¶ 11-12.) Petitioner provides an invoice from the exterminator, Pestrol, Inc., dated November 8, 2022, which states under pest activity "[n]one [n]oted" and that the"4th floor tenant just wanted glue boards," and an invoice from Pestrol, Inc., dated May 2, 2023, for extermination services in respondent's apartment. (NYSCEF Doc No. 43, petitioner's exhibit H; NYSCEF Doc No. 47, petitioner's exhibit L.) Respondent notes that neither invoice contains a license number for the purportedly licensed exterminator, and that the provided documents do not indicate that extermination was performed in the "cellar," where the rent-impairing violation exists. (NYSCEF Doc No. 50, respondent's attorney's reply affirmation ¶ 11.)

Regarding HPD violations 13710746 and 13710758, related to a roof leak and resulting damage to respondent's ceiling, petitioner avers that the roof was repaired in June 2023, and respondent's ceiling plastered and painted in April 2023. (NYSCEF Doc No. 35, Shapiro affidavit ¶¶ 13-14.) To support this, petitioner provides a "Proposal," signed only by petitioner, for work to an unspecified area described as follows: "The stucco is cracked and will be redone. Plaster on rough coat and smooth coat on top of new wire-mesh." (NYSCEF Doc No. 44, petitioner's exhibit I, proposal from General B. & Sons Construction.) There is no receipt or similarly acceptable proof of payment. (*Id.*) Petitioner does not provide an affidavit from the contractor, or clarify itself, how plaster coating on top of wire mesh repaired the roof. Respondent argues that petitioner acknowledged the roof had in fact *not* been remediated when "on December 20, 2023 [the parties stipulated] that '[p]etitioner alleges 10 days of access required to make repairs to roof/ceiling. Access to be arranged between the parties' counsel[.]'" (NYSCEF Doc No. 50, respondent's attorney's reply affirmation ¶ 14; NYSCEF Doc No. 13, stipulation ¶ 3.) Finally, respondent advances that HPD placed violations for the roof and respondent's ceiling on June 4, 2023, a date *after* petitioner states the remediation of the roof violation was allegedly completed. (NYSCEF Doc No. 50, respondent's attorney's reply

affirmation ¶ 16; NYSCEF Doc No. 32, respondent's exhibit P at 38-39, HPD violations report.)[22]

Petitioner flatly denies breaching the warranty of habitability and implies a lack of access defense. (NYSCEF Doc No 35, Shapiro affidavit ¶¶ 27-29.) Petitioner similarly opposes imposition of penalties pursuant to MDL § 302-a, on the basis that "all conditions underlying the 'rent-impairing' violations have been remediated." (*Id.* ¶ 32.) Petitioner's entire opposition to respondent's claim of harassment is that it is "untrue that [p]etitioner has 'harassed' Jimenez." (*Id.* ¶ 33.) Petitioner offers nothing further in explanation and does not address respondent's requests for sanctions based on frivolity.

APPLICABLE LAW

A court may employ the drastic remedy of summary judgment only where there is no doubt as to the absence of triable issues. (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) On such a motion, a court's function is to find, rather than to decide, issues of fact. (*Southbridge Towers, Inc. v Renda*, 21 Misc 3d 1138 [A], 2008 NY Slip Op 52418 [U] [Civ Ct, NY County 2008], citing *Epstein v Scally*, 99 AD2d 713 [1st Dept 1984].) The facts must be considered "in the light most favorable to the non-moving party." (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011].) Only upon a *prima facie* showing of entitlement to summary judgment, does the burden shift to the non-moving party to establish material issues of fact requiring a trial. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].) The party opposing a summary judgment motion must tender evidentiary proof in admissible form sufficient to raise a material issue of fact, or a reasonable excuse for failing to do so. (*Zuckerman v City of New York*, 49 NY2d 557, 563.) "An unfounded reluctance to employ the remedy of summary judgment only serves to swell the trial calendar and to deny other litigants the right to have their claims properly adjudicated." (*Pomeroy*, 35 NY2d at 364.)

Where HPD issues a "rent-impairing" violation for a condition in a multiple dwelling that is not cancelled or removed from HPD's records within six months after the date of said rent-

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[22] It appears that respondent did not respond to a notification pursuant to the Administrative Code. The violation was deemed corrected as of September 20, 2023. NYSCEF Doc No. 32, respondent's exhibit P at 38-39; *see* Administrative Code of City of NY § 27-2115 (k) (iii) ("[W]ithin five business days from the date of receipt of the notice of correction by the department, the department shall mail to the occupant of any dwelling unit for which such violation was issued notification that the owner has submitted a notice of correction for such violation. The notification to the occupant shall include information on when the violation was reportedly corrected and how the occupant may object to such notice of correction.")

impairing violation, an owner is prohibited from collecting rent "for any premises" in the multiple dwelling after the six-month period has passed, until such time as the violation is corrected. (NY MDL § 302-a [3] [a].)[23, 24] The prohibition on collecting rent does not apply if the condition underlying the rent-impairing violation does not in fact exist, notwithstanding HPD's record of a rent-impairing violation for that condition; the condition has been corrected but HPD has not removed or cancelled the record of the violation; the violation is caused by the tenant from whom the owner seeks rent in the nonpayment proceeding, or is caused by a guest or family member of said tenant, or is caused by another tenant or that tenant's guest or family member; or the tenant from whom the owner seeks rent refuses to provide access to the owner for the purpose of correcting the underlying condition. (*Id.* § 302-a [3] [b].) These are the only defenses to a claim based upon rent impairing violations. Regarding real estate conveyances, New York adheres to the doctrine of "caveat emptor" and, absent fraudulent concealment, a purchaser is charged with exercising due diligence and reviewing public records related to the property. (*Beach 104 St. Realty, Inc. v Kisslev-Mazel Realty, LLC*, 76 AD3d 661, 664 [2d Dept 2010].) To the extent that the doctrine of caveat emptor may not be applied as strictly to sales in foreclosure,[25] petitioner has not averred that the condition of the building was concealed or could not have been easily ascertained.

In a nonpayment proceeding, the tenant "must affirmatively plead and prove the material facts under" MDL § 302-a [3] [a], and must deposit "the amount of rent . . . upon which the proceeding to recover possession is based" with the court clerk "until final disposition of the action or proceeding at which time the rent deposited shall be paid to the owner, if the owner prevails, or be returned to the" tenant if the tenant prevails. (*Id.* § 302-a [3] [c].) The deposit vitiates the owner's right to terminate the tenant's lease due to nonpayment of rent. (*Id.*) The rent impairing violation need not be inside a tenant's apartment to raise the claim, and protestations

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[23] A "rent-impairing" violation is defined as "a condition in a multiple dwelling which, in the opinion of [HPD], constitutes, or if not properly corrected, will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof." NY MDL § 302-a [2] [a].)

[24] The promulgated list of rent-impairing violations can be found at 28 RCNY § 25-191.

[25] *Richardson v United Funding, Inc.*, 16 AD3d 570, 571 (2d Dept 2005) ("The doctrine of caveat emptor does not apply to conditions which the plaintiff could not have discovered with due inquiry and/or inspection[.]") (internal citation omitted); *Zweig v* Tolchin, 32 Misc 3d 1202 (A), 2011 NY Slip Op 51151 (U) (Sup. Ct, New York County 2011) ("[T]he rule of *caveat emptor* applicable to private sales [] is not applied with as much strictness in judicial sales where a purchaser may have greater reliance that there are no hidden pitfalls . . . .") (internal citation omitted).)

that a tenant denied access to remediate common area violations will not serve to raise a material issue of fact regarding access. (*Food First HDFC Inc., v Turner*, 69 Misc 3d 1202 [A], 2020 NY Slip Op 51155 [U] [Civ Ct, New York County 2020].)

Under the New York City Administrative Code, an owner of a multiple dwelling has the duty to, *inter alia*, keep the premises in good repair, to comply with requirements code, and to refrain from harassing tenants or persons entitled to occupy the dwelling. (Administrative Code of City of NY ["HMC"] § 27-2005 [a]-[b], [d].) The HMC defines harassment, in part, as "any act or omission by or on behalf of an owner that [] causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy[.]" In addition, the alleged conduct must include at least one of several enumerated acts or omissions on the part of the owner, including "repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit . . . repeated failures to correct hazardous or immediately hazardous violations . . . relating to the dwelling unit or the common areas of the building containing such dwelling unit, within the time required for such corrections," and "commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit[.]" (*Id.* § 27-2004 [a] [48] [b]; [b-2]; [d].) There is a rebuttable presumption that "such acts or omissions were intended to cause such person to vacate [the] dwelling unit or to surrender of waive any rights in relation to such occupancy . . . ." (*Id.*)

A finding that an owner has engaged in harassment in violation of Section 2005 (d) of the New York City Administrative Code is a Class "C" immediately hazardous violation, and HPD is to issue a penalty for said immediately hazardous violation. (*Id.* § 27-2115 [m] [1].) The court is empowered to issue an order restraining the owner from violating Section 2005 (d) and directing the owner to ensure no further violations occur. (*Id.* § 27-2115 [m] [2].) For each dwelling unit in which the court has found a violation of Section 2005 (d), the court is to impose a civil penalty between $1,000 and $10,000, along with other relief deemed appropriate by the court. (*Id.*) Within 90 days of receiving notice of a court's finding of harassment in violation of Section 2005 (d), HPD is to post on its website, *inter alia*, the civil penalty imposed for the violation, the date the penalty was imposed, and whether there is an order restraining the owner from violating Section 2005 (d). (*Id.* § 27-2115 [m] [6].) A court may also issue compensatory

damages, or if the litigant chooses, $1,000, along with reasonable attorneys' fees and costs. The court also has discretion to award punitive damages. (*Id.* § 27-2115 [o].) As stated in *Roach v 215 Sterling LLC*, 74 Misc 3d 1221 (A), 2022 NY Slip Op 50193 (U) (Civ Ct, New York County 2022), "[p]unitive damages are assessed by way of punishment to the wrongdoer and example to others. While no rigid formula fixes punitive damages, they should bear some reasonable relation to the harm done and the flagrancy of the conduct causing it."[26]

22 NYCRR 130-1.1 (a) states:

> "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part[.]"

22 NYCRR 130-1.1 (c) states in relevant part:

> "Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and *whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party* (emphasis added)."

"Section 130–1.2 permits a court to award costs or impose sanctions, or both, only upon a written decision setting forth sanctionable conduct, the reasons why the court found the conduct to be frivolous and the reasons why the court found the amount awarded or imposed to be appropriate." (*Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 74 [1st Dept 2006].)

DISCUSSION

At the outset, the court observes that petitioner does not object to any of respondent's submissions, and petitioner's evidence in opposition to respondent's motion for summary judgment is not in admissible form. None of the documents have been authenticated or certified.

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[26] Respondent has not requested compensatory damages, nor has respondent requested punitive damages. Respondent requests only an "injunction against future harassment and imposing civil penalties upon [p]etitioner in an amount not less than one thousand dollars and not more than ten thousand dollars[.]" NYSCEF Doc No. 27, notice of motion (sequence 3).

Petitioner did not lay a foundation for any documents in its agent's affidavit. No excuse for this failing is proffered.[27] Regardless, respondent has sustained her burden on summary judgment based on rent impairing violations and petitioner has not – through its unauthenticated submissions or through its self-serving affidavit – raised any material issues of fact. In fact, petitioner has admitted that the violation for the leaking roof was not "fully remediated" until petitioner allegedly replace the roof in June 2023. (NYSCEF Doc No. 35, Shapiro affidavit ¶ 14.)

Rent impairing violations have existed in Apartment 4L and the common areas for years, and the violations still remain as open with HPD. (NYSCEF Doc No. 51, respondent's exhibit A in reply.) At the time petitioner purchased the building, the building was in HPD's Alternative Enforcement Program ("AEP"), and hundreds of violations existed in the premises. (*See* NYSCEF Doc No. 24 at 22-26, respondent's exhibit E [listing AEP compliant inspection fees dating back to April 2016]; NYSCEF Doc No. 28, respondent's attorney's affirmation ¶ 6.) There is no dispute that the rent impairing roof violation existed at all relevant times herein and continued to exist until at least June 2023. There is no proof that the rent impairing rodent violation in the cellar has been remediated to date; indeed, as of May 21, 2024, the HPD website still lists all four (4) previously referenced rent-impairing violations (11207130; 12496122; 13710758; 13710746) as open. (NYSCEF Doc No. 51, respondent's exhibit A in reply at 12.) HPD violations are a matter of public record, easily searchable even by tenants with no real estate expertise or legal knowledge. (*See Torres v Sedgwick Ave. Dignity Devs. LLC*, 74 Misc 3d 1209 [A], 2022 NY Slip Op 50085 [U], *2-3, citing *Rochkind v Perlman*, 123 AD 808, 810-811 [2d Dept 1908].) Petitioner makes no claim that it was not aware of the violations which existed in the subject building, nor could petitioner seriously advance such an argument. Petitioner does not claim that respondent failed to provide access to the roof or the cellar, and such an argument would be specious at best. Nor does petitioner defend that the conditions were caused by

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[27] *Friends of Animals, Inc. v Associated Fur. Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 (1979); *Chin v Ademaj*, 188 AD2d 579, 579 (2d Dept 1992) ("[A]lthough it is well settled that evidence submitted both in support of and in opposition to a motion for summary judgment must be in admissible form, the rule with respect to defeating a motion for summary judgment is more flexible for the opposing party, who may be permitted to demonstrate an acceptable excuse for his failure to meet the strict requirement of tender in admissible form(.)") (internal quotation marks and citations omitted); *Spearmon v Times Square Stores Corp.*, 96 AD2d 552, 552-553 (2d Dept 1983) ("To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form(.)") (internal quotations marks and citation omitted.))

respondent. Petitioner's only defense is that the conditions were remediated on or about June 1, 2023.

Petitioner has harassed respondent by repeatedly failed to repair the roof to stop the leak at the kitchen ceiling within the time required to correct the Class C and Class B violations issued for the condition. HPD issued Violation Number 12878329 in January 2019, a Class C immediately hazardous violation, for that condition. The certification due date was February 12, 2019. (NYSCEF Doc No. 32, respondent's exhibit P, at 47; NYSCEF Doc No. 28, respondent's attorney's affirmation ¶ 36.) HPD notes the certification status as "overdue" and that the work was "[c]ompleted [b]y [o]thers [p]er [A]ep [i]nsp[ection[.]" (*Id.*) In July 2020, HPD issued a Class B hazardous violation for the same underlying condition (Violation Number 13710746), with a certification due date of August 20, 2020. (NYSCEF Doc No. 32, respondent's exhibit P, at 62.) As of May 21, 2024, the July 2020 violation remains open. (NYSCEF Doc No. 51, respondent's exhibit A in reply at 7.) As noted *supra*, respondent contends petitioner acknowledged the violation had not been corrected as of December 20, 2023, when the parties entered into a stipulation that included a statement that "[p]etitioner alleges 10 days of access required to make repairs to roof/ceiling. Access to be arranged between the parties' counsel[.]'" (NYSCEF Doc No. 50, respondent's attorney's reply affirmation ¶ 14; NYSCEF Doc No. 13, stipulation ¶ 3.) Thus, petitioner's "repeated failures to correct" the leak at the kitchen ceiling "within the time required for such correction" for Violation 12878329 and Violation 13710746, meet the requirement for a finding of harassment pursuant to Sections 27-2005 (d) and 27-2004 (a) (48) (b-2) of the New York City Administrative Code. The court orders that a Class "C" violation for harassment be placed at the subject premises by HPD. The first violation was issued in January 2019, and petitioner acknowledged in the December 2023 stipulation in this proceeding that more work needed to be done to the roof. Therefore, the court imposes a civil penalty in the amount of $10,000.00 – $2,000.00 for each calendar year petitioner failed to correct the underlying condition and certify said correction with HPD.

While the court finds the first squatter holdover proceeding to be specious, the court does not find the proceeding to be baseless or frivolous so as to warrant a finding of harassment based on *repeated* baseless or frivolous proceedings against respondent. Three months after purchasing the building in foreclosure, petitioner commenced the first squatter holdover proceeding against respondent's children. Respondent's children's attorney filed a notice of appearance in January

2018, and moved to dismiss the proceeding in February 2018. Two months later, in April 2018, petitioner cross-moved to discontinue the proceeding. Israel Segal, then a member of petitioner, averred in his affidavit in support of petitioner's cross-motion that he visited the subject building to introduce himself to each tenant in the building, and that Naija Vargas told him she lived on the fourth floor but not would not tell him her last name, who she lived with, or if she had a current lease. Segal also stated his attorneys "conducted a building-wide tenancy and occupancy investigation for all the apartments," which "revealed that Naija Vargas and Anthony Lucero were the only current occupants of the apartment." On the return date of the cross-motion, the court issued the decision/order dismissing the proceeding "with prejudice" as to the claim that the named respondents were squatters, stating the named respondents "are not licensees or squatters as acknowledged by petitioner through counsel," and reserving petitioner's right to commence a "good faith proceeding." While the judge's order some level of bad faith, the court made no such finding, and respondent. Thus, from the record of that proceeding, the court cannot determine with certainty that petitioner knew the proceeding was baseless., Moreover petitioner discontinued the proceeding.

Although the second squatter holdover proceeding was certainly baseless and frivolous based on the dismissal order of the first squatter holdover proceeding and subsequent events such as the deposition testimony of Angel Montalvo and the filing of an HP proceeding, as stated previously, the court cannot find that petitioner had no basis in law or fact to commence the first squatter holdover proceeding. Thus, respondent has not established petitioner commenced *repeated* baseless or frivolous proceedings against her to warrant a finding of harassment pursuant to Sections 27-2005 (d) and 27-2004 (a) (48) (d) of the New York City Administrative Code.

With regards to the branch of petitioner's motion seeking sanctions, the court finds that petitioner has stated a cause of action for nonpayment of rent in this nonpayment proceeding. This particular proceeding is not sanctionable, and sanctions were neither sought nor awarded in the prior two holdover proceedings.

CONCLUSION

Accordingly, it is ORDERED that for the reasons stated *supra*,

The branch of respondent's motion to dismiss the petition with prejudice through June 2023 based upon rent-impairing violations under MDL § 302-a is GRANTED; and it is further

ORDERED that the branch of respondent's motion seeking a 100 percent rent abatement for the period of October 2019 through the present is GRANTED to the extent of granting a 100 percent rent abatement for the period of October 2019 through June 2023; and it is further

ORDERED that the branch of respondent's motion seeking dismissal of the petition due to petitioner's contention in the second squatter holdover that no landlord-tenant relationship exists is DENIED; and it is further

ORDERED that the branch of respondent's motion seeking an injunction against future harassment and imposing civil penalties pursuant to Section 27-2005 and 27-2115(m)(2) of the NYC Administrative Code, is GRANTED to the extent that petitioner is hereby found to have harassed respondent in violation of Section 27-2005 (d) of the NYC Administrative Code. **The court HPD to place a Class "C" violation for harassment at the subject premises.** Petitioner is hereby ordered **to refrain from engaging in any harassing conduct prohibited by NYC Administrative Code Section 27-2005 (d) and as defined by NYC Administrative Code 27-2004(a)(48).** The court imposes a **civil penalty in the amount of $10,000**,[28] which is awarded to HPD and may be enforced as a lien against the property; and it is further

ORDERED that the branch of respondent's motion seeking sanctions against petitioner is DENIED for the reasons stated above; and it is further

ORDERED that the proceeding shall be adjourned to for settlement or trial to June 12, 2024 regarding the remaining two months due under the unamended petition. Should respondent choose to move for attorney's fees, a briefing schedule will be ordered on the adjournment date.

This constitutes the decision and order of the court.

Dated: June 3, 2024
Brooklyn, NY

So Ordered:
Hon. Karen May Bacdayan
HON. KAREN MAY BACDAYAN

[28] As previously noted, respondent has requested neither compensatory nor punitive damages, and, in this Housing Part, the notice of motion controls. However, the court finds that purchasing a dilapidated building with rent controlled tenants in residence, and then failing to address the conditions for years, as well as seeking to evict an elderly, life-long rent controlled tenant and her family, where ordinary care would have revealed the true nature of respondent's tenancy, to be abhorrent. The court cannot ignore that "[o]nly 1.4 percent of the city's rentals were available in 2023, according to new date, the lowest portion since 1968. The market was even tighter for lower-cost apartments." Mihir Zaveri, *New York City's Housing Crunch is the Worst It Has Been In Over 50 Years*, New York Times, Feb. 8, 2024 [note: online version], available at https://www.nytimes.com/2024/02/08/nyregion/apartment-vacancy-rate-housing-crisis.html. In part for that reason, the maximum civil penalties allowed by statue are awarded.