

HPD CITY OF NEW YORK OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

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In Re: DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW YORK

Petitioner,

OATH Index No. 1984/25


-against-

MICHAEL GEYLIK
Applicant for a Certification of No Harassment for
The premises known as 109 East 9th Street,
New York, New York 10003

Respondent.

-----X

**PETITIONER'S, DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT - CLOSING MEMORANDUM**



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Dated: November 6, 2025
New York, New York

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TABLE OF CONTENTS

Pages

Preliminary Statement2

Procedural History2

Governing Laws3

Allegations (a) and (b)5

Allegations (c) and (d)10

Allegations (e) and (i)13

Allegation (f)17

Allegations (g) and (h)19

Allegation (j)23

Allegations (k) and (l)25

Allegation (m)26

Conclusion28

TABLE OF AUTHORITIES

Page(s)

Statutes, Rules and Other Authorities

Multiple Dwelling Law § 29

NYC.gov (DOB Permit Filing)8

NYC.gov (Violations Correction Time Frames)28

New York City Administrative Code §26-52124

New York City Administrative Code §27-2004(a)(48)3, 4, 10, 26, 28

New York City Administrative Code §27-2011.....15

New York City Administrative Code §27-2053(b)14

New York City Administrative Code §27-205415

New York City Administrative Code §27-20675, 9

New York City Administrative Code §27-20932, 3, 4, 10, 16, 25, 29, 30

New York City Administrative Code §27-2115(c).....28

New York City Rules and Regulations Title 9, §2204.3.....18

New York City Rules and Regulations Title 9, §2524.218

New York State Building Code, Chapter 33, §3303.1013

Real Property Actions and Proceedings Law §76825

Rules of the City of New York, Title 1, §101-14 (III) Interior Partitions13

Court Cases

128 Hester LLC v. DHCR, 146 A.D.3d 706 (1st Dep’t, 2017)27

235 Hotel LLC v. DHPD, 309 A.D.2d 587 (1st Dep’t, 2003)10, 16

Ascot Realty, LLC v. Richstone, 10 A.D.3d 513 (1st Dep’t, 2004)19

Dominguez v. Vanamerongen, 56 A.D. 3d 667 (2nd Dep’t, 2008)16

Haberman v. Singer, 3 A.D.3d 188 (1st Dep’t, 2004)22

<i>Hersh v. HPD</i> , 44 A.D.3d 525 (1 st Dep't, 2007)	16
<i>HPD v. Bernardi</i> , OATH Index No. 416/09 (Mar. 19, 2009)	25
<i>HPD v. Bezzant</i> , OATH Index No. 1529/14 (Jan. 5, 2014)	19, 20
<i>HPD v. Edelstein</i> , OATH Index No. 490/12 (Dec. 7, 2012)	9, 10, 24
<i>HPD v. Forest</i> , OATH Index No. 1320/20 (Nov. 9, 2022)	13, 27
<i>HPD v. Goldsmith</i> , OATH Index No. 2018/12 (Aug. 27, 2023)	15, 20
<i>HPD v. Hersh</i> , OATH Index No. 921/05 (Jan. 12, 2006)	16
<i>HPD v. Kaplan</i> , OATH Index No. 1246/19 (Mar. 18, 2021)	10, 15
<i>HPD v. Mamudosk</i> , OATH Index No. 771/01 (Feb. 21, 2002)	20
<i>HPD v. Mendoza</i> , OATH Index No. 556/05 (Feb. 17, 2005)	30
<i>HPD v. Pedersen</i> , OATH Index No. 1093/08 (Aug. 22, 2008)	9, 27
<i>HPD v. Serradilla</i> , OATH Index No. 1802/01 (Jul. 18, 2001)	8, 9, 30
<i>HPD v. Tauber</i> , OATH Index No. 0675/07 (May 16, 2007)	15
<i>Janes v. Paddell</i> , 132 N.Y.S. 379 (NY Sup. Ct. App. Term. 1911)	20
<i>Leon St. Clair Nation v. City of New York</i> , 902 N.Y.S.2d 22 (2010)	26
<i>London Terrace Gardens, L.P. v. Heller</i> , 2009 NY Misc. 2912 (1 st Dep't, 2009)	18
<i>Mak v. Yun Pan Lee</i> , 12 Misc. 3d 142(A) (1 st Dep't, 2016)	18
<i>Rose Associates v. State Div. Of Housing & Community Renewal</i> , 121 A.D.2d 185 (1 st Dep't, 1986)	19
<i>Sadowsky v. City of New York</i> , 732 F.2d 312, 315 (2d Cir. 1984)	30
<i>Vaughan v. Michetti</i> , 176 A.D.2d 144 (1st Dep't, 1991)	22
<i>Windemere Owners LLC v. Mullu</i> , 2013 NY Slip Op 31714 (U), (NY Civ. Ct., 2013)	22

PRELIMINARY STATEMENT

This proceeding concerns the building at 109 East 9th Street, New York, New York 10003, (the “Building”), which is a single room occupancy (“SRO”) multiple dwelling. The Building’s legal configuration is fourteen SRO units, but only six are currently occupied. Exs. B2, B3, 3 and 17.¹ The Building is subject to rent stabilization. Exs. 17, 18. After receiving an inquiry alleging that harassment of tenants had taken place and continues since March 4, 2024, Department of Housing Preservation and Development (“Agency” or “Pet.”) commenced an investigation and, thereafter, suspended the Certification of No Harassment (“CONH”) issued to Respondent (“Res.”) on March 4, 2024. Thereafter, the Agency filed a Petition, consisting of thirteen allegations, seeking to have the CONH rescinded. During a six-day trial before Hon. Judge Stecura, the Agency substantiated the allegations in the Petition by providing testimonial and documentary evidence. Inasmuch as Res.’s acts and/or omissions were substantially supported by evidence adduced at trial, the statutory presumption is that any proven acts or omissions committed by Res. or on his behalf were committed with the intent to cause a person lawfully entitled to occupancy of a dwelling unit in such multiple dwelling to vacate such unit or to surrender or waive a right in relation to such occupancy. New York City Administrative Code (“Admin. Code”) §27-2093(b). As Res. did not sufficiently rebut the Agency’s evidence, the Agency respectfully asks that the Tribunal find, by a preponderance of the credible evidence, that harassment occurred at the subject building as of March 4, 2024 to the present and recommend to HPD Commissioner that the CONH be rescinded.

PROCEDURAL HISTORY

The current owner of the Building is 109E9 LLC, which owned the building as of June 28, 2021.

¹ Ex. B3 contains a typo on pg. 1 - the total units are listed as 13. However, the number of units listed for each floor on the other pages totals 14 units which is the legal configuration.

Ex. 2. Res. is a managing member of the owner and is listed as the contact person on the building registration in the place of a superintendent. Ex. 1, 4. On August 16, 2023, Res. filed an application for a CONH with the Agency. Ex. 4. In his application for a CONH, Res. stated that a permit was filed with the Department of Buildings (“DOB”) and attached a plan filed with DOB, dated November 1, 2022, for job application No. MOO865697-I1. Ex. 4 pg. 3 and last 3 pages. The plan proposed work to construct a kitchen and a bathroom consisting of a shower, toilet and sink, on the 4th floor of the Building. Before he obtained the CONH, Res. executed an Agreement of No Future Harassment on or about March 12, 2024 in order to obtain the CONH. Ex. 6.

Thereafter, about February 3, 2025, the Agency received an inquiry from Jenny Akchin, of TakeRoot Justice, alleging that Res. harassed the Building’s tenants after the CONH was issued. After investigation and legal review, the Agency made an initial determination that there was reasonable cause to believe that harassment occurred against the lawful occupants of the Building based on Res.’s acts and omissions, and suspended the CONH as of April 8, 2025. The matter was referred to the Office of Administrative Trials and Hearings (“OATH”) by filing a Notice of Petition and Petition, pursuant to Admin. Code §27-2093. After conferences, a trial was held before Hon. Judge Stecura on May 8, 22, June 5, 12, July 10, and September 25, 2025. Written closing arguments were scheduled to be submitted November 6, 2025, and replies on November 20, 2025.²

The Tribunal should find that lawful occupants were harassed pursuant to governing laws

Admin Code §27-2093, and §27-2004(a)(48) define acts and omissions that constitute harassment, which the Agency alleged as part of this case. The allegations in the Petition are

² Respondent moved to dismiss the proceeding arguing that the Agency is prohibited from revoking the CONH because the hearing, OATH’s Report and Recommendation and HPD’s Commissioner Final Determination had to be issued by, May 8, 2025, 30 days from the suspension date of April 8, 2025. In a written decision issued on May 21, 2025, Hon. Judge Stecura denied Res.’s motion.

statutorily based on Admin. Code §27-2093(a)(2), (a)(4) and (b), as well as §27-2004 (a)(48) (i), (ii), (a-1), (a-2), (b), (d), (d1) and (g). Section 27-2093, and further, §27-2004(a)(48) delineate acts and/or omissions that constitute harassment which Petitioner alleged were applicable to this case.

Section 27-2093 states in relevant part:

a. For the purposes of this section, "harassment" shall mean any conduct by or on behalf of an owner of a single room occupancy multiple dwelling that includes:

(2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy;

(4) any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit or causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy including but not limited to removing the possessions of any occupant from the dwelling unit; removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

b. For the purposes of any hearing held pursuant to this section, any of the acts or omissions described in paragraphs, one, two, three and four of subdivision a of this section which are committed at a single room occupancy multiple dwelling shall be presumed to be committed by or on behalf of the owner of such multiple dwelling and it shall be presumed that such acts or omissions were committed with the intent to cause a person lawfully entitled to occupancy of a dwelling unit in such multiple dwelling to vacate such unit or to surrender or waive a right in relation to such occupancy. *Admin Code §27-2093.*

The term "Harassment" is further defined in §27-2004 (a) (48) of the Admin. Code which states in relevant part:

Harassment shall mean any act or omission by or on behalf of an owner that (i) 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, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy...

- a-1. knowingly providing to any person lawfully entitled to occupancy of a dwelling unit false or misleading information relating to the occupancy of such unit;
- a-2. making a false statement or misrepresentation as to a material fact regarding the current occupancy or the rent stabilization status of a building or dwelling unit on any application or construction documents for a permit for work which is to be performed in the building containing the dwelling unit of any person lawfully entitled to occupancy of such dwelling unit if such building is governed by the New York city construction codes;
- b. 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;
- c. commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit;
- d-1. commencing a baseless or frivolous court proceeding against a person lawfully entitled to occupancy of such dwelling unit if repeated baseless or frivolous court proceedings have been commenced against other persons lawfully entitled to occupancy in the building containing such dwelling unit; and
- g. other repeated acts or omissions of such significance as to substantially interfere with 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....

The Petition includes thirteen allegations based on acts or omissions by the owner or its agents.³

Allegations (a) and (b) - Failure to restore a toilet, shower and kitchen the respondent removed and/or caused to be removed from the 4th floor, and failure to restore a toilet the respondent removed and/or caused to be removed from the 3rd floor, causing the 4th and 3rd floors to remain without a toilet in violation of HMC §27-2067 which requires one toilet on each occupied floor; Providing lawful occupants false and misleading information regarding the occupancy of their units, including common facilities serving their units, by telling lawful occupants not to complain to HPD about the removal of common facilities, deceiving the occupants into believing that those facilities will be restored after the Certificate of No Harassment (“CONH”) is issued, and failing to restore such facilities after the issuance of the CONH on March 4, 2024 to present.

The Building’s long term lawful occupants testified that essential services were previously provided in the form of a toilet on each floor in addition to shared shower and kitchen facilities.

³ Each allegation listed below is listed in the same form as it is contained in the Petition.

Ex. 12, 8, pg. 5-8. Judy Sabin testified that there were toilets available on the 2nd through 5th floors of the building when she moved in. Tr. 125-128. Sabin also testified there was a kitchen, and shower on the 4th floor, and a shower on the 2nd floor. Tr. 125-128. Remigiusz Chlapek (“Remy”) testified that, prior to their removal, there was a shared toilet on the 3rd floor and a shared kitchen on the 4th floor. Tr. 379-380. Zachary Hall testified that there were functioning toilets on the 3rd and 4th floors of the building, as well as a shared kitchen and shower on the 4th floor before they were removed by Res. Tr. 227. Shiras Beckwith and Thomas Dukleth testified that they have resided in the building since early 1990’s and enjoyed functioning toilets on the 3rd and 4th floors of the building, as well as a shared kitchen and shower on the 4th floor since then. Tr. 32, 36-37, 95, 104, 313-316, 326. Messrs. Beckwith and Dukleth testified that they had no toilet, shower, or kitchen facilities in their rooms. Tr. 31, 315. The only remaining shower is small and cramped and does not have ventilation, since there is no window or fan, whereas the removed shower had a window and was more spacious. Tr. 319; Ex. 12, pg. 11. After the shared kitchen was removed, the tenants were no longer able to prepare food in the building and had to expend considerable sums of money eating out. Tr. 129, 229, 319, 320. Since their removal to date, the tenants had to contend with a discontinuance of essential services at the building which made their life difficult. Tr. 40-43, 129, 191, 319-320, 383.

The shared facilities on the 4th floor were removed by Res. who told the tenants in October or November of 2022 that he needed to remove the facilities to clear DOB violations.⁴ Tr. 32, 36, 38,

⁴ Res. testified that the 4th floor is where Sabin and Dukleth live. Tr. 1053. The violation on the 4th floor was issued to remedy “rear east side space completed demolition of plaster fireproofing and wood lathe”. Ex. G4, violation 34205637H. When pressed, Res. conceded that there was no ongoing demolition of fireproofing at 4th floor rear east side space in 2022. Tr. 1050-51. Res. then claimed that he removed the toilet, shower and kitchen from the 4th floor in order to comply with a violation for “work without a permit and hazardous gas connection”. Ex. G4, violation 34166612M. However, Dukleth’s testimony established that since 2008 there was no gas

128, 318-19, 618; Ex 12 pgs. 3, 14-15. Res. asked Remy to assist in removing the 3rd floor toilet and the shared kitchen on the 4th floor and told him that the removed facilities would be replaced with nicer ones. Tr. 380-81. Dukleth corroborated Remy's testimony and testified that the 3rd floor shared toilet was removed by Remy and covered by a plywood box, which Remy installed at the request of the owner. Tr. 83. Ex. 12, pg. 8. Dukleth also testified that Res. told him that the shared facilities would be restored "better than ever" in a few months after removal. Tr. 34, 38.

Res. claimed that that SRO units were illegally converted to community facilities, but did not provide any supporting evidence. Historically, in addition to the shared facilities, there were always three residential units on the 4th floor and four residential units on the 3rd floor. Ex. 3, B2 and B3. Res.'s testimony that the shared kitchen area on the 4th floor was an illegally converted unit 3B was refuted by historical records which do not show an additional 3B unit on the 4th floor. Tr. 105, 924-25; Ex. 3, 17. Moreover, DHCR registrations for individual units note that cooking fuel was a required building service, which supports the fact that historically, there was a kitchen at the building. Ex. 18 notation at end of each individual unit registration - *required services*. Testimonial evidence established that the shared toilet, shower, and kitchen never had a letter/number designation, and historically existed on the 4th floor *in addition* to three residential units, 3C-Sabin's unit and 3D-Dukleth's unit, as well as vacant unit 3A. Tr. 30, 56, 104-05, 125-26, 225, 227,1053; Ex. 12 pgs. 1-6. A toilet historically existed on the 3rd floor *in addition* to four units, 2D-Remy's unit, 2E-Beckwith's unit and vacant units 2B and 2A; the number of residential units

connection on the 4th floor kitchen. Tr. 32-33, 111. The permit No. M08040576-II-LA filed with DOB to remedy work on the 3rd floor noted that "space has no gas service. Meter located in the cellar has been locked by the utility company". Ex. G5. Clearly, conditions in the 1999 violation for demolition of fireproofing on the 4th floor and the 1998 violation for gas meter and piping supplying gas to 3rd floor stove (hazardous) did not exist in 2022 and did not require Res. to remove essential facilities, as he claimed. Ex. G4, violations 34166612M and 34205637H.

on the 3rd floor was not reduced to accommodate the toilet space, which, in any event, was too small to be a converted residential unit. Tr. 56, 85, 102, 125-26, 228, 492-93, 622; Ex. 12 pgs. 7-8, 16-18, 21.

After removing the facilities, Res. instructed Dukleth not to complain about the removal of the facilities and threatened to sell the building if Dukleth complained. Tr. 38-40. Res. asked Dukleth to tell the other tenants not to complain, which Dukleth did. Tr. 40-41. Tenants were told that in order to restore the kitchen, bathroom, and toilets, Res. needed to obtain a CONH, and were asked not to oppose the CONH process. Tr. 92-3, 228, 624. Investigator Abimael Sequinot (“Sequinot”) testified that, when he interviewed the tenants, five of the six tenants stated that the landlord informed them that “if they helped him in getting the CONH by not complaining, that he would restore new bathrooms and a new kitchen area”. Tr. 574. Although Res. knew that he needed a CONH in November 2022, he did not file for a CONH until about nine months later. Tr. 41; Ex. 4. Even after the CONH was obtained by Res. around March 13, 2024, he failed to restore the shower, toilets and kitchen. Tr. 128, 156, 1174. Res. testified that, after he obtained the CONH, he still needed time to prepare and have the plans drafted and submitted to DOB for review, which can be a lengthy process. Tr. 1175. However, the plan for job application M00865697-11, which he attached to the CONH application, had been previously filed on November 1, 2022. Ex. 4. Res.’s testimony that DOB process was lengthy and restricted him from filing for a permit before he obtained the CONH, was incorrect as DOB process sets out that an applicant seeking a permit can file electronically so that any possible objections can be noted by the plan examiner to be resolved, leading to the issuance of the permit. *See, NYC.gov- DOB filing for permit.*

Although Res. told tenants that he had “every intention of restoring the facilities”, his actions are indicative of a purposeful delay and deprivation. Tr. 868. Tr. 128, 190. *See, HPD v. Serradilla,*

OATH Index No. 1802/01 (July 18, 2001), at 8-9, holding that an intent to harass the occupants is presumed from the facts based on the owner's acts or omissions; in the absence of any factual rebuttal to the contrary, the Serradilla court held that the logical conclusion is that owner's acts were acts of harassment against the occupants. Res. testified that his failure to restore the removed facilities was due to an April 2024 earthquake in NJ affecting the building, but the tenants consistently testified that the impact of the event on the building was not as severe as Res. alleged. Tr. 61, 88, 230, 271-272, 869. Res. failed to introduce conclusive evidence that the April 2024 earthquake was the cause of the destabilization of the building, especially in light of the evidence that the building has been deteriorating over a long time, of which he was aware, and which was due to Res.'s neglect. Tr. 797,798-80; D2, G4 – ECB violation 342095638J.

New York City Housing Maintenance Code (“HMC”) §27-2067(a) provides, in pertinent part, that, in a building containing rooming units, at least one water closet shall be located on any floor containing a rooming unit.⁵ In HPD v. Pedersen, OATH Index No. 1093/08 (Aug. 23 2008), at 5, Judge Richard found that the failure to provide a working bathroom on the 2nd floor where the tenant resided constituted a discontinuance of an essential service which was presumed to have been intended to cause the lawful occupant to vacate his unit or surrender his lawful occupancy. In HPD v. Edelstein, OATH Index No. 490/12 (Dec. 7, 2012), at 19, Judge Casey sustained the charge that the respondent disturbed the occupants' use of community kitchens and bathrooms by removing locks which allowed hotel guests to enter and use the facilities, diminishing the lawful occupants' exclusive use of the facilities. The removal of the locks was designed to pressure lawful occupants to remove their personal belongings from the shared facilities, which Judge Casey found

⁵ Among other conditions, insufficient sanitation and fire hazards, were declared a menace to the health, safety, morals, welfare and reasonable comfort of the citizens of the state. Multiple Dwelling Law (“MDL”) §2 - *legislative finding*.

constituted harassment as well as the fact that the respondent disturbed and diminished the tenants' use of community bathrooms. Edelstein, supra at 20-21. In HPD v. Kaplan, OATH Index No. 1246/19 (March 18, 2021) at 25-26, and 30, the owner was found to have harassed the tenants and deprived them of an essential service where the owner removed the community kitchen where tenants prepared their daily meals. As in the instant case, respondent in Kaplan supra, was unable to produce a written order or any other legitimate reason for the removal of the kitchen, and testimony established that no violations were issued for the basement level where the shared kitchen was located. Kaplan, supra, at 26, 30. The plausible explanation is that Res. sought to cause lawful occupants to leave the building vacate by diminishing the essential services afforded the lawful occupants, who had no toilets or kitchens in their rooms.

The failure to restore common toilets, shower and kitchen during the inquiry period directly affected the occupants' comfort, repose, peace, and quiet enjoyment of their units and amounts to harassment under Admin. Code, §§27-2093(a)(2), 27-2004(a)(48)(a-1), and 27-2004(a)(48)(b). Whereas the Appellate Court held that maintaining common bathrooms and kitchens in deplorable condition constituted an interruption of essential services, totally discontinuing such essential services clearly constitutes harassment. Matter of 235 Hotel LLC v. HPD, 309 A.D.2d 587 (1 Dep't, 2003) at 588. Therefore, Res.'s acts and omissions, relative to allegations (a) and (b) contained in the Petition, constitute harassment.

Allegations (c) and (d) – Conducting work without a permit, demolishing the floor and ceiling to the beams in non-occupied units, causing gutted areas to be open and exposed to units below or above it or on that floor affecting the safety of tenants; Stripping such areas of fire-retardant material creating a fire hazard affecting the occupants' safety; Conducting demolition work without a permit causing dust and debris to penetrate public areas and occupants' units which affected lawful occupants' air quality; Owner telling an occupant who inquired how long he should stay out of the building to avoid the demolition work and dust - "I don't care if you stay out a year."

During the November 2024 demolition in vacant rooms, Dukleth testified that unit 4A had been

demolished to the point where he could see through the removed floor into unit 3A below it. Tr. 52. Dukleth testified to the extreme demolition in units 2B and 4C, where electrical piping was left exposed. Tr. 53; Ex. 12. Sabin testified that she observed construction workers ripping up “huge holes” and floorboards, which she considered “total destruction of our building and a danger to our safety.”⁶ Tr. 147, 149-50, 204-205. She testified that she woke up to loud noises and the room shaking. Tr. 147-148. During his visit on March 19, 2025, Sequinot observed that some of the units' ceilings had been removed. Tr. 621. Unit 2A had been gutted and the subfloor was missing, where he could see into a lower floor. Tr. 621, 637; Ex. 11 pg. 10-12, 18. In his experience, exploratory opening would be much smaller in size and would be covered back up after the assessment. Tr. 638. Sequinot also observed that electrical wires were exposed, creating a fire hazard. Tr. 628; Ex. Pgs. 6, 23. Sztukowski testified that probing conditions remained unsealed from November 2024 through June 2025. Tr. 792-95. Sztukowski conceded that the conditions in vacant rooms were “unsafe.” Tr. 782. While discussing his statement, that “floor joists on upper floors lack bearing and are just supported by the sub floor to which they’re fastened”, Sztukowski was asked whether removing the subfloor can affect the stability of the building, to which Sztukowski retorted that it depends on the condition of the joists but conceded that joists in the building were not perfect throughout. Tr. 789, 256; Ex. 3D pg. 1, *item 4*; Ex. 11 pgs. 3,10, 11, 18; Ex. 24 pgs. 4, 13. Hall testified that in unit 4C, the entire ceiling had been removed leaving nothing but a sprinkler pipe and exposed electrical wires in a hazardous condition. Tr. 240; Ex. 13 at 1.02. He testified that in unit 4A, both the floor and the ceiling were removed, and he could see through the floor to the unit below. Tr. 256; Ex. 13 at 0.51. Tenants who were previously concerned that Building’s conditions may force them out, feared that the demolition work could destabilize the fragile event further. Tr.

⁶ Sabin’s fear of displacement grew further after the November 2024 demolition. Ex. 14A.

184, 234-235, 248, 306.⁷ The tenants expressed their fears to Sequinot' which became more urgent after the Nov. 2024 demolition. Tr. 620.⁸

Hall testified that the demolition was done without notice or covering the occupied units' doors while demolishing parts of rooms and hauling out debris. Tr. 234, 244; Ex. 13A at 0.14. During the demolition, there were no barriers put up to prevent the dust from entering the hallway.⁹ Tr. 247, 265; Ex. 13A at 0.15. Hall testified that the dust and debris affected his ability to breathe, and he had to wear a mask to escape any dust toxicity.¹⁰ Tr. 238, 246, 255; Ex. 13B at 0.20. Dukleth testified that demolition work produced great clouds of dust and debris everywhere, leaving him wheezing. Tr. 54, 56-57. Sabin testified that the demolition caused dust to permeate the air. Tr. 147. She stated that inhaling the dust made her ill for a week. Tr. 150. Sabin added that "when you're ripping up drywall and it's coming into parts of my units where I have my cups, it gets really tricky and dangerous for tenants". Tr. 150.

DOB was not advised that the exposed areas would not be returned to their original condition after the probing assesement. On the contrary, on April 7, 2025, months after the demolition took place, Res.'s architect, Shiming Tam, sent a letter to DOB Comm. John Raine, stating that the work

⁷ Dukleth testified that, in August 2024, after he became aware that DOB issued violations due in part to a cracked header under the 3rd floor, Res. told him that the best that he could do for residents was to offer his company's services to find other housing because DOB required him to replace all the residential floors. Tr. 62. Hall testified that, after DOB issued violations in August 2024, Res. told him and Dukleth that he may need large sums of money to deal with the DOB violations and may need to sell the building. Tr. 284-286, 289, 304-305.

⁸ After the November demolition, Hall grew more concerned that he may lose his home and resorted to contacting Res. to see if a deal could be reached that would benefit both the tenants and Res. so that they would not become homeless. Tr. 232-33, 295, 300, 306, 889.

⁹ Hall testified that, at the end of the demolition, after dust was already kicked up throughout the building, plastic zip lines were placed over the doors which had no utility. Tr. 247.

¹⁰ Hall tried to contact Res. during the demolition to no avail. Tr. 251-253; Ex. 10. When Hall was able to ask Res. if he should stay away, Res. told him that he didn't care if Hall stayed away a week, a month, or a year, exhibiting total indifference to the tenants' concerns. Tr. 253, 252; Ex. 10.

was conducted in accordance with 1 RCNY §101-14, which mandates that the temporary removal of partitions be restored to original condition. Ex. F6; 1 RCNY §101-14 (III) *Interior Partitions – building components or systems*. Res.’s and Sztukowski’s testimony, as well as other evidence, established that the removal of ceilings and floors was not temporary but remained unrestored to the original condition from November 2024 through September 25, 2025, even after HMC violations were issued on June 25, 2025. Tr. 790-96, 1147-48; Ex. 38. Relying upon the architect’s letter, DOB withdrew the violation from prosecution stating that the withdrawal was contingent on the probes remaining within the limits of RCNY 101-14 which they were not. Ex. G9.

Sequinot, CPM Del Pilar, as well as Sztukowski, consistently testified that the conditions created by Res. in vacant rooms were unsafe. In HPD v. Forest OATH Index No. 1320/20 (Nov. 9, 2022), at 26, Judge Garcia held that the failure to correct cracks affecting the integrity of the building, which ultimately caused DOB to issue a vacate order and displaced the tenants, amounted to harassment. In the case at hand, the demolition impacted the residents by creating noise, dust in violations of required protective measures. Tr. 148, 234. NYS Building Code, Chapter 33, §3303.10–titled “*Operations in Occupied Buildings*” mandates that, when demolition occurs in an occupied building, protective means such as barricades, signs, and drop cloths, shall be maintained to protect the occupants against hazard and nuisance. Res.’s violative acts and omissions, as listed in (c) and (d) in the Petition, adversely affected lawful occupants and constitute harassment.

Allegations (e) and (i) – Failing to provide janitorial services at the building resulting in the occupants having to clean and maintain common areas, community and sanitary facilities themselves, and failing to clean and remove dust and debris, due to unpermitted demolition, from common areas requiring occupants to perform the cleaning themselves; Removing a dumpster used by occupants for their trash disposal and failing to replace and/or provide ready access to a trash disposal container – telling lawful occupants that they need to dispose of their trash in the public trash cans on the sidewalk resulting in a summons issued to a tenant for using public trash cans.

Sabin testified as to the lack of janitorial services at the Building; she testified that the Building

used to have a maintenance person, Ping, who did repairs, swept, changed batteries in smoke detectors and light bulbs, and cleaned toilets. Tr. 136, 133, 188-189. The current property registration of the Building does not list a superintendent aside from Res. Ex. 1. However, Res. does not reside at the Building, or near it, as mandated by Admin. Code §27-2053(b).

The lack of a janitor assigned to cleaning duties resulted in Sabin having to clean common areas and provide needed supplies. Sabin testified that she purchases cleaning supplies and toilet paper, and she cleans the bathroom, the showers, the sink, and mops. Tr. 129-130, 133. Sabin also testified that other tenants clean and provide cleaning supplies. Tr. 133-134. Beckwith testified that the 2nd floor bathroom is not in a good condition, as they do not have janitorial services, and have not had janitorial services for several years. Tr. 316, 324. Remy testified that the 2nd floor toilet was cleaned and supplied by himself and Sabin. Tr. 383. He also testified that the tenants cleaned the common areas of the building as Res. did not have a superintendent or janitor at the building. Tr. 383. Sequinot testified that there was no super in the Building, and the tenants maintained the Building themselves. Tr. 575.

The lack of janitorial services was also evident after the demolition work in the building in 2024. Sabin testified that workers left trash and debris in the hallways that she ended up cleaning. Tr. 150; Ex. 13-13B. Even after some debris was taken out of the Building, dusty handprints on the walls remained in public areas. Tr. 151. Res. acknowledged that he has not provided the services of a superintendent who lived in or near the Building or scheduled janitorial services. Tr. 1122. Res.'s failure to comply with legal mandates demonstrates that Res. flouted laws governing the owner's responsibilities to properly maintain his building. Tr. 1120. Res. testified on cross-examination that he didn't know what he was legally required to provide as far as maintenance of

his building, although he was the registered building manager. Tr. 1120-21; Ex. 1.¹¹ In a multiple dwelling of nine or more dwelling units, such as the Building, the owner shall either perform the janitorial services himself or provide a janitor for janitorial services to be performed on a 24-hour daily basis, and the person who performs janitorial services shall reside in the building or within a distance of one block or 200 feet from the dwelling, unless the owner resides in the multiple dwelling, which Res. does not. Admin. Code, §§27-2054; 27-2011.

Recommending revocation of the CONH, Judge Lewis considered testimony of a tenant who had to clean the shared bathrooms themselves and testimony of another tenant who saw items abandoned in the bathroom on numerous occasions, amounting to lack of cleaning. HPD v. Tauber, OATH Index No. 0675/07 (May 16, 2007) at 19. In HPD v. Goldsmith, OATH Index No. 2118/12 (August 27, 2023) at 22, 25, Judge Richard credited the tenants' testimony about the respondent's failure to clean and provide supplies to maintain the community bathroom and held that the respondent's failure constituted harassment. In HPD v. Kaplan, OATH Index No. 1246/19 (March 18, 2021) at 21-22, 33, Judge Miller determined that the respondent is required to keep the community bathrooms clean, that the respondent's failure to maintain the general cleanliness of the bathrooms contributing to the finding of harassment and recommended to deny the CONH.

Res. also failed to provide ready access to garbage receptacles, therefore limiting the occupants' ability to remove trash from their units, which is another essential service that the occupants are entitled to. Res. removed a dumpster, which the occupants used to dispose of their trash, from the alleyway, and placed a trash bin inside a gated alleyway. Tr. 134-35, 208. Sabin testified that Res. told her she would receive a key to the alleyway, but not a single tenant has

¹¹ According to the doctrine of *ignorantia juris non excusat*, a person who is unaware of a law may not escape liability for violation of the law. Black's Law Dictionary 5th addition, page 673.

received a key. Tr. 134-135, 211. To access the trash bin through the closed gate, the occupants must “put [their] hands into the gate to lift a latch in order to open the gate”. Tr 134. Sabin’s testimony is corroborated by a video showing that, to access the trash bin, Sabin has to bend down, extend her arm through the closed gate and attempt to lift a latch on the inside of the gate in order to enter the alleyway to discard her trash. Ex. K6 at. 0.00-0.00 - *at start of video*.

CPM Del Pilar testified that he observed a push bar on the inside of the gate where the trash receptacle was located, but nothing on the outside of the gate. Tr. 485. Sequinot observed that there was no way to open the gate from the outside and residents had to place their hands through the bars and lift a handle to make the gate movable and open it. Tr. 623. Once the gate is locked, there was no way for the occupants to dispose of their trash. Tr. 134-35, 211-12.

Not providing an accessible trash disposal area has been held to be a reduction of a “required service” by DHCR. The Appellate Court did not disturb DHCR finding that access to trash receptacles was a “required service” and considered it inadequate when the owner moved garbage receptacle from the outside of a building to the building’s basement. Matter of Dominguez v. Vanamerongen, 56 A.D.3d 667 (2nd Dep’t, 2008) at 667-68.

In Matter of 235 Hotel LLC v. HPD, 309 A.D.2d 587 (1st Dep’t, 2003) at 588, the Appellate Court held that testimony of tenants as to the deplorable conditions of common bathrooms and kitchens was substantial evidence that the petitioner either discontinued or interrupted essential services constituting harassment under §27-2093 of NYC Admin. Code. In HPD v. Hersh, OATH Index No. 921/05 (Jan. 12, 2006) at 21 *aff’d* by Matter of Hersh v. HPD, 44 A.D.3d 525 (1st Dep’t, 2007), the Court found that the owner’s failure to keep bathrooms clean, among other deprivations of services, was intended to harass the tenants and cause them to vacate. Therefore, Res.’s acts and omissions relative to allegation (e) and (i) contained in the Petition constitute harassment.

Allegation (f) – Sending an occupant a frivolous notice on December 24, 2024, stating that a holdover court case will be filed against him due to a trumped up non-primary residence claim, seeking possession of his unit, causing distress and harassment by serving the lawful occupant’s elderly mother at her address, and serving his employer, City College of New York, office of the General Counsel, threatening to evict him from his unit if he does not remove himself from the premises.

Beckwith testified that he has resided in the building since 1992. Tr. 313. He testified about historically available shared facilities at the building.¹² Tr. 314-316. Around December 2024, Beckwith received a notice of intention to discontinue his tenancy alleging that he does not live at his unit as his primary residence. Tr. 323-324, Ex. 16. The basis for the holdover non-primary case was the allegation that Beckwith resides in student dormitories called “The Towers” at City College, which he refuted, testifying that he has never set foot in the dormitory buildings. Tr. 325. The selection of “The Towers” appears entirely arbitrary, included merely to suggest an alternate address without any factual basis; the notice further alleged, also without any factual basis, that Beckwith lived in faculty housing provided him as part of his employment as a professor with City College. Ex. 16 pgs. 5-7. Beckwith consistently refuted these allegations, testifying that unit 2E at the subject address is his primary residence. Tr. 325-26. Res.’s inclusion of these alternative addresses was done without a scintilla of substantiating evidence and was therefore inadequate.

Receiving the notice made Beckwith feel “anxious, unhappy, and upset.” Tr. 324. The notice was also sent to his mother’s address in Brooklyn and to Paul Occhiogrosso, counsel for the entire City College. Tr. 327-28. Mr. Occhiogrosso advised Beckwith to get a letter from Human Resources, which stated that his address is 109 E 9th Street. Tr. 328. Beckwith felt that serving the documentation on his employer was done to harass him. Tr. 328, 356.

¹² Beckwith testified that there used to be shared facilities in the building until November 2022 and that his neighbor, Dukleth, told him that Res. had to remove the shared facilities because old violations had to be removed. Tr. 318-19.

In London Terrace Gardens, L.P. v. Heller 975 N.Y.S.2d 710 (1st Dep't 2009), the Appellate Term held that the plain language of the governing non-primary eviction notice regulations is meant to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts. A conclusory predicate notice was found to state insufficient facts to substantiate an eviction claim based on a non-primary residence as it was too generic and conclusory to satisfy the requirements of NYC Rent and Eviction Regulations, 9 NYCRR §2204.3 that the notice states the grounds upon which the tenant's eviction is sought. See, London Terrace, *supra* at 710. The predicate notice of termination (Ex. 16, pgs. 5-7) is the legal instrument to be scrutinized to ascertain whether, at the time of filing, it contained baseless claims. London Terrace, *supra*

Although Res.'s attempts to retroactively support the filing of the non-primary holdover by suggesting that Beckwith's primary residence is in Pittsburgh, Res. failed to obtain this information when the non-primary holdover was initially filed against Beckwith in December 2024. In any event, deeds introduced by Res. indicate that 109 East 9th Street is listed as his primary address for purposes of tax forms. Exs. L8, L11, pg. 5 , and L10, pg. 4.

The notice of termination filed against Beckwith contains conclusory statements and lacks the facts necessary to establish sufficient legal grounds to justify a demand to have the tenant vacate and surrender possession of his unit. Nonspecific allegations contained in a predicate notice of termination have been held to fail to satisfy the notice requirements of Rent Stabilization Code 9 NYCRR §2524.2. Mak v. Yun Pan Lee, 824 N.Y.S.2d 763 (1st Dep't 2006). Rent stabilization laws do not prohibit a tenant from owning multiple residences for different purposes (vacation homes, investments, etc.) and such other ownership is not inherently evidence of primary residence elsewhere. The allegation that Beckwith received mail addressed to Amy Cartrell is arbitrary and does not legally support the non-primary holdover; it is an insufficient attempt to establish that

Beckwith is not residing in the apartment as his primary residence. In any event, even when a tenant resides separately from his spouse or partner and does not sleep in his unit every night, it is not indicative of not using the unit as the primary residence. Rose Associates v. State Div. Of Housing & Community Renewal, 121 A.D.2d 185 (1st Dep't, 1986) at 187.

Reducing services at the building to create a hardship for tenants to live there and subsequently suing to dispossess a tenant relying on a conclusory predicate notice, causing embarrassment, anxiety and humiliation, constitutes harassment. *See*, Ascot Realty, LLC v. Richstone, 10 A.D.3d 513 (1st Dep't, 2004) at 513-514, holding that maintaining a presence at the unit, even if a tenant only sleeps there occasionally due to the condition of the unit, is not dispositive of the fact that it is the primary residence of the tenant. In HPD v. Bezzant OATH Index No. 1529/14 (Jan. 5, 2014) at 7, Judge Casey held that baseless legal demands and threats of litigation and eviction which was upsetting and caused feelings of embarrassment, anger, humiliation and fright was held to constitute harassment.

Allegations (g) and (h) -Telling a lawful occupant that she need not pay rent and refusing to accept her rent payments while inducing her to move out of the building, helping and assisting her to file documents for building lotteries elsewhere, and influencing her to move elsewhere by telling her that a woman should not live in such conditions as are present in the subject building; Sending an occupant a notice of non-payment on December 23, 2024, seeking possession of her unit, frivolously demanding arrears from July 2021 through December 2024 after refusing her rent payments, and filing a non-payment court action, Index No. LT -301839/2025 seeking possession of her unit.

Sabin testified that, on several occasions, she made attempts to pay her rent to the landlord, but that he refused to accept it. Tr. 136-137. Specifically, when Sabin texted Res. about paying the rent, Res. did not accept it. Ex. K4 pg. 15. Sabin was clear that, prior to receiving the demand for rent in December 2024, Res. never provided her a rent arrears statement or asked her to pay her rent during the inquiry period until the December 2024 demand. Tr 137-39. Sabin testified that receiving the rent demand notice on Christmas made her feel "very scared and upset." Tr. 139-140.

Over \$6,500 was demanded as arrears since Res. purchased the building. Tr. 139; Ex. 15 pgs. 6, 8 *including cover pages*. Prior to refusing the July 2022 rent, Res. also refused rent from Sabin after he became the owner when she offered to pay him ten months of rent in advance. Tr. 916. Faced with legal action in housing court, Sabin was concerned that her record as a tenant has been adversely affected although she offered to pay her rent. Tr. 140. Even after taking two years to register the Building's tenancies with the DHCR, including the monthly rents, Res. did not accept any rent payments from Sabin. Ex. 18. *See, Bezzant, supra*, at 6-7, where Judge Casey held that a rent demand sent to a tenant whose rent payment respondent did not deposit was baseless and supported the inference that they were intended to harass. The holding in Bezzant is applicable to the instant case where Res. refused to accept rent payments and then sued the tenant for the same refused rent. An owner cannot maintain a summary proceeding to recover possession for non-payment of rent when the tenant offered to pay the rent, and the owner refused it. Janes v. Paddell, 132 N.Y.S. 379 (NY Sup. Ct., App. Term., 1911) at 384. The attempt to tender the rent is equivalent to performance of the condition to pay rent. *See, Janes supra*. It follows that filing the non-payment action against Sabin, claiming that refused rent was due since July 2021 in the amount of \$6,533.52 and seeking to dispossess her from her unit, was without legal basis. While the case against Sabin was ultimately discontinued, Sabin was in danger of being evicted had she not been able to get assistance from HRA. Such tactics have been recognized as predatory. HPD v. Mamudosk OATH Index No. 771/01 (Feb. 21, 2002) (prosecuting a non-payment case, initiated in bad faith and for the purpose of getting the tenant out of the building, constitute harassment); HPD v. Goldsmith OATH Index No. 2118/12 (Aug. 27, 2013) (filing a non-payment action without legal foundation for rent that was not owed is evidence of harassment).

Respondent was well aware that the reason Sabin's rent was in arrears was his refusal to accept

it. The eviction non-payment against Sabin was not filed in error or inadvertently, but as a purposeful attempt to dispossess her. Sabin testified that during the time that Res. refused to accept her rent and affirmatively told her not to worry about paying it, he also approached her, offering aid to enter into housing lotteries to move out of the Building. Tr. 136-137, 190-191. When Sabin brought up conditions that needed attention, Res. told her that “a woman like her shouldn’t be living in a building like this” to further induce her to leave the Building. Tr. 136, 181. Sabin testified that anytime she brought up conditions in need of repair, Res. would say that he was sorry, and would ask, “how is the building’s lottery going?”, or “why don’t you just move out?” Tr. 191.

Although Sabin responded to Res.’s offers to enter into a housing lottery, she did so in response to his inducement and when she grew concerned about Building’s issues. Texts on consecutive dates on pages 15-18 establish that between 5/29/2022 (pg. 15) and 8/5/2022 (pg. 18), Sabin did not initiate requests for housing assistance and that it was Res. who texted Sabin stating, “there are some hot buildings like Lyra 555 West 38 Street” and sending her a link to register. Ex. K4, pgs. 15-18. Although, after texting Res. on December 26, 2022 concerning lack of heat in the Building, Sabin asked about building lotteries, she did not follow up and it is Res. who texted Sabin two months later, on March 28, 2023, that he has “interesting information about housing lotteries”, to which Sabin responds, “interesting as in good interesting?” which clearly demonstrate that she had not initiated the discussion. Ex. K4, consecutive pgs. 32-33.

After Sabin became alarmed that she might need to vacate due to DOB violations around August 14, 2024, she texted Res. on August 19, 2024 about applying to housing. Ex. K4, pg. 70. Clearly, Sabin’s inquiries about other housing options were in response to her concerns. Sabin’s fears were further heightened in October 2024 when she texted Res. that two men were making noise and ripping out floors without notice to the tenants, to which Res. texted “just wanted to let you know

that we are taking out some garbage today”. Ex. 14A Pg 1-2. Inasmuch as Res.’s suggestions that Sabin would be better off leaving the building were subtle, they were nevertheless clearly done to cause her to surrender her tenancy and vacate her unit. Ignoring conditions and maintenance at the Building while aiding tenants to apply to housing lotteries is indicative of Res.’s intent to cause the occupants to leave the building.¹³ See, Vaughan v. Michetti, 176 A.D.2d 144 (1st Dep’t, 1991) at 144 (repeated buy-out offers, coupled with deplorable conditions over a lengthy time period, can constitute harassment).

In Sabin’s case, in addition to offering her other “interesting” buildings to move to, Res. refused her rent and attempted to evict her by bringing a non-payment case claiming that \$6,533.52 was owed. The “tender and refusal” of rent has been held to be pretense to evict tenants, which courts have dismissed as baseless. In Windemere Owners LLC v. Mullu, 2013 NY Slip Op 31714 (U) (NY Civ. Ct. 2013) at 5, the Court has awarded summary judgement to the respondent, holding that, in view of the tender and willingness to pay the rent and the repeated refusal to accept it, the landlord’s case attempting to dispossess the tenant alleging that rent was not paid should not be permitted. Where the landlord refused to accept the rent, and then filed a non-payment case for arrears, courts found that it was done to manipulate the tenant’s’ inability to satisfy a judgment and consequent eviction in mind. See, Haberman v. Singer, 3 A.D.3d 188 (1st Dep’t 2004) at 191. Repeated attempts to persuade a tenant to leave the Building, coupled with deplorable conditions and filing of a non-payment demanding exorbitant arrears for refused rent, constitute harassment.

¹³ Res. repeatedly approached tenants offering aid to enroll in housing lotteries as an attempt to permanently get them out of the building. Hall testified that Res. offered to help him to move out of the unit by enrolling in a housing lottery run by his company, MGNY. Tr. 223-224. Dukleth testified stated that Res. repeatedly offered his company’s, MGNY, assistance to find alternate housing through housing lotteries in NYC, and told him that the best he could do for residents was to offer his company’s services in finding alternative accommodation. Tr. 59, 62, 90-91.

Allegation (j) - Failing to provide a lawful occupant a replacement key to the building's front entrance door, effectively locking him out of the building; causing the occupant to have to ask other occupants for assistance to access his unit at the building or having to climb the fire escape to enter his unit on the 3rd floor through the window - unlawfully prohibiting the occupants' access to the building where he resides.

Over a period of months, Res. failed to provide Remy with a key to the front entrance door of the building he resided in. Remy testified that, starting in late 2024, he lost his key to the front door, and when he asked the landlord for a new key, he was told that it could not be replaced. Tr. 384. Remy indicated that during December 2024 he either entered the Building with the assistance of another tenant, Dukleth, who would let him into the Building, or was forced to climb the fire escape to enter his room through the window. Tr. 385, 405. Pet. Ex. 22. Remy texted Res. on 11/18 and 11/23/2024, asking Res. to open the front door for him to get into the Building. Tr. 397-98; Ex. 37 pgs. 4-5. On 1/3/2025 Remy asked Res. for keys to both the front door and the mailbox. Tr. 399; Ex. 37 pg. 5. Remy testified that on 2/28/2025, after texting Res. that he had to climb the fire escape after he had a few drinks and did not wish to be put in that position, Res. gave him a key, which broke in front of Res. the first time Remy used it. Tr. 387; Ex. 35. Remy testified that he treasured the key he was given and would have never broken it on purpose. Tr. 388. During March 2025, Remy was left without a key to the front entrance door yet again. Tr. 388. He had to resort to climbing the fire escape ladder to get into his unit when no one could open the front entrance door for him. Tr. 388, 391.

After being left without a key, Remy texted Res. on 3/14/2025 suggesting that he would pay a locksmith to have the lock replaced so that new keys can be issued. Tr. 120-21, 406; Ex. 37 pg. 9. However, Remy received no response, causing him to continue having to climb the fire escape ladder to gain access to the Building. Tr. 402, 403, 406. Remy indicated that he did not receive a key until April 7, 2025. Tr. 384, 407; Ex. 37 pg. 10.

Remy's testimony was largely corroborated by text messages between him and Res., and by Dukleth's testimony. Dukleth testified that whenever Remy needed access to the Building, Remy would call him, and he would let Remy in. Tr. 65. Dukleth testified that Remy did not have a key for months, and that Res. indicated that there was a limited supply of keys, which were copy protected. Tr. 73. Clearly, between November 18, 2024 and February 28, 2025, Remy had no key to access the building, and after receiving a key in February 28, 2025, which broke, he continued to be prevented from accessing his building until April 7, 2024, effectively being locked out of his building. It should be noted that Remy's demeanor towards Res. remained positive throughout this ordeal. Tr. 401. In fact, Remy testified that he did various jobs at the Building at the behest of Res. Tr. 382, 395-97, 430, 441, 468.

Admin. Code §26-521 outlaws specific acts such as engaging or threatening to engage in any other conduct which prevents or is intended to prevent an occupant from the lawful occupancy of such dwelling by changing the lock on such entrance door without supplying the occupant with a key. Although Remy attempted entry to the building by other means, he did so because Res. locked him out of the Building by virtue of not providing him a key to the front entrance door. In HPD v. Edelstein, Judge Casey found that locking a lawful occupant from entering her unit constituted harassment. *See, Edelstein* OATH Index No. 490/12 (Dec. 7, 2012) at 4, 36.

Res. testified that he did not give Remy a replacement key because he *thought* that Remy *will* give the key to drug dealers so they can enter the building. Tr. 940-941. Res.'s testimony was speculative, insinuating an imaginary scenario that did not support depriving a lawful occupant of a key to his building. Res. provided no evidence that he resorted to any legal means against Remy because he deprived Remy from having a key due to his concern that Remy will give the key to drug dealers. Instead, Res. constructively evicted Remy unlawfully. New York Consolidated

Laws, Real Property Actions and Proceedings Law (RPAPL) §768, which allows for criminal and civil penalties, states in pertinent part that it shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer...except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction.

Admin. Code §27-2093(a)(4) states in part that “harassment” shall mean any conduct by or on behalf of an owner of a single room occupancy multiple dwelling including but not limited to changing the lock on such entrance door without supplying the occupant with a key. *See, HPD v. Bernardi* OATH Index No. 416/09 (March 19, 2009) at 13, and 33-34 (two incidents of refusal to allow a lawful occupant into the building constitutes harassment). Clearly, between November 2024 and February 28, 2025, Remy was prevented from accessing the Building, and after receiving a key on February 28, 2025 which broke, he continued to be prevented from accessing the Building until April 7, 2024. This willful and wanton act by Res. was illegal and undoubtedly interfered with Remy’s quiet enjoyment of his unit which constitutes harassment.

Allegations (k) and (l) - Making misleading statements on the application for a Certificate of No Harassment (“CONH”) to support the issuance of the CONH, stating that the respondent filed an application with the Department of Buildings (“DOB”) for work at the property which would require a CONH; attaching plans to his CONH application of DOB application No. M00865697-I1 demonstrating the planned restoration of a kitchen, a bathroom and shower and failing to finalize DOB application No. M00865697-I1 after obtaining the CONH and failing to restore the specified facilities as represented; Making false statements on an application No. M01181265-I1 for a construction document with the Department of Buildings (“DOB”) for a permit for work to be performed in a building containing dwelling units of persons lawfully entitled to occupancy, misstating the number of occupied units at the building; Filing plans with DOB in conjunction with application No. M01181265-I1, falsely demonstrating that common facilities and sanitary facilities which were previously removed and not restored as still “existing” at the building.

Res. falsely stated on his CONH application that he filed for a permit with DOB. Ex. 4 pg. 3.
Res. attached plans for job No. M00865697-I1, filed with DOB, proposing installation of sanitary

facilities at the 4th floor of the building. Tr. 584. Res. falsely stated on job application No. M01181265-I1 that there were four occupied units at the building, when he knew that there were six, Ex. 25, pg. 15. Res. falsely stated on plans for the same job application that a water closet existed on the 3rd floor, and a water closet, shower, and kitchen existed on the 4th floor, when he knew they were not. Ex. 25B, pg. 4. See, Matter of Leon St. Clair Nation v. City of New York, 902 N.Y.S.2d 22, 25-26 (2010) (The purpose of penalizing false certifications with DOB is to promote public safety and prevent the waste of taxpayer dollars by eliminating repeated filing of false information relating to the construction and repair of NYC buildings). These misrepresentations were in violation of Admin. Code §27-2004(a)(48)(a-2) and constitute harassment.

Allegation (m) - Other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quite of any person lawfully entitled to occupancy of such dwelling unit and that causes or are intended to cause such person(s) to vacate such dwelling unit or surrender or waive any rights in relation to such occupancy.

Res.'s neglect of his duty to abate water infiltration from the roof and the exterior facade into the Building caused Building's structural elements to deteriorate due to unabated water penetration. Tr. 798-800, 843; Ex. D2 pg. 1. While allowing the deterioration to continue resulting in needed repairs, Res. did not act to relocate the tenants to allow the repairs, and instead, had his engineer urge DOB to issue a vacate order to vacate tenants on upper floors because of the deterioration caused by Res.'s neglect. Tr. 806-808; Ex. D4 pg. 1. Building conditions such as defective exterior façade and roof leaks, defective banisters, and sloping stairs were evident but ignored. Tr. 480-81, 606-08, 634, 797-800; Exs. 9 pgs. 21-24; 22 pgs. 1-2, 10-11, 16; D2 pg.1; D3 pg.1- *item 1*; G4 - *violation No. 34205638J*. These conditions did not happen overnight or because of an earthquake in NJ, but due to Res.'s lack of maintenance of the Building. Res.'s deliberate neglect and the resulting deterioration has come to affect the occupants, who now risk having to

vacate their homes. Tr. 797-800. In finding that the owner harassed lawful occupants by neglecting to ameliorate conditions leading to the tenants' getting vacated by DOB, Judge Garcia reasoned that the respondent knew or should have known about leaks that went on for years resulting in deterioration affecting the stability of the building. HPD v. Forest OATH Index No. 1320/20 (Nov. 9, 2022), at 24.

Sztukowski testified that the planned work at the Building requires that lawful occupants be either offered temporary relocation or be vacated by DOB. Tr. 808. Either one of these options substantially interfere with or disturb the occupants' comfort, repose, peace or quiet. When asked if the work can be done while tenants are in the Building, Res. testified that it is theoretically possible but will be financially costly or too dangerous. Tr. 1152. *See, HPD v. Pedersen* OATH Index No. 1093/08 (Aug. 22, 2008) at 6-7 (the failure to make necessary repairs to the stairs and loose balusters which resulted in disrepair constituted harassment). Res.'s neglect to ameliorate conditions affecting the building's habitability and stability points to his intent to empty out the Building. Res.'s intent is also evident from the vacancy rate of the Building of less than 50% and vacant units being warehoused during his ownership. *See, 128 Hester LLC v. DHCR*, 146 A.D.3d 706 (1st Dep't 2017) at 707-708 (DHCR rationally concluded that petitioner allowed the building to deteriorate to the point where it would fall and took no action to ameliorate conditions until the building had deteriorated beyond repair).

Sztukowski testified that repairs to the porous exterior façade and roof could have been done to halt the deterioration. Tr. 799-800, 839, 841, 843. Instead, Res. exacerbated the fragile condition of the Building by removing ceilings and floors in vacant units which occupants were concerned about. Tr. 782, 784, 786-789; Exs. 12 pgs. 12, 19-20; 11 pg. 10-18, 24 pgs. 4, 13; D3 pg.1 - *item No. 4*. After HPD issued class "B" hazardous violations on June 25, 2025 for the repair of walls,

ceilings and floors in vacate rooms 2A, 2B, 3A, 4A, and 4C, mandating repairs within 30 days, Res. conceded that, as of 9/25/2025, he failed to complete the repairs as required by law. Tr. 794-95, 1147-49; Ex. 38 pgs. 2-4; Admin Code §27-2115(c); NYC.gov - *violations' classification timeframes*. Since the inquiry period continues to the present, the failure to correct conditions alleged in the Petition and the resulting issuance of hazardous violations, which were not timely certified as required under the law, constitute harassment under NYC Admin. Code §27-2004(a)(48)(b-2). Allowing the Building to deteriorate and failing to correct violations triggers the presumption that Res. intended to cause the occupants to vacate the building or surrender their rights which constitute harassment which Res. failed to sufficiently rebut.

CONCLUSION

The demeanor and veracity of the Agency's witnesses was clear, and their testimony was obviously a product of living with the conditions caused by Res. The occupants' accounts were corroborated by other credible evidence such as emails, text messages, photographs, videos, Agency's reports and HMC violations. In contrast, Res.'s testimony was argumentative and largely in response to leading questions which, as the Tribunal rightly indicated, carry less weight. Tr. 753, 840-41, 1041-43, 1047-48, 1059, 1061, 1147-48. Counsel for Res. not only telegraphed answers by repeatedly asking leading questions but also made statements in lieu of eliciting testimony and assisted Res. by blurting answers to questions asked during Res.'s cross examination, allowing Res. to tailor his testimony accordingly. Tr. 863, 866, 1036-37, 1153-54. Res.'s testimony was at times evasive, specious, and contrary to the weight of the evidence. Tr. 924, 1111-13, 1115-16, 1118-1119, 1158, 1160. Without evidentiary support, Res. insisted that the shared toilet, shower and kitchen were in a 4th floor illegally converted unit 3B, which is non-existent and was not historically listed on the DHCR registration or on the I-cards. Tr. 1160; Ex.

3; 17. This was contrary to evidence which established that the shared facilities historically existed on the 4th floor, *in addition* to three residential units, 3C-Saban's unit, 3D-Dukleth's unit and 3A-vacant unit, and were never designated with a letter/number 3B. Tr. 30, 56, 104-05, 125-26, 225, 1053; Ex. 12 pgs. 1-6.¹⁴

Res. attempted to deflect responsibility from himself, blaming DOB without any corroboration. Res.'s testimony that: "I was required by the building department to explore and identify the structure and stability...per emergency work order", was incorrect since DOB did not issue an emergency order requiring probing; the only emergency order issued by DOB was for shoring. Tr. 1144; Ex. C, Control No. 341657. Res.'s testimony that DOB process was lengthy and restricted him from filing for a permit before he obtained the CONH, was incorrect as DOB process sets out that an applicant seeking a permit must file electronically so that any possible objections can be noted by the plan examiner to be further resolved leading to the issuance of the permit.¹⁵

The general demeanor and improper behavior on the part of both Res. and his counsel, which resulted in the Tribunal cautioning both several times during the hearing, should serve to discredit much of Res.'s testimony. Tr. 763, 779, 1031, 1034, 1037, 1042, 1047-48, 1073-74, 1099-1100, 1148-49, 1152-53. During cross examination, after Pet.'s counsel asked a "yes or no" question, seeking a "yes or no" answer, and more so after the Tribunal instructed Res. that the question was a "yes or no" question, Mr. Favilukis blurted out "Or I don't know" resulting in Res. answering "I

¹⁴ Res. also claimed that the 3rd floor shared toilet was in a converted unit, but evidence established that the 3rd floor always had four units, 2D-Remy's unit, 2E-Beckwith's unit and vacant units 2B and 2A, *in addition* to the toilet which was in a space too small to be a converted residential unit. Tr. 56, 85, 102, 125-26, 492; Ex. 12 pgs. 7-8, 16-18, 21.

¹⁵ Res. habitually tried to deflect responsibility for his actions by pointing to others although the statute presumes that all acts were committed by Res.'s or on his behalf. Tr. 1118, 1162, 1167, 1175, 1180. *See*, Admin. Code §27-2093(b).

don't know". Tr. 1037. When Res. was initially asked by Pet.'s counsel "if he made any offers to the tenants to permanently leave out of the building, before Res. could answer, Res.'s counsel blurted: "the offer was made by me, not by Michael". Tr. 1153. When Pet.'s counsel asked the question again, Res.'s answer was "I personally didn't" while conceding that the tenants were offered permanent vacature. Tr. 1153. Yet, when Pet.'s counsel asked Res. if his attorney, or anyone in his direction did so, Res. changed his testimony and answered, "I don't know". Tr. 1154.

The intent to cause lawful occupants to vacate or surrender their rights in relation to their occupancy is statutorily presumed from proven Res.'s acts and omissions as alleged under governing laws constituting harassment. *See*, Admin. Code §27-2093(b). One proven allegation substantiating harassment is sufficient to deny the CONH. *See*, HPD v. Mendoza OATH Index No. 556/05 (Feb. 17, 2005) at 7. Courts have recognized that the general thrust of the statute is "to set up a scheme under which the presence of tenant harassment will be investigated...and penalized where it is found to have occurred." Sadowsky v. City of New York, 732 F.2d 312 (2d Cir., 1984) at 315.¹⁶

I therefore, respectfully ask the Tribunal to find that Res. failed to rebut the presumption that he intended to cause the lawful occupants to vacate and surrender their protected tenancies. Having the weight of the evidence adduced at trial by a preponderance of credible evidence standard in favor of the Petitioner, I respectfully ask the Tribunal to find that harassment occurred at this building during the inquiry period and to issue a Report and Recommendation that the Certification of No Harassment be rescinded.

¹⁶ *See also*, Serradilla, OATH Index No. 1802/01, at 9 (statue provides protection for SRO tenants from owners who would unlawfully cause them to vacate and then develop the property for profit, thereby diminishing an already dwindling SRO housing stock).

Multiple Dwelling Law § 2

NEW YORK STATE MULTIPLE DWELLING LAW ARTICLE I INTRODUCTORY PROVISIONS; DEFINITIONS

This chapter shall be known as the "multiple dwelling law." § 2. Legislative finding. It is hereby declared that intensive occupation of multiple dwelling sites, overcrowding of multiple dwelling rooms, inadequate provision for light and air, and insufficient protection against the defective provision for escape from fire, and improper sanitation of multiple dwellings in certain areas of the state are a menace to the health, safety, morals, welfare, and reasonable comfort of the citizens of the state; and that the establishment and maintenance of proper housing standards requiring sufficient light, air, sanitation and protection from fire hazards are essential to the public welfare. Therefore the provisions hereinafter prescribed are enacted and their necessity in the public interest is hereby declared as a matter of legislative determination.

NYC.gov Filing for Permit



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- Certificate of Occupancy

Filing through DOB NOW: *Build*

DOB NOW is a self-service online tool that enables property owners, design professionals, filing representatives, and licensees to do all business with DOB online.

STEP 1: Register for eFiling

- All stakeholders associated to the filing **must** register for NYC.ID account before logging into DOB NOW: *Build*. If you need to create an NYC.ID account, visit nyc.gov/dobnowtips for resources and step-by-step instructions. Once registered, use your NYC.ID account information to log into DOB NOW: *Build*.

STEP 2: Login to DOB NOW: *Build* to Initiate a Job Filing

- Enter the job filing information. Afterwards the system will generate a job filing number.

STEP 3: Upload Required Documents

- Upload a PDF of the plan sets and the DPL1 document.

NOTE: The system will determine if additional documents are required based on the job filing information that was entered.

STEP 4: Obtain Attestation

- Applicant (PE/RA), property owners and other stakeholders must electronically sign the job filing.

STEP 5: Submit Payment

- Online payments can be made using a credit card, debit card or e-check.

NOTE: Anyone associated to a job filing can submit a payment.

STEP 6: Preview Submission

- Applicant **must** review the filing and provide a final electronic signature.

STEP 7: Submit Job Filing

- Applicant officially submits the job filing to the Department electronically.

STEP 8: Job Filing Review and Approval

- Department staff reviews the job filing.
- If objections are issued, the applicant will be able to make corrections in the system and resubmit.
- If a meeting is required to resolve objections, meetings will be conducted online.
- The system will send email notification to all associated stakeholder listed on the job filing once the Department has approved the job filing.

STEP 9: Enter and Submit Permit

- Permit request **must** be submitted online.
- Enter data for all required information.
- All required stakeholders **must** provide electronic signature.
- Resolve any civil penalties for Work Without a Permit prior to submittal.
- Submit the permit request electronically to the Department.

STEP 10: Permit Review and Approval

- Department staff reviews the permit request.
- The system will notify associated stakeholders if there are any objections to the request that will need to be resolved.
- Applicant or contractor will be able to resolve any issues regarding the permit request in the system and resubmit.
- The system will send email notification to all associated stakeholder listed on the job filing once the permit is issued.

STEP 11: Print Permit

- Associated stakeholders can log into DOB NOW: Build to print the permit.

*NOTE: Anyone can print a copy of the permit on the **DOB NOW Portal**.*

Post Permit Activities: Some applications require a new or amended **Certificate of Occupancy**, and others should simply be signed off when the work has been completed.

Helpful Links

- **Obtain a Permit**
- **DOB Glossary**
- **DOB Acronyms**
- **Subscribe to Buildings News**

NYC.gov Violations Correction Timeframes



Frequently Asked Questions

What is certification of correction?

A certification of correction is a statement filed with HPD by a property owner to affirm that the violation conditions cited on a Notice of Violation have been corrected within the legally required timeframe. Certification is free but must be submitted within the time stated on the Notice of Violation to be effective. There is no fee for a certification that is submitted to HPD within the required timeframe.

How are violations classified?

When an HPD inspector determines that a violation condition exists, the Inspector issues a Notice of Violation. Violations are classified as non-hazardous (class A), hazardous (class B), or immediately hazardous (class C), based upon the seriousness of the condition.

What is the timeframe for correction of each class of violation?

The timeframe for correction of each class of violation is indicated on the Notice of Violation. The following table provides details of classification of violations and their correction timeframes.

Violation Type	Class	Correction Class Date
Class A	Non-hazardous	90 days from HPD's mailing of the NOV
Class B	Hazardous	30 days from HPD's mailing of the NOV
Class C	Immediately Hazardous	24 hours from HPD's mailing of the NOV
Class C Lead-Based Paint	Immediately Hazardous	21 days from HPD's mailing of the NOV
Class C Heat/Hot Water	Immediately Hazardous	24 hours from posting at building

NYC Administrative Code § 26-521

NYC administrative Code
§ 26-521 Unlawful eviction

a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling unit or has made a request for a lease for such dwelling unit pursuant to the hotel stabilization provisions of the rent stabilization law except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:

(1) using or threatening the use of force to induce the occupant to vacate the dwelling unit;

or

(2) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or

(3) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

b. It shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit who either vacates, has been removed from or is otherwise prevented from occupying a dwelling unit as the result of any of the acts or omissions prescribed in subdivision a of this section and to provide to such occupant a dwelling unit within such dwelling suitable for occupancy, after being requested to do so by such occupant or the representative of such occupant, if such owner either committed such unlawful acts or omissions or knew or had reason to know of such unlawful acts or omissions, or if such acts or omissions occurred within seven days prior to such request.

NYC Administrative Code § 27-2004 (a)(48)

New York Admin Code 27-2004(a)(48)

48. Except where otherwise provided, the term "harassment" shall mean any act or omission by or on behalf of an owner that (i) 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, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, except that such presumption shall not apply to such acts or omissions with respect to a private dwelling, as defined in paragraph six of subdivision a of section 27-2004:

a. using force against, or making express or implied threats that force will be used against, any person lawfully entitled to occupancy of such dwelling unit;

a-1. knowingly providing to any person lawfully entitled to occupancy of a dwelling unit false or misleading information relating to the occupancy of such unit;

a-2. making a false statement or misrepresentation as to a material fact regarding the current occupancy or the rent stabilization status of a building or dwelling unit on any application or construction documents for a permit for work which is to be performed in the building containing the dwelling unit of any person lawfully entitled to occupancy of such dwelling unit if such building is governed by the New York city construction codes;

b. 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;

b-1. an interruption or discontinuance of an essential service that (i) affects such dwelling unit and (ii) occurs in a building where repeated interruptions or discontinuances of essential services have occurred;

b-2. repeated failures to correct hazardous or immediately hazardous violations of this code or major or immediately hazardous violations of the New York city construction codes, relating to the dwelling unit or the common areas of the building containing such dwelling unit, within the time required for such corrections;

b-3. repeated false certifications that a violation of this code or the New York city construction codes, relating to the building containing such dwelling unit, has been corrected;

b-4. engaging in repeated conduct within the building in violation of section 28-105.1 of the New York city construction codes;

c. failing to comply with the provisions of subdivision c of section 27-2140 of this chapter;

d. commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit;

d-1. commencing a baseless or frivolous court proceeding against a person lawfully entitled to occupancy of such dwelling unit if repeated baseless or frivolous court proceedings have been commenced against other persons lawfully entitled to occupancy in the building containing such dwelling unit;

e. removing the possessions of any person lawfully entitled to occupancy of such dwelling unit;

f. removing the door at the entrance to an occupied dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying a key to the new lock to the persons lawfully entitled to occupancy of such dwelling unit;

f-1. contacting any person lawfully entitled to occupancy of such dwelling unit, or any relative of such person, to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, for 180 days after the owner has been notified, in writing, that such person does not wish to receive any such offers, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer;

f-2. contacting any person lawfully entitled to occupancy of such dwelling unit to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, unless such owner discloses to such person in writing (i) at the time of the initial contact, and (ii) in the event that contacts continue more than 180 days after the prior

written disclosure, at the time of the first contact occurring more than 180 days after the prior written disclosure:

(1) the purpose of such contact,

(2) that such person may reject any such offer and may continue to occupy such dwelling unit,

(3) that such person may seek the guidance of an attorney regarding any such offer and may, for information on accessing legal services, refer to The ABCs of Housing guide on the department's website,

(4) that such contact is made by or on behalf of such owner,

(5) that such person may, in writing, refuse any such contact and such refusal would bar such contact for 180 days, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer,

(6) (i) the median asking rent for a dwelling unit in the same community district, provided that the department has reported such data pursuant to section 27-2096.2, within the previous twelve-month period; or

(ii) the median asking rent for a dwelling unit in the same community district with the same number of bedrooms, provided that the department has reported such data, pursuant to section 27-2096.2, within the previous twelve-month period,

(7) that there is no guarantee that such person will be able to rent a dwelling unit in the same community district with the same number of bedrooms as the dwelling unit that such person is currently lawfully entitled to occupancy of, for the same rent such person is paying at the time of such contact, and

(8) that additional factors may impact the ability of such person to rent a dwelling unit, including, but not limited to, the current employment and credit history of such person;

f-3. offering money or other valuable consideration to a person lawfully entitled to occupancy of such dwelling unit to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy while engaging in any of the following types of conduct:

- (1) threatening, intimidating or using obscene language;
- (2) initiating communication with such frequency, at such unusual hours or in such a manner as can reasonably be expected to abuse or harass such person;
- (3) initiating communication at the place of employment of such person without the prior written consent of such person; or
- (4) knowingly falsifying or misrepresenting any information provided to such person;

f-4. repeatedly contacting or visiting any person lawfully entitled to occupancy of such unit (i) on Saturdays, Sundays or legal holidays, (ii) at times other than the hours between 9 a.m. and 5 p.m. or (iii) in such a manner as can reasonably be expected to abuse or harass such person, provided that if such person has notified such owner in writing that such person consents to being contacted or visited at specified hours or in a specified manner, such owner may also contact or visit such person during such specified hours and in such specified manner, and provided further that an owner may contact or visit such person for reasons specifically authorized or mandated by law or rule;

f-5. threatening any person lawfully entitled to occupancy of such dwelling unit based on such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, uniformed service, height, weight, sexual orientation, immigration or citizenship status, status as a victim of domestic violence or as a victim of sex offenses or stalking, lawful source of income or because children are, may be or would be residing in such dwelling unit, as such terms are defined in sections 8-102 and 8-107.1 of the code;

f-6. requesting identifying documentation for any person lawfully entitled to occupancy of such dwelling unit that would disclose the citizenship status of such person, when such person has provided the owner with a current form of government-issued personal identification, as such term is defined in section 21-908, unless such documentation is otherwise required by law or is requested for a specific and limited purpose not inconsistent with this paragraph; or

f-7. threatening any person lawfully entitled to occupancy of such dwelling unit based on such person's actual or perceived status as an essential employee, status as a person impacted by COVID-19, or receipt of a rent concession or forbearance for any rent owed during the COVID-19 period; provided that for the purposes of this subparagraph:

- (1) the term "COVID-19" means the 2019 novel coronavirus or 2019-nCoV;
- (2) the term "COVID-19 period" means March 7, 2020 through the later of (i) the end of the first month that commences after the expiration of the moratorium on enforcement of evictions of any tenant residential or commercial set forth in executive order number 202.8, as issued by the governor on March 20, 2020 and extended thereafter or (ii) September 30, 2020, inclusive;

(3) the term "essential employee" means a person employed by or permitted to work at or for a business classified as an essential business by the New York state department of economic development in accordance with executive order number 202.6, as issued by the governor on March 18, 2020 and extended thereafter; and

(4) the term "person impacted by COVID-19" means a person who has experienced one or more of the following:

(i) such person was diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(ii) a member of such person's household was diagnosed with COVID-19;

(iii) such person was providing care for a family member or a member of such person's household who was diagnosed with COVID-19;

(iv) such person became unemployed, partially unemployed, or could not commence employment as a direct result of COVID-19 or the state disaster emergency declared in executive order number 202, as issued by the governor on March 7, 2020;

or
(v) such person became primarily responsible for providing financial support for the household of such person because the previous head of the household died as a direct result of COVID-19;

g. other repeated acts or omissions of such significance as to substantially interfere with 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, including improperly requiring such person to seek, receive or refrain from submitting to medical treatment in violation of subdivision b of section 26-1201.

NYC Administrative Code § 27-2011

New York City Administrative Code

§ 27-2011 Cleaning of interior shared space.

The owner of a dwelling shall maintain the public parts in a clean and sanitary condition.

NYC Administrative Code § 27-2053(b)

§27-2053. (D26-22.03) Obligations of owner.

a. The owner of a multiple dwelling shall provide adequate janitorial services.

b. In a multiple dwelling of nine or more dwelling units, the owner shall either:

(1) Perform the janitorial services himself or herself, if he or she is a resident owner; or

(2) Provide a janitor; or

(3) Provide for janitorial services to be performed on a 24-hour-a-day basis in a manner approved by the department.

c. The owner of a multiple dwelling or his or her managing agent in control shall post and maintain in such multiple dwelling a legible sign, conspicuously displayed, containing the janitor's name, address (including apartment number) and telephone number. A new identification sign shall be posted and maintained within five days following a change of janitor. *(Amended by L.L. 1978, No. 28, eff. 10/6/78.)*

NYC Administrative Code § 27-2054

§27-2054. (D26-22.05) Residence of person performing janitorial services; limitation on number of dwelling units served.

The person who performs janitorial services for a multiple dwelling of nine or more units (other than where janitorial services are performed on a 24-hour-a-day basis under paragraph (3) of subdivision b of section 27-2053 of this article) shall reside in or within a distance of one block or 200 feet from the dwelling, whichever is greater, unless the owner resides in the multiple dwelling. Where two or three multiple dwellings are connected or adjoining, it shall be sufficient, however, that the person who performs janitorial services resides in one of these, but no person who performs janitorial services for more than one multiple dwelling may service more than 65 dwelling units. Regardless of residence the janitor must have a telephone where the janitor may reasonably be expected to be reached. (Amended by L.L. 1978, No. 28, eff. 10/6/78.)

NYC Administrative Code § 27-2067

§ 27-2067 Sanitary facilities in rooming units.

a. Every building containing rooming units, and each individual apartment used for single room occupancy, shall contain at least one water closet, washbasin and bath or shower for each six persons lawfully occupying rooming units therein, and for any remainder of less than six persons. At least one water closet shall be located on any floor containing a rooming unit. If there are not more than two rooms on the first story above the basement in said rooming house, no water closet is required on such floor but the occupants of the room shall be counted in determining the required number of facilities.

b. Every occupant of a rooming unit shall have access to each required water closet, washbasin and bath or shower without passing through any other rooming unit or portion of the dwelling reserved for other occupants.

c. Any additional water closet installed to comply with the requirements of subdivision a of this section shall be located in a compartment, separate from any other water closet, bath or shower, except that a required washbasin may be provided in such compartment. Such additional baths, or showers, shall be located in compartments separate from every required water closet.

d. Sanitary facilities for the exclusive use of and accessible only to the occupants of one rooming unit may be combined in a bathroom. Neither the facilities nor the occupants shall be counted in determining the number of the facilities required in subdivision a of this section.

NYC Administrative Code § 27-2093

§ 27-2093 Certification of no harassment with respect to single room occupancy multiple dwellings.

a. For the purposes of this section, "harassment" shall mean any conduct by or on behalf of an owner of a single room occupancy multiple dwelling that includes:

(1) the use or threatened use of force which causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit in such multiple dwelling to vacate such unit or to surrender or waive any rights in relation to such occupancy;

(2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy;

(3) the failure to comply with the provisions of subdivision c of section 27-2140 of article seven of subchapter five of this code which causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to waive any rights in relation to such occupancy; or

(4) any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit or causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy including but not limited to removing the possessions of any occupant from the dwelling unit; removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

b. For the purposes of any hearing held pursuant to this section, any of the acts or omissions described in paragraphs, one, two, three and four of subdivision a of this section which are committed at a single room occupancy multiple dwelling shall be presumed to be committed by or on behalf of the owner of such multiple dwelling and it shall be presumed that such acts or omissions were committed with the intent to cause a person lawfully entitled to occupancy of a dwelling unit in such multiple dwelling to vacate such unit or to surrender or waive a right in relation to such occupancy.

c. The commissioner shall certify whether there has been no harassment of the lawful occupants of a single room occupancy multiple dwelling, as such term is defined in section 27-198 of article nineteen of subchapter one of the building code, during the thirty-six month period prior to the date of the submission of an application for a certification of no harassment by an owner of such multiple dwelling. With respect to an application for a certification of no harassment which is submitted pursuant to paragraph three of subdivision b of section 27-198 of article nineteen of subchapter one of the building code, the date of submission of such application shall be deemed to be the date of submission of an application for plan approval.

d. An application for certification of no harassment shall be in such form and shall contain such information and provisions as shall be prescribed by the commissioner including, but not limited to, consent by the applicant to access to the premises by governmental agencies, and shall be determined in accordance with the following procedure:

(1) Upon the receipt of an application for a certification of no harassment, the commissioner shall publish notice in such publication as the commissioner deems appropriate for a period of seven consecutive days, shall mail notice to the owner of record, such occupants as the department shall identify, such other interested persons as the department shall identify, the local community board and appropriate government agencies and shall post notice in a conspicuous place on the premises of the multiple dwelling for which the certification is sought.

(2) The notice shall be in such form as shall be prescribed by the commissioner and shall state, in English and whatever other language the commissioner deems appropriate:

(a) the location and general description of the multiple dwelling for which the certification is sought;

(b) a description of the certification procedure and its purpose;

(c) the period of time for which certification is to be made;

(d) in plain language, a description of conduct constituting harassment; and

(e) that any occupants or former occupants of the multiple dwelling for which such certification is sought and other interested persons, government agencies and the local community board, are invited to submit their comments within thirty days of the date of such notice in writing or orally at a designated location.

(3) Upon the expiration of such thirty day comment period, the commissioner may (i) determine that no harassment has occurred within the stated period of time and forthwith grant such certification, (ii) determine that a waiver of

certification may be granted pursuant to subdivision e of this section and forthwith grant such waiver, or (iii) deny such certification without a prior hearing if there has been a finding by the office of rent control, the conciliation and appeals board or any court having jurisdiction that there has been harassment, unlawful eviction or arson by or on behalf of the owner at the multiple dwelling for which certification is sought during the stated period of time; or (iv) where there has been no prior determination of harassment, unlawful eviction or arson by or on behalf of the owner, provide that a hearing be held in the manner provided in section 27-2092 of this article if the commissioner has reasonable cause to believe that harassment has occurred within such stated period of time and that a waiver of certification may not be granted. At such hearing, the owner of the multiple dwelling for which such certification is sought, shall have the opportunity to be heard by the commissioner or a designee prior to the granting or denial of certification or of a waiver thereof. Notice of such hearing shall be given to the applicant and to other interested parties, governmental agencies and local community board in the manner to be prescribed by rules and regulations of the commissioner. Within forty-five days after such hearing, the commissioner shall either grant or deny such certification or waiver thereof.

(4) If certification or a waiver thereof is denied, notice of such denial accompanied by written findings indicating the grounds for such denial shall be mailed to the owner of record and shall be filed in the office of the city register. Such determination shall be subject to review pursuant to article seventy-eight of the civil practice law and rules.

(5) Neither such certification nor a waiver thereof shall be granted unless the applicant submits a sworn statement, in such form as the commissioner shall prescribe, by all the owners of the multiple dwelling representing that there will be no harassment of the occupants of such multiple dwelling by or on behalf of such owners. The corporation counsel may institute any action or proceeding in any court of competent jurisdiction that may be appropriate or necessary for the enforcement of this representation and agreement. Nothing contained herein shall preclude an occupant of such multiple dwelling from applying on his or her own behalf for similar relief.

(6) The commissioner shall promulgate rules and regulations to establish procedures relating to applications for and the issuance of supplemental certifications as required by paragraph nine of subdivision b of section 27-198 of the code.

e. The commissioner may grant a waiver of certification of no harassment although the commissioner determines that harassment has occurred at the multiple dwelling for which such certification is sought during the thirty-six month period prior to the date of the submission of an application for a certification of no harassment if the commissioner finds that:

(1) (a) the owner of record of the multiple dwelling with respect to which such certification is sought was the owner of record of such multiple dwelling prior to May fifth, nineteen hundred eighty-three or had entered into a contract of sale for the purchase of such multiple dwelling which was recorded prior to such date or, with respect to a certification proceeding where the alterations sought to be performed are of the type prescribed by regulation of the commissioner pursuant to subdivision b of section 27-198 of article nineteen of subchapter one of the building code, the owner of record of such multiple dwelling was the owner of record of such multiple dwelling prior to the date of the first publication of the regulations requiring certification for such type of alterations or had entered into a contract of sale for the purchase of such multiple dwelling which was recorded prior to such date;

(b) such owner was not the owner of such multiple dwelling during any period of time in which such harassment occurred and did not at such multiple dwelling (i) otherwise engage or participate in such harassment; or (ii) with intent that harassment be performed, agree with one or more persons to engage in or cause the performance of harassment; or (iii) with intent that another person engage in conduct constituting harassment, solicit, request, command, importune or otherwise attempt to cause such person to engage in conduct constituting harassment; and

(c) such owner acquired title pursuant to a bona fide transaction that is not intended to evade the provisions of this section; or

(2) the owner acquired the multiple dwelling by sale pursuant to foreclosure of a mortgage or pursuant to a deed in lieu of foreclosure of a mortgage; provided, however, that such conveyance was a bona fide transaction for the purpose of enforcing the debt and not intended to evade the provisions of this section and either (i) a certification of no harassment or waiver thereof was granted with respect to such multiple dwelling within a sixty day period prior to the date of the recording of such mortgage and no suspension or rescission thereof was recorded prior to such date; or (ii) such mortgage was recorded prior to May fifth, nineteen hundred eighty-three, or, if such owner is a banking organization as defined in section two of the banking law, a national banking association, a federal savings and loan association, the mortgage facilities corporation, savings banks life insurance fund, the savings banks retirement system, an authorized insurer as defined in section four of the insurance law, or a trust company or other corporation organized under the laws of this state all the capital stock of which is owned by at least twenty savings banks or by at least twenty savings and loan associations or a subsidiary corporation all of the capital stock of which is owned by such trust company or other corporation, a commitment for such mortgage was made prior to May fifth, nineteen hundred eighty-three.

(3) In determining whether such transaction was bona fide, the commissioner may consider whether at such multiple dwelling or any other such multiple dwelling such owner did (i) otherwise engage or participate in harassment; or (ii) with intent that harassment be performed, agree with one or more persons to engage in or cause the performance of harassment; or (iii) with intent that another person engage in conduct constituting harassment, solicit, request, command,

importune or otherwise attempt to cause such person to engage in conduct constituting harassment. The commissioner may also consider the relationship between the parties to the transaction.

(4) A waiver of a certification pursuant to this subdivision shall state the findings of the commissioner.

f. (1) The commissioner may rescind a certification of no harassment or a waiver thereof granted with respect to the alteration or demolition of a multiple dwelling if the commissioner finds that harassment has occurred at the multiple dwelling with respect to which such certification or waiver thereof was issued after the period of time covered by such certification but prior to the commencement of substantial work pursuant to an alteration permit or demolition permit issued on the basis of such certification or waiver thereof.

(2) If the commissioner has reasonable cause to believe that such harassment has occurred, the commissioner shall suspend the certification of no harassment or waiver thereof and upon the request of the commissioner, the commissioner of buildings shall not approve any plans or issue an alteration or demolition permit with respect to the alteration or demolition of such multiple dwelling or, if such plans have been approved and an alteration or demolition permit has been issued with respect to such alteration or demolition, issue a stop-work notice and order pursuant to section 27-227 of article twenty-four of subchapter one of the building code. Notice of such suspension shall be mailed to the owner of record of such multiple dwelling and shall be filed with the city register.

(3) As soon as reasonably possible, but not later than thirty days after such suspension, the commissioner shall hold a hearing in the manner provided in section 27-2092 of this article upon appropriate notice and shall determine whether to rescind such certification; provided, however, that if, prior to the commencement of substantial work, the owner has been found by the office of rent control, the conciliation and appeals board or any court having jurisdiction, to have engaged in harassment, unlawful eviction or arson at the multiple dwelling, the commissioner may rescind such certification without holding a hearing. At such hearing the owner shall have an opportunity to be heard by the commissioner or a designee of the commissioner.

(4) If the commissioner determines not to rescind such certification, the commissioner shall notify the commissioner of buildings of such determination and any stop-work notice and order issued by the commissioner of buildings pursuant to paragraph two of this subdivision shall be vacated immediately. Notice of such determination shall be mailed to the owner of record of such multiple dwelling and filed with the city register.

(5) If the commissioner determines that such certification shall be rescinded, notice of such determination accompanied by written findings indicating the grounds for such determination shall be provided to the commissioner of buildings and shall be mailed to the owner of record of such multiple dwelling and filed with the city register. Such determination shall be subject to review pursuant to article seventy-eight of the civil practice law and rules.

(g) For the purpose of any subsequent certification proceeding with respect to such multiple dwelling pursuant to this section, the granting of a certification of no harassment or a waiver thereof for any period of time shall be conclusive proof only for the purposes of this section that either no harassment occurred within the time period covered by such certification or that the waiver of such certification for such period of time was appropriate.

h. The commissioner is authorized to establish and collect reasonable fees and charges from applicants for the administrative expenses incurred by the department for the certification proceedings prescribed in this section, including costs for publication and notices.

NYC Administrative Code § 27-2115(c)

§ 27-2115 Imposition of civil penalty.

(a) In addition to any other penalty authorized by this chapter, a person who violates any law relating to housing standards shall be subject to a civil penalty as follows:

(1) For each non-hazardous violation, not less than fifty dollars nor more than one hundred fifty dollars, and, in addition, from the date set for correction in the notice of violation until the violation is corrected, twenty-five dollars per day;

(2) For each hazardous violation, not less than seventy-five dollars nor more than five hundred dollars, and, in addition, from the date set for correction in the notice of violation until the violation is corrected, not less than twenty-five dollars nor more than one hundred twenty-five dollars per day; and

(3) For each immediately hazardous violation:

(i) In a multiple dwelling containing five or fewer dwelling units, not less than one hundred fifty dollars nor more than seven hundred fifty dollars, and, in addition, from the date set for correction in the notice of violation until the violation is corrected, not less than fifty dollars nor more than one hundred fifty dollars per day; and

(ii) In a multiple dwelling containing more than five dwelling units, not less than one hundred fifty dollars nor more than one thousand two hundred dollars, and, in addition, from the date set for correction in the notice of violation until the violation is corrected, not less than one hundred fifty dollars nor more than one thousand two hundred dollars per day.

(4) Provided, however, that in addition to the other penalties herein provided, a person who makes a false certification of correction of a violation shall be subject to a civil penalty as follows:

(i) For each non-hazardous violation falsely certified, not less than fifty dollars nor more than two hundred fifty dollars;

(ii) For each hazardous violation falsely certified, not less than two hundred fifty dollars nor more than five hundred dollars; and

(iii) For each immediately hazardous violation falsely certified, not less than five hundred dollars nor more than one thousand dollars.

(b) The department shall serve a notice of violation upon the owner, his or her agent or other person responsible for its correction. The notice shall identify the condition constituting the violation, the provision of law applicable thereto, the department's order number, the classification of the violation according to its degree of hazard, the time for certifying the correction of such violation, and the amount of the possible penalty. It shall also advise that the department will, if requested, confer with the owner or his or her representative concerning the nature and extent of the work to be done to insure compliance and the methods of financing such work. In any case where the provisions of this section authorize the service of such notice by mail, the statement of any officer, clerk, or agent of the department, or of anyone authorized by the department to mail such notice of violation, subscribed and affirmed by such person as true under the penalties of perjury, which describes the mailing procedure used by the department, or by the department's mailing vendor, or which states that these procedures were in operation during the course of mailing a particular cycle of notices of violation, shall be admitted into evidence as presumptive evidence that a regular and systematic mailing procedure is followed by the department for the mailing of its notices of violation. Where the department introduces into evidence the business records which correspond to the various stages of the mailing of a particular cycle of notices of violation, pursuant to subdivision (c) of rule forty-five hundred eighteen of the civil practice law and rules, then a presumption shall have been established that the mailing procedure was followed in the case of such cycle, and that such notice of violation has been duly served.

(c) The said notice of violation shall also specify the date by which each violation shall be corrected. Such date shall be:

(1) ninety days from the date of mailing of the notice in the case of non-hazardous violations;

(2) thirty days from the date of mailing of the notice in the case of hazardous violations; and

(3) twenty-four hours in the case of immediately hazardous violations in which case the notice shall be served by personal delivery to a person in charge of the premises or to the person last registered with the city as the owner or agent, or, by registered or certified mail, return receipt requested, to the person in charge of the premises or to the person last registered with the department as the owner or agent; provided that where a managing agent has registered with the department, such notice shall be served on the managing agent. Service of the notice shall be deemed completed five days from the date of mailing. The department may postpone the date by which a violation shall be corrected upon a showing, made within the time set for correction in the notice, that prompt action to correct the violation has been taken but that full correction cannot be completed within the time provided because of technical difficulties, inability to obtain necessary materials, funds, or labor, or inability to gain access to the dwelling unit wherein the violation occurs or such other part of the building as may be necessary to make the required repair. In the case of immediately hazardous violations such showing must be made prior to the close of business on the next full day the department is open following the period set for correction. The department may condition such postponement upon the applicant's written agreement to correct all violations placed against the premises by the department or other appropriate governmental agency and to satisfy within an appropriate period of time, all sums owing to the department for repairs made to said premises. The department may require such other conditions as are deemed necessary to insure correction of the violations within the time set by the postponement. The department shall prepare a written statement signed and dated by the person making such decision setting forth the reasons for the postponement of the date by which a violation shall be corrected or the reason for the denial of such application for postponement and said written statement shall be part of the record of the department.

(d) On or before September first, nineteen hundred seventy-two, the department shall classify all violations of the multiple dwelling law, the housing maintenance code and other applicable state and local laws as non-hazardous, hazardous and immediately hazardous, secure the approval thereof by the advisory council to the housing part of the civil court of the city of New York and publish such classification in the City Record. Such classification shall be based on the effect of the violation upon the life, health or safety of the occupants of the building and upon the public. After October first, nineteen hundred seventy-two and prior to October fifteenth, nineteen hundred seventy-two, the department shall hold a public hearing on the proposed classifications. Notice of such public hearing shall be published in the City Record not less than thirty days prior to the hearing. Within fifteen days after the conclusion of the said hearing, the department shall forward to the advisory council the list with such proposed changes as it may recommend for their approval. Within ten days of the receipt of such list, the advisory council shall advise the department as to which changes they have approved. The department shall thereupon, within five days, cause the list, together with such changes as have been approved to be published once each week for two successive weeks in the City Record. Any person who may be aggrieved as an owner or tenant may, within thirty days of such first publication seek a review of the department's action, provided that no such review shall stay the effectiveness of such list or the operation of the housing part of the civil court of the city of New York. Thereafter, and from time to time, the department may modify the list with the approval of the advisory council after publication, and public hearing as provided for the original list.

(e) In the event the department fails to promulgate such list as above provided, or to take any step in connection therewith within the time provided, the administrative judge of the civil court and the judicial conference may take such action as they deem necessary to insure the establishment of the housing part of the New York city civil court and its operation on April first, nineteen hundred seventy-three, as provided by law.

(f) (1) The notice of violation shall direct that when any violations of a particular class have been corrected, they may be certified at one time to the department or, in the alternative, each violation may be separately and independently certified. Such certification shall be made in writing, under oath by the registered owner, a registered officer or director of a corporate owner or by the registered managing agent except that, in the alternative, such certification may be submitted in an electronic form in accordance with the rules of the department which shall provide a mechanism for authenticating the source of the electronic submission; the department shall be required to accept such electronic submissions if submitted in accordance with such rules on and after the effective date of the local law that added these provisions authorizing such electronic submissions. Such certification shall be

delivered to the department in person or electronically and acknowledgement of receipt therefor obtained or shall be mailed to the department by certified or registered mail, return receipt requested, no later than fourteen days after the date set for correction in the case of non-hazardous and hazardous violations, and no later than five days after the date set for correction in the case of immediately hazardous violations, and shall include the date when each violation was corrected. Such certification of correction shall be supported by a sworn statement, which may be submitted in an electronic form in accordance with the rules of the department, by the person who performed the work if performed by an employee or agent of the owner.

(2) A copy of such certification shall then be mailed not more than twelve calendar days from the date of receipt of notification to any complainant by the department.

(3) (i) Such violation shall be deemed corrected seventy days from the date of receipt of such certification by the department unless the department has determined by a reinspection made within such period that the violation still has not been corrected and has recorded such determination upon its records and has notified the person who executed the certification by registered or certified mail to the address stated in the certification that it has been set aside and the reasons therefor; a copy of such notice shall be sent to the complainant.

(ii) Notwithstanding subparagraph (i) of this paragraph, by the later of either January 15, 2025, or the first business day thereafter, and each calendar year thereafter, the department shall compile and post on its website a list of 100 multiple dwellings for which the department has determined that: (A) more than 20 hazardous violations or immediately hazardous violations have been certified as corrected during the previous calendar year, other than a violation issued pursuant to section 27-2017.4 of this code, and (B) at least four of such hazardous or immediately hazardous violations that have been certified as corrected during such calendar year were falsely certified as corrected, provided that to the extent more than 100 multiple dwellings satisfy the criteria described in clauses (A) and (B) of this subparagraph, the department shall include in such list such multiple dwellings with the greatest number of hazardous or immediately hazardous violations that have been certified as corrected during the previous calendar year and that such department found constituted false certifications.

(iii) The department may promulgate rules excluding any immediately hazardous or hazardous violation from calculation in the number of violations certified as corrected for purposes of compiling the list described in subparagraph (ii) of this paragraph when the nature of the condition of any such violation is such that the owner has taken steps toward correcting such condition but compliance may not have been achieved.

(iv) For the duration of the calendar year following the compilation of the list described in subparagraph (ii) of this paragraph, the department shall not deem corrected any immediately hazardous or hazardous violation issued to a multiple dwelling included in such list unless: (A) such immediately hazardous or hazardous violation is excluded from calculation in the number of violations certified as corrected for purposes of compiling such list by rules promulgated pursuant to subparagraph (iii) of this paragraph, or (B) the department has attempted at least two re-inspections of such multiple dwelling to determine whether any such violation has been corrected pursuant to subparagraph (i) of this paragraph.

(4) If the department does not inspect the premises after notification by the complainant that a violation has not been corrected, any tenant affected by such false certification shall have the right to apply to the court for a determination of violation as provided in subdivision (h) of this section, at which time the court shall assess appropriate penalties as provided in this section for any willfully false certification it finds.

(5) Upon receipt of notice that the certification has been set aside the owner or his or her agent shall then have a right to apply to the court for a determination that such violation was corrected. Notice of such right shall appear on each notice that a certification has been set aside.

(6) Notwithstanding the foregoing, in the event an owner files with his or her certification a copy of a contract of sale or letter of commitment for a mortgage or refinancing of a mortgage covering the premises and further certifies that such sale or mortgage transaction is to occur within one hundred days of such certification, such violation shall be deemed corrected thirty days from the date of receipt of such certification by the department, unless the department has determined by reinspection made within such period that the violation still has not been corrected, has recorded such determination upon its records and has given notice of such determination to the owner, and has thereafter brought an action within thirty days to set aside such certification, to impose a penalty for false certification and to collect such other penalties as have accrued, provided that in all such cases, the department shall make such reinspection.

(7) Failure to file such certification of compliance shall establish a prima facie case that such violation has not been corrected.

(8) (i) Notwithstanding any other provision of law, where (A) the department has performed two or more complaint-based inspections in the same dwelling unit within a twelve-month period, (B) each such inspection has resulted in the issuance of a hazardous or immediately hazardous violation, and (C) not all such violations have been certified as corrected pursuant to this section, the department may impose an inspection fee of two hundred dollars for the third and for each subsequent complaint-based inspection that it performs in such dwelling unit within the same twelve-month period that results in the issuance of a hazardous or immediately hazardous violation, provided that the department may by rule increase the fee for inspections performed during the period of October first through May thirty-first. Such inspection fee shall be in addition to any civil penalties that may be due and payable.

(ii) Such fee shall not be applicable to inspections (A) performed in a multiple dwelling that is active in the alternative enforcement program pursuant to article ten of subchapter five of this chapter, (B) performed in a multiple dwelling that is subject to a court order appointing an administrator as the result of a proceeding brought by the department pursuant to article seven-a of the New York state real property actions and proceedings law, (C) performed pursuant to subparagraph iv of paragraph one of subdivision k of this section, (D) resulting exclusively in hazardous or immediately hazardous violations for inoperable smoke detectors, inoperable carbon monoxide detectors, double cylinder locks on entry doors of dwelling units, illegal window gates, absence of window guards, or such other hazardous or immediately hazardous violations that the department specifies by rule or (E) where an owner has notified the department of his or her objection to such fee pursuant to section 27-2129 of this code, has provided such documentation to the department as it shall prescribe by rule regarding such owner's attempted access for the purpose of making repairs to the dwelling unit that is subject to the inspection fee, and the department has reviewed and approved such objection.

(iii) All fees that remain unpaid shall constitute a debt recoverable from the owner and a lien upon the premises, and upon the rents and other income thereof. The provisions of article eight of subchapter five of this chapter shall govern the effect and enforcement of such debt and lien.

(g) When there are a number of separate instances of a single condition which violates any housing standard established by law, such separate instances shall be treated collectively as a single violation with respect to any one dwelling unit, or with respect to the public area of a building, but nothing contained in this subdivision shall limit the number of violations for which a penalty under this section may be collected with respect to each dwelling unit or the public area of a building.

(h) (1) Should the department fail to issue a notice of violation upon the request of a lawful occupant or group of lawful occupants within thirty days of the date of such request, or if there is a notice of violation outstanding respecting the premises in which the lawful occupant or group of lawful occupants resides, or, if there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter, the lawful occupant or any group of lawful occupants, may individually or jointly apply to the housing part for an order directing the owner and the department to appear before the court. Such order shall be issued at the discretion of the court for good cause shown, and shall be served as the court may direct. If the court finds a condition constituting a violation exists, it shall direct the owner to correct the violation and, upon failure to do so within the time set for certifying the correction of such violation pursuant to subdivision (c) of this section, it shall impose a penalty in accordance with subdivision (a) of this section. Nothing in this section shall preclude any person from seeking relief pursuant to any other applicable provision of law.

(2) (i) Notwithstanding the provisions of paragraph one of this subdivision, where one or more allegations of harassment pursuant to subparagraphs b, c and g of paragraph 48 of subdivision a of section 27-2004 of this chapter is made, to the extent that any such allegation is based on physical conditions of a dwelling or dwelling unit, such allegation must be based at least in part on one or more violations of record issued by the department or any other agency. Where any allegation of harassment is based on more than one physical condition, the existence of at least one violation of record with respect to any such physical condition shall be deemed sufficient to meet the requirements of this paragraph.

(ii) The provisions of subparagraph i of this paragraph shall apply to any counterclaim or defense presented by a tenant in any proceeding in the housing part of the civil court if such counterclaim or defense is based on one or more allegations of harassment. In the event there is no violation of record with respect to at least one physical condition alleged by such tenant such counterclaim or defense shall be dismissed without prejudice.

(i) In the event an owner fails to correct a violation within the time specified in a notice of violation sent to the owner, his or her agent or other person responsible for its correction pursuant to subdivision (b) of this section, or within any additional time granted pursuant to subdivision (c) of this section, and no certification of correction with respect to such violation has been filed by the owner or his or her registered managing agent in accordance with the provisions of subdivision (f) hereof, then at any time after thirty days have elapsed from the date such violation was to be corrected, any tenant or group of tenants who requested that the violation be issued may apply individually or jointly, to the housing part for an order directing the owner and the department to appear before the court. Where the violation is hazardous or immediately hazardous, the thirty-day requirement shall be waived. Said order shall be issued by the court for good cause shown. If the court finds that the violation has not been corrected, that more than thirty days have elapsed since the time to correct same has expired where a violation is non-hazardous, and that no certification of correction has been filed in accordance with the provisions of subdivision (f) hereof, then it shall direct the owner to correct the violation and shall assess penalties as provided in subdivision (a) of this section.

(j) If a tenant seeks an order directing the owner and the department to appear before the court pursuant to subdivision (h) or (i) of this section, the court may allow service of the order by the tenant by certified or registered mail, return receipt requested.

(k) (1) (i) Notwithstanding any other provision of law, a person who violates section 27-2028, subdivision a of section 27-2029, section 27-2031 or section 27-2032 of this chapter shall be subject to a civil penalty of not less than three hundred fifty nor more than one thousand two hundred fifty dollars per day for each violation from and including the date the notice is affixed pursuant to paragraph two of this subdivision until the date the violation is corrected and not less than five hundred nor more than one thousand five hundred dollars per day for each subsequent violation of such sections at the same dwelling or multiple dwelling that occurs within two consecutive calendar years or, in the case of subdivision a of section 27-2029, during two consecutive periods of October first through May thirty-first. A person who violates subdivision b of section 27-2029 of this chapter shall be subject to a civil penalty of fifty dollars per day from and including the date the notice is affixed pursuant to paragraph two of this subdivision until the date the violation is corrected but not less than two thousand dollars. There shall be a presumption that the condition constituting a violation continues after the affixing of the notice.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph and section 27-2116 of this chapter, the civil penalties set forth in subparagraph (i) of this paragraph shall be deemed satisfied for a first violation of section 27-2028, subdivision a of section 27-2029, section 27-2031 or section 27-2032 of this chapter if a notice, in a form prescribed by the department, that such violation has been corrected by the owner or an agent or employee of the owner within twenty-four hours of the affixing of the notice of such violation pursuant to paragraph two of this subdivision, and a payment of two hundred fifty dollars, are submitted to the department within ten days of affixing the notice of such violation. A person who submits a false notice of correction shall be subject to a civil penalty of not less than two hundred fifty dollars for each false notice of correction, in addition to the other penalties herein provided. If the notice of correction and payment are not received within such ten-day period then the penalties set forth in subparagraph (i) of this paragraph shall be applicable to such violations and the department may commence a proceeding for an order to correct and to recover such penalties in accordance with this section and section 27-2116 of this chapter. A person who has violated section 27-2028, subdivision a of section 27-2029, section 27-2031 or section 27-2032 of this chapter may allege as a defense or in mitigation of liability for civil penalties, compliance with the notice of correction and payment requirements of this subparagraph in any proceeding brought by the department seeking civil penalties under this subdivision. The process for submission of the notice of correction and payment set forth in this subparagraph shall not be available if a violation of section 27-2028, section 27-2031 or section 27-2032 of this chapter occurred at the same dwelling or multiple dwelling during the prior calendar year or, in the case of subdivision a of section 27-2029 of this chapter, if a violation of such subdivision occurred at the same dwelling or multiple dwelling during the prior period of October first through May thirty-first.

(iii) Notwithstanding any other provision of law, within 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. In addition, the provisions of paragraphs 4 and 5 of subdivision f of this section shall also be applicable to a notice of correction submitted in compliance with subparagraph (ii) of this paragraph.

(iv) Notwithstanding any other provision of law, a person who, after inspection by the department, is issued an immediately hazardous violation for a third or any subsequent violation of section 27-2028, section 27-2031 or section 27-2032 of this chapter at the same dwelling or multiple dwelling within the same calendar year or, in the case of subdivision a of section 27-2029 of this chapter, at the same dwelling or multiple dwelling within the same period of October first through May thirty-first, shall be subject to a fee of two hundred dollars for each inspection that results in the issuance of such violation as well as any civil penalties that may be due and payable for the violation, provided, however, that such fee shall not be applicable to inspections performed in a multiple dwelling that is included in the alternative enforcement program pursuant to article ten of subchapter five of this chapter. All fees that remain unpaid shall constitute a debt recoverable from the owner and a lien upon the premises, and upon the rents and other income thereof. The provisions of article eight of subchapter five of this chapter shall govern the effect and enforcement of such debt and lien.

(2) Notwithstanding any other provision of law, the department shall serve a notice upon the owner, his or her agent or other person responsible for the correction of violations by affixing such notice in a conspicuous place on the premises. The notice shall identify the condition constituting the violation, the provision of law applicable thereto, the date the violation was reported and set the penalty attendant thereto.

(3) Notwithstanding any other provision of law, the owner shall be responsible for the correction of all violations placed pursuant to article eight of subchapter two of this code, but in an action for civil penalties pursuant to this article may in defense or mitigation of such owner's liability for civil penalties show:

(i) That the condition which constitutes the violation did not exist at the time the violation was placed; or

(ii) That he or she began to correct the condition which constitutes the violation promptly upon discovering it but that full correction could not be completed expeditiously because of technical difficulties, inability to obtain necessary materials, funds or labor, or inability to gain access to the dwelling unit wherein the violation occurs, or such other portion of the building as might be necessary to make the repair; or

(iii) That he or she was unable to obtain a permit or license necessary to correct the violation, provided that diligent and prompt application was made therefor; or

(iv) That the violation giving rise to the action was caused by the act or negligence, neglect or abuse of another not in the employ or subject to the direction of the owner; or

(v) That in addition to any other defense or mitigation set forth in subparagraphs (i) through (iv) of this paragraph, with respect to an owner who may be subject to the penalty of not less than five hundred nor more than one thousand dollars per day with respect to a subsequent violation pursuant to paragraph one of this subdivision, documentation of prompt and diligent efforts to correct the conditions that gave rise to an initial violation and that such conditions were corrected. Where demonstrated, such subsequent violation shall be treated as though it was an initial violation. However, this defense or mitigation may not be asserted or demonstrated where the initial and subsequent violations occurred in the same calendar year or, in the case of violations of subdivision a of section 27-2029, during the same period of October first through May thirty-first.

Where the aforesaid allegations are made by way of mitigation of penalties, the owner shall show, by competent proof, pertinent financial data, and efforts made to obtain necessary materials, funds or labor or to gain access, or to obtain a permit or license and such other evidence as the court may require.

If the court finds that sufficient mitigating circumstances exist, it may remit all or part of any penalties arising from the violation, but may condition such remission upon a correction of the violation within a time period fixed by the court.

(l) (1) Notwithstanding any other provision of law, when the department serves a notice of violation to correct and certify a condition that constitutes a violation of article fourteen of subchapter two of this chapter, the notice of violation shall specify the date by which the violation shall be corrected, which shall be twenty-one days after service of the notice of violation for a class C violation and thirty days after the service of the notice of violation for a class B violation, and the procedure by which the owner, for good cause shown pursuant to this subdivision, may request a postponement. The notice of violation shall further specify that the violation shall be corrected in accordance with the work practices established in accordance with section 27-2056.11 of this code. The notice of violation shall be served by personal delivery to a person in charge of the premises or to the person last registered with the department as the owner or agent, or by registered or certified mail, return receipt requested, or by certified mail with proof of delivery, to the person in charge of the premises or to the person last registered with the department as the owner or agent; provided that where a managing agent has registered with the department, such notice of violation shall be served on the managing agent. Service of the notice of violation shall be deemed completed three days from the date of mailing. Notification, in a form to be determined by the department, of the issuance of such violation shall be sent simultaneously by regular mail to the occupant at the dwelling unit that is the subject of such notice of violation. The department may postpone the date by which a violation shall be corrected upon a showing, made within the time set for correction in the notice, that prompt action to correct the violation has been taken but that full correction cannot be completed within the time provided because of serious technical difficulties, inability to obtain necessary materials, funds or labor, inability to gain access to the dwelling unit wherein the violation exists, or such other portion of the building as may be necessary to make the required repair. Such postponement shall not exceed fourteen days from the date of correction set forth in the notice of violation. The department may require such other conditions as are deemed necessary to insure correction of the violations within the time set for the postponement. The department may grant one additional postponement of no more than fourteen days for the reasons authorized by this section so long as the paint or other condition which is the subject of the violation has been stabilized. The department is also authorized to promulgate rules establishing criteria for a postponement of the time to correct for a longer period of time where such postponement is requested because of one or more substantial capital improvements will be made that will, when completed, significantly reduce the presence of lead-based paint in such multiple dwelling or dwelling unit including, but not limited to, a requirement that the paint which is the subject of the violation is stabilized. The department shall provide to the owner and the occupant a written statement signed and dated by the person making such decision setting forth the reasons for each postponement of the date by which a violation shall be corrected or the reason for the denial of such application for a postponement. Said written statement shall be part of the records of the department.

(2) Notwithstanding any other provision of law, the notice of violation shall direct that the correction of each violation cited therein shall be certified to the department. Such certification shall be made in writing, under oath by the registered owner, a registered officer or director of a corporate owner or by the registered managing agent. Such certification shall include a statement that the violation was corrected in compliance with paragraph one of subdivision a of section 27-2056.11 of this code and shall include a copy of the lead-contaminated dust clearance test results. All certifications shall be delivered to the department and acknowledgment of receipt therefor obtained or shall be mailed to the department by certified or registered mail, return receipt requested, no later than five days after the date set for correction, and shall include the date when each violation was corrected. Such certification of correction shall be supported by a sworn statement by the person who performed the work if performed by an employee or agent of the owner. A copy of such certification shall be mailed to the complainant by the department not more than twelve full calendar days from the date of receipt of such certification by the department. Failure to file such certification shall establish a prima facie case that such violation has not been corrected.

(3) Whenever the department shall issue a notice of violation to correct a condition that constitutes a violation of section 27-2056.6 of article fourteen of subchapter two of this chapter, the department shall within fourteen days after the date set for the correction of such violation conduct a final inspection to verify that the violation has been corrected. Where, upon conducting an inspection, the department determines that a violation has not been corrected, the department shall correct such violation within forty-five additional days of such inspection or in such shorter time as is practicable.

(4) Notwithstanding any other provision of law, the department shall not remove a violation from its records nor shall it be deemed that such violation has been corrected unless the records of the department contain written verification that the department has conducted a final inspection of the premises and that such inspection verifies that the violation has been corrected, and copies of lead-contaminated dust clearance test results whenever such tests are required by applicable law, rule or regulation. A copy of the report of the final inspection of a dwelling unit and the status of the violation shall be mailed or delivered to the occupant and the owner.

(5) Notwithstanding any other provision of law, a person making a false certification of correction of a violation issued pursuant to article 14 of subchapter 2 of this chapter, in addition to any other civil penalty, shall be subject to a civil penalty of not less than one thousand dollars nor more than three thousand dollars for each false certification made, recoverable by the department in a civil action brought in a court of competent jurisdiction. If the person making such false certification is an employee of the owner then such owner shall be responsible for such civil penalty. In addition, any such person making a false certification of correction shall be guilty of a misdemeanor punishable by a fine of up to one thousand dollars or imprisonment for up to one year or both.

(6) Notwithstanding any other provision of law, a person who violates article fourteen of subchapter two of this chapter by failing to correct such violation in accordance with paragraph one of subdivision a of section 27-2056.11 of this code shall be subject to a civil penalty of two hundred fifty dollars per day for each violation to a maximum of ten thousand dollars from the initial date set for correction in the notice of violation until the date the violation is corrected and certified to the department, and in addition to any civil penalty shall, whenever appropriate, be punished under the provisions of article three of subchapter five of this code. There shall be a presumption that the condition constituting a violation continues after the service of the notice of violation. The owner shall be responsible for the correction of all violations noticed pursuant to article fourteen of subchapter two of this chapter, but in an action for civil penalties pursuant to this subdivision may in defense or mitigation of such owner's liability for civil penalties show:

- (i) That the condition which constitutes the violation did not exist at the time the violation was placed; or
- (ii) That he or she began to correct the condition which constitutes the violation promptly upon discovering it but that full correction could not be completed expeditiously because of serious technical difficulties, inability to obtain necessary materials, funds or labor, or inability to gain access to the dwelling unit wherein the violation exists, or such other portion of the building as might be necessary to make the repair, provided that a postponement was granted pursuant to this subdivision; or
- (iii) That he or she was unable to obtain a permit or license necessary to correct the violation, provided that diligent and prompt application was made therefor; or
- (iv) That the violation giving rise to the action was caused by the act of negligence, neglect or abuse of another not in the employ or subject to the direction of the owner, except that the owner shall be precluded from showing in defense or mitigation of such owner's liability for civil penalties evidence of any acts occurring, undertaken, or performed by any predecessor in title prior to the owner taking control of the premises. Where the aforesaid allegations are made by way of mitigation of penalties, the owner shall show, by competent proof, pertinent financial data and efforts made to obtain necessary materials, funds or labor or to gain access, or to obtain a permit or license and such other evidence as the court may require.

If the court finds that sufficient mitigating circumstances exist, it may remit all or part of any penalties arising from the violations, but may condition such remission upon a correction of the violation within a time period fixed by the court.

(7) Notwithstanding any other provision of law, failure by the department to comply with any time period provided in this section relating to responsibilities of the department shall not render null and void any notice of violation issued by the department or the department of health and mental hygiene pursuant to such article or section, and shall not provide a basis for defense or mitigation of an owner's liability for civil penalties for violation of such article.

(m) (1) Notwithstanding any other provision of law, a violation of subdivision d of section 27-2005 of this code shall be a class c immediately hazardous violation and a penalty shall be imposed in accordance with this section, provided, however, that such violation shall not be deemed a

continuing class c violation of record beyond the time that the conduct constituting such violation occurred.

(2) If a court of competent jurisdiction finds that conduct in violation of subdivision d of section 27-2005 of this chapter has occurred, it may determine that a class c violation existed at the time that such conduct occurred. Notwithstanding the foregoing, such court may also issue an order restraining the owner of the property from violating such subdivision and direct the owner to ensure that no further violation occurs, in accordance with section 27-2121 of this chapter. Such court shall impose a civil penalty in an amount not less than two thousand dollars and not more than ten thousand dollars for each dwelling unit in which a tenant or any person lawfully entitled to occupancy of such unit has been the subject of such violation, and such other relief as the court deems appropriate, provided that where a petitioner establishes that there was a previous finding of a violation of subdivision d of section 27-2005 against such owner and such finding was made (i) within the preceding five year period and (ii) on or after the effective date of the local law that added this clause, such court shall impose a civil penalty in an amount not less than four thousand dollars and not more than ten thousand dollars. It shall be an affirmative defense to an allegation by a tenant of the kind described in subparagraphs b, c and g of paragraph forty-eight of subdivision a of section 27-2004 of this chapter that (i) such condition or service interruption was not intended to cause any lawful occupant to vacate a dwelling unit or waive or surrender any rights in relation to such occupancy, and (ii) the owner acted in good faith in a reasonable manner to promptly correct such condition or service interruption, including providing notice to all affected lawful occupants of such efforts, where appropriate.

(3) An owner may seek an order by the court enjoining a tenant from initiating any further judicial proceedings against such owner pursuant to this section claiming harassment without prior leave of the court if (i) within a ten-year period such tenant has initiated two judicial proceedings pursuant to this section against such owner claiming harassment that have been dismissed on the merits and (ii) a third or subsequent proceeding initiated by such tenant against such owner pursuant to this section claiming harassment during such ten-year period is determined at the time of its adjudication to be frivolous. Except for an order on consent such order may be sought by such owner simultaneously with the adjudication of such third or subsequent judicial proceeding.

(4) Where the court determines that a claim of harassment by a tenant against an owner is so lacking in merit as to be frivolous, the court may award attorneys fees to such owner in an amount to be determined by the court.

(5) Nothing in paragraphs three or four of this subdivision shall be construed to affect or limit any other claims or rights of the parties.

(6) After a court of competent jurisdiction has issued a finding that conduct in violation of subdivision d of section 27-2005 of this chapter has occurred, the department, if it receives notice of such finding, shall post on its website, no later than ninety days after having received notice of such finding, the following information for each such finding: (i) the address of the building containing the dwelling unit that was the subject of such violation; (ii) the name of the property owner; (iii) the civil penalty imposed for such violation; (iv) the date such penalty was imposed; and (v) whether an order restraining the owner of such unit from violating subdivision d of section 27-2005 of this chapter was issued.

(7) A court of competent jurisdiction may find that acts of harassment that caused the issuance of a determination by the department denying a certification of no harassment pursuant to section 27-2093 or section 27-2093.1 of this code constitute conduct in violation of subdivision d of section 27-2005 by the applicant for such certification where such applicant was the owner of record when such acts of harassment occurred. Notwithstanding subdivision (c) of this section, as added by local law number 148 for the year 2017, the court upon such finding shall, in addition to any other relief such court determines to be appropriate, award to each lawful occupant of a dwelling unit that was subject to such harassment \$5,000 per dwelling unit, plus reasonable attorneys' fees and costs.

(n) The provisions of subdivision d of section 27-2005 of this chapter, subdivision m of this section and subdivision b of section 27-2120 of this chapter shall not apply where a shareholder of record on a proprietary lease for a dwelling unit, the owner of record of a dwelling unit owned as a condominium, or those lawfully entitled to reside with such shareholder or record owner, resides in the dwelling unit for which the proprietary lease authorizes residency or in such condominium unit, as is applicable.

(o)* In any action brought by a lawful occupant or group of lawful occupants under subdivision h of this section for a violation of subdivision d of section 27-2005 of this chapter, the housing part shall, in addition to any other relief such court determines to be appropriate, award to each such occupant (i) compensatory damages or, at the election of such occupant, one thousand dollars and (ii) reasonable attorneys' fees and costs. Such court may also, at its sole discretion, award punitive damages.

* Editor's note: there are two subdivisions designates as (o) in this section.

(o)* (1) Notwithstanding any other provision of law, when the department serves a notice of violation to correct and certify a condition that constitutes a violation of article four of subchapter two of this chapter, the notice of violation shall specify the date by which the violation shall be corrected as provided in such article, and the procedure by which the owner, for good cause shown pursuant to this subdivision, may request a postponement. The notice of violation shall further specify that the violation shall be corrected in accordance with section 27-2017.8 and the rules established pursuant to section 27-2017.9, where applicable. The notice of violation shall be served by personal delivery to a person in charge of the premises or to the person last registered with the department as the owner or agent, or by registered or certified mail, return receipt requested, or by certified mail with proof of delivery, to the person in charge of the premises or to the person last registered with the department as the owner or agent; provided that where a managing agent has registered with the department, such notice of violation shall be served on the managing agent. Service of the notice of violation shall be deemed completed five days from the date of mailing. Notification, in a form to be determined by the department, of the issuance of such violation shall be sent simultaneously by regular mail to the occupant at the dwelling unit that is the subject of such notice of violation.

* Editor's note: there are two subdivisions designates as (o) in this section.

(2) Notwithstanding any other provision of law, the notice of violation shall direct that the correction of each violation cited therein shall be certified to the department. Such certification shall be made in writing or electronically, under oath by the registered owner, a registered officer or director of a corporate owner or by the registered managing agent. Such certification shall include a statement that the violation was corrected in compliance with section 27-2017.8, where applicable, and the rules established pursuant to section 27-2017.9, where applicable. All certifications shall be delivered to the department and acknowledgment of receipt therefore obtained or shall be mailed to the department by certified or registered mail, return receipt requested, no later than five days after the date set for correction, or submitted electronically within five days after the date set for correction, and shall include the date when each violation was corrected. Such certification of correction shall be supported by a sworn statement saying that the violation was properly corrected by the person who performed the work if performed by an employee or agent of the owner. Notification of such certification shall be mailed to the complainant by the department not more than twelve full calendar days from the date of receipt of such certification by the department. Failure to file such certification shall establish a prima facie case that such violation has not been corrected.

(3) Whenever the department shall issue a notice of violation to correct a condition that constitutes a hazardous or immediately hazardous violation of subdivision a of section 27-2017.3 the department shall conduct a final inspection to verify that the violation has been corrected. Where the department determines that the violation has not been corrected, the department may take such enforcement action as is necessary, including performing or arranging for the performance of the work to correct the violation.

(4) Notwithstanding any other provision of law, a person making a false certification of correction of a violation issued pursuant to article four of subchapter two of this chapter, in addition to any other civil penalty, shall be subject to a civil penalty of not less than two thousand dollars nor more than ten thousand dollars for each false certification made, recoverable by the department in a civil action brought in a court of competent jurisdiction. If the person making such false certification is an employee of the owner then such owner shall be responsible for such civil penalty. In addition, any such person making a false certification of correction shall be guilty of a misdemeanor punishable by a fine of up to one thousand dollars or imprisonment for up to one year or both.

(5) Notwithstanding any other provision of law, and in addition to any penalties applicable under article three of subchapter five of this chapter, a person who violates article four of subchapter two of this chapter by failing to correct such violation in accordance with the work practices in section 27-

2017.8 and in the rules established pursuant to section

- (i) That the condition which constitutes the violation did not exist at the time the violation was placed; or
- (ii) That he or she began to correct the condition which constitutes the violation promptly upon discovering it but that full correction could not be completed expeditiously because of serious technical difficulties, inability to obtain necessary materials, funds or labor;
- (iii) That he or she was unable to gain access to the dwelling unit wherein the violation exists, or such other portion of the building as might be necessary to make the repair, provided that a postponement was granted pursuant to this subdivision; or
- (iv) That he or she was unable to obtain a permit or license necessary to correct the violation, provided that diligent and prompt application was made therefore; or
- (v) That the violation giving rise to the action was caused by the act of negligence, neglect or abuse of another not in the employ or subject to the direction of the owner, except that the owner shall be precluded from showing in defense or mitigation of such owner's liability for civil penalties evidence of any acts occurring, undertaken, or performed by any predecessor in title prior to the owner taking control of the premises. Where the aforesaid allegations are made by way of mitigation of penalties, the owner shall show, by competent proof, pertinent financial data and efforts made to obtain necessary materials, funds or labor or to gain access, or to obtain a permit or license and such other evidence as the court may require. If the court finds that sufficient mitigating circumstances exist, it may remit all or part of any penalties arising from the violations, but may condition such remission upon a correction of the violation within a time period fixed by the court.

(6) Notwithstanding any other provision of law, failure by the department to comply with any time period provided in this section relating to responsibilities of the department shall not render null and void any notice of violation issued by the department or the department of health and mental hygiene pursuant to such article or section, and shall not provide a basis for defense or mitigation of an owner's liability for civil penalties for violation of such article

(Am. L.L. 2017/015, 2/15/2017, eff. 5/16/2017; Am. L.L. 2017/148, 8/30/2017, eff. 11/28/2017; Am. L.L. 2017/165, 8/30/2017, eff. 12/28/2017; Am. L.L. 2017/184, 10/8/2017, eff. 2/5/2018; Am. L.L. 2018/055, 1/19/2018, eff. 1/19/2019; Am. L.L. 2020/028, 2/11/2020, eff. 2/11/2021; Am. L.L. 2021/140, 11/21/2021, retro eff. 10/31/2021; Am. L.L. 2022/063, 6/1/2022, eff. 7/16/2022; Am. L.L. 2023/071, 6/11/2023, eff. 12/8/2023)

Editor's note: For related unconsolidated provisions, see Appendix A at L.L. 1999/038, L.L. 2004/001, L.L. 2007/029, L.L. 2011/065, L.L. 2014/047, L.L. 2014/065 and L.L. 2021/140.

9 NYCRR § 2204.3

N.Y. Comp. Codes R. & Regs. Tit. 9 § 2204.3 - Notices required in proceedings under § 2204.2

- (a) Except where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds stated in section 2204.2 of this Part, unless and until the landlord shall have given written notice to the tenant and to the Division of Housing and Community Renewal, Office of Rent Administration, Gertz Plaza, 92-31 Union Hall Street, Jamaica, New York 11433 as hereinafter provided.
- (b) Every such notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2204.2 of this Part upon which the landlord relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.
- (c) Within 48 hours after the notice is served upon the tenant, an exact copy thereof, together with an affidavit of service, shall be filed with the Division of Housing and Community Renewal, Office of Rent Administration, Gertz Plaza, 92-31 Union Hall Street, Jamaica, New York 11433. In computing such 48-hour period, any intervening Saturday, Sunday or legal holiday shall be excluded.
- (d) Every such notice shall be served upon the tenant within the period of time hereinafter set forth prior to the date specified therein for the surrender of possession, and prior to the commencement of any proceeding for removal or eviction:
- (1) Where the notice specifies one or more of the grounds stated in paragraphs (a)(2)-(4) of section 2204.2 of this Part as the basis for such removal or eviction, not less than 10 days, unless the tenant is a weekly tenant in which case the notice required shall not be less than two days.
 - (2) Where the notice specifies one or more of the grounds stated in paragraphs (a)(1), (5) and (6) of section 2204.2 of this Part as the basis for such removal or eviction, not less than one month, unless the tenant is a weekly tenant in which case the notice required shall not be less than seven days.

Notes

N.Y. Comp. Codes R. & Regs. Tit. 9 § 2204.3

Amended New York State Register November 8, 2023/Volume XLV, Issue 45, eff. 11/8/2023

9 NYCRR § 2524.2

N.Y. Comp. Codes R. & Regs. Tit. 9 § 2524.2 - Termination notices

(a) Except where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in section 2524.3 or 2524.4 of Part, unless and until the owner shall have given written notice to such tenant as hereinafter provided.

(b) Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.

(c) Every such notice shall be served upon the tenant:

(1) in the case of a notice based upon section 2524.3(f) of this Part, at least 15 days prior to the date specified therein for the surrender of possession; or

(2) in the case of a notice on any other ground pursuant to section 2524.3, at least seven calendar days prior to the date specified therein for the surrender of possession, or in the case of a notice pursuant to section 2524.4(c) of this Part, at least 90 and not more than 150 days prior to the expiration of the lease term; or

(3) in the case of a notice pursuant to sections 2524.4(a) and 2524.5(a) of this Part, at least 90 and not more than 150 days prior to the expiration of the lease term, or in the case of a hotel permanent tenant without a lease, at least 90 and not more than 150 days prior to the commencement of a court proceeding; or

(4) in the case of a notice pursuant to section 2524.4(b) of this Part, at least 120 and not more than 150 days prior to the expiration of the lease term, or within 120 days of the expiration of the tenant's lease term, provided no summary proceeding can be commenced until the expiration of 120 days from the service of such notice, accompanied by a form prescribed by the DHCR advising the tenant of the penalties set forth in section 2524.4(b) of this Part for failure to use the housing accommodation for the charitable or educational purposes for which recovery is sought.

(d) All notices served pursuant to subdivision (c) of this section shall be in lieu of any notice in any lease or rental agreement providing for a lesser time for termination of tenancy.

(e) All notices served pursuant to an application for demolition as set forth in section 2524.5 (a)(2) of this Part shall state:

(1) that the owner will not renew the tenant's lease because the owner has filed an application pursuant to section 2524.5(a)(2) for permission to recover possession of all of the housing accommodations in the building for the purpose of demolishing them, for which plans and financing have been obtained as stated in the application;

(2) that while the application is pending, the tenant may remain in occupancy;

(3) that the tenant shall not be required to vacate until DHCR has issued a final order approving the application and setting forth the time for vacating, stipends and other relocation conditions; and

(4) that the tenant must be offered a prospective renewal lease if the application is withdrawn or denied.

Notes: N.Y. Comp. Codes R. & Regs. Tit. 9 § 2524.2

Amended New York State Register November 8, 2023/Volume XLV, Issue 45, eff. 11/8/2023

New York State Building Code, Chapter 33 § 3303.10 – titled
“Operations in Occupied Buildings”

‡‡‡ Chapter 33 was amended by Local Law 77 of 2023. This law has an effective date of June 10, 2023

CHAPTER 33

SAFEGUARDS DURING CONSTRUCTION OR DEMOLITION

SECTION BC 3301 GENERAL

3301.1 Scope. The provisions of this chapter shall govern the conduct of all construction or demolition operations with regard to the safety of the public and property. For regulations relating to the safety of persons employed in construction or demolition operations, OSHA standards shall apply.

3301.1.1 Responsibility for safety. Nothing in this chapter shall be construed to relieve persons engaged in construction or demolition operations from complying with other applicable provisions of law, nor is it intended to alter or diminish any obligation otherwise imposed by law on any party engaged in a construction or demolition operation, including but not limited to the owner, construction manager, general contractor, sub contractors, material men, registered design professionals, or other party to engage in sound design and engineering, safe construction or demolition practices, including but not limited to debris removal, and to act in a reasonable and responsible manner to maintain a safe construction or demolition site.

3301.1.2 Fire code. In addition to the requirements of this chapter, construction or demolition operations shall also be conducted in conformance with the *New York City Fire Code*.

3301.1.3 Manufacturer specifications. See Section 3301.6.1.

3301.1.4 Sizes. All sizes and dimensions prescribed in this chapter are minimum requirements, unless otherwise specified. Lumber sizes are nominal or commercial except where stated otherwise.

3301.2 Safety measures and standards. Contractors, construction managers, and subcontractors engaged in construction or demolition operations shall institute and maintain all safety measures required by this chapter and provide all equipment or temporary construction installations necessary to safeguard the public and property affected by such contractor's operations.

3301.3 Site safety managers, coordinators and construction superintendents. A site safety manager or site safety coordinator must be designated and present at the construction or demolition of a major building in accordance with Section 3310. A construction superintendent is required for the construction or demolition of buildings as identified in Section 3301.13.3.

3301.4 Inspection. Structures, temporary construction installations, materials, operations, and equipment shall be inspected as required by this code, and records of such inspections shall be maintained as required by this code.

‡‡‡ **3301.4.1 Inspection of equipment where the code does not specifically require an inspection.** Where this code does not specifically require an inspection, any equipment, except hand tools, that would affect the safety of the public or property when operated shall be inspected by a competent person designated by the contractor using the equipment before the equipment is used at the site and on a periodic basis thereafter throughout the duration of the job. The results of the inspection shall be documented in an inspection checklist signed and dated by the competent person who performed the inspection.

‡‡‡ **3301.5 Unsafe conditions.** Any structure, temporary construction installation, material, operation, or equipment found to be defective or unsafe, and posing a risk to the public or property, shall be immediately secured and corrected, or removed from the site.

3301.6 Manufacturer specifications, design, and capacity. The permit holder, or where there is no permit holder, the contractor or other entity causing the work to be performed, shall ensure compliance with manufacturer specifications, design documents, and capacity restrictions in accordance with Sections 3301.6.1 through 3301.6.5 and other applicable

sections of the code. Where there is a discrepancy between a manufacturer specification, design document, capacity restriction, or other applicable code section, the more stringent requirement shall apply.

3301.6.1 Manufacturer specifications. During construction or demolition operations, structures, building systems or components, temporary construction installations, materials, and equipment shall be installed, removed, and utilized in accordance with the specifications of their manufacturer, where such specifications exist.

3301.6.2 Design requirements. Whenever design is required by this chapter, the design shall be in accordance with the requirements of this code. This requirement does not alleviate any other design requirements imposed by law or the manufacturer.

3301.6.3 Designer. Where design is required by this chapter, the design shall be executed by or under the supervision of a registered design professional, who shall cause his or her seal and signature to be affixed to such documents that may be required for the work

Exception: Where this chapter specifically indicates that the design may be executed by another individual.

3301.6.4 Capacity. No structure, building system or component, temporary construction installation, material, or equipment, including any partially or fully completed element or section, shall be utilized in excess of its capacity.

3301.6.5 Design documents. Whenever design is required by this chapter, the design shall be indicated in plans and specifications and other written, graphic and pictorial documents that are prepared or assembled for describing the design, location, physical characteristics, and other elements of the project. Design documents shall be complete and of sufficient clarity to indicate the location and entire nature and extent of the work proposed, and shall show in detail that the work conforms to the provisions of this code and other applicable laws and rules.

3301.7 Documents to be maintained on site. Where this chapter requires documents, including but not limited to construction documents, submittal documents, shop drawings, inspection reports, logs, checklists, meeting records, pre-construction surveys, designation letters, site safety plans, fire safety and evacuation plans, tenant protection plans, occupant protection plans, or monitoring plans, copies of such documents shall be maintained at the site for the duration of the job and made available to the commissioner upon request. Copies of required construction documents or other design drawings shall also be maintained by the permit holder and the designer. Copies of required inspection records, including but not limited to reports, logs, or checklists, shall also be maintained by the permit holder and the entity that performed the inspection. Copies of required plans shall also be maintained by the permit holder and the entity that developed the plan. Copies of all other documents required by this chapter shall also be maintained by the permit holder.

‡‡‡ **3301.7.1 Other obligations.** Where this chapter requires documents to be maintained by another specified entity, such documents shall be maintained by such specified entity.

3301.7.2 Manufacturer specifications. Where compliance with manufacturer specifications is required by this chapter, copies of such manufacturer specifications shall be available at the site and made available to the commissioner upon request. Manufacturer specifications that can be readily downloaded from the manufacturer's website or that are stored in an electronic format acceptable to the commissioner shall satisfy the requirements of this section. A serial number, make and model number, or other similar identification shall be maintained in a legible condition on the item for which the manufacturer specification is required such that the identification can be used to match the item to the manufacturer specification.

Exception: Where this chapter specifically requires that the manufacturer specifications for a specific item be physically maintained at the site, downloadable or electronically formatted manufacturer specifications will not satisfy the accessibility and availability requirements of this section.

3301.8 Incidents and damage to adjoining property. The department shall be notified immediately by the permit holder, or a duly authorized representative, of any incident at a construction or demolition site, or of any damage to adjoining property caused by construction or demolition activity at the site. Where required by Section 3301.13.11 or Section 3310.8.2.1, incidents or damage to adjoining property shall instead be reported by the construction superintendent or the site safety manager or coordinator.

3301.8.1 Additional notifications. Nothing in this section shall diminish or relieve other notification requirements imposed by this chapter, including but not limited to, notifications by the site safety manager, site safety coordinator, concrete safety manager, or hoisting machine operator.

SAFEGUARDS DURING CONSTRUCTION OR DEMOLITION

location immediately adjacent to the fire department connections. This line shall be fitted with a 2.5-inch (64 mm) hose valve and shall allow for release of the pressurized air from the dry standpipe system. The number of air release valves provided shall be such that the air pressure shall be released in no more than 3 minutes, which shall be verifiable by an actual air release test performed at the time of the initial installation.

- 4.11. Construction documents. Plans shall identify all standpipe risers, cross connections, fire department connections, any intermediate check valves that have to be removed, proposed location of the air release connections, designation of the supervisory pressure, complete information regarding the alarm system, and procedures for the safe pressurization and depressurization of the system.
 - 4.12. Signage. Signage shall be provided at all fire department connections indicating that the dry standpipe system is pressurized and showing the location of the manual air release.
 - 4.13. Pressure gauges. A system of pressure gauges shall be installed at the compressor and at the most remote points of the system from the compressor.
5. Planned removal from service of standpipe system and standpipe air pressurized alarm. Whenever the standpipe system is to be placed out of service for the addition of a new section to the system, removal of an existing section as demolition operations progress, or other planned event, the standpipe alarm may be temporarily deactivated subject to compliance with the requirements of the *New York City Fire Code*. Where a site safety manager or coordinator is required by this code, all alarm activations, inspections, and repairs shall be logged into the log book maintained by such site safety manager or coordinator. If the standpipe system is not returned to a state of readiness and the alarm reactivated within 2 hours of such planned removal from service, all construction or demolition work at the site shall cease, unless otherwise approved by the Fire Department.

3303.8.2 Free from obstruction. Fire department hose connections shall be kept free from obstruction and shall be marked by a metal sign reading, "Standpipe Connection" and by a red light at night.

3303.8.3 Use of standpipes for purposes other than supplying water for firefighting. Standpipes may be used for a purpose other than to supply water for firefighting operations, including but not limited to supplying water or compressed air for construction or demolition operations, subject to the approval of the Fire Department and provided at least one standpipe riser is maintained at all times for firefighting operations. Where the standpipe is used to supply water for construction or demolition operations and freezing conditions may occur, the standpipe shall be completely drained after use to prevent freezing.

3303.9 Elements to be maintained in existing buildings. Required means of egress, existing structural elements, fire protection devices, and sanitary safeguards shall be maintained at all times during construction or demolition operations in existing buildings. Required means of egress shall not be obstructed in any manner that would destroy the full effectiveness of such means of egress.

Exception: Where adequate alternate provisions are provided in accordance with the requirements of this code, or where the element is temporarily or permanently disconnected, removed, or demolished in accordance with the requirements of this code and of the agency or authority having jurisdiction to temporarily or permanently disconnect, remove, or demolish such element. Such alternative means, disconnection, removal, or demolition shall be shown on the approved plans. Fire protection systems, including but not limited to sprinklers, standpipes, and fire alarms, shall only be taken out of service in accordance with the requirements of the *New York City Fire Code*.

3303.10 Operations in occupied buildings. When construction or demolition activity occurs in an occupied building, barricades, signs, drop cloths, and other protective means shall be installed and maintained as necessary to provide reasonable protection for the occupants against hazard and nuisance. Such protective means shall be indicated on an occupant protection plan, or where a tenant protection plan is required by Section 3303.10.1, on a tenant protection plan.

3303.10.1 Tenant protection plan. In buildings containing any occupied dwelling units, including newly constructed buildings that are partially occupied where work is still ongoing within the building, all alteration, construction, or partial demolition work shall be performed in accordance with a tenant protection plan as required by Article 120 of Title 28 of the *Administrative Code*.

Real Property Actions and Proceedings Law (RPAPL) § 768

New York Consolidated Laws, Real Property Actions and Proceedings Law - RPA § 768. Unlawful eviction

1. (a) It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:

(i) using or threatening the use of force to induce the occupant to vacate the dwelling unit; or

(ii) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or

(iii) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable, or changing the lock on such entrance door without supplying the occupant with a key.

2. Criminal and civil penalties. (a) Any person who intentionally violates or assists in the violation of any of the provisions of this section shall be guilty of a class A misdemeanor. Each such violation shall be a separate and distinct offense.

(b) Such person shall also be subject to a civil penalty of not less than one thousand nor more than ten thousand dollars for each violation. Each such violation shall be a separate and distinct offense. In the case of a failure to take all reasonable and necessary action to restore an occupant pursuant to paragraph (b) of subdivision one of this section, such person shall be subject to an additional civil penalty of not more than one hundred dollars per day from the date on which restoration to occupancy is requested until the date on which restoration occurs, provided, however, that such period shall not exceed six months.

New York Consolidated Laws, Real Property Actions and Proceedings Law - RPA § 768.
Unlawful eviction - *last updated January 01, 2024*

1 RCNY § 101-14 (III) Interior Partitions – building components or systems

1 RCNY §101-14

CHAPTER 100

Subchapter A Administration

§101-14 Categories of work that may or may not require a permit.

(a) **Scope.** This rule establishes categories of work that may be classified as a minor alteration or ordinary repair and therefore may be exempt from the permit requirements of the New York city construction codes.

(b) **References.** See Administrative Code sections 28-105.1, 28-105.4, item 6 and 28-105.4.2.1.

(c) **Compliance with code and other laws.** Any exemptions outlined by this rule will not grant authorization for any work to be done in a manner that violates the provisions of this code, the New York City Energy Conservation Code, the Zoning Resolution or any other laws, rules, or regulations. Such exemptions shall not eliminate the obligation of any owner to file at other City agencies, when appropriate, including but not limited to the Landmarks Preservation Commission, the City Planning Commission, Department of Transportation, Department of Environmental Protection, Department of Environmental Conservation, or the Fire Department, nor shall it eliminate the obligation of any owner to file at the Department of Buildings for any related work, such as, for example, associated sidewalk protection, structural work, electrical connections, or plumbing connections.

(d) **Categories of work that may be exempt from permit requirements.** In addition to the categories of work exempted from the permit requirements of Section 28-105.1 pursuant to 28-105.4, items 1 through 5, the following categories of work may be considered minor alterations or ordinary repairs that may be exempt from permit requirements. The tables below list the types of minor alterations and ordinary repairs that are exempt from permit requirements and those that require a permit. The categories shown in Tables 1-3 below are not an exclusive list of all types of minor alterations or ordinary repairs that may be exempt from permit requirements.

**Table 1
Work Exempt from Permit in One- and Two-family Dwellings**

Building component or system (accessory to one- and two-family dwellings)	Permit required?
1. Sheds. Temporary portable freestanding sheds erected on the same zoning lot as, and accessory to, a one- or two-family dwelling, provided that all of the following requirements are met: (1) The shed shall not exceed 120 square feet in area and shall not be more than 7'6" in height; and (2) The shed shall not obstruct any required window; and (3) The shed shall not be located within 3 feet (915 mm) of any lot line; and (4) The shed shall be used for storage of normal household goods, tools, or similar items; and (5) There shall not be more than one such shed on any tax lot.	NO
2. Fences. Fences 6 feet (1829 mm) or less in height, as measured from the higher of the two adjoining grades, in connection with one- and two-family dwellings.	NO
3. Small swimming pools. Outdoor in-ground or above-ground pools accessory to a one- or two-family dwelling limited to 400 square feet in area, provided that the distance from the edge of an in-ground pool to any building or lot line is greater than the depth of the deepest portion of the pool, and: (1) there is an existing sump sink for indirect waste; or (2) a plumbing permit is obtained for the installation of such sink.	NO
4. Playground equipment. Playground equipment accessory to a one- or two-family dwelling.	NO
5. Packaged air-conditioning unit in existing buildings. Packaged air-conditioning unit not exceeding 5 tons rated capacity, installed in an existing building, including installations in existing windows or in existing sleeves under windows, and that is not part of an alteration that otherwise requires a permit.	NO

Table 2
Work that may be Exempt from Permit in All Buildings

	Building component or system (all buildings)	Permit required?
I. Exterior structures	1. Retaining walls. Retaining walls less than 4 feet (1219 mm) in height, measured from the top of the footing to the top of the wall, and the wall: (1) does not support a surcharge; or (2) does not impound Class I, II or III-A liquids, as defined by section 307.2 of the New York City Building Code.	NO
	2. Nursery or agricultural shade cloth structures. Shade cloth structures constructed solely for nursery or agricultural purposes, and not covering mechanical equipment, plumbing fixtures or automobiles.	NO

II. Service equipment	1. Air conditioning and ventilating systems. Air conditioning and ventilating system installed as a voluntary system, serving only one floor of a building, and that: (1) does not use lot line openings for the intake or exhaust of air or the mounting of equipment; and (2) is not installed in any public hallway, passageway, or stairway; and (3) does not in any way reduce the ventilation of any room or space below that required by code provisions; and (4) does not penetrate any fire division, roof, floor, or wall.	NO
	2. Packaged air-conditioning unit. Packaged air-conditioning unit not exceeding 3 tons rated capacity, installed in an existing building, including installations in existing windows or in existing sleeves under windows, and that is not part of an alteration that otherwise requires a permit.	NO
	3. Fuel-burning and fuel-oil storage. Portable fuel-burning equipment that does not require a chimney or vent connection.	NO
	4. Fuel-burning and fuel-oil storage during construction. Portable heaters, having a fuel-storage capacity of 6 gallons or less, used in construction work.	NO
	5. Fuel-burning and fuel-oil storage. Oil-fired heaters, other than internal combustion engines, having a fuel-storage capacity of 6 gallons or less.	NO
	6. Refrigerating systems. Refrigerating systems twenty-five tons or less in capacity and using a Group A1 refrigerant.	NO
	7. Refrigerating systems. Refrigerating systems installed in a vehicle, railroad car, or vessel.	NO
	8. Refrigerating systems. Refrigerating systems that use water or air as the refrigerant.	NO
	9. Temporary boilers. Temporary boilers, whether placed on private property or on the street (related electrical and plumbing connections also require separate permits).	YES

	Building component or system (all buildings)	Permit required?
III. Interior partitions	<p>1. Non-fire-rated and non-load-bearing wall, temporary removal. Where the cutting away and temporary removal of any portion of a non-load-bearing, non-fire rated partition is limited to the lesser of 50% of a given wall or 45 square feet in area, and where at the completion of work the partition is restored to its original condition.</p>	NO
	<p>2. Non-fire-rated and non-load-bearing wall, permanent removal in Group R occupancies. In Group R occupancies, where the cutting away and permanent removal of any portion of a non-load-bearing, non-fire-rated partition is limited to the lesser of 50% of a given wall surface or 45 square feet in area.</p> <p><i>Exception:</i> a permit shall be required where the cutting away and permanent removal of any size occurs in a dwelling unit satisfying either of the following conditions:</p> <p>i. The dwelling unit is located in any of the following areas**:</p> <p>a. Special Hudson Yards District b. Preservation Area P-2 of the Special Garment Center District c. Special Clinton District d. Special West Chelsea District e. Greenpoint-Williamsburg anti-harassment areas in Community District 1, Borough of Brooklyn; and</p> <p>ii. the dwelling unit is within a single room occupancy multiple dwelling**</p> <p>** The permanent removal of a portion of the partition resulting in a change in the layout of rooms within a dwelling unit shall constitute a "material alteration" in accordance with Zoning Resolution sections 93-90 and 96-01. Any "material alteration" to a dwelling unit located within the "anti-harassment areas" as provided for in Zoning Resolution Sections 23-013, 93-90, 96-01, and 98-70 shall constitute an alteration in accordance with the Building Code and, therefore, require a building permit.</p> <p>** Such work shall be considered an alteration and therefore require a building permit and, where applicable, a Certificate of No Harassment in accordance with section 28-107.4 of the Administrative Code.</p>	NO
	<p>3. Non-fire-rated and non-load-bearing wall, permanent removal in Groups B, M, and S-1 occupancies. In Groups B, M, and S-1 occupancies, where the cutting away and permanent removal of a non-load-bearing, non-fire-rated partition is limited to 50 linear feet in buildings of Type I or II construction (Class I construction in buildings subject to the 1968 Building Code).</p>	NO

IV. Roofs	<p>1. Roof repair and reroofing above the deck/sheathing. Roof repair or replacement, limited to the roof membrane, roof coverings, cant strip, and any insulation above the roof deck/sheathing, provided that the New York City Energy Conservation Code does not require additional thermal insulation for the roof.</p>	NO
	<p>2. Roof repair and reroofing, including the deck/sheathing. Roof repair or replacement that includes replacement of roof deck/sheathing.</p>	YES
	<p>3. Green roofs not more than 4 inches in depth. Green roof systems, not more than 4 inches in depth measured from the upper surface of the roof covering to the top of the growth medium, located on buildings of noncombustible construction or buildings greater than 100 feet in height.</p>	NO

128 Hester LLC v. State Division of Housing & Community Renewal,
146 A.D.3d 706 (1st Dep't, 2017)

Matter of 128 Hester LLC v New York State Div. of Hous. & Community Renewal, 146 A.D.3d 706

Copy Citation

Supreme Court of New York, Appellate Division, First Department

January 31, 2017, Decided ; January 31, 2017, Entered

2684, 101754/13

Reporter

146 A.D.3d 706 * | [46 N.Y.S.3d 85 **](#) | [2017 N.Y. App. Div. LEXIS 583 ***](#) | [2017 NY Slip Op 00581 ****](#)

[**1]** In the Matter of 128 Hester LLC, Appellant, v New York State Division of Housing & Community Renewal et al., Respondents.

Subsequent History: Leave to appeal dismissed by, in part, Leave to appeal denied by, in part [128 Hester LLC v N.Y. State Div. of Hous. & Community Renewal, 30 NY3d 988, 2017 N.Y. LEXIS 3174, 66 NYS3d 215, 88 NE3d 373 \(N.Y., Oct. 24, 2017\)](#)

Core Terms

deteriorate, demolition, stipends, leaning, relocation costs, State Administrative Procedure Act, precarious, adjacent, landlord, surrepley, repair, hotel, plumb, steps

▼ Headnotes/Summary

Headnotes

Landlord and Tenant—Covenant to Repair—Building Deterioration Accelerated by Work on Adjacent Building—Failure of Landlord to Take Reasonable Steps to Protect Building

Counsel: **[***1]** [Klein Slowik PLLC](#), New York (Daniel J. Schneider of counsel), for appellant.

[Mark F. Palomino](#), New York ([Robert Ambaras](#) of counsel), for New York State Division of Housing and Community Renewal, respondent.

[John D. Gorman](#), New York, for [Hun Sui Chu](#), Kok Hong The, Eng Kam Li, Wang Ai Yu, Ji De Yang, Jian Qing Han, Alice Jean, John Jean, Duan Liang Chen and Chai Oi Hoy, respondents.

Judges: Concur—[Richter](#), J.P., [Andrias](#), [Saxe](#), [Gesmer](#), JJ.

Opinion

[*707] **[**86]** Order and judgment (one paper) of Supreme Court, New York County (Carol E. Huff, J.), entered April 7, 2015, which granted respondent New York State Division of Housing and Community Renewal's (DHCR) motion for leave

to file a surreply, denied the petition to annul DHCR's determination, dated October 17, 2013, denying the petitions for administrative review and directing petitioner to pay respondents tenants demolition stipends and relocation costs in consequence of the demolition of the subject building, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The article 78 court providently exercised its discretion in granting DHCR leave to file a surreply to rebut averrals in petitioner's pleadings (see [Pena-Vazquez v Beharry](#), 82 AD3d 649, 649, 919 NYS2d 336 [1st Dept 2011]).

Petitioner was afforded due process [***2] at the various stages of this proceeding (see [Matter of Beck-Nichols v Bianco](#), 20 NY3d 540, 559, [**87] 987 NE2d 233, 964 NYS2d 456 [2013]; [Matter of Daxor Corp. v State of N.Y. Dept. of Health](#), 90 NY2d 89, 681 NE2d 356, 659 NYS2d 189 [1997], cert denied 523 US 1074, 118 S Ct 1516, 140 L Ed 2d 669 [1998]).

The agency determination has a rational basis in the record (see [Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal](#), 46 AD3d 425, 428, 849 NYS2d 43 [1st Dept 2007], affd 11 NY3d 859, 901 NE2d 740, 873 NYS2d 247 [2008]). The record shows that, by the time petitioner purchased the building in August 2007, it was already in extremely poor physical condition, settling unevenly into its foundation and leaning six inches out of plumb, its internal steel support columns also leaning precariously, and wooden floor joists rotten and damaged by termites. Although petitioner undertook emergency shoring work, allegedly spending \$100,000, the building continued to deteriorate and lean farther out of plumb, its demise hastened by vibrations from construction work on an 18-story hotel on an adjacent lot. Petitioner took no action for two years, until the building had deteriorated beyond repair, despite last-ditch efforts ordered by the Department of Buildings (DOB) in the summer of 2009.

Petitioner cannot escape responsibility for the building's precarious condition when acquired, since the condition was documented in outstanding DOB violations, and "the need to make . . . repairs could have been anticipated" before the purchase ([Eyedent v Vickers Mgt.](#), 150 AD2d 202, 205, 541 NYS2d 210 [1st Dept 1989]). Similarly, to the extent the [***3] deterioration was accelerated by work on the adjacent hotel project, it was incumbent [*708] upon petitioner, as landlord, to take steps to ameliorate it, including through stop work orders. As landlord, petitioner was obligated to take reasonable steps to protect the building from the effects of the work next door, regardless of whether there was any overlap in ownership interests in the two properties (see [Park W. Mgt. Corp. v Mitchell](#), 47 NY2d 316, 327, 391 NE2d 1288, 418 NYS2d 310 [1979], cert denied 444 US 992, 100 S Ct 523, 62 L Ed 2d 421 [1979]). DHCR thus [****2] rationally concluded that petitioner "allow[ed] the building to deteriorate to the point where it would fall down" ([Eyedent](#), 150 AD2d at 204 [internal quotation marks omitted]), warranting the award of demolition stipends and relocation costs (see 9 NYCRR 2524.5 [a] [2] [iii] [a], [b] [3]).

DHCR Operational Bulletin 2009-1 is not a "rule" for purposes of the State Administrative Procedure Act (State Administrative Procedure Act § 102 [2] [a] [i]; [b] [iv]), but merely develops the parameters for calculation of the demolition stipend, as expressly provided for in the Rent Stabilization Code (see 9 NYCRR 2524.5 [a] [2] [iii] [a], [b] [3]; 2527.11).

We have considered petitioner's remaining contentions and find them unavailing. Concur—Richter, J.P., [Andrias Saxe](#) and [Gesmer](#), JJ.

235 Hotel LLC v. HPD, A.D.2d 587 (1st Dep't, 2003)



Neutral

As of: October 24, 2025 3:38 PM Z

235 Hotel LLC v. Dep't of Hous. Pres. & Dev.

Supreme Court of New York, Appellate Division, First Department

October 14, 2003, Decided ; October 14, 2003, Entered

1642

Reporter

309 A.D.2d 587 *; 765 N.Y.S.2d 360 **; 2003 N.Y. App. Div. LEXIS 10566 ***

In the Matter of 235 Hotel LLC, Respondent, v. Department of Housing Preservation and Development of the City of New York, Appellant.

Prior History: [235 Hotel LLC v. Dep't of Hous. Pres. & Dev., 2003 N.Y. App. Div. LEXIS 3032 \(N.Y. App. Div. 1st Dep't, Mar. 18, 2003\)](#)

Core Terms

substantial evidence, harassment, tenant, application for a certificate, de novo review, transferred

Case Summary

Procedural Posture

Appellant Department of Housing Preservation and Development of the City of New York appealed the order and judgment of the Supreme Court, New York County (New York), granting the Department's motion to reargue appellee applicant's N.Y. C.P.L.R. art. 78 application to annul the determination that denied the application for a certificate of no harassment, and upon reargument, adhered to judgment setting aside the Department's determination.

Overview

Because the petition raised an issue as to whether the challenged determination of the Department, that denied the application of the applicant for a certificate of no harassment, was supported by substantial evidence, the matter should have been transferred to the appellate court pursuant to [N.Y. C.P.L.R. 7804\(g\)](#). The appellate court found that the Department's determination was supported by substantial evidence and should not have been disturbed. The witnesses testified as to the deplorable physical condition of their individual living areas and the common bathrooms and kitchens. This constituted substantial evidence that the applicant either

discontinued or interrupted essential services constituting harassment under New York City, N.Y., *Admin. Code* § 27-2093. Testimony regarding the conduct of the building's owners toward a particular tenant constituted substantial evidence of acts of intimidation and harassment designed to coerce the tenant to move out of the premises in violation of New York City, N.Y., *Admin. Code* § 27-2093(a)(4).

Outcome

The order and judgment were unanimously reversed, the petition was treated as one transferred to the appellate court for de novo review. Upon such review, the Department's determination was reinstated and confirmed, the petition was denied, and the proceeding was dismissed.

Counsel: For Petitioner-Respondent: Richard A. Kaplan.

For Respondent-Appellant: John Hogrogian.

Judges: Concur--Saxe, J.P., Rosenberger, Williams, Lerner, JJ.

Opinion

[*587] [**360] Order and judgment (one paper), Supreme Court, New York County (William Wetzel, J.), entered April 23, 2002, which granted respondent's motion to reargue petitioner's [CPLR article 78](#) application to annul respondent's determination, dated May 3, 2000, which denied petitioner's application [**361] for a certificate of no harassment, and upon reargument, adhered to judgment, same court and Justice, entered on or about January 31, 2002, which set aside respondent's determination, unanimously reversed, on the law, without costs, the petition treated as one transferred to this Court for de novo review, and upon such review, respondent's determination reinstated and confirmed, the petition

denied and the proceeding dismissed.

Inasmuch as the petition raised an issue as to whether the challenged determination of respondent, which denied petitioner's application for a certificate of no harassment, was supported by substantial evidence, the IAS [***2] court should have transferred the proceeding to this Court pursuant to CPLR 7804 (g) (see Matter Featherstone v Franco, 269 A.D.2d 109, 110, 703 N.Y.S.2d 11 [2000], *affd* 95 N.Y.2d 550, 742 N.E.2d 607, 720 N.Y.S.2d 93 [2000]; Matter of McMillian v Kerik, 306 A.D.2d 17, 761 N.Y.S.2d 166 [2003]).

Upon our de novo review of the record, we find that the [*588] determination of the respondent is supported by substantial evidence and should not be disturbed (see Matter Schaefer v Safir, 281 A.D.2d 163, 721 N.Y.S.2d 231 [2001]; see also Lindemann v American Horse Shows Assn., 222 A.D.2d 248, 250, 634 N.Y.S.2d 697 [1995]). The testimony of the tenant witnesses as to the deplorable physical condition of their individual living areas and the common bathrooms and kitchens was substantial evidence that the petitioner either discontinued or interrupted essential services constituting harassment under section 27-2093 of the Administrative Code of the City of New York. Similarly, testimony regarding the conduct of the building's owners toward a particular tenant constituted substantial evidence of acts of intimidation and [***3] harassment designed to coerce this tenant into moving out of the subject premises in violation of section 27-2093 (a) (4) of the Administrative Code of the City of New York.

Concur--Saxe, J.P., Rosenberger, Williams and Lerner, JJ.

Ascot Realty, LLC v. Richstone, 10 A.D.3d 513 (1st Dep't, 2004)



Neutral

As of: October 24, 2025 3:42 PM Z

Ascot Realty, LLC v. Richstone

Supreme Court of New York, Appellate Division, First Department

September 9, 2004, Decided ; September 9, 2004, Entered

4014

Reporter

10 A.D.3d 513 *; 781 N.Y.S.2d 513 **; 2004 N.Y. App. Div. LEXIS 10525 ***

Ascot Realty LLC, Respondent, v. Geoffrey Richstone, Appellant.

Subsequent History: [***1]

Reargument denied by [Ascot Realty, LLC v. Richstone, 2005 N.Y. App. Div. LEXIS 121 \(N.Y. App. Div. 1st Dep't, Jan. 4, 2005\)](#)

Appeal dismissed by [Ascot Realty LLC v. Richstone, 4 N.Y.3d 842, 830 N.E.2d 311, 797 N.Y.S.2d 413, 2005 N.Y. LEXIS 799 \(2005\)](#)

Prior History: [Ascot Realty v. Richstone, 2003 N.Y. Misc. LEXIS 1133 \(N.Y. App. Term, Aug. 20, 2003\)](#)

Core Terms

apartment, refurbishment, termination, notice, tenant, primary residence

Case Summary

Procedural Posture

Respondent tenant sought review of an order from the Appellate Term of the Supreme Court, First Department (New York), which upheld an order awarding judgment to petitioner landlord in a non-primary residence summary proceeding.

Overview

The landlord brought a non-primary residence summary proceeding against the tenant. The lower court upheld an order granting possession of the apartment to the landlord. On appeal, the court found that it was undisputed that the apartment was the tenant's primary residence for more than 30 years before he moved into his friend's apartment while his apartment was being fully refurbished. The fact that such refurbishment took a year-and-a-half rather than the original estimate of three

months; that the tenant preferred to sleep in his friend's apartment rather than in his own cluttered, dirty, and undecorated apartment; and that he seemed to be in no hurry to finish the redecoration of his apartment while the eviction proceeding was pending, was insufficient to establish that, at the time the notice of termination was served, the subject apartment was not the tenant's primary residence.

Outcome

The court reversed the order awarding judgment to the landlord and dismissed the petition.

Headnotes/Summary

Headnotes

Landlord and Tenant--Rent Regulation--Primary Residence.--Since rent controlled apartment was tenant's primary residence for more than 30 years before he moved into his friend's apartment while it was being fully refurbished, circumstances, including fact that refurbishment took year and half rather than original estimate of three months, that tenant preferred to sleep in his friend's apartment rather than in his own apartment; and that he seemed to be in no hurry to finish redecoration of his apartment while this eviction proceeding was pending, was insufficient to establish that apartment was not tenant's primary residence.

Counsel: Law Firm of Candace C. Carponter, P.C., New York (Candace C. Carponter of counsel), for appellant.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for respondent.

Judges: Concur--Tom, J.P., Andrias, Williams, Marlow, Gonzalez, JJ.

Opinion

[*513] [****514**] Order of the Appellate Term of the Supreme Court, First Department, entered August 21, 2003, which affirmed a judgment of the Civil Court, New York County (Jean T. Schneider, J.), entered May 10, 2001, after a nonjury trial, granting possession to petitioner landlord in this nonprimary residence summary proceeding, unanimously reversed, on the law, without costs, the judgment of the Civil Court vacated and the petition dismissed.

Despite the absence of any objection to testimony that the tenant continued staying in his friend's apartment subsequent to service of the notice of termination, such testimony was irrelevant to the issue of whether at the time petitioner served the notice of termination, respondent tenant continued to maintain a substantial physical nexus to the premises. The trial court found the tenant's [*****2**] explanation of the reasons for his two-year absence from his rent controlled apartment incredible. However, it is undisputed that the apartment was the tenant's primary residence for more than 30 years before he moved into his friend's apartment while his apartment was being fully refurbished. The fact that such refurbishment took a year and a half rather than the original estimate of three months; that the tenant preferred to sleep in his friend's apartment rather than in his own cluttered, dirty and undecorated apartment; and that he seemed to be in no hurry to finish the redecoration of his apartment while this eviction proceeding was pending, is insufficient [***514**] to establish that, at the time the notice of termination was served, on May 11, 2000, in the midst of the refurbishment, the subject apartment was not the tenant's primary residence. Were we to reach the issue, we would find the Civil Court's determination to the contrary to be against the weight of the evidence. Concur--Tom, J.P., Andrias, Williams, Marlow and Gonzalez, JJ. [See [2003 NY Slip Op 51244\(U\)](#), [2003 N.Y. Misc. LEXIS 1133](#).]

Dominguez v. Vanamerongen, 56 A.D.3d 667 (2nd Dep't, 2008)

Matter of Dominguez v. Vanamerongen

Supreme Court of New York, Appellate Division, Second Department

November 18, 2008, Decided

2007-08950

Reporter

56 A.D.3d 667 *; 868 N.Y.S.2d 236 **; 2008 N.Y. App. Div. LEXIS 8786 ***; 2008 NY Slip Op 9076 ****

[****1] In the Matter of Joe Dominguez, Appellant, v Deborah Vanamerongen et al., Respondents. (Index No. 12201/07)

Core Terms

landlord, arbitrary and capricious, review a determination, administrative agency, administrative review, rational basis, inter alia, substitution, receptacles, garbage, tenant

Headnotes/Summary

Headnotes

Landlord and Tenant--Rent Regulation--Maintenance of Services.--Determination that petitioner and other tenants had sustained improper substitution related to "required service" as defined by Rent Stabilization Law of 1969 (*Administrative Code of City of NY § 26-514*) when landlord moved garbage receptacles into basement of building from outside front of building was rational, and was not arbitrary and capricious.

Counsel: [***1] Joe Dominguez, Brooklyn, N.Y., appellant, Pro se.

Gary R. Connor, New York, N.Y. (Caroline M. Sullivan of counsel), for respondent New York State Division of Housing and Community Renewal.

Judges: FRED T. SANTUCCI, J.P., JOSEPH COVELLO, JOHN M. LEVENTHAL, ARIEL E. BELEN, JJ. SANTUCCI, J.P., COVELLO, LEVENTHAL and BELEN, JJ., concur.

Opinion

[**237] [*667] In a proceeding pursuant to *CPLR article 78* to review a determination of the Deputy Commissioner of the New York State Division of Housing and Community Renewal dated March 15, 2007, which, inter alia, denied the tenant's petition for administrative review of an order of the District Rent Administrator dated October 16, 2006, finding that the landlord had not provided an adequate substitute for a required service, the petitioner tenant appeals from a judgment of the Supreme Court, Kings County (Dabiri, J.), dated September 10, 2007, which denied the petition and dismissed the proceeding seeking, inter alia, an increase in penalties against the landlord.

Ordered that the judgment is affirmed, with costs.

The principal issue determined by the New York State Division of Housing and Community Renewal (hereinafter the DHCR) was whether the petitioner and [***2] other tenants at 409 7th Avenue in Brooklyn had sustained an improper substitution related to a "required service" as defined by the Rent Stabilization Law of 1969 (*Administrative Code of City of NY § 26-514; Matter of Hyde Park Gardens v State of N.Y., Div. of Hous. & Community Renewal, Off. of Rent Admin., 140 AD2d 351, 527 NYS2d 841 [1988], affd 73 NY2d 998, 539 NE2d 101, 541 NYS2d 345 [1989]*). Specifically, the issue determined by the [**238] DHCR was whether there had been an improper substitution since the landlord had moved the garbage receptacles into the basement of the building from [****2] the outside front of the building. "The question of what constitutes a required service presents a factual issue which is to be determined by the . . . administrative agency" (*Matter of Hyde Park Gardens v State of N.Y., Div. of Hous. and Community Renewal, Off. of Rent Admin., 140 AD2d 351, 352, 527 NYS2d 841 [1988], affd 3 NY2d 998, 539 NE2d 101, 541 NYS2d 345 [1989]*, quoting *Fresh Meadows Assoc. v Conciliation & Appeals Bd., 88 Misc 2d 1003, 1004, 390 NYS2d 351 [1976], affd 55 AD2d 559, 390 NYS2d 69 [1976], affd 42 NY2d 925, 366*

56 A.D.3d 667, *667; 868 N.Y.S.2d 236, **238; 2008 N.Y. App. Div. LEXIS 8786, ***2; 2008 NY Slip Op 9076, ****2.

NE2d 1361, 397 NYS2d 1007 [1977]). The DHCR found that the service provided [*668] was not adequate. The Deputy Commissioner, in denying administrative review, determined that the DHCR's finding was proper and that the doctrines of res judicata and collateral estoppel were [***3] not applicable since a prior proceeding in the 1990s before the DHCR relating to the landlord's elimination of garbage receptacles differed from the instant proceeding before the DHCR.

In reviewing a determination made by an administrative agency such as the DHCR, the court's inquiry is limited to whether the determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in law (see CPLR 7803 [3]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231, 313 NE2d 321, 356 NYS2d 833 [1974]; Matter of ATM One, LLC v New York State Div. of Hous. & Community Renewal, 37 AD3d 714, 714, 831 NYS2d 436 [2007]). "An agency's interpretation of the statutes and regulations that it administers is entitled to deference, and must be upheld if reasonable" (Matter of ATM One, LLC v New York State Div. of Hous. & Community Renewal, 37 AD3d at 714).

The Deputy Commissioner's determination could be annulled only if it lacked a rational basis, or was arbitrary and capricious (see Matter of Gilman v New York State Div. of Hous. & Community Renewal, 99 NY2d 144, 149, 782 NE2d 1137, 753 NYS2d 1 [2002]; CPLR 7803 [3]). Here, the Deputy Commissioner's determination was rational, [***4] and was not arbitrary and capricious. Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding. Santucci, J.P., Covello, Leventhal and Belen, JJ., concur.

Haberman v. Singer, 3 A.D.3d 188 (1st Dep't, 2004)



Positive

As of: September 16, 2025 2:39 PM Z

Haberman v. Singer

Supreme Court of New York, Appellate Division, First Department

February 5, 2004, Decided ; February 5, 2004, Entered

2262

Reporter

3 A.D.3d 188 *; 771 N.Y.S.2d 505 **; 2004 N.Y. App. Div. LEXIS 1100 ***

Simon Haberman, Doing Business as Orwell Management Co., Appellant, v. David S. Singer et al., Respondents. 251 CPW Housing LLC, Appellant, v. David S. Singer et al., Respondents.

Prior History: [***1] Appeal from an order of the Supreme Court, New York County (Louise Gruner Gans, J.), entered July 12, 2002. The order, insofar as appealed from, granted defendant tenant's motion for summary judgment dismissing the complaints in both actions seeking recovery for use and occupancy of the demised premises.

[Haberman v. Singer, 2002 N.Y. Misc. LEXIS 2034 \(N.Y. Sup. Ct., July 8, 2002\)](#)

Core Terms

rent, landlord, tenant, lease, eviction, renewal, checks, security deposit, occupancy

Case Summary

Procedural Posture

Plaintiff landlord appealed the order of the Supreme Court, New York County (New York), granting defendant tenant's motion for summary judgment seeking dismissal of landlord's action in equity that sought damages, on a theory of unjust enrichment, in the amount of the full value of the tenant's use and occupancy of the apartment for the period of 1983 through 1996.

Overview

The tenant and landlord's lease commenced on September 1, 1982, at a monthly rent of \$ 2,200. In June 1983, the conciliation and appeals board declared the base rent to be \$ 854. This rate was retroactive to the beginning of the lease. Furthermore, the board

ordered the landlord to offer to renew the tenant's lease for two years. The landlord refused to refund the tenant's overpayment of rent. The landlord failed to offer the tenant a new lease. Instead, the landlord rejected the checks tendered by the tenant for payment of rent and filed actions against the tenant seeking rent arrears and to evict the tenant. The landlord filed actions in 1998 and 2000 seeking, in part, equitable relief in the form of payment of the tenant's rent from 1983 through 1996. The trial court properly refused to grant the landlord equitable relief in the 1998 and 2000 actions. The landlord refused to accept the tenant's checks for the legal regulated rent. He refused to offer the tenant a renewal lease until 13 years after he was ordered to do so. Simple compliance with the law presumably would have resulted in his receipt of the legal regulated rent for the duration of the tenancy.

Outcome

The order was affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Residential Leases

[HN1](#) [↓] **Defenses, Demurrers & Objections, Affirmative Defenses**

There may be instances in which a landlord would purposefully delay many months in instituting a proceeding for nonpayment hoping to terminate the tenancy by eviction where the tenant is unable to pay large arrears in rent. The equitable defense of laches, if

established at trial, would be a bar to a final judgment of possession founded on the stale demand.

Headnotes/Summary

Headnotes

Landlord and Tenant -- Rent Regulation -- Use and Occupancy -- Denial of Equity Relief Because of Landlord's Conduct

1. Plaintiff landlord's conduct in refusing to accept defendant tenant's rent checks for the legal regulated rent for the subject apartment initially fixed by the Conciliation and Appeals Board in 1983, and in refusing to offer defendant a renewal lease or to return defendant's excess security deposit until 13 years after being ordered to so, precluded any equitable award to plaintiff on a theory of unjust enrichment for defendant's use and occupancy from 1983 to 1996. Instead of simply complying with the law and accepting defendant's tender of the legal regulated rent, plaintiff commenced an eviction action in 1984, an action for arrears for use and occupancy in 1991, two more eviction actions in 1995 and 1996, and another action for arrears for use and occupancy in 1998. Moreover, even after the March 1, 1996 lease was executed and defendant was paying rent on a monthly basis, instead of cashing the rent checks as received, plaintiff deposited a year's worth of checks on one day and brought an action for possession claiming nonpayment of rent. These facts established that plaintiff was manipulating defendant with defendant's ultimate inability to satisfy a judgment and consequent eviction in mind. Plaintiff's attempt to frustrate the purposes of the *Rent Stabilization Law* militated against the intervention of equity on plaintiff's behalf.

Counsel: *Gale Fieldman* for appellants.

David S. Singer, pro se, and *Michael R. Cohen* for David S. Singer, respondent.

Kilhenny & Felix (*James M. Felix* of counsel), for Shelley R. Singer, respondent.

Judges: John T. Buckley, P.J., Ernst H. Rosenberger, Betty Weinberg Ellerin, Milton L. Williams, Luis A. Gonzalez, JJ. Buckley, P.J., Rosenberger, Williams and Gonzalez, JJ., concur.

Opinion by: Betty Weinberg Ellerin

Opinion

[*189] [**505] Ellerin, J.

These actions arise from a landlord's intransigence over a one-year rent stabilized lease entered into more than 20 years ago on apartment 12E at 1 West 85th Street in Manhattan. The lease commenced September 1, 1982 at a monthly [**506] rent of \$ 2,200. In June 1983, the Conciliation and Appeals Board (CAB) issued an opinion declaring the base rent to be \$ 853.62 and directing the landlord [***2] to roll back the rent to that amount and to refund or credit against future rents over the next six months any rent the tenant had paid in excess of the base rent and any security deposit exceeding the lawful limits. The opinion provided that, if the landlord did not take action to comply within 30 days, the tenant could credit the excess rent against the succeeding months' rent until it was fully offset.

In October 1983, the CAB issued an opinion directing the landlord to offer the tenant a renewal lease for two years and, in 1984, it issued an opinion directing the landlord to refund the overpayments dating from September 1982 through June 1983, which totaled \$ 13,463.80.

The landlord brought a [CPLR article 78](#) proceeding challenging the CAB's determination of the legal regulated rent. However, even after his application was denied and the petition dismissed in May 1984, rather than comply with any of the above directives, he brought an eviction/holdover proceeding in Housing Court. (It was dismissed in August 1984.) Moreover, the landlord rejected the checks tendered by the tenant in December 1984 and January 1985, which, crediting the \$ 13,463.80 never refunded by the landlord, was [***3] the first date that rent was due again following the reduction. He also ignored the tenant's January 8, 1985 and February 1, 1985 letters offering to pay the legal rent upon the landlord's instructions.

In August 1991, the landlord commenced an action in Supreme Court seeking rent "arrears" for the tenant's use and [*190] occupancy of the apartment from July 1983 through August 1991 at the rate of \$ 853.62 per month, for a total of \$ 70,190.96, and, while that action was pending, he brought an eviction proceeding in Housing Court for nonpayment of rent. Upon the tenant's motion for summary judgment, this Housing

3 A.D.3d 188, *190; 771 N.Y.S.2d 505, **506; 2004 N.Y. App. Div. LEXIS 1100, ***3

Court proceeding too was dismissed, "without prejudice to a new lawsuit, begun at a time that [the landlord] can at least properly *claim* that he is in compliance with the *Rent Stabilization Law and Code* provisions regarding lease renewals and/or security deposits" (emphasis in original). The court found that the landlord's statement in his petition that he was in compliance with applicable laws was not accurate and that his offer, "*finally*," of a lease renewal, which was made in his attorney's affirmation in opposition to the tenant's motion, was not only "'too little and [***4] too late' to *nunc pro tunc* correct th[at] improper *verified* allegation" but also did not address "the excessive, and improper, security deposit being retained by [the landlord]" (emphasis in original).

In any event, in December 1995, 12 years after the CAB had so directed him, the landlord offered the tenant a renewal lease, which the parties executed for a term of one year commencing March 1, 1996. The landlord also returned the tenant's excess security deposit, with interest (although he did not refund the rent overpayments). In 1996, he brought another eviction proceeding in Housing Court for nonpayment of rent from April 1995 through April 1996. The portion of the proceeding that sought rent arrears from April 1995 through February 1996 was dismissed because the landlord's petition was based on the lease that commenced March 1, 1996. The remainder of the proceeding was settled.

Although the tenant timely tendered the rent for March and April 1996, the landlord did not cash the checks until February 1997, when he deposited them along with other checks that he had received from the tenant and never cashed. In [**507] June 1998, the landlord brought another action in Supreme Court [***5] seeking rent arrears for the period from September 1991 through February 1996 at the rate of \$ 853.62 per month, for a total of \$ 46,095.48.

Considering the 1991 and 1998 actions jointly, on July 7, 1999, Supreme Court (Louise Gruner Gans, J.) dismissed the landlord's 1991 claim, pursuant to a lease, for rent for the period from September 1983 through August 1991 because there was no lease in effect after August 1983, and dismissed his 1998 [*191] claim, pursuant to [section 2523.5 \(d\) of the Rent Stabilization Code \(9 NYCRR 2523.5 \[d\]\)](#), for rent for the period subsequent to the filing of the 1991 action because no obligation to pay rent arises from that provision. The court declined, however, to dismiss the landlord's claim for equitable relief. In June 2000, this

Court affirmed the dismissal of that portion of the complaint that sought back rent for the period between 1983 and 1991 pursuant to the *Rent Stabilization Law* and affirmed that the landlord was not precluded from claiming back rent on a basis such as quantum meruit ([273 A.D.2d 177, 710 N.Y.S.2d 64 \[2000\]](#)).

In August 2000, the landlord brought an action in equity seeking, on a theory of unjust enrichment, damages [***6] in the amount of the full value of tenant's use and occupancy of the apartment for the period September 1, 1983 through August 30, 1991, at the rate of \$ 853.62 per month, for a total of \$ 70,190.96. The tenant moved for summary judgment dismissing the complaints in both the 2000 action (seeking recovery for use and occupancy from 1983 to 1991) and the 1998 action (seeking recovery for rent from 1991 to 1996) on the ground that the landlord's conduct in this case "is so patently beyond the pale that no recovery is available as a matter of law." Balancing the equities, the court agreed that any equitable award to the landlord would be "a mockery of the legal process." The complaints were dismissed and the landlord appealed.

We now affirm. The landlord refused to accept the tenant's checks for the legal regulated rent or to respond to the tenant's request for instructions as to tendering payment, even after his appeal of the CAB's determination of the rent was denied. He refused to offer the tenant a renewal lease or to return the tenant's excess security deposit until 12 years after he was ordered to do so. Simple compliance with the law presumably would have resulted in his receipt [***7] of the legal regulated rent for the duration of the tenancy. Indeed, once the renewal lease was issued in March 1996, the tenants began paying their rent monthly. However, instead of simply complying with the law, the landlord commenced an eviction action in 1984, an action for arrears for use and occupancy in 1991, two more eviction actions in 1995 and 1996, and another action for arrears for use and occupancy in 1998. Moreover, even after the March 1, 1996 lease was executed and the tenant was paying rent on a monthly basis, instead of cashing the rent checks as he received them, the landlord deposited a year's worth of checks on one day and brought an action for possession claiming nonpayment of rent. (The action was dismissed.)

[*192] These facts establish that the landlord was manipulating the tenant with the tenant's ultimate inability to satisfy a judgment and consequent eviction in mind (see [City of New York v Betancourt, 79 Misc. 2d](#)

3 A.D.3d 188, *192; 771 N.Y.S.2d 505, **507; 2004 N.Y. App. Div. LEXIS 1100, ****7

[146, 148, 359 N.Y.S.2d 707 \[1974\] HN1](#) [↑] ["There may be instances in which a landlord would purposefully delay many months in instituting a proceeding for nonpayment hoping to terminate the tenancy by eviction where the tenant is unable to pay large arrears in rent"], [***8] *affd* [79 Misc. 2d 907, 908, \[**508\] 362 N.Y.S.2d 728 \[1974\]](#) ["The equitable defense of laches ... if established on the trial ... , would be a bar to a final judgment of possession founded on the stale demand"]. The landlord's undeniable attempt to frustrate the purposes of the *Rent Stabilization Law* militates against the intervention of equity on his behalf.

Accordingly, the order of the Supreme Court, New York County (Louise Gruner Gans, J.), entered July 12, 2002, which, to the extent appealed from as limited by the brief, granted defendant David Singer's motion for summary judgment dismissing the complaints in both actions, should be affirmed, without costs.

Buckley, P.J., Rosenberger, Williams and Gonzalez, JJ., concur.

Order, Supreme Court, New York County, entered July 12, 2002, affirmed, without costs.

Hersh v. HPD, 44 A.D.3d 525 (1st Dep't, 2007)



Cited

As of: October 24, 2025 3:40 PM Z

Matter of Hersh v. City of N.Y. Dept. of Hous. Preserv. & Dev.

Supreme Court of New York, Appellate Division, First Department

October 23, 2007, Decided; October 23, 2007, Entered

1799

Reporter

44 A.D.3d 525 *; 844 N.Y.S.2d 219 **; 2007 N.Y. App. Div. LEXIS 10841 ***; 2007 NY Slip Op 7931 ****

The determination was unanimously confirmed, the petition was denied, and the proceeding was dismissed.

[****1] In the Matter of Mark Hersh et al., Petitioners, v City of New York Department of Housing Preservation and Development et al., Respondents. Index 106712/06

LexisNexis® Headnotes

Core Terms

harassment, petitioners', certificate, respondents', premises, reasonable cause, tenants, visited

Real Property Law > Landlord & Tenant > General Overview

Case Summary

HN1 Real Property Law, Landlord & Tenant

Procedural Posture

Petitioner owners appealed a determination by respondent City of New York Department of Housing Preservation and Development (HPD) that denied their application for a certificate of no harassment.

In a landlord-tenant context, the Administrative Code of the City of NY § 27-198(b)(7) specifically precludes the consideration of any further application for 36 months after a denial of a certificate of no harassment.

Overview

During the 30-day period for comments, the HPD received a letter from a law project, attached to which were, among other things, affidavits from tenants asserting harassment. An HPD investigator visited the premises and observed the dirty and deteriorated condition of the building, including failure to keep public hallways and bathrooms clean, to adequately exterminate vermin, to repair holes in the ceiling, and permitting overcrowding. HPD also obtained a copy of the violation history of the building indicating over 450 violations issued against the building during the inquiry period, of which 150 remained pending at the time of the owners' application. The court found, inter alia, that substantial evidence supported the HPD's finding that the owners engaged in harassment as defined in *Administrative Code of the City of NY § 27-2093(a)*. Consequently, the denial of the application for a certificate of no harassment was proper.

Headnotes/Summary

Headnotes

Landlord and Tenant--Harassment of Tenant.--Petitioners engaged in harassment as defined in Housing Maintenance Code (*Administrative Code of City of NY § 27-2093 [a]*); four witnesses described conditions at premises, including failure to keep public hallways and bathrooms clean, to adequately exterminate vermin, to repair holes in ceiling, and overcrowding.

Counsel: [***1] Adam Leitman Bailey, P.C., New York (Colin E. Kaufman of counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondents.

Judges: Concur--Lippman, P.J., Andrias, Williams, Buckley and Malone, JJ.

Outcome

Opinion

[*525] [**220] Determination of respondents, dated January 19, 2006, which denied petitioners' application for a "certificate of no harassment," unanimously confirmed, the petition denied, and this proceeding (transferred to this Court by order of Supreme Court, New York County [Carol Edmead, J.], entered October 11, 2006), dismissed, without costs.

The record clearly demonstrates that respondents had reasonable cause to believe tenants in petitioners' building had been harassed, and properly directed a hearing. During the 30-day period for comments, respondent City of New York Department of Housing Preservation and Development (HPD) received a letter from the West Side SRO Law Project, attached to which were, among other things, affidavits from tenants asserting harassment. An HPD investigator visited the premises and observed the dirty and deteriorated condition of the building, and HPD obtained a copy of the violation history of the building indicating over 450 violations issued against the building during the inquiry period, of which [***2] 150 remained pending at the time of petitioners' application.

Substantial evidence supports respondents' finding that petitioners engaged in harassment as that term is defined in the Housing Maintenance Code (*Administrative Code of City of NY § 27-2093 [a]*), and thus, the denial of the application for a certificate of no harassment was proper. No basis exists to disturb respondents' findings of credibility (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 517 NE2d 193, 522 NYS2d 478 [1987]). The testimony of the four witnesses who visited the premises during the inquiry period and described the conditions they observed was sufficient to sustain the allegations of harassment found by the Administrative Law Judge, including failure to keep public hallways and bathrooms clean, to adequately exterminate vermin, to repair holes in the ceiling, and permitting overcrowding (see *Matter of 235 Hotel v Department of Hous. Preserv. & Dev. of City of N.Y.*, 309 AD2d 587, 765 NYS2d 360 [2003]).

Respondents' issuance of the reasonable cause determination in November 2004, two years after petitioners' application for a certificate of no harassment was filed, did not violate any [*526] statutorily prescribed time periods, and thus was not an abuse of discretion. In [***3] any event, petitioners have failed to demonstrate substantial prejudice from the delay.

[****2] Respondents did not exceed their statutory authority in directing that the denial of the certificate of no harassment for the subject premises remain in effect until January 19, 2009. [HN1](#) The Building Code (Administrative Code § 27-198 [b] [7]) specifically precludes the consideration of [**221] any further application for 36 months after a denial, which is appropriate (see *Matter of Vaughan v Michetti*, 176 AD2d 144, 574 NYS2d 30 [1991]).

We have considered petitioners' remaining contentions and find them without merit. Concur--Lippman, P.J., Andrias, Williams, Buckley and Malone, JJ.

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HPD v. Bernardi, OATH Index No.: 416/09 (Mar. 19, 2009)

Dep't of Housing Preservation & Development v. Bernardi

OATH Index No. 416/09 (Mar. 19, 2009)

ALJ found that evidence showed numerous acts of harassment occurred during inquiry period, including verbal abuse and threats by management employees, posting of a humiliating sign, displays of violence, denying a tenant entry to his room, refusal to abate noise from hallway doors, and denying entry to a SRO tenant representative. ALJ thus recommends denial of SRO owner's application for certificate of no harassment.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**

Petitioner

- against -

GLEN P. BERNARDI

Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This is a proceeding commenced by petitioner, the Department of Housing Preservation and Development, pursuant to Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2009). Respondent Glen Bernardi is a principal of MJG Holdings, LLC, the net lessee of the premises 182-184 11th Avenue, New York, New York. Petitioner seeks a finding that the tenants at the premises were harassed during the period from December 20, 2004, to date.

At a seven-day hearing held before me on October 29, 30, November 5, December 8, 9, 16, and 18, 2008, petitioner presented 44 exhibits showing violations and past tenant complaints, as well as the testimony of four tenants and inspectors who visited the premises during the inquiry period. Respondent offered many hundreds of pages of records and the testimony of several management employees and four tenants to corroborate his assertion that the tenants were never harassed.

For the reasons explained below, I find the proof sufficient to prove that harassment occurred and recommend that respondent's application be denied.

On October 28, 2008, the petition was amended to add an allegation of illegal cavedropping. Respondent's objection to this amendment was overruled on the grounds that the addition of this one allegation did not unfairly prejudice him. Petitioner's counsel apparently became aware of the audio surveillance only after respondent sought to introduce video and audio recordings into the record and respondent was provided sufficient notice and time to address this new allegation by additional evidence. *See Dep't of Housing Preservation & Development v. Carone*, OATH Index Nos. 1302/08, 1303/08 & 1304/08 (June 30, 2008).

Petitioner asserts that the 21 alleged actions constitute harassment as defined by section 27-2093(a)(2) of the Administrative Code: any conduct by or on behalf of an owner which interrupts "essential services" or otherwise "interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy" and "causes or is intended to cause such person . . . to vacate." Section 27-2093(b) creates a presumption that any statutory act defined in section 27-2093(a) shall be presumed to have been committed with an intent to cause a legal tenant to vacate the unit. An owner, on the other hand, may rebut the presumption of intentional harassment set forth in the Administrative Code by offering further evidence explaining its conduct, as respondent in the instant case has attempted to do. *See generally Dep't of Housing Preservation & Development v. Wulliger*, OATH Index No. 782/06 (May 5, 2006) (statutory presumption of intentional harassment rebutted). Furthermore, it is well settled that any acts of harassment during the inquiry period are attributed to the current owner, even if those acts were committed by prior owners, without regard to the current owner's fault. *Dep't of Housing Preservation & Development v. Bryant*, OATH Index No. 149/07, at 4 (Jan. 5, 2007), *aff'd*, Sup. Ct. N.Y. Co. Index No. 102249/07 (Oct. 10, 2007). Thus, any harassment attributed to the prior landlord, West 23rd Street Hospitality, would be sufficient to warrant denial of the current landlord's application for a certificate of no harassment.

As discussed below, I find that the evidence of verbal abuse and other intimidating actions by the staff of the previous and the current net lessee as well as the failure to abate the noise from slamming hallway doors and denying entry to both a tenant and an SRO project representative constituted harassment.

David Glasser, the tenant in room 401, testified to various encounters with Mr. Mahmoud. On October 30, 2006, Mr. Glasser wanted to sit in the lobby and read his paper. A coffee table had been turned over by the cleaning staff and Mr. Glasser asked Mr. Mahmoud to move it back so he could set his coffee on it. Mr. Mahmoud told Mr. Glasser he did not work for Mr. Glasser and cursed. He clenched his fist, drew it back, and said he was going to "kill" or "cut" Mr. Glasser (Tr. 411-12). Mr. Glasser called 911 to report a threat on his life, as Mr. Mahmoud also called 911. The police reported, listened to both men, and left.

On another occasion, when Mr. Glasser was standing near the bottom of the stairs, Mr. Mahmoud told Mr. Glasser that he could not stand there and, when Mr. Glasser refused to move, called 911. Mr. Glasser also called 911. Several minutes later, police officers arrived and spoke with Mr. Glasser (Tr. 415-16).

Some of the tenant accounts of Mr. Mahmoud's abusive behavior were corroborated. Mr. Stevens wrote a letter (Pet. Ex. 16) to Nathan Wasserman, dated September 19, 2007, complaining of Mr. Mahmoud's behavior, including a description of Mr. Mahmoud shouting at Ms. Catlin about the broken sink and the September 18 incident involving the police. He stated that, after shouting profanities, Mr. Mahmoud accused Ms. Catlin of breaking the cabinet on purpose and then phoned in a police complaint, accusing Ms. Catlin of vandalizing the sink. In addition, in January 2008, several of the tenants also told Department Investigator Wycoff about being verbally harassed by Mr. Mahmoud (Tr. 343).

It is unclear whether any of the tenants notified management of Mr. Mahmoud's behavior prior to September 2007. None of the three tenants who testified mentioned doing so and there is no basis to find that the prior management was made aware of Mr. Mahmoud's surly actions. Once the current landlord received the tenant complaints in September 2007, they dismissed Mr. Mahmoud within a few weeks.

Mr. Stevens and Mr. Glasser testified that, after Mr. Mahmoud was fired in late 2007, a subtler level of abusive treatment persisted by both the staff and the principals of the new management company, preying upon various fears of the tenants. In his account, Mr. Stevens explained that he feared that he and his girlfriend might be subject to eviction because the size of their current room was not large enough for both of them to legally reside in. He learned that the building management had brought eviction proceedings against another tenant whose wife and child resided in the room with him. When Gaston Sanginese, a desk clerk hired by respondent, came to his room and asked to measure the room's size (Tr. 64-65), Mr. Stevens feared that this

Mr. Glasser construed this display of violence as an implicit threat to harm him if he continued to oppose the landlord's plans (Tr. 435).

Around 2007, Mr. Glasser became convinced that he was not receiving some of his mail. He therefore began complaining about the building desk staff signing for and accepting certified mail (Tr. 421-22). Mr. Sanginese, the regular desk clerk, admitted that this practice was at one time followed and then stopped by Nathan Wasserman (Tr. 692). Mr. Glasser testified that, at around 10:30 p.m. on October 20, 2008, Mr. Surace, accompanied by Mr. Bernardi, stopped Mr. Glasser as Mr. Glasser entered the lobby. Mr. Surace waved around a letter, asked why Mr. Glasser would not accept it, and loudly warned him to "treat my guys with respect" (Tr. 423-24). Mr. Glasser understood that the letter was certified and had already been signed as received by the desk staff. Mr. Glasser said he did want the hotel staff to accept certified mail for him. Mr. Surace continued to "yell" at him for five minutes. Then Mr. Bernardi started yelling, asking why Mr. Glasser did not pay his rent, complaining that the Department of Buildings process was slow due to him, and concluding by yelling, "Your days are numbered" (Tr. 425).

Feeling intimidated, Mr. Glasser left the building and called the police. He also asked Mr. Stevens to come down. When the men inside the lobby heard Mr. Glasser calling the police, Mr. George said, "If you call the police, you'll regret it" (Tr. 427). When the police arrived, Mr. George tried to make a complaint about Mr. Glasser assaulting him by pushing him the day before (Tr. 428-29). Mr. Stevens was there when the police responded to Mr. Glasser's complaint (Stevens: Tr. 98).

In their testimony, Mr. Bernardi and Mr. George confirmed that Mr. George tried to give Mr. Glasser mail, but insisted that Mr. Glasser "slapped" the mail to the floor and pushed Mr. George aside (Bernardi: Tr. 956; George: Tr. 655-56). Mr. Bernardi warned Mr. Glasser that he could not "terrorize" the staff and, when Mr. Glasser went outside to the sidewalk, Mr. Bernardi decided to call the police (Bernardi: Tr. 956).

Mr. Glasser described a lengthy dispute in which he declined to give management a copy of his room key. When management threatened to change the locks on the room without his permission, he consulted with an attorney. He then placed a notice to the landlord on his door, stating that breaking into his room to change the locks would be considered breaking and entering and that he would file a police complaint. Whenever Mr. Glasser posted such a notice, it would disappear within a day and Mr. Glasser would replace it (Tr. 440-41).

confirming that the police were called on multiple occasions and that cross complaints about assaultive behavior were made.

In attacking Mr. Glasser's credibility, respondent made much of an inconsistency between the testimony of Mr. Glasser and Fateh Chaudhery, a former Chelsea Inn employee, as to a recent conversation the two had had. Mr. Glasser recalled visiting Mr. Chaudhery in November 2008 and being told that the staff would manually turn the boiler on and off to adjust the temperature (Tr. 452-53). In his testimony, taken by telephone from Pakistan, Mr. Chaudhery confirmed speaking with Mr. Glasser but recalled only discussing Mr. Chaudhery's own health (Tr. 939-40). Mr. Glasser's vague hearsay statement about the building staff having manually adjusted the boiler seemed, at best, collateral to the allegations of harassment. Thus, any discrepancy between the two accounts was first and foremost irrelevant and, in any event, seemed more likely caused by a failure of memory by Mr. Chaudhery than by a deliberate effort by Mr. Glasser to offer false testimony.

Respondent asserts that Mr. Stevens and Mr. Glasser were incredible due to their anger toward the landlord. There is some basis to support the contention that both tenants were disgruntled. However, the angriest witnesses seemed to be Mr. Bernardi and Mr. George. Mr. George displayed a general antipathy for Mr. Stevens and Mr. Glasser, since they frequently defied his instructions. Clearly, Mr. Bernardi, the primary applicant on the papers seeking the certificate, was highly interested in the outcome of the proceeding. Mr. Bernardi seemed particularly incensed about a 1997 agreement (Pet. Ex. 13) made between the previous landlord and Mr. Glasser, whereby Mr. Glasser was relieved of any obligation to pay rent while preserving a continued right to occupy room 401 indefinitely. The landlord initiated a lawsuit (Pet. Ex. 32), characterizing Mr. Glasser's rights as equivalent to a "life estate" in the building, and challenging the legal validity of this agreement. The profane remarks attributed to Mr. Bernardi about Mr. Glasser seemed consistent with his frustration about Mr. Glasser's rent-free status.

It was apparent that Mr. Bernardi and his business partners had a financial motive in seeking the certificate of harassment. Both Mr. Bernardi and Jeffrey Wasserman, a partner in MJG Holdings, were circumspect in acknowledging what their plans for the building were. On the one hand, they insisted that the primary value of the property rested with operating the adult club on the ground floor. For this particular building, the adult club use predated the zoning amendment and could therefore be grandfathered in as legal, so long as the use was continuous.

Mr. Ogunrinde offered no credible explanation for his simultaneous claim of residing at two buildings at the same time, as more fully described below in the lockout discussion. In January 2006, he commenced a lockout proceeding against the 330 West 51st Street landlord and, on February 6, 2006, was apparently restored to possession of his room in that building (Resp. Ex. ZZ). At the same time, he insisted that he was claiming permanent residence at the premises and, on February 1, 2006, delivered a letter (Pet. Ex. 22) to the Chelsea Inn requesting a permanent lease (Tr. 222).

In fact, I concluded that Mr. Ogunrinde's claim to have written this letter in February 2006 was false. At that time, he had only been staying in the Chelsea Inn for a few days and, according to evidence regarding his residence at 300 West 51st Street, apparently regarded the Chelsea Inn as a temporary substitute for his primary residence. Mr. Asghar, a neutral witness with no apparent interest in this proceeding, testified that this letter was never received by Chelsea Inn (Tr. 603) and the letter was apparently not produced or mentioned during the lockout proceeding in 2006. It did not surface until May 2007, during the protracted overcharge case before the DHCR, when Mr. Ogunrinde was alleging rent-protected status. I thus did not credit Mr. Ogunrinde's contention that this letter was delivered to the Chelsea Inn management on February 1, 2006, and find that it was likely created by Mr. Ogunrinde over a year later in order to buttress his pending overcharge case.

Various complaints made by Mr. Ogunrinde were either too vague or too confusing to be fully credited. He stated that, when he tried to speak with Mr. Bernardi about a nonpayment action against him, Mr. Bernardi loudly said he was going to "attack" him if he did not leave (Tr. 181). Unlike Mr. Stevens and Mr. Glasser, who both provided plausible details concerning their interactions with management, Mr. Ogunrinde's accounts were largely bereft of detail and replete with speculative references of illegal intent. Mr. Ogunrinde testified that, in October 2008, he parked his car in front of the building to bring in his laundry. Mr. George came running out and instructed Mr. Ogunrinde to move right away (Tr. 192-93). Mr. Ogunrinde parked on West 24th Street, but Mr. George again approached "as though he wants to attack me" (Tr. 193).

Due to these problems, I found Mr. Ogunrinde's testimony concerning Mr. Mahmoud, Mr. Bernardi, and Mr. George to be insufficiently credible to support any fact-findings.

The evidence further demonstrated that, at the time the remarks to Mr. Stevens and Mr. Glasser were made, the landlord intended to empty as many of the residential rooms as possible and that the tenants were aware of this. According to the filings in support of the application, at

Stevens's testimony sufficient to establish that Mr. Mahmoud's insult and false complaint were an intentional effort by the landlord to harass Mr. Stevens. I also find that the posting of a sign concerning the deadline for Mr. Stevens to pay \$7,000 in back rent to be harassment. The purpose of the sign, posted in the form of a valentine wish from Mr. Bernardi, was to humiliate Mr. Stevens and to threaten some form of unspecified action if the deadline was not met. As such, it was intended to intimidate Mr. Stevens and was harassment. *See Dep't of Housing Preservation & Development v. Pedersen*, OATH Index No. 1093/08 (Aug. 22, 2008) (landlord's warning that he had "very big plans" for tenant found to be a threat constituting harassment).

The evidence also indicated that Mr. Bernardi called Mr. Glasser a "fucking mutt" and a "stupid fuck" and that Mr. George called him an "asshole." Mr. Bernardi also told Mr. Glasser, "Your days are numbered." Mr. Bernardi's and Mr. George's profane insults and threat to Mr. Glasser were harassment. *Tauber*, OATH Index No. 675/07.

Based upon Mr. Glasser's credible account, I also find that Mr. Mahmoud threatened to "kill" or "cut" him. Such a threat of physical force constituted harassment. *See Admin. Code § 27-2093(a)(1)* (Lexis 2009) ("Harassment" includes "threatened use of force").

Mr. Surace's display of kicking the lobby door 10 or 15 times, as Mr. Glasser waited to enter, was also harassment. From Mr. Glasser's account, there was no reason given by Mr. Surace to refuse to open the lobby door, other than to force Mr. Glasser to remain in the lobby and witness a demonstration of his kicking the door. Similarly, given the history of management's actions toward Mr. Glasser, the incident in which a security guard followed Mr. Glasser in order to prevent his being "jumped" seemed calculated as a warning he might be attacked. Mr. Glasser reasonably interpreted Mr. Surace's violent attack on the door and Mr. George's pointed offer of the security guard as suggestions of what management might do to him. The facts established that these incidents were implicit threats of physical force and constituted harassment.

The two refusals to permit Mr. Glasser entry to his room, in October 2007 and later in July 2008, were similarly harassment. On the first occasion, Mr. Glasser was denied entry, prompting him to call the police. The purpose of detaining Mr. Glasser was apparently to allow Mr. Wasserman to serve him with legal papers. In the July 2008 incident, Mr. Glasser was again refused entry, apparently because management was angry about the notices on his door. Denying Mr. Glasser entry to his room in order to serve legal papers on him or in retaliation for placing notices on his door was harassment.

81-82). Later in July 2008, after Mr. Leon became a friend of Mr. Bernardi's, management installed a foam strip on a door close to his third floor room to silence it (Tr. 85-86). Nothing was installed on the door near Mr. Glasser's room.

In a letter (Pet. Ex. 28) dated January 7, 2008, Mr. Astin complained to the Department (although not, apparently, to the landlord) about the noise from the hallway doors. Other than Mr. Stevens and Mr. Astin, none of the other tenants evidently complained of this problem. Investigator Wycoff also observed the lack of tension arms on the hallway doors when he visited the building in January 2008 (Tr. 337).

Mr. George testified that the hallway doors on the third and fourth floors were replaced because the old doors were not compliant with fire code requirements in that they did not close or seal properly (Tr. 624). The hallway doors on the second floor met fire code requirements and were therefore not changed (Tr. 624-625). He also stated that management was advised by the Fire Department that if they were going to change the doors, they should replace them with doors that had no tension arms (Tr. 645). He acknowledged that, when Mr. Leon complained about the noise, the landlord applied foam stripping to silence it (Tr. 646). He also acknowledged getting complaints about the noise from the doors from Mr. Stevens and Mr. Glasser (Tr. 625).

Petitioner contended that, even assuming the landlord had a legitimate reason to replace the third and fourth floor hallway doors, the refusal to dampen the noise from the doors for Mr. Stevens and Mr. Glasser constituted harassment. Based upon the evidence, I must agree. It was notable that the landlord failed to offer any other plausible reason to address the noise problem for Mr. Leon but not for either Mr. Stevens or Mr. Glasser. When asked this precise question as to why the landlord did not also put the same stripping on the other third and fourth floor doors in response to the Stevens and Glasser complaints, Mr. George continued to insist that the noise was due, not to the way the doors closed, but to Mr. Astin deliberately slamming all of the doors. He replied that "no one was slamming that door" the way Mr. Astin had been slamming the door near Mr. Leon's room (Tr. 646). Having already conceded that the new doors were noisier than the old doors due to lack of a tension arm and that the legitimate noise complaints made by Mr. Leon had been acted upon, this answer made little sense.

The testimony of Mr. Stevens and Mr. Glasser indicated that the noise from the slamming doors was loud and incessant, disturbing the tenants at night whenever anyone passed through the hall. Based upon the seriousness of the problem, and respondent's deliberate refusal to complete a simple repair to alleviate it, I therefore find that the refusal of the landlord to dampen

evict tenant). There is therefore no basis to find that the landlord's failure to initiate eviction proceedings was unreasonable or intended to harass the other tenants, particularly where other more effective crime deterrence measures such as video surveillance and monitoring of visitors were instituted.

There was some evidence that the tenants were deprived of heat or hot water, but little evidence that these disruptions lasted more than a day or two. The worst complaints came from John Wowk in room 307, who testified that the heat was "on and off" and that he was certain that the cause of his wife's death in 2006 was "hypothermia" (Tr. 397-98). However, Mr. Wowk was elderly and seemed to suffer from memory lapses, making his statements of limited value.

Only one tenant indicated that lack of heat was pervasive. Frank Leon, in room 322 and later room 301, testified that, since he moved into the building in 1977, "generally there was no heat" (Tr. 679). He indicated that, after complaining about the problem to Mr. Chaudhery, there was no improvement. Hot water was supplied, although "it wasn't that often" (Tr. 679). When asked whether heat was supplied in 2007, Mr. Leon said, "I gave up paying attention" (Tr. 680).

The other tenants all indicated that the heat outages were temporary, lasting for a day or two. Mr. Glasser stated that the landlord turned off the heat at night and turned it back on for about an hour at around 5:00 a.m. During the winter, the building staff wore heavy clothing (Tr. 453). In November 2008, Mr. Glasser spoke with a former employee and tenant of the building named Fateh Chaudhery. Mr. Chaudhery told him that the building staff would adjust the heat by manually turning the boiler on and off (Tr. 452-53). Beginning in December 2007, after the new management took over the building, the heat improved (Tr. 453).

Mr. Stevens insisted that, since 2004, the boiler has failed at least once per month (Tr. 76). He and other tenants used space heaters whenever this happened and he did not know how long the boiler was down. He conceded that hot water had improved since the current management took over (Tr. 77).

Ms. Wambach, in unit 321, testified that in 2005 and 2006 the heat was "okay," although it "wasn't as good as it is now" (Tr. 831-32). She recalled that, from approximately 2002 to 2004, the boiler repeatedly broke down and she would see repairmen working on it (Tr. 832).

Raphael Ortiz, who lives in rooms 410 and 411, has lived in the building for 31 years. He recalled that, prior to 2007, the heat was "bad," commenting that "there were sometimes they don't give you no heat for three days" (Tr. 855). Mr. Ortiz did not complain because he is "not a person to complain" (Tr. 857). Since 2007 the heat and hot water have been "good" (Tr. 855).

The evidence on closure of the community bathrooms also indicated that the closures lasted no more than a few days. Mr. Stevens indicated that one of the three bathrooms on the third floor was closed while it was being painted. During this time, a leak in the sink was not fixed (Tr. 71). Later the leak caused the roof to cave in and closed the bathroom for three weeks. Mr. Stevens complained to the Department who sent an inspector. The Department told management to fix the problem and the leak was fixed and the bathroom re-opened in two days (Tr. 72).

Mr. Stevens stated that, on another occasion management locked one of the bathrooms to replace six wall tiles, leaving one open bathroom on the third floor. Mr. Stevens complained to Mr. George, who said he had relayed the information to Nathan Wasserman. After a week, Mr. Stevens complained again to Mr. Sanginese. Mr. Sanginese told Mr. Stevens that Mr. Wasserman had decided to keep the bathroom closed because he suspected the tenants had vandalized it (Tr. 74-75). On July 3, 2008, Mr. George again closed one of the bathrooms because he said a light was out (Tr. 75). Mr. Stevens again called the Department and the next day the bathroom was open (Tr. 75).

Mr. Glasser indicated that, in December 2007, the bathrooms were frequently closed for plumbing repairs (Tr. 455). In July 2007, construction workers damaged a water supply line and the water for the building was shut off, causing Mr. Glasser to go to the storage rental building nearby to rinse shampoo from his hair (Tr. 456-57).

Respondent introduced evidence from its surveillance cameras (Resp. Exs. G, H, I, and J) purportedly showing Mr. Astin vandalizing a bathroom and throwing trash into a hallway in July 2008 and later cursing at a camera in September 2008. This evidence was vigorously objected to by petitioner, who asserted that the audio portion constituted illegal eavesdropping under Penal Law section 250.05. At this tribunal's direction, respondent edited the video files by removing the audio. The edited video (Resp. Ex. G) shows Mr. Astin entering and leaving a bathroom on July 25, 2008. Another video file (Resp. Ex. J) shows him walking up to a video surveillance camera and gesticulating, mouthing words which cannot be heard. The videos of Mr. Astin were equivocal, at best, and largely irrelevant to the issue of whether the landlord adequately maintained the bathrooms since no direct proof of vandalism was offered.

The evidence thus suggested that the community bathrooms were closed for several days at a time in order to repair and prevent damage from leaks or to clean. The tenants themselves testified to numerous plumbing problems, leaks, and damage observed in the bathrooms which

The evidence indicated that the vermin problem in the building was in part a result of the tenants' failure to cooperate in having their units treated by the exterminator. Furthermore, there was no evidence that the delay in cleaning and exterminating room 310 upon the departure and eviction of the prior tenant was negligent or calculated to harass the other tenants. There is no basis to make a finding of harassment as to this issue.

Mr. Stevens testified that he had no supply of cold water to his sink for about a year and a half (Tr. 100-103). Although the cause was not fully explained, it appeared to be due to a broken faucet: the 311 complaint from August 2007 indicated that the faucet was "broken/missing or leaking" (Pet. Ex. 4 at p. 97) and an August 27, 2007 letter from Nathan Wasserman (Pet. Ex. 43) indicated that the "plumbing" needed to be repaired to restore the cold water. In August 2007 Mr. Wasserman proposed to repair the plumbing, repaint the room, and clean or replace the carpet if Mr. Stevens and Ms. Catlin would relocate to room 308 (Pet. Ex. 43). In three letters (Resp. HH) written in September and October 2007, Mr. Wasserman advised Mr. Stevens that the work would be done when Mr. Stevens and Ms. Catlin relocated temporarily to another room. Although he initially estimated that the work would take a week to complete, he subsequently indicated that it would take "several weeks" and no exact date of return could be guaranteed. Mr. Wasserman testified that the reason for the additional time was the discovery of a cracked floor in Mr. Stevens's room which the contractor believed could take additional time to patch and repair (Tr. 777). Mr. Stevens refused to agree to this indefinite relocation and, in fact, stated in a December 27, 2007 stipulation of settlement (Resp. Ex. JJ) that he would "not provide access to petitioner to remedy any claimed repairs or outstanding violations."

During October 2008, Mr. Stevens renewed his efforts to arrange repairs and told management that he would be willing to relocate to either room 310 or room 319. When the landlord offered to permanently relocate Mr. Stevens to room 319, Mr. Stevens asked management to provide him with a written document recording the terms of a permanent relocation, but received only a draft of a surrender agreement. On October 20, 2008, he wrote a letter (Pet. Ex. 20) to Mr. Wasserman asking to be temporarily relocated to another room while repairs to room 311 were completed. He insisted that his offer to relocate on a temporary basis was not responded to (Tr. 103-07). According to Mr. Wasserman, however, the landlord repeatedly offered to perform the needed repairs in Mr. Stevens's unit but was denied access (Tr. 753-54).

the tenants. A photograph (Pct. Ex. 39-2) taken by Mr. Glasser in September 2007 shows a notice posted indicating "No Visitors Allowed" (Tr. 519). In October 2008, the landlord sent letters (Pct. Ex. 24) to the tenants indicating that tenants were allowed to have guests in their rooms "as long as guests provide proper identification."

The no-visitor policy was a subject of contention in the fall of 2007 when Mr. Stevens invited a tenant organizer from the Westside SRO Project to visit him. On September 28, 2007, a representative named Matt Wade had an appointment with Mr. Stevens. Mr. Wade gave his name to the desk clerk. When Mr. Stevens came down to escort Mr. Wade up to his room, Mr. Sanginese said he had been instructed that no visitors would be permitted in the building (Tr. 59). Mr. Wade told Mr. Sanginese this was against the law. Mr. Stevens then brought Mr. Wade upstairs and the two began knocking on all of the tenants' doors to announce a meeting and distribute flyers. Mr. Sanginese came up and told them that, if Mr. Wade was a visitor, he had to go to Mr. Stevens's room and could not knock on the other tenants' doors (Tr. 59).

As Mr. Wade was leaving, he was confronted in the lobby by Mr. George, the onsite manager. Mr. George told Mr. Wade he was not allowed in the building and told Mr. Stevens to "take a walk" (Tr. 60). Mr. Wade gave Mr. George his business card and left. As Mr. Stevens went back to his room, Mr. George said, "Good night, idiot" (Tr. 60). Later Mr. Stevens saw Mr. George speaking with the police and learned that he had tried to have Mr. Wade arrested for trespassing (Tr. 60). Mr. Stevens spoke with the police and gave them some flyers indicating that residents could have guests. The police threatened to make arrests if they were called to the building again (Tr. 61).

The next day Mr. Sanginese told Mr. Stevens that no visitors would be allowed (Tr. 66). Mr. Stevens told him that he would be meeting again with the Westside SRO representative. Mr. Sanginese told Mr. Stevens two days later that he could have visitors, but that the visitor would have to go straight with Mr. Stevens to his room without knocking on other tenants' doors (Tr. 66). Mr. Sanginese said that, if this rule was not obeyed, the police would be called. Upon hearing this, Mr. Stevens said there would be "a shit load of trouble" and "false arrest lawsuits." Mr. Stevens was later assured by Nathan Wasserman that visitors would be allowed so long as they showed identification (Tr. 67).

Mr. Ogunrinde testified that, in 2006, his brother was not permitted to visit him as a guest, as was another female friend in March 2008 (Tr. 190). He later received a copy of the Chelsea Riverside Hotel's guest policy in October 2008 (Tr. 189). This policy (Pct. Ex. 24)

a.m., Mr. George wrote that Mr. Astin told Mr. Glasser in front of camera 11, "He got to murder Brent George" (Pet. Ex. 12 at 7). On April 6, 2008, at 9:45 a.m., Mr. George wrote that Mr. Astin and Mr. Ogunrinde were "talking in the bathroom about all that is going on with their cases" (Pet. Ex. 12 at 16). On July 8, 2008, at 3:35 a.m., Mr. George recorded that Mr. Astin told Mr. Glasser some door molding was a fire violation (Pet. Ex. 12 at 22). On July 15, 2008, at 4:02 a.m., Mr. George wrote that Mr. Astin swore at Mr. Glasser for walking his cat (Pet. Ex. 12 at 23). On August 22, 2008, at 8:20 a.m., Mr. Sanginese overheard Mr. Astin on the surveillance camera microphone tell the cleaning lady he will be rich soon (Pet. Ex. 12 at 26).

Although it was not clear exactly when the tenants became aware that audio surveillance equipment was being used, they began complaining about it soon after the application for a certificate was filed in late 2007. When Investigator Wycoff visited the building in January 2008, he spoke with a tenant named John Kuraski. Mr. Kuraski told the investigator that management had installed listening devices to record tenant conversations. Mr. Kuraski insisted on whispering the entire conversation to avoid being picked up by the microphones (Tr. 340).

Petitioner contends that the audio surveillance was illegal under New York law and constituted harassment. Penal Law section 250.05 provides that "a person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of electronic communication." "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present, by means of any instrument, device or equipment. N. Y. Penal Law § 250.00.

Respondent raises a number of less than convincing arguments as to why the audio surveillance here was legal. Respondent argues that, because it seems undisputed that the equipment was installed to control criminal activity and provide greater security, this practice should not be considered to be unlawful. However, even if the intent behind installing the audio equipment was to fight crime, these good intentions cannot protect actions which would otherwise be criminal. Second, respondent contends that, at least by the end of 2007, the tenants were aware of the microphones and thus "consented" to the eavesdropping. Insofar as this argument seems to suggest that tenants may consent to any service deprivation by simply remaining in a building after becoming aware of it, this argument is specious and must be rejected. Finally, respondent argues that the microphones were too poor in quality to discern

go” because the building was being renovated and should come up with a “reasonably fair offer” (Tr. 83). Two months before the hearing, Mr. Stevens told Mr. Ortiz, the tenant of rooms 410-411, that Mr. Ortiz should obtain a written agreement concerning his move from a large second floor room to another room. Mr. Ortiz was ultimately given two rooms on the fourth floor (Tr. 84-85).

Mr. Stevens tried to help a tenant named Ingrid Anderson who was displaced from her room to another room during the construction. After three weeks, she came to Mr. Stevens for help in getting back in her room. Mr. Stevens told Mr. Sanginese he had 24 hours to give Ms. Anderson access or Mr. Stevens would call the police and complain of an illegal lockout. The next day Mr. Stevens saw that carpet was installed in Ms. Anderson’s room and she was permitted to return (Tr. 140-42).

Petitioner asserts that the landlord’s representations to the tenants were “false” in that the structural problems with the north wall should not have required the tenants to relocate. Petitioner points out that, a letter of January 21, 2008 (Resp. Ex. Q), advises that “no major alteration occurred within any SRO unit.” However, respondent’s evidence indicated that the problems with the north wall were severe. Numerous photographs showed a visible crack extending up the brick exterior of the building. In a series of documents (Resp. Ex. Q), the contractor indicated that, for a total of \$400,000, it was hired to perform various work on the roof and exterior of the building in order to remediate structural problems. As to the north wall, the work included building new concrete footings, opening up interior walls and installing square stock to the steel rafters, and installing I beams and support beams. As of February 2008, metal tubes through the exterior wall were installed and welded to the floor beams on the second and third floors.

In light of the detailed evidence that extensive structural work was performed on the north wall, including numerous penetrations through the exterior walls to interior steel floor beams, it seemed likely that tenants living along this wall would be adversely impacted by noise and vibrations from this work. The engineer’s reference to “no major alteration” work being done in the occupied rooms did not suggest otherwise and does not, as petitioner suggests, show that relocation of the occupants of the rooms along the north wall was unnecessary. The engineer’s qualification merely indicates that the construction work entailed no reconfiguration of the individual rooms. Since there was sufficient evidence to find that the relocation was necessary and there was no evidence that any of the tenants were deprived of rights as a result of

It appears to be undisputed that Mr. Ogunrinde was denied entry to the building on March 9, 2006. He stated that, on March 9, when he entered the lobby, Mr. Mahmoud and another employee refused to permit him to go upstairs to his room (Tr. 159). Mr. Ogunrinde called 911 to summon the police. Two police officers arrived and advised Mr. Ogunrinde to initiate an illegal lockout proceeding in court (Tr. 161-62; Resp. Ex. M).

The same day, Mr. Ogunrinde commenced a housing court action alleging that he vacated his unit on March 3 so the landlord could repair a water leak and was then locked out as of March 9. After going to court on March 14, 2006, a judge ordered the landlord to permit Mr. Ogunrinde access to his unit from 2:00 p.m. to 3:00 p.m. to remove some of his belongings and adjourned the case to March 17. When Mr. Ogunrinde went to the building at 2:00 p.m., Mr. Mahmoud and Mr. Asghar still refused to let him in and he again called the police. The police ordered the clerks to permit Mr. Ogunrinde to go into his unit and bring items out but the clerks refused. Instead, Mr. Mahmoud went to the room and carried down a bag. According to Mr. Ogunrinde, the police ordered him to take the bag and, when he said he had nowhere to take it to, the police threw the bag into the street (Tr. 164-66).

In a stipulation settling the lockout case (Resp. Ex. M), the landlord agreed to let Mr. Ogunrinde back into his unit on March 27, 2006, and Mr. Ogunrinde agreed to obey all hotel rules (Tr. 163, 168). Respondent adduced no direct evidence as to the reasons that the former management took this action.

The landlord did present records to show that Mr. Ogunrinde occupied another rent-regulated room nearby at 330 West 51st Street. In fact, Mr. Ogunrinde himself said that he was illegally locked out of 330 West 51st Street in January 2006, after returning from Africa (Tr. 252-53). In January 2006, he commenced a lockout proceeding against the 330 West 51st Street landlord and, on February 6, 2006, the same day he apparently checked out of the premises here, he was restored to possession of his room at 330 West 51st Street (Resp. Ex. ZZ). Later in 2006, the 330 West 51st Street landlord commenced a nonpayment action for \$8,600 in back rent, alleging that Mr. Ogunrinde moved back into the building on February 6, 2006, and paid rent only through April 2006 (Resp. Ex. EEE). Mr. Ogunrinde defended the action on various grounds, including unsafe conditions, threats from management, and the need to pay \$25,000 to the Chelsea Inn for other accommodations (Resp. Ex. EEE). According to respondent, Mr. Ogunrinde's assertion of residential rights at the West 51st Street building demonstrated that he was a "transient" occupant and that the March 9 lockout was therefore not illegal. However,

The proof of the other lockout was even more equivocal. Mr. Glasser stated that a tenant named Rebecca Johnson lived in the building from March of 2006 and June of 2006. He stated that, even after she requested a lease, she was illegally locked out of her unit (Tr. 501; Pet. Ex. 36). Mr. Glasser indicated that he listened to tapes of Ms. Johnson's lockout trial, where she stated that she was moved from room to room every 14 days by the landlord to avoid having her occupy the same room for more than 30 days and become a permanent resident. Mr. Glasser indicated that this practice was confirmed by Mr. Chaudhery (Tr. 507).

While I found Mr. Glasser to be generally truthful, I also found that he was a highly partisan witness, committed to defeating the landlord's application. Several of the tenants mentioned being approached by Mr. Glasser and lobbied to oppose the landlord's application for fear of being forced to vacate the building. For this reason, I found Mr. Glasser's uncorroborated hearsay rendition of the circumstances around Ms. Johnson's occupancy to be insufficiently reliable to make fact-findings as to whether the landlord treated her unfairly. Since no other evidence was offered to show that management's treatment of Ms. Johnson was in any way illegal or violated her rights, there can be no finding that the landlord's actions toward Ms. Johnson constituted harassment.

Demolition on the First Floor

Petitioner alleged that demolition work done on the ground floor prior to the opening of the adult club resulted in a stop work order and constituted harassment. Soon after the MJG took over the net lease of the building in late May 2007, construction was apparently begun on the ground floor in order to open an adult club. According to Department of Buildings records (Pet. Ex. 9), violations and a stop work order were entered on July 3, 2007. At this time an inspector found that "demo in progress more than 50% of org interior has been demolished 1st floor & basement" without a permit being issued for such work. A stop work order was therefore issued. In addition, the inspector found water lines removed without a permit and also a failure to present approved plans. The three violations were resolved on March 20, 2008, by payment of \$1550 in fines.

An expediter named Nicolett Moskover testified that she had filed and helped process plans for work on the first floor and cellar with regard to the eating and drinking establishment, beginning around August or September 2008 (Tr. 887, 893). The stop work order was issued in

legal rent for Mr. Ogunrinde's room. The parties dispute what the registered rent for the room is and have now placed this issue before the DHCR. There is therefore no basis to find that the 2006 nonpayment action was frivolous or otherwise without legal grounds. *See Dep't of Housing Preservation and Development v. Mendoza*, OATH Index No. 556/05 (Feb. 17, 2005) (harassment found where landlord initiated holdover proceeding against a month-to-month tenant who should have had a rent stabilization lease); *Dep't of Housing Preservation and Development v. Nesbitt*, OATH Index No. 1505/04 at 8 (Nov. 4, 2004) (harassment found where landlord brought eviction proceeding "falsely claiming that the premises was not . . . rent stabilized").

The legal rent for Mr. Astin's room was also the subject of protracted litigation (Resp. Ex. LL). In 1999, the landlord sued Mr. Astin, then going by the name of David Worthy, for nonpayment of rent. In a decision dated December 20, 2000, the Civil Court rejected the landlord's claims that the rent was \$186 per week and found that the legal rent was \$270.84 per month. The court also calculated an overcharge due Mr. Astin of \$5,681. A month later, treble damages were awarded to Mr. Astin, bringing the total overcharge award to \$17,583. In August 2007, Mr. Astin filed a complaint with the DHCR, alleging that the landlord had still failed to properly register the legal rent as \$270.84, that the landlord had not paid the overcharge award and continued to demand \$186 per week in rent, and that Mr. Astin had not been paying rent to the landlord as a credit against the unpaid overcharge award. The DHCR action was resolved in March 2008 after the current landlord registered the legal rent for room 312 as \$270.84 pursuant to the 2000 Civil Court decision.

The only facts not in dispute with regard to Mr. Astin are that Mr. Astin's legal rent was set at \$270.84 in 2000 with an overcharge award due of \$17,583, that the landlord did not file a registration of this legal rent with the DHCR until 2008, and that Mr. Astin has not paid any rent since 2000. The only act of the landlord within the inquiry period is the delay in registering Mr. Astin's rent. Although no reason was provided for this delay, there is no indication that it had a significant impact upon Mr. Astin, who has refused to pay any rent whatever for some eight years. I therefore cannot find that the landlord's actions were "frivolous" or otherwise calculated to harass Mr. Astin or force him to vacate the building.

In sum, I find that the verbal abuse and threats made to Mr. Stevens and Mr. Glasser, the posting of a sign to humiliate and intimidate Mr. Stevens, the display of violent kicking to Mr. Glasser, the warning that Mr. Glasser needed extra security, the two refusals to permit Mr.

HPD v. Bezzant, OATH Index No. 1529/14 (Jan. 5, 2014)

***Dep't of Housing Preservation
& Development v. Bezzant***

OATH Index No. 1529/14 (Jan. 5, 2015)

Petitioner proved that respondent committed acts of harassment within the meaning of section 27-2093 of the Administrative Code. Thus, respondent's application for a certificate of no harassment should be denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**

Petitioner
- against -
JOHN BEZZANT
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Housing Preservation and Development, commenced this proceeding under section 27-2093 of the Administrative Code. On June 3, 2013, respondent John Bezzant, an officer and representative of building owner Aimco, Inc., applied for a certificate of no harassment for a building located at 238-244 West 73rd Street, New York, New York. Petitioner seeks denial of respondent's application for a certificate of no harassment, alleging that respondent committed acts of harassment against the building's tenants from June 3, 2010 to date (ALJ Ex. 1, Second Amended Petition). Admin. Code § 27-2004(a)(48) (Lexis 2014). Respondent denies committing any harassment and insists that it took reasonable actions to remedy any conditions of which it was aware (ALJ Ex. 2, Answer to Second Amended Petition).

At a six-day hearing that ended on October 1, 2014, petitioner relied on documentary evidence and testimony of fifteen witnesses (thirteen current tenants, an investigator, and an elevator repairer). Respondent relied on documentary evidence and testimony from five current

or former Aimco employees. Following receipt of written summations, the record was closed on November 20, 2014.

For the reasons below, I find that petitioner proved that respondent harassed lawful tenants and recommend denial of the certificate of no harassment.

ANALYSIS

Background

The building, known as the Tempo, is a Class A hotel located at 238-244 West 73rd Street (Tr. 7, 762). When respondent applied for a certificate of no harassment on June 3, 2013, 150 units were occupied by permanent single room occupancy (SRO) rent-stabilized tenants and 75 other units were rented at market rate (Tr. 7-8; Pet. Ex. 1). Before issuing a certificate of no harassment, petitioner must certify that there has been no harassment of the lawful occupants of the premises within the 36 months preceding respondents' application. Admin. Code § 27-2093(c) (Lexis 2014). Thus, the relevant inquiry period is from June 3, 2010 to date. 28 RCNY § 10-01 (Lexis 2014) (inquiry period ends on the date of final determination).

Harassment includes "the interruption or discontinuance of essential services" that "interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of" a lawful occupant's use or occupancy of a dwelling unit; and "causes or intends to cause a [lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy," or "any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit or causes or is intended to cause [a lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy." Admin. Code § 27-2093(a).

If an act of harassment is proved, it is presumed that such acts were "committed by and on behalf of the owner" and "such acts or omissions were committed with the intent to cause a [lawful occupant] to vacate such unit or to surrender or waive a right" to lawful occupancy. Admin. Code § 27-2093(b). Respondent may rebut the presumption of intent by showing that proven acts of harassment were not intended to cause lawful occupants to vacate their rooms, or surrender or waive their rights to their rooms. *See Dep't of Housing Preservation & Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 at 12 (Dec. 29, 2006).

Petitioner alleged that respondent committed a dozen different forms of harassment (ALJ Ex. 1 at ¶ 9). Respondent countered that the premises is a beautiful, old building with many amenities (Tr. 852-53). Though I did not credit all of the claims made by petitioner's witnesses, the evidence was sufficient to prove that respondent committed acts of harassment. Petitioner demonstrated that respondent repeatedly failed to repair broken plaster and paint, and make other repairs, in a timely fashion. The evidence also showed that respondent repeatedly posted rent demands, along with unlawful requests for legal fees, on the doors of SRO tenants when no rent was due.

Proven Acts of Harassment

Failing to respond to tenants' complaints or repair broken plaster and paint in a timely fashion (ALJ Ex. 1 § 9 (b), (h))

When petitioner's investigator inspected the premises on November 12, 2013, he photographed at least ten SRO units with significant amounts of peeling paint and plaster (Tr. 762-63; Pet. Exs. 21, 29, 32, 48, 49, 52, 57, 65, 66, 67, 68). The investigator returned on March 17, 2014, and photographed four more SRO units with similar conditions (Pet. Exs. 43, 60, 69, 70).

At the hearing, tenants credibly testified that building management and employees either ignored or failed to make requested repairs in a timely fashion throughout the inquiry period. For example, tenant Arnone testified that it took months to repair a leaky bathroom sink and faucet in 2013 (Tr. 148-50; Pet. Ex. 30). Tenant Goldberg testified about recurring leaks in his bathroom ceiling which caused plaster and paint to drip down and bubble in multiple spots from 2010 to 2013 (Tr. 329-30). The building owner refused to repair the condition or only made temporary fixes until the summer of 2014 (Tr. 331, 341, 350-51). Tenant Meltzer testified about mold, cracked porcelain, and blistering paint in her apartment that building employees refused to repair (Tr. 630-34, 639; Pet. Ex. 57). Tenant Darrow described recurring leaks and flaking plaster that were in her bathroom for more than a year (Tr. 304, 321-22, 324; Pet. Ex. 37). Despite repeated requests, the building owner repaired the condition only recently (Tr. 323-25). Tenant Harris described a peeling plaster condition that kept recurring from 2010 until the building owner finally repaired it in 2014 (Tr. 111-117, 122; Pet. Ex. 29). Tenant Winther testified about a recurring problem with leaks and peeling plaster which had been a problem for more than a year and was not repaired until 2014 (Tr. 61, 66, 72-73; Pet. Ex. 21). According to

tenant McIntyre, a 2014 ceiling leak caused his wall to disintegrate and his bookshelves to collapse (Tr. 469). It took three or four weeks for the superintendent to inspect the condition and a few more weeks for the building manager to look at it (Tr. 470). The condition has yet to be repaired and one-hundred square feet of concrete in his living room is still exposed (Tr. 470, 472).

Tenant Pinchefsky testified that her kitchen counter has been falling apart for years (Tr. 368-70). Though she exaggerated when she described her kitchen as “third world,” Pinchefsky credibly maintained that she repeatedly asked building superintendents to repair bubbling plaster and the counter, which was attached to a rotting piece of wood (Tr. 368-70, 376-78, 380; Pet. Exs. 41, 42, 43).

Tenant Schiller testified that, despite repeated requests in 2012 and 2013, the building owner would not replace a frayed and tattered carpet that had been in his apartment when he moved in nearly 40 years ago (Tr. 524-28; Pet. Exs. 8, 50, 51). Tenant Slater testified about mold on bathroom tiles, which the building owner refused to have scraped or repainted for nearly two years, which was finally repaired in June 2014 (Tr. 216-18, 221, 226; Pet. Exs. 26, 33). Schiller described mold, flaking plaster, leaks “too numerous to count” in his bathroom (Tr. 533, 537-40; Pet. Ex 52). Despite years of complaints, the building owner only performed cosmetic maintenance work and did not repair the condition until 2014, while the application for a certificate of no harassment was pending (Tr. 535, 541-42, 544, 549-50).

Tenant Cunningham testified that her windows and window frames had cracks, which a maintenance worker refused to repair (Tr. 705-06, 710; Pet. Ex. 60). Cunningham, the president of the tenants’ association, also described the mold and flaking plaster in other tenants’ rooms. Despite Cunningham’s protests, those conditions were not repaired (Tr. 714, 721; Pet. Exs. 64). *See Dep’t of Housing Preservation & Development v. Domb*, OATH Index No. 586/09 (Apr. 17, 2009), *aff’d*, *Domb v. Cestero*, 89 A.D.3d 347 (1st Dep’t 2011) (hearsay regarding failure to make repairs can be relied upon to prove harassment).

The photographs and credible testimony proved that respondent failed to make timely repairs of peeling paint, bubbling plaster, and other conditions in the units of SRO tenants. Relying on evidence that it had a full-time staff of maintenance workers who made repairs and kept detailed records, respondent argued that there was no intent to harass (Resp. Exs. A-H). Respondent also argued that tenants failed to substantiate that paint and plaster conditions were

brought to its attention (Resp. Mem. at 28). In respondent's view, the tenants' complaints were false, concocted, de minimis, vague, or uncorroborated (Resp. Mem. at 40). The evidence does not support respondent's claims.

Respondent performed routine repairs, such as replacing light fixtures and unclogging bathtubs (Resp. Ex. F). Occasionally, respondent also performed major repairs of SRO units, including the complete renovation of one bathroom to make it handicap accessible (Tr. 1167-68). However, the extensive evidence of peeling paint and bubbling plaster in multiple SRO units demonstrates that this was a serious, recurring condition that respondent failed to address for years.

The tenants credibly testified that their complaints were ignored. This was confirmed by evidence of at least twenty 311 complaints regarding peeling paint and plaster or mold (Tr. 1156; Pet. Ex. 20). Respondent's witnesses acknowledged that they received alerts from 311 (Tr. 1156). In several instances, respondent repaired long-standing conditions only after it filed the certificate of no harassment. This evidence supports a finding that respondent was aware of this ongoing problem and did not address it in a timely fashion.

Contrary to respondent's argument, there was no evidence that tenants prevented work from being performed. Though Schiller conceded that he did not want major repair work in his unit performed while he was finishing his dissertation in 2012, he credibly maintained that he wanted the work performed in 2013 or 2014 and was willing to relocate if necessary (Tr. 530-31, 550-51). Respondent's repair records show that Schiller complained about the decades-old tattered carpet in November 2013 (Resp. Ex. F). Yet that request was ignored.

In sum, the evidence showed that respondent committed acts of harassment by failing to make timely repairs, especially for peeling paint and broken plaster. The widespread nature of the conditions, confirmed by photographic evidence, demonstrated that this was a serious, recurring problem. Respondent failed to rebut the inference that this harassment was committed with the intent to cause lawful SRO occupants to vacate their units or surrender their rights. *See Dep't of Housing Preservation & Development v. Goldsmith*, OATH Index No. 2118/12 at 30 (Aug. 27, 2013) (failure to correct recurring leaks and defective floors, doors, and windows, deemed harassment); *Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07 at 15, 21 (May 16, 2007) (persistently ignored deplorable conditions, including leaks, constitutes harassment).

Repeatedly failing to credit rent payments in a timely fashion, posting false demands for rent and legal fees on tenants' doors, and bringing court proceedings against tenants without legal foundation (ALJ Ex. 1 § 9 (c), (d))

SRO tenants claimed that baseless demands for rent, including threats of litigation of eviction, were posted to their apartment doors after they had already paid their rent. The evidence fully supported this claim. Respondent's actions constituted harassment.

Cunningham testified that, in October 2013, she received a rent demand, signed by the building's managing agent, after she had already paid her rent (Tr. 698-700; Pet. Ex. 58). She also received a five-day notice in November 2013, for that month's rent, a few days after she had already paid it (Tr. 701-02; Pet. Ex. 59). Goldberg received a rent demand in October 2013 after she had already paid her rent (Tr. 345; Pet. Ex. 38). Slater testified that he received a rent demand on his door in November 2013 five days after his monthly rent check had cleared (Tr. 256; Pet. Ex. 33). Silva received a similar notice after he had already paid his rent with a money order (Tr. 399, 421). Harris, another long-time SRO tenant, received a rent demand in September 2013 after respondent had failed to deposit several months' rent checks (Tr. 84, 87; Pet. Ex. 24).

McIntyre testified that respondent did not deposit his March 2013 rent payment because the check also had his wife's name on it and respondent insisted on seeing a copy of their marriage license (Tr. 451, 484). In late November 2013, McIntyre received a rent demand posted on his door when he returned from vacation (Tr. 449). He conceded that he had not yet paid his rent for that month (Tr. 449). After receiving the notice, McIntyre immediately paid his November and December 2013 rents (Tr. 449-50). Though respondent received McIntyre's December rent on November 26, he received a demand for rent on December 12, falsely claiming that he owed November and December's rent and legal fees, and suggesting that he faced eviction (Tr. 455-56; Pet. Ex. 6).

Respondent did not dispute that in nearly every instance the SRO tenant had already tendered the monthly rent before the demand for rent and legal fees had been posted on the apartment door. However, respondent explained that it had referred each matter to its attorney because the tenants had failed to pay the monthly rent on the first of the month as required or within a ten-day grace period. Because its corporate offices and the bank used for rent deposits were located out-of-state, payments received after the tenth of the month were not always

processed in time before the rent demands were posted by respondent's attorney (Tr. 258, 955). Thus, respondent argued that there was no intentional harassment because the tenants' payments were untimely and it was not responsible for errors committed by its attorney (Resp. Mem. at 36, 39).

Respondent is mistaken. Except for the November rent demand to McIntyre, all of the other rent demands were baseless because the rents had already been paid before the demands were posted. The repeated nature of these demands supports the inference that they were intended to harass SRO occupants. And respondent cannot excuse its conduct by blaming its attorney. In each case, respondent referred the rent demand to its attorney without bothering to follow up and notify the attorney when the payments were received and the attorney posted the rent demands at respondent's behest.

A finding of harassment is further supported by the fact that some of the notices included unlawful requests for late fees or attorney fees (Pet. Ex. 59). Respondent did not dispute that rents for rent stabilized tenants cannot include extra charges for late fees or attorney fees. *See* 9 NYCRR § 2525.1 (Lexis 2014); *London Terrace Gardens v. Stevens*, 159 Misc.2d 542 (N.Y. Civ. Ct. N.Y. Co. 1993) (legal fees and late fees may not be collected from rent stabilized tenants). Indeed, before the November and December 2013 rent demands were posted, tenants, a local elected official, and the SRO Law Project had put respondent on notice that it was improper to include such fees in rent demands (Tr. 451, 577-79; Pet. Ex. 7). Despite such notice, respondent repeatedly made unlawful demands for legal fees and late fees.

Respondent now argues that there was no harm because in most cases the rent demands were withdrawn after it was notified that the rent had been paid and none of the SRO tenants actually paid any late fees or attorney expenses (Tr. 666). That argument ignores the tenants' credible testimony that they felt embarrassed, annoyed, or harassed by receiving a notice prominently posted on their door demanding rent that had already been paid. For example, Cunningham, an elderly tenant who has been living in the building for more than 30 years, described how she walked to respondent's offices on Madison Avenue each month to pay her rent and receive a receipt (Tr. 686, 703-04). She credibly maintained that receiving a rent demand after she had already paid her rent was quite upsetting (Tr. 702). Other tenants described similar feelings of embarrassment, anger, humiliation, and fright (Tr. 105, 347, 401, 454). Based on this evidence, petitioner proved that respondent engaged in harassment. *See*

Dep't of Housing Preservation & Development v. Bernardi, OATH 416/09 at 6, 13 (Mar. 19, 2009) (harassment shown by evidence that landlord posted embarrassing notice to SRO tenant).

In at least two instances, tenants protested that they were required to make needless court appearances. However, the evidence failed to show that those appearances constituted additional acts of harassment.

McIntyre testified that he went to court to defend against the non-payment action for the November and December 2013 rent demands, and the court dismissed the action on mutual consent. However, McIntyre acknowledged he could have avoided the court appearances but he could not agree on proposed language when respondent's counsel offered a stipulation withdrawing the action (Tr. 461-62).

Tenant Meltzer was the subject of a non-residency action that was dismissed on procedural grounds (Tr. 1170-71; Pet. Exs. 4, 8). Respondent began the action after Meltzer asked to have her mail sent to a post office box; employees reported that they had not seen her in the building for a few months; and an internet search indicated that she may have lived in the Philadelphia area (Tr. 1170). An unsuccessful lawsuit, alone, is not proof of harassment.

Unproven Acts of Harassment

Intimidation, threats, and dismissive treatment (ALJ Ex. 1 § 9 (a))

Petitioner alleged the following acts of verbal and physical harassment: building manager Richardson loudly yelled and raised her fist in an intimidating manner at tenant Cunningham; building superintendent Cappelli demanded, in an angry and menacing fashion, that tenant Arena not call 311; and building management and agents treated tenants in a dismissive, contemptuous manner. The evidence failed to prove that respondent's employees verbally or physically harassed tenants. Many of the allegations are based on the tenants' subjective interpretations of ambiguous words or actions. To the extent that some of respondent's employees made isolated, inappropriate remarks, they were not intended to harass.

For example, Cunningham recalled an incident in 2012 when she was unable to get her walker through the front door which was undergoing repairs. When she tried to use the service entrance, she asked a porter to remove trash bags that blocked her way (Tr. 690). According to Cunningham, building manager Richardson ran after her, yelled at her, raised her fist in an intimidating manner, and told her to stop abusing employees (Tr. 690-91). Cunningham, who has a cardiac condition, claimed that she was frightened (Tr. 690). Though she felt palpitations

and wanted to go to a doctor, she went to pay her rent instead (Tr. 691). Richardson recalled that she once asked a porter to remove some construction debris and assist Cunningham in using the service entrance (Tr. 1086-87).

This evidence was too vague to support a harassment claim. There was no contemporaneous report of the incident. There was no evidence of how much distance there was between Richardson and Cunningham or what they said to each other. And Cunningham's claim – two years after the incident – that she wanted to go to a doctor but decided to pay her rent instead, seemed embellished.

Similarly, Arnone recalled that she once complained to Richardson about a young man playing a musical instrument in the building's fitness center (Tr. 176). According to Arnone, Richardson replied that rent stabilized tenants did not belong in the fitness room (Tr. 176). It is unclear when this incident supposedly occurred and there was no contemporaneous report of it. It is unlikely that Richardson uttered the alleged remark and, even if she did, it may have been made in jest. Arnone conceded that she and other tenants routinely use the fitness center and they had never been prevented from doing so during the inquiry period (Tr. 178).

Tenant Arena testified that she once called 311 to complain about a lack of hot water and building superintendent Cappelli later asked if she had first reported the matter to building management. When Arena said "No," Cappelli allegedly became very aggressive and in an angry and menacing tone ordered her not to complain to 311 (Tr. 489-91). Cappelli credibly testified that he did not recall making such a remark and explained that, when he received a report of a 311 call regarding the lack of hot water, it would have been standard procedure for him to contact the tenant and inquire about the reported condition (Tr. 1202, 1216).

It is unclear what exactly Cappelli told Arena or what she meant by an "angry" or "aggressive tone." In the absence of any allegation of similar behavior by Cappelli, I find it unlikely that he would have suddenly ordered Arena not to call 311. Tenants routinely made such complaints. There was no reason for Cappelli to single out Arena for unfair attention. It is likely that he may have asked her to notify building management the next time that she had a complaint about hot water. Depending on what was said or how he said it, Arena may have misconstrued Cappelli's remarks as an "order" not to call 311. Other evidence suggested that Arena tended to exaggerate. When the superintendent banged on her door to investigate a plumbing problem, she said that it sounded like "the Gestapo" was at her door (Tr. 494-95).

The remaining allegations of verbal abuse were vague and subjective. Slater claimed that Richardson's "general attitude" was "cold, aloof, a little bit belligerent" when he asked her to repair some tiles (Tr. 219). Meltzer described Richardson's tone and "body language" as "hostile" and "filled with contempt" when they had a disagreement about a fee for a mailbox key (Tr. 579-81).

Individually and collectively, this evidence of alleged physical and verbal abuse fell short of proving any intent to harass.

Elevator service (ALJ Ex. 1 § 9(e))

Petitioner alleged that respondent's failure to maintain the building's elevators caused a decrease in service due to chronic shutdowns. Though there were problems with the elevators, petitioner failed to prove that it was due to a lack of maintenance.

The building has two passenger elevators and one freight elevator (Tr. 766). Tenants claimed that one or more elevators were frequently out of service or malfunctioning. For example, Cunningham testified that elevators were "constantly" breaking down (Tr. 692). Pinchefsky testified that they were inoperable "at least monthly" and she has been stuck in an elevator twice since 2010 (Tr. 365-66). McIntyre testified that "when available" the elevator ride could be "spooky" and he was stuck in once for 45 minutes (Tr. 443). Meltzer testified that in December 2013, one elevator was out of service for two weeks (Tr. 560; Pet. Ex. 53). The Department of Buildings had issued a violation on November 29, 2013 (Pet. Ex. 16; Tr. 561-62). Petitioner's investigator noted that one elevator was out of service when he inspected the premises in March 2014 (Tr. 763). Some of the tenants suggested that the elevators broke down more frequently a few years ago when many apartments in the building were being used by a company named WooGoo as a short-term or overnight hotel (Tr. 247-48, 497).¹

However, one of petitioner's witnesses, supervisor Mayer from KONE Elevators and Escalators, credibly testified that none of the interruptions of elevator service were due to a lack of maintenance (Tr. 749). Mayer, who has been servicing the building since 2011, described respondent's concerted efforts to maintain the elevators and keep them in working order (Tr. 727-28). He stated that respondent has an all-inclusive contract with KONE to maintain all the elevators in the building (Tr. 726, 748; Pet. Exs. 62, 63). The contract also provides for 24-hour

¹ Petitioner did not allege that respondent committed harassment by allowing WooGoo to operate an illegal hotel. Respondent took legal action against WooGoo to compel it to stop such activity (Tr. 656).

emergency repairs (Tr. 749-50). After reviewing service records, Mayer testified that there was one occasion when both passenger elevators were not working for approximately 75 minutes (Tr. 740-41). At no point were all three elevators out (Pet. Exs. 62, 63). Mayer's testimony, supported by maintenance and repair records, successfully rebutted the claim that respondent harassed SRO tenants by causing a lack of elevator service.

Interrupting and discontinuing longstanding services (ALJ Ex. 1 § 9(f), (k))

Petitioner alleged that respondent interrupted or discontinued longstanding services. However, the evidence failed to support this claim.

For example, two witnesses recalled seeing roaches or mice in the building (Tr. 52-53, 342-43). There was no indication that those observations were reported to respondent. Moreover, respondent presented credible evidence that it has a contract for regular monthly extermination service (Tr. 934). Tenants could also request additional extermination services (Tr. 342-43, 934, 1065).

Some tenants complained that there were occasions when there was no security person at the building entrance and there were a few months in 2013 when the building did not have a superintendent (Tr. 54-56, 74, 498, 515). However, respondents presented credible evidence that the building's lobby is located next to the entrance and there is a doorman there 24 hours per day (Tr. 855, 1064). Respondent also showed that there were at least three or four employees on duty at all times (Tr. 1088, 1201). When the doorman takes a break, one of the other employees fills in (Tr. 416, 498, 856, 1063-64). A superintendent once quit on short notice and it took three months to hire a replacement, but respondent continued to provide porters, maintenance workers, and interim superintendents without interruption (Tr. 56, 855, 962, 1063).

One tenant claimed that, in the past, a tenant could request a repair by going to the front desk and now the only way to make such a request was on-line (Tr. 432). Respondent rebutted that claim with ample evidence that repair requests could be made in person at the front desk, by phone, or on-line (Tr. 1063-64).

Until recently, there were trash receptacles on each floor near the stairwell landings. However, that practice ended when it resulted in violations issued by the Fire Department. After meeting with tenants and local elected officials, respondent obtained permission from the Department of Buildings to install a trash room in the basement near the freight elevator. Now tenants take their trash down on the freight elevator to the trash room. Respondent offered to

provide assistance to those tenants who were unable to bring their trash to the trash room (Tr. 1153-54). Petitioner argued that, according to the State Division of Housing and Community Renewal and section 1213 of New York City's Building Code, respondent should have installed a trash compactor, but respondent presented evidence that, due to the age of the building it was not required to do so. *See Admin. Code § 24-119 (Lexis 2014)* (multiple dwellings built prior to May 20, 1968, are exempt from trash compactor requirement).

It is inconvenient to take a freight elevator to the trash room. But the evidence showed that respondent only created the trash room after the Fire Department found the previous trash collection system to be unsafe. Though unpleasant, the trash room is probably more sanitary and safer than having separate trash receptacles on each residential floor of the building. Respondent also presented evidence that installing trash chutes on each floor would have taken space away from some tenants' apartments. Under these circumstances, installation of a trash room was not an act of harassment.

Hot water (ALJ Ex. 1 § 9(g))

Petitioner alleged that respondent repeatedly failed to provide hot water. A few tenants testified about incidents where there was a lack of hot water. For example, Darrow testified that there were violations for lack of hot water issued on May 6 and June 16, 2011 (Tr. 316-17). In 2013, she complained that there was scalding hot water when her upstairs neighbor flushed the toilet as she took a shower (Tr. 316). Arena and Harris also said that there were problems with a recurring lack of hot water (Tr. 79, 141, 489-91).

Respondent countered with evidence that it installed new hot water heaters and had a service contract for maintenance or repairs (Tr. 988-89, 1131; Resp. Ex. L). The problems with Darrow's hot water were due to a connection valve that respondent repaired (Tr. 1161-12). Other problems were related to the installation of a new hot water system (Tr. 1158-59). Petitioner failed to prove that there were chronic, recurring problems with hot water caused by respondent.

Unsafe or unlawful construction work (ALJ Ex. 1 § 9(j))

Some tenants complained about disturbances caused by construction work in and around the building. For example, Darrow recalled that workers repairing the building's façade dropped a brick and hit the window frame on her balcony, causing a table to break. She also described an incident where workers' sparks set fire to a topiary. Goldberg described falling debris that

knocked her air-conditioner out of a window (Tr. 342). Workers also dropped bricks that broke the skylight of a chiropractor's office in the building (Tr. 311, 325-26).

Meltzer, Arena, and Cunningham noted that there was noise and debris from renovations of units and common areas. According to Meltzer, construction workers made banging noises before 9:00 a.m. and there was an interruption of the water supply due to construction (Tr. 568-570, 575). Cunningham recalled an incident where she tripped over materials left out by a contractor (Tr. 696). Arena estimated that the scaffolding work took two years (Tr. 507).

Another tenant, Alvarez, gave construction workers permission to go through his upper floor apartment to work on the roof (Tr. 793, 805). But he later complained that the work took too long, many of his plants died due to the dust, and there was another door that the construction workers could have used (Tr. 793-94, 806-08).

Respondent offered proof that it had permits for all the work and it took corrective action when it learned of problems caused by the contractors (Tr. 1182). The evidence also showed that any interruptions of water due to construction were temporary and limited in scope (Tr. 1099-1101).

Though accidents occurred, construction work took longer than expected, and there may have been some inconvenience, petitioner failed to prove that respondent did anything improper. On the contrary, the evidence showed that respondent made necessary repairs to the building's exterior and common areas.

Generally interrupting or decreasing services (ALJ Ex. 1 § 9(I))

Petitioner failed to prove its catch-all claim that other essential services were interrupted or discontinued. As petitioner's investigator acknowledged, the building seemed well-maintained (Pet. Ex. 64). Among other things, respondent installed a new hot water system and new laundry machines (Tr. 938-39, 1064-65). At the end of the hearing, petitioner withdrew allegations that respondent failed to provide linen and maid service, light bulbs, fuses, toilet paper, long-distance phone service, or smoke and carbon-monoxide detectors (Tr. 1219-1223). With the exception of the proven acts of harassment discussed above, petitioner failed to prove the general claim that occupants of SRO units received less service than the occupants of market-rate apartments.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent failed to respond to tenants' complaints or repair broken plaster and peeling paint in a timely fashion.
2. Petitioner proved that respondent repeatedly failed to credit rent payments in a timely fashion and posted false demands for rent on tenants' doors.
3. Petitioner's remaining contentions were either unproved or did not constitute intentional harassment.

RECOMMENDATION

I recommend that respondent's application for a certificate of no harassment be denied.

Kevin F. Casey
Administrative Law Judge

January 5, 2015

SUBMITTED TO:

VICKI BEEN
Commissioner

APPEARANCES:

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HPD v. Edelstein, OATH Index No. 490/12 (Dec. 7, 2012)

***Dep't of Housing Preservation
& Development v. Edelstein***

OATH Index No. 490/12 (Dec. 7, 2012)

Petitioner proved that respondent committed acts of harassment within the meaning of section 27-2093 of the Administrative Code. Thus, respondent's application for a certificate of no harassment should be denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**
Petitioner
- against -
MICHAEL EDELSTEIN
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Housing Preservation and Development, commenced this proceeding under section 27-2093 of the Administrative Code. Respondent Michael Edelstein, owner of a building at 307 West 79th Street, New York, New York, applied for a certificate of no harassment on January 19, 2011. Petitioner seeks denial of respondent's application for a certificate of no harassment, alleging that respondent committed acts of harassment against the building's tenants from January 19, 2008 to date (ALJ Ex. 1). Admin. Code § 27-2004(a)(48) (Lexis 2012).

At a twelve-day hearing that ended on July 9, 2012, petitioner relied on documentary evidence and testimony of seventeen witnesses. Respondent, who did not testify, relied on documentary evidence and testimony from ten witnesses. Following submission of written summations, the record was closed on October 10, 2012.

For the reasons below, I find that petitioner proved that respondent harassed lawful tenants and recommend denial of the certificate of no harassment.

ANALYSIS

I. Background

The building at 307 West 79th Street is an eleven-story structure with 227 residential units. When respondent applied for a certificate of no harassment on January 19, 2011, 83 units were occupied by permanent single room occupancy (SRO) residents and 144 units were used for hotel guests (Pet. Exs. 1, 31). Before issuing a certificate of no harassment, the commissioner must certify that there has been no harassment of the lawful occupants of the premises within the 36 months preceding respondents' application. Admin. Code § 27-2093(c). Thus, the relevant inquiry period is from January 19, 2008, to date. 28 RCNY § 10-01 (inquiry period ends on the date of Commissioner's final determination).

Harassment includes "the interruption or discontinuance of essential services" that "interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of" of a lawful occupant's use or occupancy of a dwelling unit; and "causes or intends to cause a [lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy," or "any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit or causes or is intended to cause [a lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy." Admin. Code § 27-2093(a).

If an act of harassment is proved, it is presumed that such acts were "committed by and on behalf of the owner" and "such acts or omissions were committed with the intent to cause a [lawful occupant] to vacate such unit or to surrender or waive a right" to lawful occupancy. Admin. Code § 27-2093(b). Respondent may rebut the presumption of intent by showing that statutorily-defined acts of harassment were not intended to cause lawful occupants to vacate their rooms, or surrender or waive their rights to their rooms. *See Dep't of Housing Preservation & Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 at 12 (Dec. 29, 2006).

II. Preliminary Issues

Prior to the hearing, respondent protested that it had not received specific notice of the charges. On December 5, 2011, this tribunal directed petitioner to file a more specific pleading. Petitioner filed an amended pleading on January 13, 2012, and a second amended pleading on February 24, 2012, providing more detailed allegations of harassment (Pet. Ex. 1). The amended

pleadings provided sufficient notice to respondent to defend against the charges. *See Dep't of Housing Preservation & Development v. Bernardi*, OATH Index No. 416/09 at 3 (Mar. 19, 2009).

At the outset of the hearing, petitioner sought to amend the petition for a third time to add new claims (Tr. 5). Petitioner asserted that, after it had amended the petition for a second time, respondent committed additional acts of harassment by installing a security camera aimed at a tenant's apartment door and verbally harassing that tenant (Tr. 7-9, 13). Although the inquiry period continues up to the commissioner's final determination, I denied petitioner's request to amend the petition to include a new allegation regarding a surveillance camera, because of the potential for unfair prejudice to respondent (Tr. 17). But I granted the amendment regarding the additional act of verbal harassment, because there was no undue prejudice. The allegation was uncomplicated and the relevant witness was not scheduled to testify until several weeks later (Tr. 18).

During the hearing, respondent objected to evidence that did not directly relate to specific allegations in the petition. Petitioner argued that such evidence was admissible because one of the specifications accused respondent of "generally interrupting and/or discontinuing and decreasing essential services" and other specifications included the phrase "including but not limited to" (ALJ Ex. 1). Respondent's objections to such evidence were generally sustained and the evidence precluded due to lack of specific notice and the potential for undue prejudice (Tr. 244, 673, 779, 1855). For example, petitioner repeatedly tried to admit evidence that tenants, not specified in the petition, had complained about the lack of heat (Tr. 2951). Among other things, petitioner argued that respondent had opened the door to such evidence when one of its witnesses testified that only one tenant complained about inadequate heat (Tr. 2952). I precluded that evidence of uncharged and unproven heat complaints because it was collateral and generally lacking in probative value (Tr. 2953, 2956, 2968).

Though the evidence was precluded, respondent argued that petitioner's attempt to introduce it was unethical and violated due process. Resp. Mem. at 5. Respondent's claim lacks merit. Both sides were represented by able counsel who repeated unsuccessful arguments in the hope of obtaining a different ruling (Tr. 619, 1427-28, 1605, 1610, 1754, 1768, 2497, 2890). That was not unethical or prejudicial.

III. Proven Charges of Harassment

1. Illegal lockout of tenant (ALJ Ex. 1 ¶12(a)).

Petitioner alleged that, in April 2009, respondent illegally locked out Dorothy Williamson from her unit, removed her belongings from unit 118, and physically threatened her. Also, petitioner alleged that respondent delayed Williamson's entry to her unit in September 2009 by failing to give her a working key. This specification should be sustained in part. Petitioner proved that respondent harassed Williamson by locking her out and removing her belongings in April 2009, but it did not establish that she was physically threatened in April 2009 or harassed in September 2009.

Dorothy Williamson rented unit 118 from March 21 through April 4, 2009 (Williamson: Tr. 178-79). On April 3, Williamson, aided by the SRO Law Project, submitted a written request for a lease (Tr. 181, 188, 202, 206; Pet. Ex. 17).

There was conflicting testimony about what happened the next day, April 4. Williamson recalled that she was told that she had to vacate her unit because it had been booked for a tourist (Tr. 206). According to Williamson, building manager David Kelner said, "I want you to leave this building and come back next week, and I'll decide if I want you to have the room" (Tr. 207-08). He added, "Don't challenge me, or you will lose" (Tr. 208). Williamson recalled that Kelner punched his left palm with his right fist (Tr. 208). After telling Kelner that she was going to speak to her lawyer, Williamson, walked out of the building (Tr. 208). Later that day, another tenant called Williamson and told her that the police were at the building and her clothes were in the lobby (Tr. 211).

After contacting a local elected official, Williamson returned to the building and found her clothing in the lobby, packed in two black trash bags (Tr. 211-12). A police officer told Williamson, "We came here to arrest you and you weren't here" (Tr. 212). Williamson showed the police paperwork regarding the unit and the police called the elected official (Tr. 212-14). The police spoke to Kelner, told him to find another room for Williamson, and gave him a summons (Tr. 216-17). Kelner moved Williamson to unit 143, which she described as "filthy" (Tr. 218-19).

Charles Nassif testified that he saw the exchange between Williamson and Kelner where Kelner made a gesture with his fist (Tr. 1759-60). Nassif also said that he overheard a police officer refer to a summons for an illegal eviction (Tr. 1766).

Former building manager David Kelner, who is also respondent's brother-in-law, testified that when he arrived for work on April 4, he learned that Williamson had submitted a written request to lease her unit (Tr. 2513). One month earlier, Kelner had received an advisory opinion from the Department of Housing and Community Renewal (DHCR) stating that if a hotel occupant notified the building owner of an intent to reside in the building on a long-term basis, the owner could not prevent such occupant from becoming a permanent tenant (Tr. 2717; Resp. Ex. J). But on the morning of April 4, Williamson's unit had been overbooked and a hotel guest was scheduled to arrive (Tr. 2515). Kelner said that he knocked on Williamson's door, did not hear any answer, and learned that she had gone out that morning (Tr. 2515).

According to Kelner, he normally would have charged Williamson for another night's stay. However, because the unit was overbooked, respondent's attorney told him that there was "no choice" but to remove Williamson's belongings and put them in a safe place (Tr. 2515-16). So he "took all her stuff and put them in bags in front of the front desk" (Tr. 2516). When Williamson returned, she insisted on going to unit 118 and Kelner offered to find a room in another hotel (Tr. 2517-18). After Williamson rejected that proposal, Kelner offered to move her to room 143 until the matter was resolved (Tr. 2519, 3147). According to Kelner, his staff quickly prepared room 143 and they did whatever they could to accommodate Williamson (Tr. 2522-23).

Five days later, on April 9, 2009, the SRO Law Project commenced a civil court action to restore Williamson to possession of unit 118 (Pet. Ex. 4). The SRO Law Project also filed a harassment complaint with DHCR on Williamson's behalf (Pet. Ex. 6). On April 14, the hotel guest vacated unit 118 and Williamson was moved back into that unit, where she continues to reside. In June 2009, the civil court proceeding was settled after the parties agreed that Williamson had been restored to unit 118 and Williamson withdrew the DHCR complaint with prejudice; Williamson also agreed not to oppose respondent's motion to dismiss the police summons (Pet. Ex. 6).

Petitioner proved that respondent harassed Williamson. Before removing Williamson's belongings from her unit, Kelner knew that she had requested a lease. Despite that knowledge,

Kelner took all of Williamson's belongings and dumped them in trash bags in the lobby. Williamson, an elderly woman who testified in a straightforward manner, credibly described how she found all of her belongings in garbage bags. She recalled that the contents of her refrigerator were stuffed in the same bags as her clothing, including her undergarments, "I had ice cream on my clothes" (Tr. 220).

In contrast, I found Kelner's testimony evasive. At first, he denied putting anything in trash bags (Tr. 2523). When pressed, he claimed that whatever did not fit in suitcases, were put in "clear or black plastic bags" (Tr. 2523, 2718). And he grudgingly conceded that it was "possible" that food from Williamson's refrigerator ended up in the bags (Tr. 2719-20). I did not credit Kelner's claim that he put Williamson's belongings in the lobby for safekeeping. If Kelner genuinely intended to protect her property, he could have packed it carefully and safely stored it in an office adjacent to the lobby.

Nor did I credit Kelner's claim that there was "no choice" and he had to move Williamson's belongings. Respondent offered no documentary evidence to support Kelner's assertion that the building was "booked solid" on April 4, 2009 (Tr. 2518). Indeed, the contrary appeared to be true. Kelner first offered to find Williamson another unit in different hotel. But when the police and an elected official were called, Kelner suddenly found Williamson a vacant unit on the same floor where she had been staying.

The evidence strongly supports the inference that respondent wrongfully removed Williamson from unit 118 to prevent her from becoming another long-term SRO tenant in the building. That is harassment.

It does not matter that Williamson later withdrew her DHCR harassment complaint. She withdrew her claim as part of a settlement agreement after respondent restored her to unit 118 and gave her a lease. Petitioner was not a party to that litigation and not bound by any settlement agreement.

Respondent also suggested that the SRO Law Project sent Williamson to the building as a "set up." That argument lacks merit. The SRO Law Project helped Williamson exercise her rights. She lawfully requested a lease. If respondent had honored that request, there would have been no harassment. Instead, respondent elected to ignore Williamson's request for a lease, entered her unit without her permission, and removed her belongings. Respondent is solely responsible for those actions.

The evidence regarding Kelner's hand gesture was more equivocal and insufficient to prove a physical threat. Williamson did not mention any hand gesture in her DHCR complaint and I did not credit Nassif's claim that he saw the gesture. It is also possible that Kelner rubbed his hands together and Williamson, upset at the prospect of losing her room, misconstrued the gesture.

Petitioner also failed to prove that respondent deliberately locked Williamson out of her unit in September 2009. The evidence showed that long-term residents have locks with keys for their doors. Hotel guests have electronic key cards. Because Williamson's unit was a hotel room when she first moved there in March 2009, she was given a key card that was periodically reprogrammed (Tr. 2526). On Labor Day weekend, Williamson's card expired and the person working at the front desk could not immediately reactivate it. The card was reactivated the next day and Williamson's key card was later replaced with a lock and key (Tr. 2526-27). This was an isolated, inadvertent incident and not harassment.

2. Entering lawful occupants' units without permission (ALJ Ex. 1 ¶12(b)).

Petitioner alleged that respondent entered the units of five tenants – Jesse Zhu, Linda Cool, Thomas Miller, Michael Cutler, and Richard Amelius – without their permission and took photographs, violating the tenants' rights to exclusive possession of their units and disturbing their comfort, repose, peace, and quiet enjoyment. This specification should be sustained.

According to petitioner's investigator, respondent produced 500 to 700 photographs during pre-hearing discovery (Wycoff: Tr. 2010). Some tenants expressed concern when they saw the photographs and learned that building management had photographed the interiors of their rooms (Tr. 1992, 2010).

Respondent questioned whether tenants were harassed if they were unaware that photographs had been taken and only learned of them after they were provided to petitioner in discovery (Resp. Mem. at 19). That argument is mistaken. Tenants are entitled to privacy and quiet enjoyment of a dwelling. That privacy is violated when someone enters a home, without the occupant's knowledge or permission, and takes photographs, even if such conduct is only discovered after the fact.

Alternatively, respondent argued that its employees only entered units with tenants' permission for authorized repairs, if requested by an inspector, or when it was necessary to make

emergency repairs (Kelner: Tr. 2486-87). Respondent's claim was not supported by credible evidence.

Jesse Zhu identified photographs that were taken of his room in 2009 and 2010 (Tr. 563-65; Pet. Exs. 12, 13, 14, 24, 25). He credibly testified that he did not give anyone, especially building management, permission to enter and photograph his room (Tr. 549, 568-69). Zhu conceded that it was possible that his wife let someone in their room to take pictures, but he said that was unlikely (Tr. 591-92). She had previously refused to allow an inspector into the room, she would not let someone into the room to take pictures, and if she had done so she would have told Zhu (Tr. 591-93).

According to Zhu, Kelner accompanied a Department of Buildings (DOB) inspector to Zhu's room for a scheduled inspection in September 2009. Zhu permitted the inspector to enter, but would not allow Kelner inside (Tr. 525). Kelner stayed in the hallway as the inspector looked inside Zhu's room (Tr. 526).

Respondent offered conflicting evidence on this issue. Kelner testified that he "usually" does not open an apartment door for an inspector when the tenant is not at home (Tr. 2698). Instead, he would leave a note for the tenant to make an appointment for the inspection (Tr. 2698-99). However, Kelner also testified that he has opened the door to Zhu's apartment and taken photographs in the presence of a DOB inspector when Zhu was not there (Tr. 2697, 2703-04).

Kelner recalled another incident when he accompanied a DOB inspector to Zhu's apartment for a court-ordered inspection. When Zhu opened his door, he told Kelner to "go away" (Tr. 2552). Kelner replied, "What do you mean? I'm here with the inspector, I'm in the hallway" (Tr. 2552). Initially, Kelner testified that he walked into Zhu's apartment with the inspector (Tr. 2686). Later, Kelner testified that he took photographs from the hallway and did not accompany the inspector into Zhu's room (Tr. 2701-02).

Parveen Sharma, who has worked at the building for thirty years, testified that he also took photographs of Zhu's room in response to Zhu's complaint about falling plaster (Tr. 2258, 2331; Pet. Ex. 25). According to Sharma, he took photographs to show respondent the work that needed to be done (Tr. 2259). Sharma testified that Zhu gave him permission to enter, "He did not say wait for me or don't go, he told me to go and take a look at whatever needed to be done" (Tr. 2259).

However, Sharma later said that he was unsure whether he took photographs for repair work and, instead he may have taken the photographs during a DOB inspection (Tr. 2319-21, 2323-24). Sharma testified that he took the photographs in the presence of a DOB inspector, without Zhu's permission (Tr. 2319-20).

Linda Cool identified photographs that were taken inside her apartment, without her permission, in mid-February 2011 (Tr. 854; Pet. Ex. 38). She recognized that building management might need to inspect her apartment before making repairs, but she expected to be notified in advance and she was startled to learn that someone had taken photographs inside her room without her knowledge (Tr. 884).

Kelner testified that Cool had requested repairs and he arranged with her to inspect her room (Tr. 2743). He said that Cool was present when the photographs were taken. Cool was not depicted in any of the photographs; Kelner claimed that she "didn't want to be in them" (Tr. 2745). He also claimed that photographs which did not depict needed repairs were taken to show clutter that had to be cleared (Tr. 3111).

Long-time tenant Thomas Miller testified that he usually spends winters in Florida (Tr. 1353). He received photographs from petitioner's investigator and, based on the contents depicted in them, concluded that they were taken from December 2008 to December 2010 (Tr. 1359). Miller did not give building management permission to enter his apartment or to take photographs (Tr. 1358, 1368).

Kelner offered conflicting testimony regarding Miller's apartment. At first, he testified that he entered with Miller's permission to take pictures and check a major water leak from 10th to 5th floors (Tr. 2591, 3116). Kelner later conceded that he did not call Miller before entering his room (Tr. 2752).

Michael Cutler, who has lived in the building for a decade, testified that he never gave building management permission to enter his apartment (Tr. 1075, 1078, 1081). He identified photographs of his apartment that were taken on different occasions. Although he was satisfied with the repairs and maintenance, Cutler protested that people had entered his apartment and photographed it without his permission (Tr. 2006).

Sharma testified that he went into Cutler's apartment and took photographs on three occasions from 2009 to 2010 (Tr. 2350-51; Pet. Exs. 46B, 46C, 46D). According to Sharma, he first entered the apartment with an inspector to cure a violation (Tr. 2327). Next, he went into

the apartment with Cutler's permission for repairs (Tr. 2370). Sharma photographed the inside of the apartment because there was too much clutter, which prevented him from making the repairs (Tr. 2370). On the third occasion, Sharma planned to meet with someone from the SRO Law Project regarding repairs and, when the representative did not appear, he photographed conditions inside the apartment (Tr. 2371). Cutler was not present when the photographs were taken, but Sharma said that he had Cutler's permission to enter (Tr. 2330).

Richard Amelius identified photographs of his apartment that appeared to have been taken in the summer of 2008 (Tr. 1573-74; Pet. Exs. 61, 62). After learning about the photographs in November 2011, Amelius contacted his former roommate to confirm that the roommate had not allowed building management to enter the apartment (Tr. 1578). Amelius, who denied requesting repairs in 2008, insisted that he never gave anyone from building management permission to enter his apartment and he felt "gross" that his privacy had been violated (Tr. 1587).

According to respondent's repair log, Amelius requested repairs in May 2008 (Tr. 2283; Resp. Ex. Q). Kelner testified that, in response, he and Sharma went to the apartment, and Amelius's roommate gave them permission to enter (Tr. 2616-17, 2764). However, Sharma did not testify that he entered Amelius's apartment with Kelner. Instead, he said that he went with the building superintendent (Tr. 2371, 2285, 2290). Sharma said that he discussed the repair with Amelius's roommate in advance and the roommate left an extra key to allow access to the apartment (Tr. 2371-72). Sharma also insisted that Amelius gave him permission to enter the apartment, but he conceded that Amelius never gave him permission to photograph the apartment (Tr. 2290).

Petitioner introduced a March 2011 letter from a sixth tenant, Sally Goodwin, complaining that respondent's employees had entered her apartment without permission to perform repairs and maintenance (Tr. 982; Pet. Ex. 43). Although the petition did not include a specification on this issue regarding Goodwin, the evidence was admitted to corroborate the testimony of the other tenants (Tr. 985-89).

The overwhelming evidence established that respondent's employees routinely entered tenants' apartments and took photographs without permission. There were some minor inconsistencies in the tenants' testimony. For example, Amelius appears to be mistaken that he did not request repairs in 2008. But that did not detract from their overall credibility. The tenant

witnesses consistently maintained that they never authorized respondent's employees to enter without their knowledge and they never agreed to have their rooms photographed. In contrast, respondent's witnesses offered inconsistent and implausible explanations for their actions.

I found it particularly unlikely that Zhu and Cool, who were very concerned about privacy, would have allowed respondent's employees to take photographs of their apartments. They credibly testified that they were surprised to learn about the photographs. Their testimony was more plausible than respondent's claim that they were present when their rooms were photographed.

Furthermore, I reject the suggestion that respondent's employees only entered an apartment without a tenant's permission when an inspector needed access or when emergency repairs were required. As Kelner conceded, if a tenant was not present for an inspection, the normal practice would be to leave a note and reschedule rather than enter the apartment without the tenant's knowledge. There was also no credible proof that respondent needed to perform emergency repairs that were so urgent that there was no time to contact the tenant. On the contrary, the evidence showed that respondent's employees routinely entered and photographed tenants' apartments without their knowledge or permission. The photographs show that respondent's employees did not limit themselves to photographing items that needed to be repaired. Instead, they routinely photographed rooms that had little or no connection to any repair work.

Respondent's employees invaded tenants' privacy and interfered with their right to exclusive use of their apartments. This was harassment. *See Steltzer v. Spesaison*, 161 Misc.2d 507, 510 (Civ. Ct. Kings Co. 1994) (landlord's entries into apartments without proper notice violated tenant's reasonable expectation of privacy and right to exclusive possession).

3. Verbal threats (ALJ Ex. 1 ¶ 12(d)).

Petitioner alleged that respondent's employees harassed tenants by yelling at them, insulting them, and taunting them. The most credible charge involved an incident between Kelner and Zhu in 2009. This allegation should be sustained.

Zhu testified that Kelner accompanied a DOB inspector for a scheduled inspection in September 2009. According to Zhu, he heard loud pounding on his apartment door, "like the police or SWAT Team" (Tr. 524). When Zhu opened his door, he saw Kelner and the DOB

inspector (Tr. 618). Zhu permitted the inspector to enter, but told Kelner to stay in the hallway (Tr. 525). Kelner became angry and said, "I can come into your room any time I want" (Tr. 525-26). After the inspector looked around the apartment and said that there was no violation, Kelner "got mad" and loudly shouted at Zhu, "I want you evicted" (Tr. 526-27).

Donald Wilson, a thirty-year resident of the building who lives on the same floor as Zhu, overheard the incident (Tr. 1163; Pet. Ex. 51). Wilson heard a loud noise and saw Kelner, accompanied by a man who appeared to be an inspector (Tr. 1162). Kelner told Zhu something to the effect of, "now, we're at last going to have you kicked out of here" (Tr. 1162, 1164). Zhu was crying and seemed disoriented (Tr. 1164).

Kelner denied threatening to evict Zhu and testified that the accusation that he had yelled at Zhu was "laughable" (Tr. 2555). According to Kelner, he accompanied the inspector to Zhu's apartment (Tr. 2552). When Zhu opened the door, he told Kelner to "go away" (Tr. 2552). Kelner replied, "What do you mean? I'm here with the inspector, I'm in the hallway" (Tr. 2552). After Kelner went ahead and entered the apartment, Zhu became "very enraged" and told him to leave (Tr. 2553). Kelner replied that he was the general manager and he could go anywhere in the building (Tr. 2553). Zhu told the inspector that he lived alone in the apartment (Tr. 2552). Kelner, who believed that Zhu and Zhu's wife unlawfully occupied the small one-room apartment, told the inspector that Zhu was lying (Tr. 2552). Kelner offered to show the inspector surveillance video, but the inspector left after noting that he did not see anyone in the apartment besides Zhu (Tr. 2552, 2554).

I credited Zhu's testimony regarding this incident. He may have exaggerated when he described the banging on the door as sounding like "a SWAT team" (Tr. 524). However, his overall testimony was persuasive and corroborated by Wilson. Wilson candidly conceded that he did not hear the entire incident, but he credibly recalled that Kelner threatened to evict Zhu.

In contrast, I found Kelner's testimony inconsistent and implausible. Remarkably, he testified that he was only concerned about clearing up an earlier violation for Zhu's unit (Tr. 2554). Kelner's actions belied that testimony. He ignored Zhu's request to stay in the hallway, he told the inspector that Zhu was lying, and he offered to show the inspector surveillance video. It appeared that Kelner was displeased by Zhu's attempt to bar him from the room and became frustrated by the inspector's failure to issue a violation. Kelner was angry enough to call Zhu a liar in the inspector's presence; it is not difficult to believe that he also threatened to evict him.

Verbally abusing and threatening a tenant are forms of harassment. *See, e.g., Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07 at 21 (May 16, 2007). Because Kelner, the building manager, angrily threatened to evict Zhu, this specification should be sustained.

4. Pressuring lawful occupants to vacate their units and move to other units or buildings when they asked for repairs (ALJ Ex. 1 ¶12(f)).

Petitioner alleged that respondent harassed three tenants, Linda Cool, Geuseppe Baquer, and Olga Papkovitch, by pressuring them to vacate their units and surrender or waive their occupancy rights when they requested repairs. This charge should be sustained because the evidence showed that respondent repeatedly attempted to convince tenants to move to other buildings when they requested repairs or maintenance.

Linda Cool, who has lived in the building for twenty-eight years, complained about mold in her apartment (Tr. 731-33). In February 2011 she spoke to Kelner, who told her that repairs would take two or three weeks because they would have to rip out the walls, allow the area to dry, and install new walls (Tr. 799). Kelner told Cool that she could not remain in the apartment while the work was performed. When she asked if there was another room available in the building, Kelner said no and offered to permanently relocate her to a one-bedroom apartment, with a kitchen, in Washington Heights (Tr. 800). Cool declined that offer (Tr. 801).

Frightened that she might lose her apartment, Cool contacted a local elected official and the SRO Law Project to confirm that it was her responsibility to find housing while respondent repaired her apartment (Tr. 803). Kelner later angrily asked Cool why she had called the elected official. After Cool explained that she only wanted to learn about her rights, Kelner re-offered her the apartment in Washington Heights and Cool again declined the offer (Tr. 806-07).

In March 2011, after scheduling the repairs, Cool visited her mother in Missouri for ten days (Tr. 808, 873). After the first day, Cool called a friend in the building to find out how the repair work was progressing. The friend told Cool that the work was finished and the wall had been re-plastered (Tr. 810). This upset Cool, because Kelner told her that the work would take two to three weeks (Tr. 811). She would not have used her vacation days and spent money to travel if the work only took a few days (Tr. 809).

Kelner testified that he told Cool that the repair work in her apartment could be handled two ways (Tr. 2562). The first option, cleaning and repainting the existing walls, would take about one week (Tr. 2563). The second option, replacing the wall, would take about two weeks (Tr. 2564). Initially, Cool agreed to the second option and said that she would visit her mother for a few weeks (Tr. 2564). However, Kelner claimed that Cool changed her mind a few days later because she was concerned about losing her room or having less space in her room (Tr. 2564). According to Kelner, workers started on Monday and finished by Thursday or Friday (Tr. 2565-66). He did not know how someone could think that the work was finished in a day, but he surmised that Cool's friend saw that the mold had been scraped off the first day and mistakenly assumed that the job was completed (Tr. 2566-67). Kelner recalled that the workers put up a new wall with a plastic barrier covering the old wall, eliminating the mold problem (Tr. 2569).

Geussepe Baquer, who has lived in the building twelve years, testified that Kelner told him in January 2011 that access was needed to Baquer's room to repair a leak in the apartment below (Tr. 2805-07, 2851-52). Kelner told Baquer that the repair would take four to seven weeks (Tr. 2806, 2852, 2869). Baquer told Kelner that he could not leave the room because he had no place else to go (Tr. 2808-09). In response, Kelner said, "The only thing I can suggest is that you go to another building" (Tr. 2811). When Baquer said that he would think about it, Kelner offered to show him buildings in Washington Heights (Tr. 2812).

Baquer checked with an attorney from the SRO Law Project who told him that if he liked another apartment he should move there, but he should get any agreement in writing (Tr. 2812). He also spoke to a plumber who said that the leak could be repaired from below and would only take two days (Tr. 2815, 2873). Baquer spoke to Kelner and offered to pay for the plumber, but Kelner declined that offer (Tr. 2815). Meanwhile, Baquer looked at the apartments in Washington Heights (Tr. 2820).

In February and March 2011 respondent told Baquer that he had to vacate the apartment for repairs (Tr. 2830; Pet. Ex. 84). The estimated time of repair was now two weeks instead of seven weeks and respondent offered Baquer a temporary room on the same floor as his apartment (Tr. 2879-80). Finally, respondent said that the repairs would only take one day (Tr. 2845). Baquer took off from work to observe the repairs and his wife spent the day in a park (Tr. 2846-48). The work was eventually completed in three days (Tr. 2849).

Kelner testified that a leak from Baquer's shower flooded the apartment below (Tr. 3189). According to Kelner, he needed to remove the walls and tiling from Baquer's bathroom (Tr. 3189). He explained the problem to Baquer and said that repairs might take "a week or two" but also suggested that a complete renovation would take five to six weeks (Tr. 3191). Kelner felt bad for Baquer, who had a family, so he offered him bigger apartments in Washington Heights. Baquer considered the offer and spent months looking at apartments in other buildings and negotiating with respondent (Tr. 3197).

When they could not agree on an apartment in another building, respondent offered Baquer a newly renovated, temporary apartment on the same floor as his current apartment (Tr. 3196, 3200). After receiving inquiries from the SRO Law Project and an elected official, respondent scheduled the repair, which was completed in about five days (Tr. 3203). Kelner did the best that he could, given the time constraints, but he believed that the repair would only last a few years (Tr. 3216).

Gleny Quezada, Kelner's assistant, testified that she was present for many of the conversations between respondent and Baquer (Tr. 3219-20). She said that respondent was never antagonistic and he never pressured Baquer to move (Tr. 3220).

Olga Papkovitch has lived in the building for eight years (Tr. 1198). Since 2008, despite her repeated requests, respondent refused to repaint her living room and Kelner repeatedly offered her an apartment in Washington Heights. In 2010, after Papkovitch complained about bathroom mold, Kelner again refused to paint the living room, but he agreed to repaint her bathroom (Tr. 1201). Kelner asked her why she would not move to the apartment in Washington Heights that she had previously been offered (Tr. 1203). Papkovitch testified that she felt humiliated and uncomfortable when Kelner repeatedly asked her to relocate (Tr. 1203).

Conceding that he offered Papkovitch another apartment, Kelner denied that he pressured her to move (Tr. 2584, 3097). He agreed to repaint her bathroom because of a mold condition, but he would not repaint her living room because she had painted it green, in violation of building rules (Tr. 2584-85, 3177-78). According to Kelner, he offered Papkovitch another room in a different building after she asked about a larger apartment (Tr. 2585, 3177; Resp. Ex. S). Kelner testified that it was respondent's "policy" to offer any tenant the option of moving to a one bedroom apartment or studio in another building if there were major repair issues (Tr. 2745-46, 3166).

The evidence failed to show that respondent “pressured” tenants to vacate their SRO units and move to apartments in different buildings. Instead, respondent had offered apartments in different neighborhoods to SRO tenants who had major repair issues. If the tenant declined the offer, they were permitted to remain in their SRO units. In at least two instances, however, respondent exaggerated the amount of time that repairs would require. Respondent told Cool and Baquer that repairs would take weeks. In both cases, after the SRO Law Project and elected officials became involved, the repair work was eventually performed in a week or less. This suggested that respondent exaggerated repair times or engaged in deception in an effort to persuade lawful occupants of SRO units to vacate their units and waive their rights. That is harassment.

5. Repeatedly attempting to bar SRO Law Project representatives from conducting outreach to lawful occupants in the building (ALJ Ex. 1 ¶12(g)).

Petitioner alleged that, on three occasions from August to November 2010, respondent’s agents tried to bar SRO Law Project organizers from conducting lawful outreach by yelling at them, stopping them from entering the building, and falsely telling the police that the organizers were trespassers. This charge should be sustained.

Tenant Sally Goodwin testified that in August 2010 she handed out fliers in the building with SRO Law Project organizer, Yarrow Wilman-Cole (Tr. 966; Pet. Ex. 42). After they met in the lobby, Goodwin went to the 10th floor and worked her way down the building (Tr. 967). When Goodwin returned to the lobby, Wilman-Cole told her that Rico, who worked at the front desk, had stopped her, grabbed her arm, and prevented her from distributing flyers (Tr. 968, 974; Pet. Ex. 42).

Goodwin accompanied Wilman-Cole to the elevators and Rico stood in front of them, blocking them with his arms extended out (Tr. 972). Wilman-Cole called the police (TR.972). When the police arrived, Goodwin told them that she was a tenant and they were distributing flyers (Tr. 973). Rico told the police that distributing the flyers was illegal and an officer told Rico that he had to let them distribute the flyers because Goodwin was a tenant (Tr. 974).

Tara Buentello, former organizer with the SRO Law Project, testified that in October 2010 she went with tenants in an attempt to distribute written information to other tenants about

their rights (Tr. 330-32). A colleague warned Buentello that she had been blocked from entering the building in August 2010 (Tr. 335).

When Buentello went to the building in October, she and the tenants knocked on apartment doors until Rico approached and told them to leave (Tr. 338). Buentello then tried to show Rico a piece of paper specifying her rights but he kept yelling and got in her "space" (Tr. 338). Buentello felt uncomfortable and left the building (Tr. 339).

On November 15, 2010, Buentello returned to the building with fellow organizer Wilman-Cole and tenant Charles Nassif (Tr. 342). After the SRO Law Project representatives signed in at the lobby, they went to an upper floor and knocked on tenants' doors (Tr. 342). Moments later, Kelner arrived and loudly yelled that they had to leave because they were trespassing (Tr. 342, 359). Kelner called the police (Tr. 343).

Kelner told the organizers that he would have them arrested for trespassing (Tr. 343). When the police arrived, Kelner told them that he did not know the organizers or Nassif, even though he had lived in the building for many years (Tr. 343). Kelner invited the police to view surveillance video and asked them to arrest the organizers (Tr. 343). After Wilman-Cole showed paperwork to the police, organizers received summonses for criminal trespass (Tr. 345; Pet. Ex. 18). Later that day, building management distributed notices under tenants' doors advising them that their guests had to sign in at the front desk and that "roaming around" the building would be considered trespassing (Tr. 353; Pet. Ex. 19).

After this incident, representatives from the District Attorney's Office met with building management and the tenants, to confirm that tenants may go to other floors of the building and knock on doors (Tr. 356-57). When Buentello appeared in court on the summons, there was no record that it had been filed (Tr. 357).

Nassif testified and confirmed that he accompanied Wilman-Cole and Buentella in the building in November 2010 (Tr. 1796). After the two organizers signed in at the front desk, they all went upstairs (Tr. 1976). Shortly afterwards, Kelner told them all to leave the building immediately and he called the police (Tr. 1797). When the police arrived, Nassif told them that he was a tenant and the organizers were his guests (Tr. 1798). At Kelner's insistence, the police issued summonses to the organizers (Tr. 1799).

Respondent did not call Rico as a witness and Kelner testified that he had "no idea" what Buentello was talking about when she claimed that organizers had been physically blocked from

entering the building (Tr. 2731). He had no recollection of organizers being in the building in August or October 2010. As for the November incident, Kelner noticed on security cameras that there were about six people on the 10th floor of the building, running and knocking on doors (Tr. 2528, 2729). Kelner recognized Nassif but not the others (Tr. 2528-29). With other staff, Kelner went to the 10th floor, asked the people what they were doing, and told them that they must leave the building immediately (Tr. 2530, 3142). He denied yelling at anyone.

Kelner conceded that he asked the police to arrest all the organizers, including Nassif, who was a tenant (Tr. 2532, 2734-36). In Kelner's view, Nassif trespassed when he went to other tenants' floors and knocked on doors (Tr. 2735).

Section 230(2) of the Real Property Law broadly allows "tenants' groups" to meet "in any location on the premises," as long as the meetings are held in "a peaceful manner," held at "reasonable hours," and held "without obstructing access to the premises or facilities." *1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 A.D.3d 18, 22 (1st Dep't 2011). Consistent with the statute, tenants and organizers should not be unfairly prevented from informing tenants of their rights. *See Bernadi*, OATH 416/09 at 24.

I credited petitioner's evidence that tenant organizers accompanied tenants to the building in August, October, and November 2010, and on each occasion, respondent's employees attempted to prevent or impede tenant outreach. There was no credible evidence that tenants and organizers were loud, disruptive, or obstructive on any of those occasions. Indeed, in August and October organizers were deterred from entering the building even though they were accompanied by tenants. And I do not credit respondent's argument that Kelner's response in November 2010 was an "isolated incident" was "not indicative of the hospitality afforded the SRO Project when they requested meeting space in the building." Resp. Mem. at 17. Rather, the evidence showed that respondent's employees engaged in a pattern of intimidation designed to prevent tenants from learning about their rights. This was harassment.

6. Using the building primarily for transient hotel guests in violation of the certificate of occupancy, disturbing the lawful occupants' ability to use community kitchens and community bathrooms, and generally disturbing the lawful occupants' comfort, repose, peace and quiet (AL J Ex. 1 ¶12(h)).¹

Petitioner alleged that respondent disturbed lawful occupants' use of community kitchens and bathrooms by removing locks and giving hotel guests access to those facilities. This charge should be sustained. The evidence showed that respondent's actions interfered with the tenants' use of community kitchens and bathrooms.

Several tenants testified that, in 2008, at the beginning of the inquiry period, they had keys for locks to the community kitchens and bathrooms (Zhu: Tr. 458; Kahn: Tr. 1421, Goodwin: Tr. 978). Two tenants testified that, because management temporarily removed the locks from community kitchens, they were unable to keep personal property there (Zhu: 458; Kahn: 1421, 1423; Pet. Ex. 59). After complaints to local elected officials, building management restored the locks to the community kitchens (Zhu: 459, 462-63). A third tenant, Beasley, who did not testify, made a similar complaint to petitioner's investigator and alleged that, after the locks were removed from the community kitchen, someone removed his personal belongings (Wycoff: Tr. 1982; Pet. Ex. 76).

Kelner testified that Kahn and Zhu were told to remove their belongings from the community kitchens because there was too much clutter and it was a potential fire hazard (Tr. 2756-57). Alternatively, Kelner claimed that the facilities were public kitchens and the only reason they kept locks on them was to prevent children or others from leaving the gas stoves on (Tr. 2557). He conceded that he sent written notification to Kahn "to pressure" her to remove her personal property and make her feel "unsecure" (Tr. 2757, 2759). There was also evidence that Kahn, a long-time tenant, was given free storage space in the basement for her belongings (Tr. 2260-61).

Tenants also testified that building management replaced the locks for community bathrooms with less secure "hook and eye" latches or "sliding locks" (Williamson: Tr. 250; Zhu: Tr. 466, 603; Amelius: Tr. 1565). Bathrooms that were exclusively used by a few tenants are now open to hotel guests, building employees, and others (Williamson: Tr. 250; Zhu: Tr. 473;

¹ The allegation that respondent used the building in violation of the certificate of occupancy overlaps with claims that respondent received Environmental Control Board (ECB) violations for such conduct, and is addressed in section IV(6).

Goodwin: Tr. 977; Kahn: Tr. 1432, 1434; Amelius: 1567; Nassif: Tr. 1780-81). Tenants have suffered embarrassment when people enter or attempt to enter occupied bathrooms. For example, Williamson recalled an incident when she was using the shower and a hotel guest tried to enter the bathroom. Kahn testified that people are “constantly” trying to enter the bathroom when she is using it; indeed, the day before she testified, someone pushed open the door slightly while she was using the bathroom. She said it was “very unnerving” (Tr. 1435).

According to Kelner, the bathroom locks were removed a few years before 2008 (Tr. 2740). He also claimed that the locks were removed from the community bathrooms because there was a “big issue” with people losing keys and, for “all but one or two” bathrooms, locks were replaced with “nice brass latches” (Tr. 2619-20, 2774). Housekeeping supervisor Maria Balbuena testified that common bathrooms are cleaned regularly (Tr. 2908, 2922, 2926, 2941).

The evidence showed that, during the inquiry period, respondent removed the locks from community kitchens to pressure lawful occupants to remove their personal belongings. This was harassment. I did not credit respondent’s claim that safety and cleanliness were the sole motivations for removing the locks. Indeed, respondent promptly restored those locks after receiving complaints from elected officials.

Petitioner also presented convincing evidence that tenants’ use of community bathrooms has been disturbed and diminished. Before management removed the keyed locks, long-term tenants shared community bathrooms with a few other tenants on the same floor. Now, the community bathrooms are accessible to a large number of hotel guests, building staff, outside workers, and delivery personnel. As respondent’s witnesses conceded, anyone can use the common bathrooms (Balbuena: Tr. 2947; Sharma: Tr. 2242). There has been a loss of privacy for many tenants, especially on the first floor where people in the lobby use the common bathroom as a public restroom.

I did not credit respondent’s claim that the locks were removed prior to 2008. That testimony was not corroborated by documentary evidence, it seemed contrived, and it was rebutted by several tenants. Nor did I credit respondent’s claim that locks were replaced with latches because there was a problem with lost keys. On the contrary, the more plausible explanation is that respondent elected to maximize the convenience of hotel guests and staff to the detriment of long-term tenants and disturbing their comfort and repose. That is harassment.

Because respondent has increased the number of units for hotel guests in the past three years, this problem has only gotten worse (Pet. Exs. 29-32).

IV. Unproven Harassment Allegations

1. Demanding that lawful occupants vacate their units and threatening them with relocation or eviction (ALJ Ex. 1 § 12(c)).

Petitioner alleged that an attorney acting on respondent's behalf sent letters to some tenants in August 2010, directing them to vacate their SRO units. According to petitioner, the letter caused anxiety and fear among the tenants – Sinja Cho, Sally Goodwin, and Ferdinand Bellicosi – and constituted harassment. This specification should be dismissed. Although two tenants credibly testified that they suffered anxiety as a result of respondent's actions, respondent successfully rebutted the charge of harassment by showing that it was motivated by a desire to improve building safety.

By letter dated August 19, 2010, attorney Ronald Krakauer directed several tenants to vacate their units and move to “substantially similar” housing accommodations in the same building within 30 days because construction of a new staircase required demolition of their units (Pet. Exs. 26, 39). At the time, respondent had a work permit to construct the new staircase (Pet. Ex. 9). However, on August 25, 2010, DOB issued a letter of intent to revoke the work permit and it issued a stop-work order on September 8, 2010 (Pet. Exs. 11, 12, 72).

Sinja Cho, who has lived in the building for fifteen years, testified that she received the letter a few days after August 24 and was “terrified” that she would have to find a new home within a few weeks (Tr. 1307-09). Cho contacted the SRO Law Project and was advised that she did not have to move because the proposed construction was illegal (Tr. 1311). Meanwhile, respondent's employees showed her other units and told her that she had to “choose right now” because there were only “two left” (Tr. 1317). The other units appeared to be smaller (Tr. 1329, 1342-43).

Sally Goodwin, a resident of the building for eight years, testified that she received the letter from Krakauer on August 23 (Tr. 900, 913). She was “scared” and “pretty terrified” that she would be evicted and her unit would be demolished (Tr. 911, 913). Goodwin took time off from work and met with respondent who showed her apartments in Washington Heights (Tr.

912). After Goodwin told respondent that she did not want to move, he offered her a smaller unit on the same floor as her current unit (Tr. 914). Goodwin turned down that offer (Tr. 914, 944).

Respondent offered Goodwin another unit on a different floor of the building, but she rejected that offer because the unit was smaller than her current unit and not big enough to fit her couch (Tr. 920-21). Although respondent offered to buy her a new couch, Goodwin was not interested (Tr. 923, 1005). She was also not interested in a first-floor apartment that she considered unsafe (Tr. 928). Meanwhile, Goodwin contacted the SRO Law Project and was advised that she probably did not have to move or accept a smaller apartment (Tr. 917, 946, 951).

Ferdinand Bellicosi, who has lived in the building for more than twenty years, testified that he was not upset when he received the letter from respondent's lawyer (Tr. 1105, 1118). After receiving the letter, Bellicosi spoke with respondent, who arranged for Bellicosi to relocate to another apartment within the building. The new unit was "more or less" the same size as, or slightly smaller than, his previous unit, and it had a "beautiful view of the Hudson River" (Tr. 1107). Bellicosi noted that he formerly worked for respondent and, when he was recuperating from illnesses, respondent provided him with a temporary special unit at no extra cost (Tr. 1116-17, 1123).

Cho, Goodwin, and Bellicosi were all credible witnesses. I believed that Cho and Goodwin were frightened at the prospect of losing their homes. Contrary to respondent's summation argument, I found nothing suspicious by their use of the word "terrified" to describe their feelings. It did not appear that they were coached to use such terminology. Rather, they were expressing sincerely held beliefs.

I also credited Bellicosi's testimony that he had no problem moving to a different apartment with a nicer view. Petitioner offered statements from other witnesses to suggest that Bellicosi may have been intimidated, but I did not credit that evidence. Respondent never harassed him.

Thus, the evidence established that two tenants, Cho and Goodwin, suffered anxiety as a result of receiving the letter from respondent's lawyer. However, respondent denied that there was any intent to harass. Respondent argued that he had a valid building permit when Krakauer sent the notices to the tenants. Moreover, respondent maintained that a second stairwell was necessary for the protection of all the tenants (Tr. 2464). According to respondent, if it is not

permitted to build a second staircase, “the occupants of the Building, including the complaining tenants, will continue to live in an unsafe building.” Resp. Mem. at 5.

Petitioner countered that respondent wrongly obtained that permit for the second staircase and it was properly revoked. According to petitioner, respondent neglected to mention in its application for the building permit that apartments would be demolished. Petitioner also stressed that respondent could not obtain the building permit without requesting and receiving a certificate of no harassment. Pet. Mem. at 110-11.

I was not convinced that respondent’s intent was to harass tenants. First, the construction of the second staircase would have eliminated seven SRO units but it would have also eliminated fifteen non-SRO units (Tr. 2470). Second, a second staircase would provide greater fire safety for hotel guests and SRO tenants alike. Petitioner presented evidence that the second staircase was not required by the Building Code and that there were alternative means of improving fire safety, yet several witnesses testified that they would feel safer if there was a second means of egress (Pendill: Tr. 2057; Johnson: 2089; Dicker: Tr. 3357). Thus, I was unpersuaded that the proposed second stairwell was a pretext for harassing tenants. Rather, it appears the proposed stairwell was another step toward overall improvement of the building. *See Dep’t of Housing Preservation & Development v. Scharf*, OATH Index No. 262/07 (Mar. 31, 2008) (relocation necessitated by replacement of damaged floor joists not found to be harassment).

2. Verbal Harassment (ALJ Ex. 1 ¶12(d)).

Petitioner accused respondent and his employees of yelling at tenants or using derogatory, threatening, insulting, or taunting language against them or their guests. With the exception of the remarks directed at Zhu, addressed in section III(3) above, petitioner failed to prove that the alleged remarks were uttered or that they were said with malicious intent. Thus, except for the threats to Zhu, this charge should be dismissed.

Petitioner alleged that there was an incident of verbal harassment involving respondent and Williamson on or about September 2010. It is unclear what this allegation refers to. There was no evidence that respondent spoke to Williamson in September 2010. In its post-hearing submission, petitioner argued that respondent told Williamson that if she decided not to move to another building he would “put” her in another unit (Pet. Mem. at 120). Apparently, petitioner is referring to a conversation that occurred between respondent and Williamson when her

belongings were removed from her apartment in April 2009. As previously discussed, respondent's removal of Williamson's belongings from her unit, and failure to immediately return her to her unit, constituted harassment. But there was insufficient evidence that he made any verbal threats that constituted an independent act of harassment.

Sally Goodwin testified that Rico, who worked at the front desk, asked her personal questions and acted "inappropriately" (Tr. 964). She claimed that Rico hesitated before giving Goodwin her mail and occasionally she would receive opened mail or not receive her mail at all (Tr. 960). One time, possibly in 2009, after she locked herself out of the bathroom, he supposedly said, "I don't know if I'm going to hand [the key] to you" (Tr. 965). She also testified that she felt intimidated by Rico's presence during SRO Law Project meetings that were held in the building's lobby (Tr. 963).

Although a single act of verbal abuse could be sufficient to prove harassment, Goodwin's allegations were too vague. Rico worked at the front desk. He was entitled to be there when the tenants held a meeting in the lobby. As for the other incidents, Goodwin never complained to building management about inappropriate conduct or opened mail. In addition, when Rico allegedly refused to provide the bathroom key, Goodwin acknowledged that it may have been a misguided attempt at humor (Tr. 965-66). Goodwin felt uncomfortable around Rico, but the evidence fell short of proving that he engaged in deliberate harassment.

Carmel Galante, who has lived in the building for more than thirty years, testified about an incident that occurred in September 2010 (Tr. 1467). Her sink was leaking and her uncle, a plumber, told her that she needed to replace a worn out faucet stem. Galante, who usually performed her own repairs, asked a building custodian for help to move the sink (Tr. 1474). When she mentioned the repair to building manager Kelner, he went "off the handle" and demanded to see the sink (Tr. 1475, 1515, 1523).

Inside her apartment, Kelner saw that the sink had already been pushed away from the wall and he screamed at Galante, "This does not belong to you" and "This is going to make a lot of trouble for you" (Tr. 1478). A friend of Galante's tried to intervene and Kelner said to him, "Who are you?" and "Shut up" (Tr. 1478). Galante told Kelner not to talk to her friend that way and she demanded that Kelner leave the apartment (Tr. 1478, 1480). Kelner stepped back and said, "You're right," but added, "You know this is going to be a problem for you" (Tr. 1479). Galante testified that she was frightened by Kelner's bullying (Tr. 1479).

Kelner denied yelling at Galante (Tr. 2606). He testified that, when Galante first approached him, she said that a family member had removed the sink from the bathroom and she was trying to shut off a water valve (Tr. 2595). According to Kelner, he replied, "Who gave you permission to remove the sink? You can't do plumbing work in your room" and "This is not your own house" (Tr. 2595).

When Kelner went to Galante's apartment, he found the sink removed from the wall (Tr. 2595). He told Galante to stop what she was doing and he took pictures to show respondent (Tr. 2595). Respondent's lawyer later sent Galante a letter to "cease and desist" from doing her own plumbing work (Tr. 2596, 2600; Resp. Ex. T).

Kelner acknowledged, "I'm not going to tell you that there was no encounter," (Tr. 2606). He conceded that he may have been "a little loud," but he insisted that Galante had exaggerated (Tr. 2607). Kelner also recalled that Galante's friend had yelled at him and he replied by telling them that Galante could not repair the sink because she might cause a flood in the apartment below (Tr. 2606, 2754).

The parties disagreed about the condition of the sink when Galante showed it to Kelner. Kelner presented photographs which he claimed depicted the condition of the sink (Tr. 2604; Resp. Ex. H, R, U). The photographs show the sink moved from the wall and the faucets disconnected. Galante questioned the accuracy of the photographs and denied that the sink had been disconnected from the wall, but she conceded that it "looked kind of mess" (Tr. 1483). I credited Kelner's testimony that he took the photographs on the same day that Galante showed him the sink.

Petitioner proved that Kelner became upset about the disconnected sink, but that did not prove harassment. It was a brief, isolated incident. Kelner may have over-reacted, but his response was somewhat understandable because he spent a lot of time and money repairing leaks in the building. Notably, after taking the photographs, Kelner repaired the sink and later replaced it. He had no further dispute with Galante.

The remaining acts of alleged verbal harassment were based on the testimony of Charles Nassif who described three incidents with building staff from 2009 to 2010. These specifications should be dismissed because Nassif lacked credibility. The evidence showed that he had a long history of making unfounded complaints.

Nassif, who has lived in the building since 2004, testified that he had a dispute with a porter named Eddie in 2009 (Tr. 1743, 1782). According to Nassif, Eddie finished cleaning a first floor bathroom near Nassif's apartment and told him, "It's clean now, don't use it" (Tr. 1782). Because there was an ongoing issue concerning the bathroom, he told Eddie, "Excuse me, I thought I addressed this with you not to talk to me about this again" (Tr. 1783). Nassif claimed that Eddie replied by calling him a "fucking cock sucker" and moving aggressively towards him, as if to fight (Tr. 1783). Nassif recalled that he walked away and called the police (Tr. 1783). The police arrived and told Eddie to stay away from Nassif, who later filed a complaint (Tr. 1784).

In 2010, Nassif had another run-in with Eddie. According to Nassif, Eddie cleaned the bathroom, slammed the bathroom door loudly, and banged on Nassif's door while holding a mop in his hand (Tr. 1785-86). Nassif called the police and filed another complaint (Tr. 1790). There was no evidence that Eddie ever received a summons or faced any criminal charges for either incident (Pet. Ex. 66).

Nassif recalled that he also had an argument with building manager Kelner in 2010. According to Nassif, he was complaining to Sharma about noise from an air conditioner and Kelner overheard the conversation (Tr. 1793). Kelner said, "Why don't you do what you always do and complain?" (Tr. 1793). When Nassif replied that he would complain to DHCR and elsewhere, Kelner allegedly told Nassif to "fuck himself" and threatened to take him to court (Tr. 1793).

Eddie, who no longer works for respondent, did not testify. However, Sharma recalled a 2010 incident between Eddie and Nassif. Eddie, the building's night porter who lived in a hotel room on Nassif's floor, had finished using the common bathroom that Nassif normally used (Tr. 2271). Nassif screamed at Eddie and asked why he could not use another bathroom on the floor (Tr. 2271). According to Sharma, Nassif complained to him that Eddie had "looked at him" angrily (Tr. 2272). Sharma asked Nassif whether Eddie had said anything and Nassif replied, "No" (Tr. 2272). Sharma then told Nassif that Eddie had said that Nassif was always cursing at him (Tr. 2272).

Sharma recalled another occasion when the police came to the building and told Nassif and Eddie to "cool down" and to stay away from each other (Tr. 2272). Eddie did not have any problems with any other tenants (Tr. 2379).

Kelner denied yelling at Nassif (Tr. 2621-22). According to Kelner, Nassif harassed building staff (Tr. 2496). Among other things, Nassif frequently messed up the bathroom and had run-ins with porters (Tr. 2497-98). In 2010, Kelner saw Nassif making obscene hand and arm gestures to Eddie who then chased Nassif into the building (Tr. 2498). Kelner stopped Eddie and admonished him (Tr. 2499). Nassif called the police, who responded and told him and Eddie to stay away from each other (Tr. 2684).

Nassif's credibility was called into question because he has a history of making unfounded complaints. Respondent presented evidence that, from March 2008 to February 2012, Nassif made over 90 complaints to petitioner regarding the building (Resp. Exs. F, G). The vast majority of those complaints were for "no heat" (Resp. Exs. F, G). None of those complaints were substantiated (Resp. Exs. F, G, I).

Petitioner correctly notes that, for any given complaint, the lack of substantiation does not mean that a complaint was baseless, because an inspector may not have been able to get access to Nassif's apartment (Tr. 1672, 1677). However, the large number of unsubstantiated complaints strongly suggests that Nassif lacks credibility.

If there was a persistent problem of no heat, surely there would have been some independent verification. There was no such evidence. Moreover, respondent presented evidence that the building has a centralized heating system. If there was a continuing problem of no heat in this large building, petitioner would have been inundated with complaints from other tenants. Instead, petitioner received only a small number of sporadic complaints from other tenants. Respondent also retains the services of a company that electronically monitors heat in the building. This evidence, showing that respondent closely tracks heat issues and takes prompt corrective action, substantially undercut Nassif's credibility.

In light of Nassif's credibility problems, petitioner failed to prove his uncorroborated claims of verbal harassment. There was no reliable proof that Kelner verbally harassed Nassif. And, although respondent's witnesses confirmed that there were some disagreements between Eddie and Nassif, it is unclear what took place or whether Nassif shared some responsibility for whatever occurred. This evidence did not prove that respondent harassed Nassif.

3. Failing to respond to tenants' requests for repairs or supplies of essential services in a timely fashion (ALJ Ex. 1 ¶12(e)).

Petitioner presented evidence from seven witnesses who alleged that respondent did not make timely repairs: Baquer (bathroom leak in unit 646); Cool: (mold in unit 144); Popkovitch (plaster and paint repairs in unit 917); Galante (leaky faucet in unit 322); Nassif (inadequate heat in unit 144); Zhu (defective stove in unit 921); and Wilson (leaky sink in unit 921). Respondent presented credible evidence that it has a systematic procedure for tracking complaints and following up with necessary repairs (Quezada: 2144, 2172; Sharma: Tr. 2232; Kelner: Tr. 2485; Resp. Ex. Q). Current and former tenants testified that repairs are timely (McIntosh: Tr. 942; Pendill: Tr. 2047-50; M. Johnson: 2084-86; Dicker: 3351-53; C. Johnson: Tr. 3380-81). Because petitioner failed to prove that respondent harassed tenants by not making timely and necessary repairs, this specification should be dismissed.

As previously discussed, Baquer, Cool, and Popkovitch requested repairs and respondent's initial reply was to offer them apartments elsewhere. With respect to Baquer and Cool, it appears that respondent may have exaggerated repair times in an improper effort to persuade them to vacate their units. That was harassment. However, the evidence did not show that respondent further harassed those tenants. Instead, after each tenant decided against relocating, respondent made the necessary repairs.

There was also evidence that Kelner was upset at Galante's attempt to repair her own sink. But after that, he promptly offered to replace the sink. Galante declined that offer and asked Kelner to repair the sink instead. Respondent attempted to comply with that request and when repair attempts did not resolve the problem, the sink was eventually replaced.

As noted, Nassif made many complaints about lack of heat, but the overwhelming majority of his complaints were unproved and he generally lacked credibility.

Zhu recalled that he complained in 2008 that his gas oven was not working and nothing was done about it (Tr. 481-83). Three years later, he complained to Kelner about the stove and it was replaced the next day (Tr. 483). Kelner testified that Zhu initially complained in January 2009 about gas burners on the stove top, which were promptly repaired. When Zhu later complained that the stove had not been repaired, Kelner went with him to inspect and discovered that the oven's pilot light was not working. He immediately replaced the stove (Tr. 2560-61).

Respondent's repair log confirmed that Zhu complained about the stove in January 2009 and it was promptly repaired (Resp. Ex. Q). There was no evidence that respondent was aware of any continuing problem with the stove. Indeed, Zhu conceded that he did not complain again until 2011 (Tr. 605). This incident appears to be an isolated misunderstanding rather than harassment.

Wilson complained about a leak in his sink in 2010 (Tr. 1153, 1173; Pet. Ex. 50). He recalled that a maintenance worker told him that the leak required a major repair of pipes and would include removal of cabinets and walls (Tr. 1154, 1156). After Wilson contacted a local elected official, the faucet was repaired within twenty minutes (Tr. 1157). An unidentified maintenance worker made a mistaken judgment call about the nature of a repair. That did not prove that respondent committed harassment.

4. Prohibiting lawful occupants from contracting for their own extermination service at their own expense and failing to dispense mail (ALJ Ex. 1 ¶12(i)).

Petitioner alleged that respondent prevented Shirley Kahn, the tenant in unit 344, from hiring her own extermination service and failed to dispense mail to the roommate of Amelius, the tenant in unit 745. The evidence failed to prove either charge.

Kahn, who has lived in unit 344 for forty-three years, testified that in 2008 she wanted to hire her own exterminator because she did not like the fumes created by respondent's exterminator (Tr. 1438, 1455). When Kahn told Kelner of her plans, he asked for a list of chemicals used by her exterminator to make sure that they were compatible with the chemicals used by respondent's exterminator (Tr. 1439). According to Kahn, she repeatedly complied with Kelner's request and when she did not hear back from him, she made an appointment for her exterminator to come to her apartment (Tr. 1440). When Kahn's exterminator arrived at the building, Kelner stopped him in the lobby and became angry (Tr. 1440-41). After Kahn complained to a local elected official, Kelner reached an agreement with Kahn about the chemicals to be used and respondent's exterminators treated her apartment (Tr. 1443).

Kelner testified that tenants cannot bring their own exterminators, who use chemicals that may conflict with those used by respondent's exterminators and void respondent's warranty (Tr. 2612). He denied yelling at Kahn (Tr. 2613).

Amelius testified that, in the summer of 2011, he notified building management in writing that he would be sharing his room with a friend, Spencer Wills (Tr. 1554). According to Amelius, he provided a copy of Wills's driver's license and directed respondent to give Wills access to his mail (Tr. 1554). Near the end of July, Amelius was in Pennsylvania and Wills called him to say that Sharma, who worked at the front desk, would not give him the mail (Tr. 1555-56). Amelius told Wills to go back to Sharma and threatened to call the police (Tr. 1557). According to Amelius, he then listened on the phone as Wills argued with Sharma (Tr. 1557). When Amelius later returned to New York, Wills had moved out (Tr. 1559).

Sharma recalled an incident when a man asked for mail addressed to Amelius's apartment (Tr. 2246). According to Sharma, he did not have authorization from Amelius to give the mail to anyone and the man who was asking for the mail did not provide any identification (Tr. 2247). After speaking with Amelius by phone and receiving the required written authorization a few days later, Sharma gave the man his mail (Tr. 2247, 2298). Kelner noted that Amelius had many roommates and subtenants (Tr. 2640).

Petitioner failed to prove this allegation. Amelius offered no documentary evidence to support his claim, such as the written notice that he allegedly provided to respondent. Wills did not testify and did not provide a written statement. Moreover, I found Sharma's recollection of this incident to be more reliable. If Amelius had given prior written notice to respondent, then it would have made sense for him to ask to speak to Sharma when a dispute arose about the mail. That scenario made more sense than Amelius's claim that he listened in as Wills argued on his behalf.

5. Causing lawful occupants to suffer loud noises, foul smells, and vermin infestations from "refuse rooms" adjacent to their units (ALJ Ex. 1 ¶12(j)).

Petitioner alleged that respondent illegally converted one room on each of the upper floors to trash collection rooms. The evidence showed that, after March 2008, respondent converted a line of rooms with dumbwaiters to trash compactor rooms (Tr. 676; Pet. Exs. 35, 72). Before respondent created the compactor rooms, garbage was kept in cans in the hallways. Nassif claimed that there were SRO occupants that had to vacate a room due to the installation of trash compactor rooms, but there was no credible evidence to support that claim. Instead, Kelner testified that few of the rooms were occupied before they were converted to compactor rooms

and the rooms were selected for conversion because they were adjacent to an unused dumbwaiter (Tr. 2460, 2468).

Some tenants who lived near the compactor rooms complained about the noise, smell, and presence of vermin (Kahn: Tr. 1431-32; Amelius: Tr. 1548-49; Nassif: Tr. 1838). Other tenants testified that the compactor rooms are clean, convenient, and an improvement over keeping garbage cans in the hallways (Cool: Tr. 893; Pendill: Tr. 2055; McIntosh: Tr. 2104). Kelner also testified that the rooms are cleaned twice per day (Tr. 2461). Petitioner's investigator made an unannounced inspection of the compactor rooms and found no evidence of infestation (Tr. 2023-24).

The evidence failed to prove that there was an illegal conversion or that respondent harassed tenants by creating compactor rooms on each floor. On the contrary, there was credible evidence that the compactor rooms are a major sanitary improvement and far preferable to keeping trash in cans in the hallways. This was not harassment.

6. ECB Violations. Conducting work without a permit and failing to maintain the building in a code compliant manner (ALJ Ex. 1 ¶¶12(k), 12(l), 12(m)).

Petitioner alleged that respondent performed work without a permit and failed to maintain the building in a code compliant manner, as demonstrated by the issuance of multiple ECB violations, issued by the DOB on five occasions from March 26, 2009 through January 13, 2011. Respondent did not dispute most of the ECB violations, but contended that there was no proof of intentional harassment. These specifications should be dismissed. Although the ECB violations were evidence of harassment within the meaning of section 27-2093 of the Administrative Code, respondent successfully rebutted the presumption that such harassment was intentional.

The violations fell into two categories. In the first group, there were miscellaneous violations including: installation of washers and dryers in the cellar without a permit, erecting partitions and installing two air conditioning units without a permit, failure to provide an unobstructed passageway to a rear yard, failure to comply with exit discharge requirements, and accumulation of debris in the rear yards (Pet. Exs. 13, 14). Respondent did not dispute those violations, which resulted in penalties of up to \$1,600 and filings of certificates of correction (Pet. Ex. 14).

Without minimizing the importance of complying with the Building Code, an ECB violation is not necessarily proof of harassment by a building owner. Here, violations for disparate acts, such as installing a washing machine or air conditioners without a permit, are not proof of intentional harassment.

The second group of violations, stemmed from allegations that respondent has illegally used the premises as a transient hotel, in violation of the certificate of occupancy (C of O). On January 13, 2011, a DOB inspector issued respondent violations for illegal occupancy contrary to the C of O and illegal use in a residential district, because the building was being used illegally as a transient hotel (Pet. Ex. 14). *See* Admin. Code § 28-118.3.2, Zoning Resolution 22-00. The violations were upheld at ECB and respondent paid fines of \$2,400 and \$800, respectively (Pet. Ex. 14). There is no dispute that the building is used as a hotel. However, respondent argued that such use is not contrary to the C of O. There was conflicting evidence on this point.

Petitioner relied on a September 2011 letter from DOB's First Deputy Commissioner to respondent's counsel; a prior filing in which respondent's architect described the building as being occupied by permanent month-to-month tenants; and the DOB-issued violations that were sustained by ECB and never appealed by respondent. Pet. Mem. at 96.

Respondent presented expert testimony from professional architect Martin Marcus, who opined that the building's current use, as an SRO for permanent residents and short-term stay guests, is legal (Tr. 3260). He explained that there was no C of O when the building was constructed in 1906 (Tr. 3261-62). A 1943 C of O described the Building as a single room occupancy, new law tenement (Tr. 3262; Resp. Ex. Y). The current C of O, issued in 1960, added the term "Class A Multiple Dwelling" (Pet. Ex. 3). At that time, according to Marcus, the Multiple Dwelling Law prohibited the renting of any room for less than a week, but allowed occupancies for a minimum of seven days (Tr. 3269, 3276). *See* MDL § 248 (1), (16) (repealed effective May 1, 2011).

Recent amendments to the Multiple Dwelling Law provide that dwelling units shall be occupied for permanent residence for a minimum of thirty days. MDL § 4(8)(a) ("A class A multiple dwelling shall only be used for permanent residence purposes," defined as "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more")(effective May 1, 2011). However, Marcus opined that respondent's continued rental of units for a minimum of seven days, and less than thirty days, is lawful under "saving clauses" or

“grandfathering provisions” of the Multiple Dwelling Law (Tr. 3374). *See* MDL § 366(1); *see also* ZR 52-11 (*eff.* Dec. 15, 1961) (authorizing continuation of non-conforming use).

Respondent claimed that the building has been used as “a short-term stay hotel” since 1946. Resp. Mem. at 6. Sharma testified that the building has been renting units for a minimum of seven-day stays since 1982 (Tr. 2248-49). Kahn, a long-time tenant, testified that the building has operated as a hotel since the late 1960s (Tr. 1417-21). Kelner testified that he has seen advertisements and tax records from 1946, and respondent has rented to hotel guests “forever” (Tr. 2499-2500). Respondent also introduced a 1946 certificate authorizing it to collect hotel room taxes and hotel registration cards for seven residents, including one card from 1956 (Resp. Exs. L, M).

The building has long been referred to as a hotel, and respondent presented credible evidence that it currently requires guests to stay a minimum of seven days. But there was little evidence that the building has a lengthy history of having “short-term” guests. According to the seven registration cards that respondent introduced, one resident lived in the building for forty years. There is no indication when the other tenants moved out (Resp. Ex. M).

On this record, I have serious doubt about respondent’s contention that it may lawfully continue to rent to guests for less than thirty days. And the other evidence, including the sustained ECB violations, suggests that respondent’s interpretation of the law is mistaken. However, petitioner did not call any witness to rebut Marcus’s expert testimony. Given that gap in petitioner’s proof, respondent has demonstrated that it has a good-faith basis for arguing that its current use of the building is not contrary to the C of O or the Zoning Resolution. Thus, respondent has rebutted the inference that the ECB violations are proof of intentional harassment.

Finally, petitioner alleged that respondent filed a false certificate of correction. Though the evidence proved that the certification was false, it was insufficient evidence of intentional harassment.

In 2006, respondent received a violation for operating as a hotel contrary to the C of O and advertising on the internet as a hotel with daily rentals (Pet. Ex. 69). In affidavits dated February 16, 2010, referring to the 2006 violation, Kelner certified that the condition had been corrected and stated that “the building is occupied according to existing C of O Number 53010, and there is no advertising on the internet” (Tr. 2503, 2667). At the hearing, Kelner’s assistant

confirmed that respondent continues to advertise units on the internet, but there is a minimum rental of seven nights (Tr. 2145, 2217).

Kelner testified that he hired a firm to handle ECB violations and he merely signed the certificate of correction and affidavit prepared by someone else (Tr. 2508-09). He said that he believed the 2010 affidavit referred to a 2006 violation that had been corrected (Tr. 2509). According to Kelner the 2006 violation was due to an internet service, referred to as Woogo, that improperly advertised rooms at the building for stays of less than seven nights (Tr. 2507). After receiving the violation, respondent discontinued working with Woogo (Tr. 2507).

I did not credit Kelner's testimony. The affidavit is false. It states without qualification that there is no more advertising. Even if Kelner meant to state that there was no more advertising for less than seven days, that is not what he attested to and submitted to ECB. Nevertheless, the evidence failed to show that Kelner intended to harass tenants when he filed the affidavit.

7. Generally interrupting or discontinuing essential services (ALJ Ex. 1 ¶12(n)).

The evidence did not support petitioner's catch-all allegation that other essential services were interrupted or discontinued. Although petitioner proved the specific acts of harassment discussed in section III, above, the evidence tended to show that, in recent years, respondent has made significant improvements to the building's heating, plumbing, electrical, lighting and security systems.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that, in April 2009, respondent illegally locked out Dorothy Williamson and removed her belongings from unit 118.
2. Petitioner proved that, from 2008 to 2010, respondent repeatedly entered and photographed the units of lawful occupants without their permission.
3. Petitioner proved that, in 2009, respondent verbally threatened Jesse Zhu.
4. Petitioner proved that respondent exaggerated the time needed for repairs in an effort to cause lawful occupants to vacate or surrender their rights of occupancy.

5. Petitioner proved that, in 2010, respondent repeatedly attempted to bar tenant organizers from conducting outreach to lawful occupants.
6. Petitioner proved that, from 2008 to present, respondent disturbed and diminished lawful occupants' use of community kitchens and community bathrooms by removing locks.
7. Petitioner's remaining contentions were either unproved or did not constitute intentional harassment.

RECOMMENDATION

I recommend that respondent's application for a certificate of no harassment be denied.

Kevin F. Casey
Administrative Law Judge

December 7, 2012

SUBMITTED TO:

MATTHEW M. WAMBUA
Commissioner

APPEARANCES:

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HPD v. Forest, OATH Index No. 1320/20 (Nov. 9, 2022)

***Dep't of Housing Preservation
& Development v. Forest***

OATH Index No. 1320/20 (Nov. 9, 2022), *adopted*, Comm'r Dec. (Nov. 16, 2022), **appended**

Petitioner presented proof that building owner failed to fix leaks and cracks in the walls of a building which was eventually evacuated by the Fire Department. ALJ found these actions constituted harassment. Denial of certificate of no harassment recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**
Petitioner
-against-
STEVEN FOREST
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

The Department of Housing Preservation and Development (the "Department" or "petitioner") referred this matter pursuant to section 27-2093.1 of the New York City Administrative Code. Respondent Steven Forest, an asset manager and leasing agent with Walter & Samuels, Inc. ("Walter & Samuels") who acts on behalf of 96 & Second LLC, the owner of the building at 300 East 96th Street, New York, New York (the "Building"), applied for a certificate of no harassment ("CONH") for the Building. Petitioner seeks a finding that harassment occurred and denial of respondent's application for a CONH pursuant to section 27-2004 of the Administrative Code.

During an eight-day trial, petitioner called seven witnesses and offered documentary evidence. Respondent called five witnesses, testified on his own behalf, and offered documentary evidence. The record closed after submission of closing briefs.

For the reasons below, I find that petitioner proved that respondent harassed lawful occupants of the Building. Thus, the application for a CONH should be denied.

ANALYSIS

Local Law 1 of 2018, the CONH Pilot Program, directs petitioner to identify distressed buildings where harassment may have occurred that are located within identified community districts and to create a Pilot Program List (the “List”) that includes buildings based on a Building Qualification Index (“BQI”). Admin. Code § 27-2093.1 (Lexis 2022).

Petitioner’s rules specify criteria for calculating BQI, including the number of open and closed hazardous and immediately hazardous violations of the Housing Maintenance Code (“HMC”) and the amount of emergency repair charges at the Building, per “adjusted dwelling unit,” within five years before July 24, 2018. 28 RCNY § 53-03(1), (2). Also considered is the number of times a building changes ownership, if any, within the same five-year time frame. 28 RCNY § 53-03(3). A building could also be added to the List based on other criteria, such as if the building is subject to a full vacate order, which is what occurred here. *See, e.g.*, 28 RCNY § 53-02(2)(b).

Owners of buildings on the Pilot Program List who wish to obtain a permit from the Department of Buildings (“DOB”) to perform renovations must first obtain a CONH from petitioner or a waiver of such a certificate. Admin. Code §§ 27-2093.1(c)(1); 28-505.4 (Lexis 2022). After a CONH application is filed, petitioner investigates to determine whether harassment occurred in the building during the preceding five years. Admin. Code § 27-2093.1(d). If petitioner determines that no harassment occurred, it will issue a CONH. Admin. Code § 27-2093.1(d)(5)(A). If petitioner finds reasonable cause that harassment occurred, it will refer the matter to this tribunal for a trial. Admin. Code § 27-2093.1(d)(5)(C); 28 RCNY § 53-07(1).

On November 9, 2017, the DOB issued a preemptory vacate order for the Building (“Vacate Order”) (Pet. Ex. 11). The Vacate Order indicated that the Building had developed severe interior and exterior cracks which rendered it unsafe (Pet. Ex. 11). The tenants were immediately vacated by the Fire Department of the City of New York (“FDNY”).

On July 15, 2019, respondent applied for a CONH (Pet. Ex. 3). On December 18, 2019, the Department issued an initial determination that there was reasonable cause to believe that harassment of lawful occupants occurred at the Building during the inquiry period, and the matter was referred to this tribunal (ALJ Ex. 1).¹

¹ The “inquiry period” commences five years before submission of the CONH application and ends on the date that the Department issues its final determination. 28 RCNY § 53-01.

In an amended petition dated October 26, 2020, the Department alleged that respondent committed harassment during the inquiry period, from July 15, 2014, to the time of trial, by: (1) failing to fix conditions leading to leaks and water accumulation in the Building's entrance lobby and stairways; (2) failing to repair cracks in the walls in public areas; (3) failing to repair cracks in the walls inside lawful occupants' units; (4) failing to fix the Building's front door; (5) failing to fix conditions leading to leaks inside lawful occupants' units; (6) failing to promptly fix a broken mailbox unit; (7) failing to repair conditions which lead to the Vacate Order; and (8) substantially interfering with and disturbing the comfort, repose, peace and quiet of lawful occupants, causing or intending to cause such lawful occupants to vacate or surrender their occupancy rights (ALJ Ex. 1).

Respondent disputed the allegations of harassment, contending that it made timely efforts to maintain the Building as required and that it did not commit actions or omissions that constitute harassment.

Petitioner's Evidence

To prove that harassment occurred, petitioner presented the testimony of four tenants: Michelle Leonard, Omri Shellef, Reva Sookraj, and Aleksandra Palak.

Michelle Leonard

Ms. Leonard testified she lived in unit 4B of the Building from May 2014 until November 9, 2017, that her rent was \$1,850 a month, and that her unit was not rent stabilized (Tr. 16, 60). Throughout her tenancy, she observed several problems in the Building's common areas as well as within her unit.

Ms. Leonard described a major leak in the lobby which persisted from May 2017 until early September 2017 (Tr. 16-17). She stated that the leak was "very heavy" and that a clear plastic tarp was placed on the ceiling of the lobby to "cover it" (Tr. 47). The tarp, however, would fill with water and the leak would continue (Tr. 47). She stated that if it was raining outside, "it would run nonstop, and the lobby would be completely covered in water" (Tr. 47). Ms. Leonard took videos of the leak on May 13, 2017 and June 19, 2017 (Tr. 19; Pet. Exs. 14, 15). These videos show water streaming down from a large piece of plastic material taped to the ceiling and puddling on the tile floor below (Pet. Exs. 14, 15). Ms. Leonard complained to management about the leaks (Tr. 21-22).

On August 31, 2015, Ms. Leonard received a notice from the United States Postal Service (“USPS”) indicating that the Building’s mailboxes could not be locked (Tr. 26-29; Pet. Exs. 16, 17). As a result, she would need to pick her mail up at the post office (Tr. 29). On September 8, 2015, she sent an e-mail with an image of the USPS notice to Norman Silver, a member of building management (Tr. 26; Pet. Ex. 16). On April 27, 2016, she received a second notice from USPS indicating that deliveries would be discontinued until further notice due to the condition of the mailboxes (Pet. Ex. 17). On June 15, 2017, Ms. Leonard sent an e-mail to Mr. Silver requesting a “break” on her rent and attaching a photograph of the second USPS notice (Pet. Ex. 18). Because of her work schedule, she had difficulty picking up her mail (Tr. 29). She testified that she was aware that construction in an adjacent building had caused the problem with the Building’s mailboxes (Tr. 55-56).

On June 15, 2017, Ms. Leonard sent another e-mail to Mr. Silver stating that the “building is becoming incredibly dilapidated” and inquiring when repairs would take place (Pet. Ex. 18). On November 9, 2017, she sent an e-mail to Linda Grabow, an attorney for the landlord, after she witnessed an individual installing shoring inside the lobby (Tr. 36; Pet. Ex. 20). In the e-mail she asked for an explanation regarding the construction in the hallway. Later that day, she sent a follow-up e-mail to Ms. Grabow stating “Let me out of my lease. The building is collapsing.” (Pet. Ex. 21). Ms. Leonard attached photographs showing floor-to-ceiling cracks with shoring installed, apparently to support the Building (Tr. 49-50; Pet. Ex. 21). Ms. Leonard called 311 to report the conditions and was instructed to call 911 (Tr. 39-40). After she called 911, the FDNY arrived within minutes (Tr. 40). She stated that the “City said that it wasn’t safe to stay there and so they evacuated all of us” (Tr. 16).

After being evacuated, Ms. Leonard retrieved some of her belongings with the assistance of the FDNY (Tr. 40). Since being evacuated, she has been able to return to her apartment only once and she estimates roughly \$20,000 to \$30,000 in belongings remain in the apartment (Tr. 40-43).

Ms. Leonard also identified certain issues specific to her unit including problems with the toilet seat, the window guard to the fire escape, and paint in the bathroom which was peeling and showing moisture marks (Tr. 17). She e-mailed Ms. Grabow regarding the peeling paint in her bathroom (Tr. 30; Pet. Ex. 19). Her e-mail contained images that show bubbling paint adjacent to her showerhead and a large water stain in the corner of the room, but management failed to address the issue (Tr. 30; Pet. Ex. 19).

Ms. Leonard spoke with Peter Gray, a tenant advocate, in connection with his investigation regarding the Building and his report largely corroborates her testimony. She also told Mr. Gray that management would negotiate moveouts with tenants who would lodge complaints rather than address the issues (Pet. Ex. 6, Memorandum Regarding Conversation with M. Leonard).

Omri Shellef

A second tenant, Omri Shellef, lived in unit 6B of the Building from January of 2017 until he was evacuated by the FDNY, and his unit was not rent stabilized (Tr. 74-75, 108). His starting rent was \$2,225 per month which was later increased to \$2,450 per month (Tr. 75).

Mr. Shellef stated that during his entire tenancy there was a leak in the Building's lobby (Tr. 77). He explained that when it would rain, "it would rain inside the building" resulting in wet, dangerous floors (Tr. 77). Prior to moving in, he had been assured by management that the leak would be fixed "very, very soon" (Tr. 81). He continued complaining to management regarding the leaks when he would drop off his rent checks (Tr. 79).

Mr. Shellef indicated that by the spring of 2017 he had not received mail for months because the Building's mailboxes had been damaged and would not fully close (Tr. 81). He complained to management about this issue, but did not receive mail until he moved to a new address (Tr. 82). As a result, he missed a bill payment (Tr. 83).

On November 9, 2017, the FDNY woke Mr. Shellef and told him to evacuate the Building (Tr. 83-85). He was allowed two minutes to gather his essential belongings (Tr. 83-85). He was later granted two brief opportunities to retrieve items from his apartment but many of his belongings remain in the unit (Tr. 86-89). Mr. Shellef claimed that he has been unable to pursue litigation in connection with a prior business deal because relevant documents remain in the apartment (Tr. 88). However, he filed a lawsuit related to this business deal seven months after the evacuation (Tr. 100; Resp. Ex. B). Mr. Shellef testified that he lost a job, has been depressed, and has had problems sleeping as a result of the evacuation from the Building (Tr. 90).

Mr. Shellef filed a claim with the Division of Housing and Community Renewal ("DHCR") for rent reduction. DHCR adjusted his rent to \$1.00 per month so that he may keep his rights to the unit (Tr. 90, 129). He also filed a claim against the landlord for damages suffered from leaving his possessions behind (Tr. 118). Additionally, he filed a third claim against the Metropolitan Transportation Authority ("MTA") and the Building's management. That claim alleges that

subway construction nearby may be partially responsible for the damage to the Building (Tr. 120-22).

Reva Sookraj

A third tenant, Reva Sookraj, lived in unit 2A of the Building from September 2017 until November 2017, paid \$1,900 per month in rent, and her apartment was not rent-stabilized (Tr. 134, 149).

On the day Ms. Sookraj moved into her apartment, the door to her unit broke, locking her inside (Tr. 135). When she reported the situation to the Building's superintendent via text message, he instructed her to use a credit card or screwdriver to open the door (Tr. 137; Pet. Exs. 24, 25). She replied: "This is very illegal. If there was a fire I would die. I have to report this" (Pet. Ex. 25). Ms. Sookraj was unable to unlock the door and pleaded with the superintendent to come free her from the apartment (Tr. 137; Pet. Exs. 24, 25). The superintendent responded, "I can do it tomorrow 7:00 am" (Pet. Ex. 25). Ms. Sookraj called the FDNY who ultimately broke down her door (Tr. 138). When she e-mailed management regarding this incident, they initially suggested that she may need to pay for the damage (Tr. 138).

Additionally, Ms. Sookraj notified management and the superintendent that the front door to the Building was broken (Tr. 139-40). For more than a week, both the front door and the door to her apartment were broken, leaving her unit accessible "to anyone" (Tr. 139). She also told management that her bathroom ceiling had a leak which was causing the drywall and plaster to fall off, but management did not reply to her complaint (Tr. 140-41).

The FDNY evacuated Ms. Sookraj from the Building on November 9, 2017 (Tr. 141-42). While she was able to retrieve some essential items, much of her property remains in her unit (Tr. 143). She was later informed by building management that the evacuation was the result of structural damage to the Building (Tr. 144). Ms. Sookraj filed an insurance claim for her property that remains in the Building and is a party to a lawsuit against management and the owners of the Building (Tr. 152, 155). She also initiated a DHCR proceeding, which set her rent at \$1.00 per month (Tr. 149-50).

Aleksandra Palak

A fourth tenant, Aleksandra Palak, lived in unit 4A of the Building from November 15, 2013 until she was evacuated on November 9, 2017 (Tr. 168). She testified that there was a major leak in the Building's lobby area with some "baby leaks" in the staircase area (Tr. 170). She

witnessed the leaks “as many times as there was rain” (Tr. 170). She stated that “safety was always a concern” because the floor tile would become “very, very slippery” (Tr. 171). She notified the superintendent about the leaks in person, but management did not fix the leaks. Instead, a tarp was placed in the ceiling of the lobby (Tr. 172).

Ms. Palak noticed cracks in the walls of the Building when she began her tenancy (Tr. 173). Light from the outdoors was visible through the cracks in the staircase wall (Tr. 173). She also noticed a larger crack between her apartment and apartment 4B, which ran across the whole wall (Tr. 174). However, she never complained to management regarding these cracks because she assumed that “nobody would let her live” in a building that was not safe (Tr. 177).

Ms. Palak testified that, because of construction in an adjacent building, her mailbox was filled with chunks of concrete (Tr. 179, 200). USPS subsequently left a notice stating that mail would no longer be delivered until the mailboxes were fixed, and the mailboxes remained broken for a few weeks (Tr. 179-80). Ms. Palak complained to the superintendent verbally and sent an e-mail to Mr. Silver on June 20, 2017, in which she complained that the mail situation was “unacceptable” (Tr. 180-81; Pet. Ex. 23). Later that day, Mr. Silver forwarded the message to Ms. Grabow and wrote “This tenant appears to be talking with 4B, Michelle Leonard” (Pet. Ex. 23). Mr. Silver directed Ms. Palak to communicate with Ms. Grabow regarding a potential rent adjustment (Tr. 183).

Ms. Palak stated that the Building entrance had two doors, the first of which did not have a lock and would remain partially open (Tr. 184). While the second door required a key, the lock was broken, so anyone could walk in (Tr. 184). She described this as an ongoing condition which lasted for about a year or two, during which she complained to management multiple times (Tr. 185).

Ms. Palak’s HVAC unit broke during the winter of 2016 (Tr. 186). Although management sent someone to fix the unit, it broke repeatedly after being repaired (Tr. 186). She used extra blankets to sleep during cold weather, and used cold towels during the summer months (Tr. 187). She complained to the superintendent numerous times and e-mailed Mr. Silver on May 1, 2017, that the HVAC unit had “broken multiple times” in the last year (Tr. 187; Pet. Ex. 22). After six months of the HVAC unit repeatedly malfunctioning, the unit was replaced (Tr. 189). When the broken unit was removed, a large hole was left in the wall, which was covered with cardboard for eight days until the new unit was installed (Tr. 189).

After the evacuation on November 9, 2017, Ms. Palak was permitted to return to her unit twice to remove personal items, but was able to return only once due to her work schedule (Tr. 191). She estimated that about \$3,500 worth of belongings remain in the apartment (Tr. 191-92). Ultimately, she received a settlement of \$2,500 to compensate her for the belongings that remain in the apartment (Tr. 193).

Ms. Palak spoke with Mr. Gray in connection with his investigation regarding the Building, and his report largely corroborates her testimony (Pet. Ex. 6, Memorandum Regarding Conversation with A. Palak).

In addition to the testimony of the four tenants, petitioner presented the testimonies of Guy Donaldson, a Department investigator, and Peter Gray, a tenant advocate.

Investigator Donaldson

Investigator Donaldson conducted an investigation into the Building. As part of the investigation, he visited the premises and reviewed violations found in DOB and HPD databases (Tr. 221).

Investigator Donaldson identified a Department “Open Violation Summary Report,” dated November 4, 2020, which indicates the Building has two open violations for water leaks (Tr. 223-24; Pet. Ex. 7). The violations, issued on June 28, 2017, report water leaks on the first, second, and third floors (Pet. Ex. 7). The Open Violation Summary Report also notes a third violation, dated June 20, 2017, for a broken mailbox for apartment 4B (Tr. 224; Pet. Ex. 7).

Investigator Donaldson also identified a DOB summons for “failure to maintain building in a code compliant manner” dated November 10, 2017, the day after the order to vacate was issued (Tr. 230; Pet. Ex. 12). The summons describes cracks throughout the masonry and indicates that due “to lack of maintenance/or repair to this pre-existing condition and the possibility of failure” the Building is unsafe (Pet. Ex. 12). A separate DOB summons from November 9, 2017, indicates that “exposure #3 wall has vertical crack from 1st story up to 6th story” that is “approximately 2 inches wide” (Pet. Ex. 12). Multiple DOB summonses were issued for failure to comply with the Commissioner’s Orders contained in the original summonses (Pet. Ex. 12).

Certified 311 records in connection with unit 4B and dated June 17, 2017, describe the ceiling as “collapsing or falling” (Pet. Ex. 9). These records also identify heavy leaks from the ceiling and a broken or missing mailbox (Pet. Ex. 9). Records in connection with unit 2A and dated September 4, 2017, describe a problem with the door lock and lines of travel (Pet. Ex. 9).

Similar door issues were reported to 311 again on September 15, 2017 (Pet. Ex. 9). Complaints regarding the heat and hot water in unit 2B and 6E were reported on January 18, 2016, and February 15, 2016, respectively (Pet. Ex. 9). These records also reveal other complaints regarding the Building, including problems with the plumbing, heating, hot water, plaster, and windows (Pet. Ex. 9).

On September 25, 2019, Investigator Donaldson inspected the outside of the Building and observed scaffolding, a posted vacate order, and cracks on the exterior wall (Tr. 238, 247). He did not go inside the Building (Tr. 247-48). Photographs taken by Investigator Donaldson show large cracks along the walls with shoring in place (Tr. 238; Pet. Ex. 32).

Tenant Advocate Peter Gray

Mr. Gray is a tenant advocate with Lenox Hill Neighborhood House, where he assists tenants with housing issues (Tr. 262). The Department subcontracts Lenox Hill Neighborhood House to work on the CONH Pilot Program (Tr. 263). Mr. Gray's role is to conduct on-site investigations and gauge the status of a building (Tr. 263-64).

On October 1, 2019, Mr. Gray met with respondent at the Building (Tr. 264). As indicated in his investigative report (the "Investigative Report"), submitted to the Department detailing his tour of the Building, Mr. Gray walked through floors 3, 5, 6, and the roof, and also observed various apartments (Pet. Ex. 5). He observed scaffolding outside the Building and described the Building as "rundown" (Tr. 264). The Building smelled due to lack of airflow, the elevator was broken, and there was shoring on each floor he entered (Tr. 265). Inside the apartments, Mr. Gray saw that a "lot of things had been left" behind and that "[t]oiletries remained in some of the bathrooms" (Tr. 265). Mr. Gray took pictures during his visit to the property (Tr. 266; Pet. Ex. 39). These photographs show extensive shoring along the hallways (Pet. Ex. 39). Mr. Gray noted in the Investigative Report that the Building had been vacant for two years, that there was no work in progress, and that the "entire building is in disrepair, very dirty" with "[s]horing visible on all floors" (Pet. Ex. 5).

The Investigative Report also includes several memoranda detailing conversations Mr. Gray had with at least four additional Building tenants beyond the four who testified at trial. These tenants reported building conditions similar to those testified to by Ms. Leonard, Mr. Shellef, Ms. Sookraj, and Ms. Palak (Pet. Ex. 5).

Specifically, the memoranda indicate that numerous former tenants experienced what Mr. Gray characterizes as “living conditions that did not comply with the Warranty of Habitability” (Pet. Exs. 5, 6). These conditions included: cracks on the walls, some of which were so large tenants could see outside from inside their apartments; leaks inside their apartments and throughout the Building; feeling the Building shake; and problems receiving mail due to damaged mailboxes (Pet. Exs. 5, 6). These tenants also reported many of the same difficulties dealing with management, whom they described as “shady,” “rude,” and “unhelpful” (Pet. Exs. 5, 6).

Architect Notaro

Lastly, petitioner elicited testimony from Michael Notaro, an architect familiar with the Building. Mr. Notaro, president of MVN Architect LLC, testified that he has worked as an architect for almost 40 years (Tr. 694). He oversaw an inspection of the exterior of a building located at 1850 Second Avenue, which is adjacent to the Building. As part of his inspection, he was required to prepare reports and to communicate with the Department (Tr. 759). Sometime in the middle of 2017, he learned that the bottom portion of 1850 Second Avenue was enclosed by a wall shared with the Building (Tr. 759, 772). A survey of the property confirmed that this was a party wall shared by the two buildings (Tr. 759-60).

Mr. Notaro explained that the Building relies on the shared wall for “enclosure and bearing” while 1850 Second Avenue utilizes the shared wall only for enclosure (Tr. 698, 701). A partial vacate order was issued in 2017 for 1850 Second Avenue because of unstable masonry on the party wall (Tr. 707). The partial vacate order impacted the first-floor retail tenant at 1850 Second Avenue (Tr. 707; Pet. Ex. 43). Mr. Notaro stated that the unstable masonry could potentially fall and injure staff who maintained equipment on the roof of 1850 Second Avenue as well as people occupying the first-floor retail space (Tr. 708-09). He suggested that the unsafe conditions could adversely affect occupants in the first seven stories of 1850 Second Avenue (Tr. 710).

Mr. Notaro was present at 1850 Second Avenue on many occasions and observed the party wall progressively deteriorate over the course of years (Tr. 722). He stated that the deterioration accelerated after 2010 (Tr. 731). He submitted a report regarding the condition of the party wall to the City in 2017, but did not discuss the wall with anyone from the Building management until after the November 9, 2017 vacate order was issued (Tr. 732-34). However, he stated that Nancy

Wan, a representative of 1850 Second Avenue Services Company, reported by e-mail the condition of the wall to Building management prior to the evacuation order (Tr. 769-70).

On November 9, 2017, DOB issued a complaint to 1850 Second Avenue Services Company regarding 1850 Second Avenue (Tr. 710; Pet. Ex. 44). The complaint indicates that the Building has not been maintained in a code compliant manner “due to [the] compromise[d] condition of 300 E 96th Street” (Pet. Ex. 44). Mr. Notaro attended an on-site meeting with DOB officials (Tr. 711). He also engaged in various discussions with individuals from Walter & Samuels regarding repairs to the party wall (Tr. 712). Amidst conversations with James Scheld of Shapiro Associates, Mr. Notaro reviewed and gave feedback regarding design proposals to repair the party wall (Tr. 713). He indicated that his role was to review the designs and communicate with management for 1850 Second Avenue about the process (Tr. 714-15).

In March 2018, DOB officials met with representatives from both buildings (Tr. 715-16). DOB requested that 1850 Second Avenue Services Company file plans for a fire separation partition between the two buildings prior to the commencement of work on the party wall (Tr. 717). The purpose of the fire separation partition was to maintain a legal fire separation at the property line (Tr. 719). These plans were submitted in the weeks following the meeting (Tr. 717). The fire separation partition was to be constructed by 1850 Second Avenue Services Company (Tr. 717). Representatives of the Building were to be responsible for undertaking the repair of the enclosure and structure (Tr. 717).

The application for the fire separation partition was approved on June 4, 2018 (Pet. Ex. 45). Constructing the fire separation partition from the 1850 Second Avenue side presented difficulties because this space was occupied by the New York Foundation for Senior Citizens which houses elderly and frail individuals (Tr. 719). Mr. Notaro indicated that constructing the fire separation partition using access through the Building became a topic of discussion for the next few years (Tr. 719).

The parties continued to engage in discussions regarding repair of the party wall (Tr. 721). Mr. Notaro reviewed subsequent iterations of the repair proposals including a review of the shoring design involved in the repair of the Building (Tr. 721, 739). Towards the end of 2019, James Scheld submitted a new approach to the party wall repair (Tr. 739). This new plan involved an “encasement scenario” which involved construction of a reinforced concrete masonry unit which would attach to the frame of 1850 Second Avenue (Tr. 739-40). 1850 Second Avenue Services

Company agreed to proceed with the encasement scenario, which eliminated the need for the fire separation partition (Tr. 741).

Mr. Notaro indicated that James Scheld later communicated to him that there were additional problems involving the foundation of the Building (Tr. 741). The foundation had been built on wood piles which had deteriorated, requiring the use of underpinning to facilitate the replacement of the rotted wood with reinforced concrete (Tr. 741-42). Building management was also considering demolishing the Building (Tr. 743). Mr. Notaro noted that in the event of a demolition, the encasement scenario should remain in place to form the fire separation partition and create a stabilizing element for the party wall (Tr. 743).

At a February 2020 meeting, representatives of the Building indicated that repairs to the party wall were not dependent on demolition (Tr. 745). The parties also discussed certain changes to the enclosure of the one-story extension of 1850 Second Avenue (Tr. 746). According to Mr. Notaro, the plan was satisfactory to 1850 Second Avenue Services Company and they were optimistic about moving forward (Tr. 747). The fire separation partition was to be progressively installed from the Building side while portions of the party wall were repaired (Tr. 793). However, no work was ultimately done in connection with this plan (Tr. 748).

Respondent's Evidence

Respondent presented testimony from the superintendent of the building, Vate Pepushaj, and the Building's managing agent, Norman Silver. Together they handled the day-to-day operations of the Building while acting as the point of first contact between tenants and management. Respondent, an asset manager and leasing agent with Walter & Samuels and a part owner of the entity that owns the Building, also testified.

Building Superintendent Pepushaj

Mr. Pepushaj owns a company named I&V Reliable Corporation, under which he worked as a contractor and superintendent for the Building (Tr. 388-89). His company would invoice Walter & Samuels for his work in both roles (Tr. 389). As superintendent, Mr. Pepushaj maintained the Building by removing garbage, cleaning, shoveling snow, and handling complaints from tenants (Tr. 389). He was present in the Building every morning, Monday through Saturday, and would sometimes return in the afternoon to complete additional tasks such as trash removal (Tr. 391, 450, 452). Tenants would contact him with requests by text message, phone, and

sometimes e-mail (Tr. 448). He testified that he would complete small repairs immediately but required management approval for larger repairs (Tr. 391, 450).

Mr. Pepushaj testified that he observed leaks in the Building lobby which caused the floor to become wet and slippery during heavy rain (Tr. 392, 461-62). To deal with the leaks, he would use a bucket to collect the water and he would mop the floor (Tr. 394, 462). A tarp was used while the leak was investigated (Tr. 462). He stated that the Building's roof was replaced by different contractors in the summers of 2014, 2015, and 2016 (Tr. 396-97, 463). In the summer of 2017, the lobby ceiling was opened to attempt to trace the source of the water leaks (Tr. 431). Plastic was used to cover the ceiling (Tr. 432). Mr. Pepushaj invoiced Walter & Samuels for work in connection with the leaks on October 13, 2014, September 12, 2015, July 24, 2016, and October 8, 2017 (Tr. 429; Resp. Ex. W-1).

The Building has two front entrance doors (Tr. 399). Mr. Pepushaj indicated that the first entrance door, opening onto the sidewalk, was always left open to provide access to the intercom which is located between the first door and the second, inner door (Tr. 399). In August of 2015, the lock to the second inner door had to be replaced because the magnetic strip in the mechanism failed, preventing it from locking (Tr. 401-02; Resp. Ex. W-1). The handle for the second door would sometimes become loose and Mr. Pepushaj would have to tighten it (Tr. 402-03). Both doors had previously been replaced in 2014 (Tr. 399-400, 464-65).

In the summer of 2016, after management received complaints from Ms. Palak that her HVAC unit was not working, an air-conditioning company made multiple attempts to repair the unit (Tr. 414-15, 465). Mr. Silver later approved the replacement of the entire unit (Tr. 415). After the old unit was removed, the air-conditioning company covered the hole in the wall with cardboard until the new unit could be installed (Tr. 416). Mr. Pepushaj claimed that the unit was only broken for about a week (Tr. 465). He did not recall receiving complaints from Ms. Palak during the winter (Tr. 466). Mr. Pepushaj was aware that Ms. Palak would be leaving her unit at the end of her lease, and he observed that, following the Vacate Order, her apartment was empty except for a single cardboard box (Tr. 417-18).

Prior to Ms. Sookraj moving into her apartment, Mr. Pepushaj painted and prepared the unit for her arrival (Tr. 427-28; Resp. Ex. W). Upon recalling the events in which Ms. Sookraj became locked inside her apartment, Mr. Pepushaj stated he did not consider the situation to be an emergency (Tr. 467). He stated that Ms. Sookraj began texting him at 9:45 p.m., and that he responded that he would come to her unit in the morning (Tr. 406). He instructed her by text

message to use a screwdriver or credit card to open the door (Tr. 406; Pet. Exs. 24, 25). He indicated that she was “afraid to do that” and “afraid of staying” in the apartment (Tr. 406). The following day, after the door had been forcibly opened by the FDNY, he had the door replaced and a locksmith installed a new lock (Tr. 407; Resp. Ex. W-1). Ms. Sookraj also complained to Mr. Pepushaj about a leak in her bathroom, but he was unable to identify any leaks and suggested that the water damage was the result of a lack of ventilation (Tr. 412-13).

Mr. Pepushaj plastered cracks in the hallways and inside apartments but indicated that he did not observe cracks in the lobby (Tr. 404-05, 453). He would repair cracks using tape and plaster (Tr. 404). Neither the tenants nor the authorities were alerted to these cracks (Tr. 461). In early November 2017, Mr. Pepushaj saw the large crack which was photographed by Ms. Leonard (Tr. 454, Pet. Ex. 21). He also saw cracks on the third, fifth, and sixth floors (Tr. 475). He notified management, who directed Colgate Restoration to install a small amount of shoring on the sixth floor (Tr. 459-60, 478). When asked why he had not observed the cracks from the outside of the Building, Mr. Pepushaj indicated that the Building does not have a yard from which these cracks could be seen (Tr. 424).

During the week before the Vacate Order, Mr. Pepushaj noticed that tape on the walls had begun to curl, which he believed meant “something is moving” (Tr. 421). Mr. Pepushaj reported this development to management (Tr. 421). An engineer and construction company were hired to remove sheet rock to allow for inspection of the walls (Tr. 422).

Managing Agent Silver

Mr. Silver has been employed as a managing agent by Walter & Samuels for almost 40 years (Tr. 481-82, 515). He manages approximately 12 buildings, including the Building, by supervising day-to-day operations, overseeing the superintendents, responding to tenant complaints, collecting rent, and processing paperwork in connection with the property (Tr. 482, 515). He is in daily contact with the superintendent for the Building (Tr. 515). Mr. Silver indicated that the current owners of the Building acquired title in July of 2013 (Tr. 482). He explained that management did not typically confer with the owners regarding conditions at the Building (Tr. 519).

Mr. Silver has authority to approve routine maintenance work, but prior approval is needed for repairs that exceed a certain price point (Tr. 521). Any violations issued to the Building would be addressed with the superintendent (Tr. 499).

Between July 2013 and when the Building was evacuated, Mr. Silver received phone calls and e-mails from tenants regarding issues with the Building (Tr. 483). Sometimes tenants would reach out directly to Mr. Silver but other times they would contact the superintendent (Tr. 483). Mr. Silver testified that he would call a contractor if needed or would notify the superintendent to conduct certain repairs (Tr. 483).

Mr. Silver indicated that the general plan for the Building was to keep tenants in their apartments with lease renewals, or if they chose not to renew, to find new tenants as quickly as possible (Tr. 483). When an apartment was rented to a new tenant, Mr. Silver would inspect the unit (Tr. 504). Otherwise, he would not inspect an apartment unless he was called by a tenant (Tr. 504). Mr. Silver was present at the Building typically once a week but sometimes every other week (Tr. 483). He would meet with the superintendent to evaluate any conditions that needed repair (Tr. 484).

At some point, the Building superintendent told Mr. Silver that construction at a nearby building had caused damage to the mailboxes in the lobby (Tr. 484). He inspected the damage on the same day that it was reported (Tr. 484). He notified the developer of the adjacent property via e-mail and followed-up with one or two phone calls (Tr. 485; Resp. Ex. DD). The developer sent someone to photograph the damage and take measurements for replacement boxes (Tr. 485-86). Mr. Silver testified that he had constant communication with the developer who provided updates about the timeline for replacing the mailboxes, which needed to be custom manufactured (Tr. 486; Resp. Ex. DD). During the construction on the adjacent property, Mr. Silver observed that the Building would shake (Tr. 498).

A printout of the e-mails between Mr. Silver and the contractor contains a hand-written notation which reads "No mailboxes from: 6/3/17-7/7/17" (Resp. Ex. DD).

Mr. Silver described the lobby and entrance of the Building as a "setback" that was built after the property had originally been developed (Tr. 493). The lobby area is only one story tall (Tr. 493). He acknowledged that when there was heavy rain, the lobby would leak (Tr. 492-93). He indicated that this had been occurring since management took over the Building (Tr. 493). Mr. Silver was alerted to the leaks by tenants and the superintendent (Tr. 493). He described the leaks as serious and "more than a trickle" (Tr. 516). Typically, the superintendent would attempt to find the source of the leak and repair it (Tr. 493). When this was not possible, an outside contractor was called (Tr. 493). Mr. Silver estimated that he observed the leaks four to six times between 2013 and 2017 (Tr. 494).

To contain the leaks, the Building superintendent installed a tarp beneath the leaks, although Mr. Silver could not recall when this occurred (Tr. 495). The tarp remained in place for about six weeks (Tr. 525). Mr. Silver typically called a contractor within a few days of learning of the leaks (Tr. 496). He estimated that repairs were attempted four times (Tr. 495). After the repairs, the leaks would stop for a period of months and then reoccur in a different part of the roof (Tr. 496). Because the lobby was an add-on to the building and management did not possess any plans for the structure, no one was able to determine the source of the leaks (Tr. 527).

According to Mr. Silver, the original contractor used for the repairs was Mesta Renovation Inc. (Tr. 509). That company was subsequently taken over and began doing business under the name Kanaris Contracting Corporation (Tr. 509). Mr. Silver identified several invoices from these two entities (Tr. 510; Resp. Ex. FF). He authorized payment for these invoices and confirmed that the work had been done in each case (Tr. 510).

Mr. Silver testified that Colgate Restoration had also been hired to perform waterproofing and other repairs (Tr. 505). He identified two invoices in connection with this work, which were signed by Mr. Silver and another member of management (Tr. 506; Resp. Ex. EE). Prior to approving payment, Mr. Silver would confirm that the work had been done by speaking with the superintendent and, if necessary, visiting the Building to inspect the work (Tr. 507). The first invoice was for a repair to the main roof (Tr. 508; Resp. Ex. EE). The second invoice was for emergency repairs to the lobby roof and stairs (Tr. 508; Resp. Ex. EE). Mr. Silver indicated that the second job involved waterproofing and stucco replacement (Tr. 508).

Mr. Silver recalled that the door to the entrance of the Building had to be replaced although he could not remember when this occurred (Tr. 525, 527). He stated that management "certainly wouldn't leave the door wide open" (Tr. 527). He estimated that it took two or three weeks to get a replacement (Tr. 525). He did not recall how many complaints he received regarding the door; he suggested "it might have been just a handful" (Tr. 526).

During routine walkthroughs of the Building, the superintendent would sometimes point out cracks to Mr. Silver (Tr. 496). Some of these cracks were in the stairwell but were strictly cosmetic (Tr. 496-97). Similar cracks were also present in the public hallway (Tr. 497). These cracks were typically six inches long and half an inch or less wide (Tr. 497). Mr. Silver suggested that these cracks were also cosmetic (Tr. 497). At the time, these cracks did not concern Mr. Silver as he felt that they were typical for an older building (Tr. 498).

Mr. Silver was unclear about the timing of events leading up to the Vacate Order. Towards the end of October 2017, he had not observed any condition in the Building that would be of concern (Tr. 501). Around this time, he performed his routine inspections with the superintendent during which they walked through the Building from top to bottom (Tr. 501). He did not observe any cracks in the sheetrock although he did receive a complaint from a tenant regarding sheetrock (Tr. 502). Upon inspection of the tenant's unit, he observed a separation of the sheetrock in the unit (Tr. 502). He subsequently notified senior management about this condition (Tr. 502).

Mr. Silver testified that sometime during the 30-day period prior to the Vacate Order, the superintendent pointed out to him a structural crack on the south wall (Tr. 504). This crack was not visible from the street (Tr. 504). Sometime before the Vacate Order, Mr. Silver went to an adjacent building to view the crack (Tr. 505). Around this time, he also observed large cracks in the sheetrock of the upper floor hallways (Tr. 500). He notified senior management about these conditions (Tr. 500-01). Senior management brought in an engineer who recommended the immediate installation of shoring (Tr. 501). Mr. Silver did not notify the tenants or any authorities about these events (Tr. 524).

Mr. Silver testified that to his knowledge, ownership or management never attempted to interrupt services or create conditions that would cause tenants to vacate the Building (Tr. 514). Prior to the Vacate Order, Mr. Silver was not aware of any tenants who had left the Building because of interruptions in service or lack of repairs (Tr. 514).

Respondent's testimony

Respondent testified that he is an asset manager and leasing agent with Walter & Samuels and has worked in this role for over 20 years (Tr. 607). Respondent was responsible for making sure that apartments within the Building were occupied (Tr. 608). He also worked with the Building manager, Mr. Silver, and the superintendent, Mr. Pepushaj, to manage the day-to-day operations of the Building (Tr. 608).

The owners, 96 & Second LLC, acquired title to the Building in 2013 (Tr. 608). Respondent has a three percent ownership interest in the company (Tr. 627). The business plan was to maintain the Building fully occupied and in good condition (Tr. 608). When a lease approached expiration, management would contact the tenant to determine if they were interested in renewing the lease (Tr. 610). Incremental increases in rent were sought where the market allowed; otherwise renewals were offered at the existing rent (Tr. 611). Respondent's

understanding was that all the units in the Building were free market apartments (Tr. 611). He testified that he never checked whether the rent being charged was below the standard for rent stabilization guidelines (Tr. 635).

When a tenant moved out, the superintendent and managing agent would inspect the unit and discuss any necessary upgrades with respondent (Tr. 611-12). Keeping tenants in their apartment was a priority because when a tenant left management would often need to spend funds on improvements (Tr. 612). Management would also have to bear the cost of lost rent if a replacement tenant was not immediately found (Tr. 612-13). Respondent suggested that the rent rolls illustrate this plan by showing consistent levels of rent (Tr. 615-16; Resp. Ex. Y).

Respondent is listed as the applicant for the CONH (Tr. 678). After filing for the CONH, the Department informed respondent that Lenox Hill Neighborhood House would be conducting an inspection of the Building (Tr. 638). Respondent met with Mr. Gray at the Building although he was unfamiliar with Mr. Gray's role and did not know that the Department could refer the investigation to a community organization (Tr. 639).

With regard to the maintenance of the Building, respondent claimed that Mr. Silver monitored day-to-day operations (Tr. 648). In certain circumstances, issues would then be reported to respondent (Tr. 648). Respondent acknowledged that he knew that construction was taking place near the Building (Tr. 643).

Respondent testified that he never saw the crack in the south wall of the Building until a few days before the Vacate Order (Tr. 653). He stated that the Vacate Order was issued because "there was some physical condition that rendered the building unsafe for the tenants" (Tr. 656). Respondent was aware that there were plans to remedy the crack but was not aware of the details. His involvement with the Building was limited after the Vacate Order went into effect (Tr. 659-60). He was not involved in discussions regarding the party wall and was not aware of the specifics of the DOB violations and orders issued (Tr. 661-62, 672-73). Further, he did not recall that a criminal summons had been issued to the Building (Tr. 662). He was also unaware of whether Walter & Samuels or agents of the owner were monitoring the Building (Tr. 664).

Respondent was aware that all tenants were forced to vacate the Building, leaving behind much of their belongings (Tr. 668). He could not explain why it took more than 18 months from the Vacate Order to file the COHN application (Tr. 679-80).

Mr. Almiroudis

Adamantios Almiroudis, who holds a degree in engineering, is a general contractor and has been a principal at Kanaris Contracting Corporation for five years (Tr. 568-69). Prior to this position, he worked at Mesta Renovation. Under both these companies, Mr. Almiroudis has performed work for the Building (Tr. 568, 570).

In the summer of 2014, Mr. Almiroudis was retained to perform waterproofing work for the Building and identify the source of water leaks (Tr. 570). When he inspected the roof, Mr. Almiroudis saw that several areas were torn and damaged (Tr. 574). He described the situation as an “ongoing operation” and that there was “a lot of vibration in the area, so there was continuous work performed on the façade or on the roof to help mitigate the problem” (Tr. 576). He indicated that there were potential penetration points, such as “pitch pockets,” which required special waterproofing (Tr. 574). Probes were cut into the ceiling to look for the source of the leaks (Tr. 575). Approximately 50 square feet of roof had to be removed and waterproofed (Tr. 576). After completing the work, Mr. Almiroudis believed that the issues had been resolved (Tr. 575, 578).

In November of 2016, Mr. Almiroudis returned to the Building to deal with another leak in the lobby (Tr. 578). He performed an inspection that included the chimney stack that went to the roof (Tr. 578). Water was entering from the chimney stack through another stack connected to the mailroom (Tr. 579). His inspection revealed a crack in the acrylic stucco, approximately ten feet from the roof, which required repair (Tr. 579). Mr. Almiroudis indicated that the Building was under “high vibrations” because of nearby construction (Tr. 580).

Steve Marku

Steve Marku, the owner of a construction business called Colgate Restoration, testified that he dispatched a crew to patch minor leaks in the main roof of the Building in September of 2017 (Tr. 535-37). He was called again in early October of 2017 to address leaks in the façade of the Building (Tr. 537-38). His team used hanging scaffolds to patch the cracks, and subsequently applied an elastomeric coating, which prevents water from re-entering the façade (Tr. 538-39). They also performed emergency repairs on the first-floor roof, lobby, and stairs, and repaired minor cracks on the front of the Building (Tr. 540, 542).

Mr. Marku testified that in November of 2017, drywall was removed after a crack was discovered inside the hallway (Tr. 543). Mr. Marku observed the crack and recommended that an engineer immediately survey the area (Tr. 544). The engineer suggested the installation of shoring

and that drywall on other floors be removed to gain an understanding of the integrity of the rest of the Building (Tr. 545). Mr. Marku stated that as additional drywall was removed, it became clear that there were “much bigger issues at the building than anyone ever thought” (Tr. 545). Roughly ten days prior to the Vacate Order, shoring was installed in the Building (Tr. 556). On the recommendation of DOB and the engineer, a sidewalk shed was also installed (Tr. 546).

Howard I. Shapiro & Associates (“Shapiro Associates”) was hired to handle the engineering side of the process (Tr. 547). Shapiro Associates requested that additional, more robust shoring be put in place to prevent the wall from collapsing (Tr. 547). Monitoring devices were installed on the front wall along with tarps to prevent additional water from entering the Building (Tr. 548). Conversations began between Shapiro Associates, Colgate Restoration, and Building management regarding a complete rebuild of the wall (Tr. 549). These conversations continued for five or six months (Tr. 549).

Subsequently repair plans for the wall were submitted to and approved by DOB (Tr. 549). The plans required that the entire wall be demolished to the foundation and a new wall built in its place (Tr. 550). Re-building the wall also required partial demolition of a wall shared with the adjacent building (Tr. 555-56). Mr. Marku indicated that an agreement could not be reached with the owners of the adjacent property (Tr. 550-51). He also determined that the wall could not be re-built (Tr. 551).

James Scheld

James Scheld is the structural engineer who was brought in to evaluate the structural integrity of the Building. He has been a structural engineer with Shapiro Associates for 17 years (Tr. 311). He was qualified as an expert for the portion of his testimony that pertained to engineering (Tr. 314).

Mr. Scheld was hired by Walter & Samuels to assess the condition of the Building in 2017, shortly after the Vacate Order was issued (Tr. 315). Mr. Scheld was provided with a survey prepared by an inspection service called MT Group which indicated that the Building was in good condition with only minor deficiencies (Tr. 348-49; Resp. Ex. V). The survey contains a photo of certain cracks in the stucco, plaster, and masonry. Mr. Scheld indicated that these cracks did not impact the structural stability of the Building (Tr. 350-51; Resp. Ex. V). Based on the survey, Mr. Scheld did not see any cause for concern with regard to the Building in November of 2015 (Tr. 349-50).

On November 10, 2017, Mr. Scheld evaluated the crack in the Building's south wall which he described as a "full-height crack from the roof to the ground floor" that was "1-5/8 inch at the roof line and tapered to zero at the ground floor" (Tr. 315). Because the floors were in danger of collapsing, he ordered ten-feet of shoring be installed on either side of the crack from the roof to the cellar (Tr. 315). To inspect for additional cracks, Mr. Scheld instructed the contractor to remove the drywall covering the south wall (Tr. 317). Once the drywall had been removed, more cracks were discovered towards the western end of the Building (Tr. 318). The bricks within the wall had also shattered, causing the wall to buckle (Tr. 318).

Mr. Scheld submitted a letter to the Department on August 7, 2019, with affixed photos taken at the end of 2017 (Tr. 319-21; Resp. Ex. S). One of the photographs submitted shows the crack in the Building which resulted in the Vacate Order (Tr. 323; Resp. Ex. S, Fig. 2). Mr. Scheld stated that to see this crack, one would need to stand in the back of 1850 Second Avenue on the roof of the extension (Tr. 323-24). The crack was not visible from any other outdoor vantage point (Tr. 323). According to Mr. Scheld, the crack only became visible inside the Building once the drywall had been removed (Tr. 369-70).

The third photo provides a close-up, showing the extent of the crack in greater detail (Tr. 325; Resp. Ex. S, Fig. 3). The fourth photo, taken from the sixth floor, provides a close-up of the crack at its widest point (Tr. 325; Resp. Ex. S, Fig. 4). The fifth photo shows an opening in the wall exposing the concrete masonry behind it (Tr. 325; Resp. Ex. S, Fig. 5). By testing the wall in various locations, Mr. Scheld was able to verify that the wall was originally 12 inches wide because the original width remained intact in certain locations along the wall (Tr. 326). The sixth photo reveals collapsed brick that had fallen out of the wall (Tr. 327; Resp. Ex. S, Fig. 6).

After the shoring was installed, the plan was to perform a partial demolition of the party wall which would then be re-built to the correct thickness (Tr. 330-31). However, Walter & Samuels hired a geotechnical engineer who concluded that timber piles beneath the Building were rotting, compromising the foundation, and causing the Building to tilt (Tr. 334). Mr. Scheld attributed the large crack running the height of the Building to this tilting and suggested that the crack may have also caused the stair tower and elevator shaft to pull away from the main structure (Tr. 334). In connection with nearby construction at 302 East 96th Street, drilling was being performed which may have disturbed the foundation (Tr. 335). He also suggested that construction on the 96th Street subway in 2010 may have also been a contributing factor, as evidenced by

monitors which were installed by the MTA on existing cracks within the Building (Tr. 337-38; Resp. Ex. S, Fig. 9).

In August of 2018, after the investigation of the foundation, it was determined that it was best to demolish the Building in its entirety (Tr. 340, 378). Fixing the foundation problems would have required jacking up the full weight of the Building and installing new piles underneath the foundation (Tr. 342-43). Mr. Scheld testified that remedying the DOB violations was “not possible” and “doesn’t make sense” (Tr. 343). In his career, he had never seen a building of this age undergo such work (Tr. 344). Further supporting demolition, initial plans for rebuilding the party wall required a “two-hour fire rated wall” be built to protect the adjacent senior citizen tenants in 1850 Second Avenue (Tr. 340-41). Mr. Scheld indicated that management from 1850 Second Avenue was opposed to construction that would impact these senior citizen tenants (Tr. 341).

Two plans were developed (Tr. 344). The first involved keeping the compromised party wall and building a new eight-inch concrete masonry wall in front of it (Tr. 344). An application for the partial demolition of the party wall was filed with DOB in early 2018 (Tr. 331-33, 378; Resp. Ex. PW-1). The second plan was to demolish the Building (Tr. 344). An application to demolish the entire building was filed with DOB in June of 2019 (Tr. 344-45, 378; Resp. Ex. PW-1). Mr. Scheld indicated that this plan has been submitted three times but could not move forward without the certificate of no harassment (Tr. 346).

In anticipation of a meeting with representatives of 1850 Second Avenue, a drawing putting forth the demolition plan was prepared (Tr. 351-54; Resp. Ex. R). The plan involved a repair scheme through which, following the demolition of the Building, the party wall would be repaired, and an eight-inch wall would be built to lock it in place (Tr. 354-55). This plan was received positively by the representatives of 1850 Second Avenue Services Company (Tr. 355).

Mr. Scheld reviewed the violation received by the Building on November 13, 2017, indicating that each one of the remedies had been implemented (Tr. 362-36; Pet. Ex. 35). In addressing the violation received on November 14, 2017, Mr. Scheld indicated that it was impossible to comply because the remedies required access to 1850 Second Avenue (Tr. 365-66; Pet. Ex. 36). In connection with the criminal summons for failure to complete job application number 14073938, Mr. Scheld stated that “the due diligence of investigating the foundation” and having to “coordinate with the adjoining property owner” made completing the job “impossible”

(Tr. 366-67). On cross-examination, Mr. Scheld acknowledged that the work had not been completed by January 20, 2018 as required by DOB violation (Tr. 374-75).

Harassment

The issue before this tribunal is whether respondent engaged in harassment against the tenants.² The City's Housing Maintenance Code definition of "harassment" by or on behalf of a building owner includes any one of the following acts:

(b) 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;

(b-1) an interruption or discontinuance of an essential service that (i) affects such dwelling unit and (ii) occurs in a building where repeated interruptions or discontinuances of essential services have occurred;

Admin. Code § 27-2004(a)(48), (b), (b-1); *see also* Admin. Code § 27-2093.1(a) ("harassment" under the Pilot Program has the meaning set forth in subdivision 48 of section 27-2004 of the Administrative Code). The statute includes a rebuttable presumption that acts of harassment were committed on the owner's behalf with the intent to cause the lawful tenant to vacate a multiple dwelling unit. Admin. Code § 27-2004(a)(48)(ii); *see Dep't of Housing Preservation & Development v. Edelstein*, OATH Index No. 490/12 at 2 (Dec. 7, 2012) (owner may rebut presumption of intent by a preponderance of credible evidence); *Dep't of Housing Preservation & Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 at 12 (Dec. 29, 2006). The specific allegations are addressed below.

Leaks and Water Accumulation in the Building's Lobby and in Units

Petitioner proved that respondent failed to correct conditions in the Building in a timely or diligent manner, which resulted in the consistent leaking of water in the Building lobby area. Ms.

² The parties, respondent in particular, also sought to elicit testimony from the witnesses regarding the appropriate steps that should be taken in connection with the Building moving forward, including respondent's preferred option of demolishing the Building. This question is not before this tribunal and is best left to the agencies and stakeholders with expertise in the field. But without question, public safety should be the central criteria for determining any future steps for the Building.

Leonard, Mr. Shellef, and Ms. Palak all credibly and consistently testified that when it rained, a significant amount of water would collect in the Building lobby area.

Ms. Palak, who lived in the Building from 2013 to 2017, credibly testified that there was a major leak in the Building's lobby area, and smaller leaks in the staircase area. She witnessed the leaks "as many times as there was rain" and noted that the floor would become slippery. To address the leak, the superintendent placed a tarp on the ceiling of the lobby (Tr. 172). Another tenant, Ms. Leonard, also saw a "major" leak in the lobby during the time she lived in the Building, from May 2017 until early September 2017 (Tr. 16-17). She stated that the leak was "very heavy" and that if it was raining outside, "it would run nonstop, and the lobby would be completely covered in water" (Tr. 47). Her testimony was corroborated by video evidence, which shows water streaming down from a large piece of plastic material taped to the ceiling and puddling on the tile floor below (Pet. Exs. 14, 15). A third tenant, Mr. Shellef, added that when it would rain, "it would rain inside the building" resulting in wet, dangerous floors (Tr. 77).

Respondent did not contest the leaks occurred in the lobby area when it rained. Indeed, Mr. Silver, the managing agent, conceded that when it rained heavily, the lobby would leak (Tr. 492-93). He further testified that the leaks had been occurring since management took over the Building, which presumably meant since 2013, when the owners acquired the Building. Yet in 2017, the leaks continued.

Respondent argued that Building management contracted several contractors to make repairs multiple times and stop the leaks (Tr. 537-40, 570-80). Respondent also sought to mitigate the leaks with a tarp (Tr. 47, 172, 495, 462). However, none of these actions solved the problem, and the leaks returned although sometimes in a different portion of the lobby (Tr. 496).

The weight of the evidence establishes that respondent's hodge-podge and myopic approach to address the leaks allowed for repeated interruptions of essential services and substantially impaired the habitability of the Building. Put another way, while respondent knew or should have known about the major and consistent leaks in the lobby that went on for years, the growing cracks in the wall that required shoring, the nearby construction project affecting the Building, and the frequent shaking of the Building, it seems to have never occurred to respondent or the owners that these were signs of a greater structural problem that required more than just roof repairs.

Indeed, it was Ms. Leonard, a tenant, who on November 9, 2017, saw shoring being placed in the lobby area and wrote an e-mail to management pleading, "Let me out of my lease. The

building is collapsing” (Pet. Ex. 21). Her alarm caused her to call 911, which resulted in the evacuation of the building by FDNY. Yet Mr. Pepushaj and Mr. Silver, the building superintendent and managing agent, seem to believe the Building was in good condition up until the time of the evacuation. Instead, the evidence is clear that the leaks were a serious, reoccurring problem impacting all tenants in the Building.

Part of the objective of the harassment statute is to keep tenants in their homes. *Allen v. 219 24th St. LLC*, 2020 N.Y. Misc. LEXIS 1753 at *69 (N.Y. Civ. Ct. May 6, 2020). Respondent’s contention that they wanted to keep tenants in the Building as part of their business plan is insufficient to overcome the evidence of deferred or insufficient maintenance which had the effect of causing tenants to move out of their units.

In sum, the evidence showed that respondent committed acts of harassment by failing to fix conditions leading to leaks and water accumulation in the Building’s entrance lobby and stairways. Respondent failed to rebut the inference that this harassment was committed with the intent to cause lawful occupants to vacate their units or surrender their rights. *See Dep’t of Housing Preservation & Development v. Goldsmith*, OATH Index No. 2118/12 at 30 (Aug. 27, 2013) (failure to correct recurring leaks and defective floors, doors, and windows, deemed harassment); *Dep’t of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07 at 15, 21 (May 16, 2007) (persistently ignoring deplorable conditions, including leaks, constitutes harassment).

Additionally, petitioner proved that respondent failed to fix conditions leading to leaks inside lawful occupants’ units. Ms. Sookraj testified that a leak in her bathroom ceiling caused drywall and plaster to fall off (Tr. 139-40). The reports prepared by Lenox Hill Neighborhood House also note similar leaks within the bathrooms of certain units (Pet. Exs. 5, 6). Yet there is no evidence that respondent or the owners addressed or fixed these issues.

Wall Cracks

Petitioner alleges that respondent failed to repair cracks in the walls in public areas within the Building (ALJ Ex. 1). The evidence proves the presence of various cracks throughout the Building. Some of these cracks appear to have been small and potentially “cosmetic” rather than structural (Tr. 173-77, 350-51, 404-05, 453, 496-97, 542; Pet. Exs. 5, 6; Resp. Ex. V). Other cracks were larger and may have impacted the overall integrity of the Building (Tr. 49-50, 238, 454, 500-04; Pet. Exs. 12, 21, 32). The testimony of the superintendent, Mr. Pepushaj, suggests that he made attempts to remedy cracks using tape and plaster (Tr. 404-06). Mr. Silver confirmed that

Mr. Pepushaj would show him these cracks during their walkthroughs of the Building (Tr. 496-98).

Respondent purports to have been unaware of the structural problems with the Building prior to the period immediately before the Vacate Order (Tr. 501-04, 653-60, 841). The timing of the complaints from Ms. Leonard corroborates that the more extreme cracks may not have been immediately visible (Tr. 36-40; Pet. Exs. 20, 21). The testimony of Mr. Scheld also supports respondent's position that the structural cracks were not discovered until the removal of certain pieces of drywall on November 10, 2017 (Tr. 315-18). However, other testimony establishes that while respondent made cosmetic fixes to the cracks in public areas, he failed to adequately address the visible cracks and ignored numerous warning signs of actual structural problems.

Ms. Palak credibly testified that she had noticed cracks in the walls since 2013, and that light from the outdoors was visible in the staircase (Tr. 173-74). The reports prepared by Lenox Hill Neighborhood House corroborate the existence of these major cracks and indicate that management took the position that these were cosmetic issues and failed to investigate further (Tr. 275-76; Pet. Exs. 5, 6). It strains credulity that cracks which allow daylight into a building should be characterized as "cosmetic." Further, the failure to thoroughly inspect the Building despite the consistent leaks and cracks shows a lack of diligence, which allowed unsafe conditions to persist despite numerous complaints from tenants. Indeed, once Mr. Scheld was hired to conduct such an inspection, it seems he had no great difficulty gaining access to the adjacent building to see the crack that led to the Vacate Order.

Petitioner also alleged that respondent failed to repair cracks in the walls inside lawful occupants' units (ALJ Ex. 1). The reports prepared by Lenox Hill Neighborhood House credibly indicate that several tenants had extensive cracks in their units which were never repaired despite complaints to management (Pet. Exs. 5, 6). Respondent failed to provide any evidence to rebut these claims. Accordingly, the evidence established that respondent committed acts of harassment by failing to adequately address and inspect the Building for cracks, despite sufficient warning signs that the Building was unsound, which eventually led to the evacuation of tenants from the Building, and for which they have yet to return.

Issues with Front Door

Petitioner alleged that respondent failed to fix the Building's front door (ALJ Ex. 1). Petitioner's witnesses testified that at certain times the locks to the doors at the front of the Building

were broken in such a way that left the Building completely open (Tr. 139-40, 184). Records from 311 also indicate problems with the front door (Pet. Ex. 9).

Mr. Pepushaj testified that the first door to the Building is always left open in order to provide access to the intercom which is located between the two front doors (Tr. 399). Mr. Pepushaj testified to making timely repairs to the second door when necessary (Tr. 399-403). Mr. Silver testified that at a certain point, one of the doors needed to be replaced (Tr. 525). He estimated that it may have taken up to three weeks to get a replacement (Tr. 525).

In addition to these problems with the front door, Ms. Sookraj testified that when she first moved into her apartment, the door to her unit broke, locking her inside her apartment (Tr. 135). Mr. Pepushaj failed to provide her with effective assistance (Tr. 137, 506; Pet. Exs. 24, 25). She was forced to call the FDNY, which had to break down her door (Tr. 137-38, 407). Ms. Sookraj indicates that for more than a week, while the front door was broken, her unit door also remained broken (Tr. 139). Mr. Pepushaj disputed this, stating that the lock was fixed the next day even as he acknowledged that the door ultimately had to be replaced (Tr. 407-08).

While discrete maintenance issues may not rise to the level of harassment, the persistent problems with the front door where it would remain unlocked, and the weeklong period during which Ms. Sookraj's unit door remained broken, constitutes a denial of an essential service, and therefore harassment.

Broken Mailboxes

Petitioner alleges that respondent failed to fix the broken mailboxes (ALJ Ex. 1). Ms. Leonard testified that on August 31, 2015, she received a notice from USPS which indicated that, because the mailboxes could not be locked, mail would need to be picked up at the post office (Tr. 26-29; Pet. Exs. 16, 17). Mr. Shellef, Ms. Palak, and other tenants also identified this problem, as do records from 311 (Tr. 81, 179-80; Pet. Exs. 5, 6, 9).

Mr. Silver testified that construction at a nearby building caused damage to the mailboxes which prevented USPS from delivering mail (Tr. 484-86). He worked closely with the developer of the adjacent property to replace the mailboxes (Tr. 485-86; Resp. Ex. DD). The evidence suggests that the mailboxes remained damaged for about a month, from early June 2017 until early July 2017 (Resp. Ex. DD). According to Mr. Silver, the mailboxes needed to be custom manufactured (Tr. 486). The evidence establishes that Mr. Silver made appropriate efforts to

remedy the issues with the mailboxes and that the failure to fix the broken mailboxes did not constitute harassment.

Conditions Which Led to the Vacate Order

Petitioner alleges that respondent failed to repair conditions which led to the issuance of the Vacate Order (ALJ Ex. 1). Respondent claims to have been unaware of these conditions (the structural issues with the Building manifested by major leaks when it rained and significant cracks in the Building) prior to the Vacate Order and asserts that they were beyond his control (Tr. 501-04, 653-60, 841, 853). These issues have already been discussed above. Petitioner proved that during the inquiry period, respondent failed to fix a number of conditions within the Building, which led to the Vacate Order. Respondent failed to rebut the statutory presumption that these acts or omissions constitute acts of harassment that were intended to cause lawful occupants to vacate their units or waive their occupancy rights.

Substantial Interference with and Disturbing the Comfort, Repose, Peace and Quiet of Lawful Occupants

Petitioner alleged that respondent substantially interfered with and disturbed the comfort, repose, peace and quiet of lawful occupants, causing or intending to cause such lawful occupants to vacate or surrender their occupancy rights (ALJ Ex. 1). Tenants within the Building have dealt with reoccurring leaks in the lobby and cracks in the walls. Management has remedied certain minor issues raised by tenants, but has persistently failed to remedy large-scale problems in the Building. Therefore, petitioner has shown that respondent substantially interfered with and disturbed the comfort, repose, peace and quiet of lawful occupants.

In sum, petitioner proved that during the inquiry period, respondent interrupted or discontinued essential services. Respondent failed to rebut the statutory presumption that these acts or omissions constitute acts of harassment that were intended to cause lawful occupants to vacate their units or waive their occupancy rights.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent committed harassment during the inquiry period by failing to fix conditions leading to leaks and water accumulation in the Building's lobby and stairway, failing to repair the front door, failing to repair cracks in the

walls in public areas and inside occupants' units, and disturbing the comfort, repose, peace, and quiet of lawful occupants.

2. Because respondent harassed lawful occupants, his application for a certificate of no harassment should be denied.

RECOMMENDATION

I recommend that respondent's application for a certificate of no harassment be denied.

Noel R. Garcia
Administrative Law Judge

November 9, 2022

SUBMITTED TO:

ADOLFO CARRIÓN JR.
Commissioner

APPEARANCES:

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**CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT**

**FINAL DETERMINATION UPON APPLICATION FOR A
CERTIFICATION OF NO HARASSMENT PURSUANT TO SECTION 27-2093.1
OF THE NEW YORK CITY ADMINISTRATIVE CODE**

Application No.: 73/19

Applicant(s): Steve Forest

Premises: 1854 2nd Avenue
New York, New York 10128

Inquiry Period: July 15, 2014 to the present.

Action: Denied, after hearing, pursuant to Section 27-2093.1(d)(5)(C) of the New York City Administrative Code.

Duration: No application for a Certification will be accepted for five years from the date of this determination.

Date of Issuance: November 16, 2022


Martha Ann Weithman, Assistant Commissioner - HLD
Department of Housing Preservation & Development

ACKNOWLEDGEMENT

STATE OF NEW YORK)

)ss.:

COUNTY OF NEW YORK)

On the 16th day of November, in the year 2022, before me the undersigned, Martha Ann Weithman, personally appeared, personally known to me or proven to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed this instrument.


NOTARY PUBLIC

RONIT JOSEPH
Notary Public, State of New York
No. 02JO6371480
Qualified in Richmond County
Commission Expires Feb. 26, 2026

HPD v. Goldsmith, OATH Index No. 2018/12 (Aug. 27, 2023)

***Dep't of Housing Preservation and Development
v. Goldsmith***

OATH Index No. 2118/12 (Aug. 27, 2013)

Department proved that owner harassed SRO tenants within the meaning of section 27-2093 of the Administrative Code. Owner's application for a certificate of no harassment should be denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**
Petitioner
- against -
FLORENCE GOLDSMITH
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

Petitioner, the Department of Housing Preservation and Development ("HPD"), commenced this proceeding pursuant to section 27-2093 of the Administrative Code, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2013). Respondent Florence Goldsmith is the general partner of Chelsea Partners, LLC, the owner of 246 West 21st Street, New York, New York. HPD seeks denial of respondent's application for a certificate of no harassment, alleging that respondent committed acts of harassment against the building's SRO tenants.

A hearing was conducted before me on February 4 and 11, and March 13, 2013. The record remained open for the submission of closing briefs and was closed on April 26, 2013. Petitioner presented the testimony of three tenants and an HPD investigator and inspector. Respondent called as witnesses the building superintendent and owner Larry Tauber.

For the reasons set forth below, I find that respondent harassed lawful occupants and recommend the certificate of no harassment be denied.

ANALYSIS

The building at 246 West 21st Street is a four-story Class B multiple dwelling owned by Chelsea Partners, LLC (Pet. Ex. 1 at 2). The building's four floors contain 28 SRO units, twelve or thirteen of which were occupied at the time of filing (Pet. Ex. 33 at 4; Pet. Ex. 1 at 2, 8). There are four SRO units on the first floor and eight on each of the other three floors. Nine units are currently occupied (Tr. 701-02). There are no non-SRO units in the building. Each floor has a public hall and a public hall community bathroom.

On August 17, 2011, Florence Goldsmith filed with HPD an application for a certificate of no harassment ("CONH") for the stated purpose of "combining . . . units" and doing "future work" (Pet. Ex. 1 at 2). Before issuing a CONH, HPD must certify that there has been no harassment of the lawful occupants of the premises within the 36 months preceding the application, an inquiry period that commenced on August 17, 2008. Admin. Code § 27-2093(c). The law defines "harassment" as conduct by or on behalf of an owner of an SRO multiple dwelling that "causes or is intended to cause" a lawful occupant to vacate the unit or to surrender or waive any rights to the unit, such as the interruption or discontinuance of essential services that interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of a lawful occupant. Admin. Code § 27-2093(a)(2).

The law creates a presumption that any statutory act defined in section 27-2093(a) was committed with the intent to cause a legal occupant to vacate the SRO unit. Admin. Code § 27-2093(b); *Dep't of Housing Preservation & Development v. Fenelon*, OATH Index No. 1525/04 at 3 (Oct. 6, 2004), *aff'd*, Index. No. 5111/05 (Sup. Ct. Kings Co. July 12, 2005). Thus, a two-pronged analysis is employed to determine (i) whether petitioner proved a statutorily defined act of harassment and, if so, (ii) whether respondent successfully rebutted the presumption. See *Dep't of Housing Preservation and Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 at 12 (Dec. 29, 2006); *Dep't of Housing Preservation and Development v. Rice*, OATH Index No. 1838/04 at 11 (Mar. 23, 2005); *Dep't of Housing Preservation & Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000) (owner may rebut the presumption by a preponderance of credible evidence).

The amended petition alleges the following acts of harassment occurred during the inquiry period:

1. failure to provide a secure front door from the street and from the vestibule into the building;
2. failure to clear and repair the roof to prevent recurring leaks resulting in a partial collapse of the ceiling at the 4th floor public hall, and failure to properly secure the door leading to the bulk head by roof;
3. failure to provide adequate heat and access to the heating system;
4. verbally insulting and intimidating lawful occupants;
5. failure to timely correct defective floors, defective doors, broken locks, missing or inoperative smoke detectors and carbon monoxide detectors, defective windows, and painted sprinkler heads throughout the building;
6. failure to timely correct defective plaster and paint throughout the building;
7. failure to secure water closet resulting in an emergency repair by HPD;
8. filing false certifications of correction for conditions for which violations were issued;
9. failure to correct broken electric fuse box;
10. failure to maintain community bathrooms and timely repair defective fixtures, doors and skylights;
11. failure to clear accumulation of refuse, debris, and tall foliage at backyard;
12. commencing a frivolous court action against Harvey Spevak, a lawful occupant; and
13. generally interrupting and/or discontinuing and decreasing essential services and repairs.

(ALJ Ex. 6).

Four current tenants of the building testified at the hearing: Lannie Hill, who has occupied Room 26 on the fourth floor since 1994 (Tr. 63); Mercedes Jativa, the occupant of Room 8 on the first floor since 1993 (Tr. 207); Harvey Spevak, the occupant of Room 10 on the first floor since 1979 (Tr. 242), and Edan Banegas, occupant of Room 24 on the fourth floor since 1993 (Tr. 255). Petitioner asserts that it proved the following acts of harassment at trial.

Failure to Secure the Front Door from the Street

Petitioner alleged that respondent failed to provide a secure front door into the building from the street. The Multiple Dwelling Law requires all doors that open onto a public hall to be self-closing. Mult. Dwell. Law § 248(4)(d) (Lexis 2013) (ALJ Ex. 2). This allegation should be sustained. The evidence showed that the front door has repeatedly been found unsecure, in 2009, 2010, and 2011, and that strangers have entered the building through that door when locked.

The exterior front door to the building opens unto a vestibule area where a bell and buzzer are located. The front door does not lock and is not intended to lock, according to respondent, so that visitors may access the bell and buzzer system inside the vestibule area (Tr. 661). The vestibule door, however, is intended to be locked. The tenants complained that the vestibule door is unsecure and, without much difficulty, can be pushed open without use of a key. They say they have complained about this condition over the years.

In a 2009 Housing Court action, the tenants sued on the basis of the owner's failure to correct a number of violations, including the failure to repair the "first exterior door to building [which] does not fully close" (Pet. Ex. 12 at 5). In a settlement stipulation, respondent agreed to inspect and repair the "first exterior door to building [which] does not fully close" (Pet. Ex. 13 at 26).

In April 2010, the tenants filed a complaint with the Division of Housing and Community Renewal ("DHCR") alleging various conditions in the building. DHCR conducted inspections on November 19 and December 23, 2010, and found on May 2, 2011, that the building entrance door did not lock and the vestibule door "opens even when it is locked"; based upon this and other existing conditions, DHCR ordered the landlord to restore proper service and reduce the tenants' stabilized rents (Pet. Ex. 17 at 3, 6; Tr. 125).

Investigator Sequinot, employed in HPD's certificate of no harassment unit, visited the building September 22, 2011, and found both entry doors unsecure (Tr. 442). He testified that he entered the vestibule door, when locked, by pushing it with minimal force (Tr. 446-47). He noted this in his report of the visit (Pet. Ex. 33 at 5).

Several of the tenants testified about stranger intrusions, which they said were facilitated by the lack of a secure door at the front entrance. Lannie Hill testified that, in January 2009, he entered the building, closed the vestibule door behind him, and started up the stairs to his room on the fourth floor when he heard the door open behind him and someone laugh (Tr. 74-77). The rooms on the ground floor, which was just below him, were vacant, so when he heard a door open on that floor, he decided to call 911. When the police arrived, Hill told them the people on the ground floor did not live there. He watched as the police took three men out of the building and put them in the police car. He was not sure how the men got in, but he assumed it was through the vestibule door which was loose inside the frame and could be pushed open without engaging the lock.

Mercedes Jativa, who lives alone on the first floor, regularly observed strangers enter the building and blamed the vestibule door which is supposed to lock but is not secure (Tr. 210). In September 2012, she was awakened by a loud noise at her door around 4:15 a.m., which scared her. She looked through the peephole and saw two strangers go into the bathroom on her floor (Tr. 211). She called the police who came right away. She could not buzz them into the building because her buzzer was not working, so she told the police to push the door with their shoulder and they were able to enter the building. She was very nervous but she let the police inside her room to talk to her, and she showed them the bathroom where the men were. The police found and detained the men (Tr. 213).

Ms. Jativa recalled being afraid in the summer of 2010, when she found a strange man asleep in the first floor lobby. Someone must have called the police because fifteen minutes later she heard police walkie talkies and saw police take the man away (Tr. 214). She recalled on another occasion seeing a man enter the building and attempt to go to the second floor. Watching him through the peephole, she banged very loudly against the door to scare him away and he left the building (Tr. 214-15).

Harvey Spevak did not depend upon the front door being locked because the lock was "screwed up" (Tr. 243). He also said that, from August 2010 to June 2011, while construction was being done in the adjacent building, the workers often left the front door unlocked as they worked so they could use a room on the ground floor to store materials (Tr. 240-41; Pet. Ex. 27).

Edan Banegas said the vestibule door is known to be unsecure and he has seen people who do not belong in the building enter, easily, by pushing the door (Tr. 269). In 2009, he saw two men come into the building that way; they then broke a padlock on the door to the super's storage room on the ground floor and stole some items (Tr. 270).

Citing a violation issued in January 2011 for repair of the lock on the vestibule door and the closure of that violation after the owner certified compliance, respondent disputed any failure to repair the front door (Resp. Br. at 13-14). Respondent contended the tenants failed to notify the owner of the condition and respondent lacked knowledge (Resp. Br. at 16-17). Respondent also argued that the tenants' claims of stranger intrusions were not corroborated by documentary evidence, such as police reports.

Documentary evidence of the stranger intrusions was not necessary since I found the tenants' testimony about these events sufficiently reliable. Their testimony was detailed,

consistent, and credible. Although the tenants did not always see the strangers at the moment they entered the building, the circumstances described left little doubt that these strangers were trespassers who forced their way into the building without a key. This was confirmed by the fact that, almost invariably, the strangers were removed from the premises by police.

Larry Tauber is the registered managing agent and managing member of Chelsea Partners, LLC, which owns the building (Tr. 591). Although the tenants did not report that they notified the landlord of the stranger intrusions, Mr. Tauber admitted being aware the door malfunctioned and that intruders were entering the building.

According to his testimony, Larry Tauber received notice of the malfunctioning front door lock through the Housing Court action the tenants initiated in 2009 and by electronic phone calls he received from HPD (Tr. 687-88). DHCR's 2010 inspections and its order of May 2011, also provided notice of the front door's failure to remain secure. Mr. Tauber, who testified that there was no "issue with the way the front door operates" and that it "operates the same way it's always operated," conceded that "on rare occasions" there were problems "with the door malfunctioning because of the locking mechanism that had to be adjusted or replaced" (Tr. 687). Tauber admitted that, 13 years ago when he purchased the property, he enrolled the building in a law enforcement program that permits police to detain and arrest anyone not authorized to enter the premises; he also placed "no trespassing" signs in this and another building he owns to improve security "because of situations we had heard about in the past" (Tr. 688-89; Resp. Ex. E). He said he regularly renews the building's membership in the program and was informed in September 2012 about a recent "complaint about people getting into the building" (Tr. 734). When asked whether the program had prevented strangers from entering the building, he replied, "obviously not" (Tr. 735). Respondent's only reaction to the intrusions appeared to be posting "No trespassing" signs and enrollment in the DA's program; respondent offered no documentary evidence that repairs of the door or its locking mechanism were ever made.

In defense, respondent submitted a recent photograph of the vestibule door as evidence that it is a self-closing self-locking door and a photograph of a "No Trespassing" sign posted in the vestibule area (Resp. Exs. D-4, D-6; Tr. 633, 664; Resp. Citation for Supplemental Photographs at 2). The tenants do not contest that the door self-closes or self-locks. They testified that the door, when locked, still allows strangers to get inside the building by pushing with moderate pressure; thus, it is not a secure entry. Two of the tenants testified that the door

remains unsecure today: Lannie Hill said "the vestibule door could still be opened even if it is locked today" (Tr. 128), and Ms. Jativa, who said the door had received "Mickey Mouse repairs" in the past, maintained the door was still not secure (Tr. 210).

The photographs of the "No Trespassing" sign and of a closed and apparently locked door do not rebut the compelling evidence on this record that the door does not remain secure when closed and locked. The landlord has failed either to install a locking system that remains in good repair or door frames sufficiently strong to make the locking system effective, a problem the evidence shows has persisted for years.

Failure to Cure Recurring Roof Leaks, Clear Debris, Failure to Secure Door to Roof

Petitioner alleged that respondent failed to repair recurring roof leaks, clear debris from the roof, and secure the door leading to the bulkhead by the roof. Petitioner's allegation that respondent failed to clear the roof of debris should be dismissed for lack of evidence. The other allegations are sustained.

2009 Tenant-initiated Housing Court action

In April 2009, the tenants commenced a Housing Court action by Order to Show Cause asserting violations for a leak from the roof into the third and fourth floors, peeling paint and falling plaster, and other conditions.¹ In July 2009, the parties agreed to a settlement and respondent commenced repairs, some of which were completed but many that were not (Tr. 118). Notices of Violation ("NOVs") were issued on April 20 and November 4, 2009, for broken/defective fire retardant material at fourth floor public hall ceiling and on November 4, 2009, for roof leaks over the fourth floor public hall (Pet. Ex. 5 at 8, 34). As of December 15, 2009, there were open violations for the leaky roof and defective ceiling at the fourth story public hall (issued April 11, 2009) and for defective plaster walls and ceilings at the public hall on all stories (Pet. Ex. 32 at 2, 14; Tr. 359, 363). In January 2010, the tenants moved for civil and criminal contempt citing respondent's failure to comply with the settlement (Pet. Ex. 13 at 12). The case was finally resolved by stipulation on August 6, 2010, whereby respondent agreed to issue five months' rent credit to the tenants, correct all outstanding violations, and remedy certain enumerated conditions, including the roof leak into the third and fourth floors (Pet. Ex. 13 at 1, 26, 27). Larry Tauber testified that, during a court-ordered inspection of the building

¹ The suit, filed by Westside SRO Law Project, alleged 69 violations of the Housing Maintenance Code and the Multiple Dwelling Law, including two class C violations (Pet. Ex. 12 at 5-6).

performed by HPD on July 27, 2010, Lannie Hill's unit was inspected for water damage and leaks in the walls, and no violation was issued (Tr. 597, 603-06). Thus, the credible evidence shows that the roof leaked into the third and fourth floors for at least the 17 months from March 2009 until July 2010.

Lannie Hill, who lives on the fourth floor, testified that leaks from the roof into the fourth floor hallway and into his room had recurred for years (Tr. 78, 145; Pet. Ex. 21). The tenants attempted to have these leaks corrected in their 2009 HP proceeding (Tr. 146-47), but the condition recurred in August 2011. A year after the housing court settlement, the leaks caused a partial collapse of the fourth floor ceiling, on August 25, 2011, days before Hurricane Irene hit New York City.² Edan Banegas recalled the ceiling collapse and recognized the photographs taken of the conditions around that time (Pet. Ex. 25). He said the ceiling was always dripping water and had loose plaster (Tr. 277-78).

On Friday, August 26, 2011, Hill sent an e-mail to the SRO Law Project complaining about the partial collapse of the fourth floor ceiling and attaching photographs. The photographs show chunks of plaster and dust on the floor, stairs and banisters and the ceiling from where the plaster had fallen (Pet. Ex. 25; Tr. 144-46). Hill described the collapse in his August 26 e-mail:

Yesterday afternoon, a 2 X 3 foot section of ceiling in the Common Area of the 4th Floor collapsed. Because De la Vega, Benegas and Rivera were worried about worse to come, they called the police. We called 311. As of noon the LL has not responded to the problem, which will grow all the worse with the hurricane this weekend. The LL is busy tearing out an apartment at 248 West 21st Street this morning and does not seem concerned with the massive leak on the 4th Floor.

(Pet. Ex. 25).³ The fourth floor ceiling had leaked for years and had been re-plastered many times, he testified (Tr. 104, 145, 203). Calling the landlord about the leaks had been "completely useless" in the past as the landlord had not corrected conditions until the tenants filed a court action (Tr. 202). He said he had provided access for repairs to be done for nine months prior to the 2009 court action, and the landlord never sent anyone to do the work (Tr. 202). He did not

² According to the National Weather Service the center of Hurricane Irene passed over New York City at 9:00 a.m. Sunday, August 28, 2011 (ALJ Ex. 4).

³ Lannie Hill also complained of recurring leaks in a letter he sent to HPD in September 2011 in response to HPD's Request for Comment Regarding an Application for a CONH (Pet. Exs. 20, 21; Tr. 66). He stated in the letter that "the leaks ha[d] continued for the last three years" and the roof leaks entered his room in the Winter of 2008 (Pet. Ex. 21 at 4). Despite periodic applications of tar to the roof, respondent's repairs were ineffective; Hill believed they were cosmetic efforts merely to clear the violations and not to make permanent repairs.

recall who called 311 the day of the collapse, but he expected the landlord to be contacted by 311 because they normally made the notification (Tr. 174-75).

HPD Inspector Jagusiak testified that, when a 311 complaint is received, HPD's callback unit attempts to notify the owner by phone call to the owner or its registered agent and then mails the notice of violation when it is issued (Tr. 375-76). Admin. Code § 27-2115(b) (Lexis 2013) (HPD "shall serve a notice of violation upon the owner, his or her agent or other person responsible for its correction.").

311 records show that Hill reported the collapse on August 26, 2011, and that Larry Tauber was contacted and notified about the complaint the same day (Pet. Ex. 10 at 3). NOV's for "broken or defective fire retardant material" at the fourth floor hallway ceiling were issued on September 8 and 12, 2011 (Pet. Ex. 4 at 8; Pet. Ex. 10 at 5). An NOV also was issued on September 12 for roof repair at the fourth floor public hall "so that it will not leak" (Pet. Ex. 4 at 8). The NOV's were certified as corrected by the owner on October 27 and 28, 2011, and closed on December 19, 2011. The certifications were later deemed false.

The building super, Pedro Hernandez, testified that he scraped, plastered and painted the ceiling in the fourth floor hallway just a few days after the hurricane passed, and he repaired the roof with tar and roof cement (Tr. 514-15, 536-39, 545). He said he was not notified by the tenants but he discovered the damage when he went to the building to clean it after the hurricane. He said he repaired the ceiling on two other occasions, but he did not recall when; this was the only time he repaired the roof (Tr. 536-38). He thought another company might be performing those repairs now.

To close the three violations, Larry Tauber signed certifications swearing the conditions were corrected on October 7 and 14, 2011, by an "agent or employee" named "Pedro Guzman" (Pet. Exs. 36, 37). This would suggest that repair of these B violations took a month to perform, consistent with HPD rules which require that B violations are corrected within 30 days of HPD mailing the NOV (ALJ Ex. 1). However, the certifications were deemed false, as discussed below (Pet. Ex. 4 at 8). An owner certification is deemed false if, upon inspection, HPD finds the work either was not performed or was not performed properly (Tr. 377). Here, corrective repair actually took much longer than one month.

Therefore, in addition to evidence that the roof leaked into the third and fourth floors for the 17 months from March 2009 to July 2010, petitioner offered credible evidence that the roof

leaks recurred and caused a partial ceiling collapse at the fourth floor in August 2011. It is unclear when the condition was eventually corrected, as respondent put on no evidence of repair aside from the testimony of Pedro Hernandez, who said he performed repairs days after the hurricane. When shown certifications filed by the owner indicating the repairs were completed, Hernandez did not recognize them and testified that he was not "Guzman," the individual indicated on the certification as having done the work, and he did not perform repairs in October, as indicated in the certifications (Tr. 540-41).

Once HPD inspected and deemed the repairs inadequate (falsely certified), respondent was still obligated to correct the condition. According to HPD's records, further repairs were not made (Pet. Ex. 4 at 8). Petitioner does not contend the leaks are continuing (Tr. 653). Nevertheless, petitioner has proved respondent's failure to repair the roof to prevent leaks into the building; the interruption of this essential service is harassment.

Petitioner also alleged that respondent failed to provide a secure door leading to the bulkhead by the roof. This allegation should be sustained.

Petitioner introduced into evidence NOV's issued on April 5 and August 3, 2010, to "make self-closing the doors at bulkhead to roof" (Pet. Ex. 13 at 3; Pet. Ex. 5 at 35). Respondent agreed to repair this condition pursuant to a settlement stipulation entered with the tenants on August 6, 2010 (Pet. Ex. 13 at 1). Nevertheless, a DHCR inspector noted on November 19, 2010, that the roof door was old and in poor condition and was "held closed with a hook and eye device" and there was "a gap between [the] door and frame" (Pet. Ex. 18 at 9). Another NOV was issued on September 26, 2011, to make self-closing the door to roof at bulkhead remained open as of October 17, 2012 (Pet. Ex. 4 at 9).

The Multiple Dwelling Law requires "a fire-retarded bulkhead in the roof connecting directly with the highest portion of any stairway to the roof, which bulkhead shall contain a fireproof door and assembly with the door self-closing. The stairs leading to such bulkhead shall be fireproof or fire-retarded as required for public stairways in the other parts of such dwelling." Mult. Dwell. Law § 248(7).

Investigator Sequinot, who visited the building in September 2011, testified that the door to the roof from the fourth floor had no lock on it and that it posed a security risk because someone could gain access to the roof from the outside and get inside the building (Tr. 492). He noted in his report that the "roof door was not secure (did not have a lock on it)" (Pet. Ex. 33 at

5). Apartment buildings, he said, generally have a push bar on the roof door that automatically slam locks and has an alarm, though they are not required (Tr. 494). The bulkhead door in this case had no knob and no locking mechanism (Tr. 493). The investigator also observed that the roof top was dirty and had lots of debris that appeared to be remnants of prior roof work, "peeled off old tar" and shingles (Tr. 496; Pet. Ex. 33 at 5). Mr. Banegas, who went to the roof with Investigator Sequinot, said there was a slider lock on the door to the roof which was very easy to disengage (Tr. 280-81). Pedro Hernandez admitted the door had only a latch and hook (Tr. 515).

The credible evidence shows that the door to the bulkhead is not self-closing as required in the Multiple Dwelling Law, a condition that was written up as a violation in September 2011 and remained open as of October 2012 (Pet. Ex. 4 at 9). This tribunal has recognized that a violation is *prima facie* evidence of harassment. *Dep't of Housing Preservation & Development v. Stephenson*, OATH Index No. 2945/10 at 10 (Sept. 3, 2010), *adopted*, Dep. Comm'r Dec. (Oct. 5, 2010), citing *Dep't of Housing Preservation & Development v. Wulliger*, OATH Index No. 782/06 at 12 (May 5, 2006) (finding "sufficient documentary proof as an initial matter to support the Department's allegations based on a codified presumption of intentional harassment"). Respondent offered no proof the condition has been corrected since that time. Moreover, the only locking device on the door works by hook and eye – or latch and hook – which is inadequate, particularly on a door that does not self-close.

Failure to Maintain Adequate Heat, Failure to Provide Access to the Boiler

Petitioner alleged that respondent failed to maintain adequate heat and failed to provide access to the heating system. The allegation that respondent failed to maintain adequate heat is not sustained. The allegation that respondent failed to provide access to the heating system is sustained.

The tenants complained of a lack of heat in the building. The building has a gas-fired steam boiler, located in the basement, which also services the adjacent building, 248 West 21st Street (Tr. 595-96).

Lannie Hill said several of the tenants told him in December 2009, when they were not getting enough heat (Tr. 68). Mr. Marks, who lived on the second floor in Room 16, was elderly and ill and required the use of crutches to get around; he complained to Hill that his room was

very cold because the room across the hall from him had a broken windowpane (Tr. 157).⁴ Hill believed the cold in the building was caused by rooms that were kept empty (or "warehoused") that tended to have windows that were left ajar or had broken windowpanes (Tr. 71). One of his bedroom walls which is adjacent to an empty room is noticeably colder than the other walls. He said Marks' door was "ice cold" and he could feel "air blowing under the door" (Tr. 69). Hill also said there was no heat in the fourth floor hallway (Tr. 72).

A violation for inadequate supply of heat from the central heating system at Room 16, Marks' room, was issued on December 28, 2009 and closed on December 30, 2009 (Pet. Ex. 5 at 44; Tr. 368).⁵ In December 2010, Mr. Mejia, who lived on the first floor in Room 6, complained to Hill about the lack of heat (Tr. 69). According to 311 complaint logs, Mejia reported inadequate heat in his room on December 9 and 15, 2010 (Pet. Ex. 7 at 59, 61, 63; Tr. 370). An NOV was issued for inadequate heat to Mejia's room on December 20 and closed on December 21, 2010 (Pet. Ex. 5 at 45).⁶

Mr. Spevak, who lives on the first floor in Room 10, said he was completely without heat from December 22 to 27, 2010, and the radiators were "ice cold" (Tr. 236-37). He also lacked heat, intermittently, during the remainder of the winter, which he stated in a letter he sent to HPD (Pet. Ex. 27). He described "cold blasts [of air] coming from empty rooms" in the building and a broken window on his floor which blows cold air from the hallway into his room through the gap under his door (Tr. 239). Spevak said the heat was inadequate during the recent 2012 winter, and his room was "freezing cold" (Tr. 238). Spevak's complaints were not substantiated by the issuance of a violation.

Mr. Hill made several calls to 311 on April 3, 7, and 11, 2012, to report the lack of heat (Tr. 70, 186-88, 336; Pet. Ex. 8). His complaint was inspected on April 11 and C violations were issued on April 13 for inadequate heat in his room and failure to provide ready access to the building's heating system ("boiler room door locked at cellar") (Pet. Ex. 8 at 11-12). According

⁴ When visited by an HPD investigator on September 22, 2011, Mr. Marks said he had no complaints about the building (Pet. Ex. 33 at 8, 19). Petitioner submitted a letter from Marks received by Goddard Riverside SRO Law Project that lists a number of complaints about conditions in the building, including the lack of heat and hot water (Pet. Ex. 35 at 4-6). Marks did not appear at the hearing.

⁵ Based on the Marks violation, without admitting liability, respondent entered a consent order and judgment in Housing Court on February 11, 2010, that required the owner to provide heat and hot water in accordance with the Housing Maintenance Code (Pet. Ex. 15).

⁶ Based upon this violation, on February 3, 2011, the landlord entered into a settlement stipulation in Housing Court by which he agreed to pay a civil penalty of \$750.00 (Pet. Ex. 16).

to HPD Inspector Jagusiak, 24-hour access to the boiler is required in case of emergency (Tr. 340). The violation for inadequate heat in Hill's room was certified as corrected by the owner on April 23 and closed on April 26, 2012 (Pet. Ex. 8 at 11). The violation for failure to provide boiler room access was certified corrected by the owner but later was deemed to be false, as discussed below (Pet. Ex. 4 at 11). As of April 26, 2012, almost two weeks after HPD's 24-hour deadline to correct a C violation (ALJ Ex. 1), respondent had not complied.

Hill, who preferred to call 311 to lodge a complaint rather than contact the owner directly, did not recall how long it took the owner to correct the heat violations (Tr. 191, 193). Inspector Jagusiak said the existence of so many complaints indicates the lack of heat was a recurring problem (Tr. 373).

The tenants credibly testified about the lack of adequate heat in the building that recurred each winter. Their testimony was corroborated by letters they wrote describing the conditions, and in some cases by documentary evidence of 311 complaints, violations, and the landlord's agreement to pay a civil penalty. Although there are heat violations, they were closed in short order. Thus, petitioner did not establish the lapses continued for extended periods. Restoration of heat to Hill's unit in 2012 took a couple of weeks at most. Thus, the evidence did not prove a failure to supply heat.

However, as of October 2012, respondent still had not corrected the C violation issued in April for its failure to provide boiler room access (Pet. Ex. 4 at 11), and according to Larry Tauber, the door to the boiler room remains locked.

Rather than unlocking the boiler room door, Tauber said he corrected the violation by posting a notice on the basement door that notifies everyone how to contact management in case of emergency (Tr. 665, 719). He provided a photograph of the notice, which he said was on plain, unprotected paper taped to the cellar door (Resp. Ex. D-7). He said the notice had been posted in the past but had to be replaced several times during the inquiry period; he was unaware that it had gone missing until he received a violation (Tr. 666, 689).

Petitioner contends this is not a proper correction of the violation (Reply at 5). The Housing Maintenance Code provides that:

The owner of every multiple dwelling shall have the area, where the building's heating system is located, readily accessible to members of the department to make inspection pursuant to this chapter. *In the event such area is kept under lock, a key shall be*

kept on the premises at all times with such person as the owner shall designate; however, if there is a person residing on the premises who performs janitorial services, such person shall hold the key. The owner shall post a notice in a form approved by the department naming such designated person and his or her location.

Admin. Code § 27-2033(a) (Lexis 2013) (emphasis added). Although there is a super, Mr. Hernandez does not live in the building. Thus, the only individuals with a key live off premises. Under the circumstances, posting a notice advising how to contact the owner or super is not a valid correction of the violation under the Housing Maintenance Code. To date, respondent has failed to correct the condition.

False Certifications by Landlord

Petitioner alleged that respondent submitted false certifications that conditions had been corrected when they had not. The allegation is sustained.

Data from HPD's Division of Code Enforcement shows that HPD received four false certifications from the landlord during the inquiry period (Pet. Ex. 4). Admin. Code § 27-2115(f)(1) ("The notice of violation shall direct that when . . . violations . . . have been corrected, they may be certified . . . to the department Such certification shall be made in writing, under oath by the registered owner, a registered officer or director of a corporate owner or by the registered managing agent"). A landlord certification is deemed false if the work was not performed or was performed improperly (Tr. 377).

A violation issued on September 8, 2011, for broken or defective fire retardant material at the fourth floor public hall was certified as corrected by the landlord on October 27, 2011 (Pet. Ex. 4 at 8; Pet. Ex. 37). The certification, which states the corrective work was done on October 7, 2011, was deemed false when HPD re-inspected on December 18, 2011, and found the condition was not corrected (Tr. 376-77). Another NOV issued on September 12, 2011, for the same condition also was certified falsely (Pet. Ex. 36).

A violation issued on September 12, 2011, for repairing the roof so it will not leak was certified as corrected by the landlord on October 28, 2011 (Pet. Ex. 4 at 8; Pet. Ex. 36). The certification, which states the corrective work was done on October 14, 2011, was deemed false when HPD re-inspected on December 18, 2011, and found the condition was not corrected.

A "C" violation issued on April 13, 2012, for failure to provide ready access to the building heating system ("boiler room door locked at cellar") was certified as corrected by the

landlord on April 23, 2012 (Pet. Ex. 4 at 11; Pet. Ex. 39). The certification, which indicates the corrective work was done on April 11, 2012, was deemed false when HPD re-inspected on April 25, 2012, and found the condition was not corrected (Tr. 378).

Each of the four certifications was signed by Larry Tauber as the registered managing agent of the property, stating that he had "examined the area(s) containing the violation(s)" and that each violation had been corrected (Pet. Exs. 36, 37, 39). Tauber admitted his certifications were deemed false after HPD inspected the building (Tr. 720). All four certifications state the work was performed by "Pedro Guzman," an agent or employee of the managing agent. Shown the certifications during cross examination, Pedro Hernandez denied he was Pedro Guzman and he denied performing any repairs on October 7 or 14, as stated in the certifications (Tr. 540-41, 548; Pet. Exs. 36, 37).

Larry Tauber admitted he had no employee named Pedro Guzman (Tr. 714). Tauber testified that Hernandez performed the corrective work and, at the time, he believed Pedro Hernandez's name was Pedro Guzman (Tr. 717, 719). It should be noted that "Pedro Guzman" also is listed on respondent's CONH application, in paragraph 11, as one of three individuals (in addition to Larry Tauber and the applicant) "who exercises . . . discretion in the management of the premises" or was involved in the building's operation during the inquiry period (Pet. Ex. 1 at 3). I noted during the hearing that Tauber appeared willing to mislead the tribunal about his knowledge of "Pedro Guzman" when, before the certifications were put before him with Guzman's name on them, he denied without explanation knowing any such person (Tr. 714).⁷ After the certifications were presented, and when continuing to deny knowledge of Guzman would have lead to the conclusion that Tauber provided a fake identity in his certifications which were made under penalty of perjury, he offered the additional explanation that he had been mistaken about the building superintendent's name at the time he signed the certifications (Tr. 715-18). I was skeptical of this testimony (1) because of Tauber's delay in offering a full explanation sooner and (2) because of Hernandez's involvement in this and other of respondent's properties, I found it implausible that Tauber did not know Hernandez's last name when he signed the certifications. Tauber knew each building that Hernandez worked in, and the number

⁷ Petitioner offered a letter dated January 25, 2011, and printed on the letterhead of Chelsea Partners, LLC, that was written and signed by "Pedro Guzman" (Pet. Ex. 38). The letter, which is directed to "Whom It May Concern," introduces Mr. Guzman as the superintendent of 246 West 21st Street. The letter was produced by respondent in discovery (Tr. 711), but was not entered in evidence when Tauber stated that he did not know Guzman and had never before seen the letter (Tr. 706-08).

of units in each (Tr. 743-44). It was Tauber's responsibility to know his employee's name, as he was certifying this information under penalty of perjury.

Thus, the certifications were false in two respects: HPD found that the conditions were not in fact corrected, and the evidence shows that respondent certified that a nonexistent individual performed the repairs.

Verbal insults and intimidation

Petitioner alleged that respondent's family members harassed Lannie Hill by verbally insulting and intimidating him. This allegation should be sustained.

Lannie Hill testified that Josh Tauber, who is Larry Tauber's father, knocked on his door on July 21, 2010, and said "I'm getting you ready." Hill asked "For what?" and Tauber said, "To get rid of you" (Tr. 85-88). Hill was intimidated and saw this as an effort to make him "surrender [his] rent rights" (Tr. 87). He documented the event in an e-mail he sent to his lawyer on August 2, 2010 (Pet. Ex. 23). Hill testified that he became afraid when Tauber turned to leave and laughed at him (Tr. 88). The entire exchange took place through his front door, which he refused to open. On another occasion in July 2010, Hill took a photograph of Jacob Tauber, Josh Tauber's brother, through the peephole of his door (Tr. 89, 176-77; Pet. Ex. 23). At the time, Jacob Tauber was laying plywood sheeting on the fourth floor. Tauber took a 4-foot by 8-foot sheet of plywood and slammed it against Hill's door and stated, "I want to be your friend" (Tr. 89). Hill experienced this as intimidation as well. He noted in an e-mail he sent to the SRO Law Project at the time that Jacob Tauber "used a notepad to write down whenever I came in or left" (Pet. Ex. 23). He did not recall notifying the landlord of these events (Tr. 178).

In August 2010, Josh Tauber was leaning on the railing next door, at 244 West 21st Street which was being gut renovated, when he said to Hill, "you are next" (Tr. 90). In December 2010, in a similar scenario, Josh Tauber stated to him "nobody lives there" while pointing to his building, 246 W. 21st Street (Tr. 90). He believed it was an indication of Tauber's intention (Tr. 91). In June 2011, Hill was leaving the building when Josh Tauber, again leaning on the railing, stated "you won't last," which Hill believed meant that Tauber would drive him out of his home (Tr. 91).

According to Larry Tauber, respondent seeks the CONH so it can renovate the empty units in the building, consolidate them, and create Class A multiple dwellings (Tr. 696, 703).

The currently occupied SRO units will remain occupied, he testified. He denied any intention to remove the current tenants or to demolish the building (Tr. 697).

Tauber said his father, Joshua, is 80 years old, approximately 5 feet 6 inches tall and 160 pounds with graying hair (Tr. 695). Jack Tauber is his father's brother, who passed away a year ago, at the age of 70 (Tr. 696). Before he died, Jack had similar height and weight as Joshua; he also wore glasses and was blind in one eye. Larry Tauber denied that the man in Mr. Hill's photograph (Pet. Ex. 23) was Jack Tauber.

I credited Hill's account of these events and his testimony that he was intimidated by these interactions with agents and/or relatives of the owner. *See, e.g., Mauro v. Division of Housing & Community Renewal*, 309 A.D.2d 678, 679 (1st Dep't 2003) (harassment includes verbal abuse and intimidation); *Dep't of Housing Preservation and Development v. Edelstein*, OATH Index No. 490/12 at 13 (Dec. 7, 2012) (angry threat to evict occupant was harassment); *Dep't of Housing Preservation and Development v. Greaux*, OATH Index No. 1457/02 at 19-20 (Aug. 30, 2002) (harassment sustained where the owner issued a "veiled, but clearly implied, threat that harm might befall [the tenant] if he did not leave," suggested the tenant might find his belongings on the street, and referred to the tenant's inability to afford a court proceeding). Hill's testimony that he was fearful was reasonable under the circumstances; it was not the men's ages or physical stature but their influence as agents of the owner that created the intimidation. I also noted the degree to which Hill's testimony is corroborated by the e-mail he sent his attorney at that time (Pet. Ex. 23). The e-mail is a daily catalog of occurrences during the course of floor repairs and other work that was being done in July 2010, as supervised by Jacob Tauber. The e-mail corroborates in substantial detail the statements Hill said both men made to him in July 2010.

Although Larry Tauber disputed that the photograph Hill took was of his uncle (Tr. 696), he did not deny knowing the person in the photo nor did he deny that it was a different family member or an employee of respondent. At a minimum, the individual in the photo was respondent's agent, as he was performing work in the building at the time. Moreover, on this record, Larry Tauber's testimony regarding identifications has been less than candid.

I find that petitioner proved by a preponderance of evidence that respondent made these veiled threats in an effort to intimidate Mr. Hill into relinquishing his legal occupancy. In light of respondent's failure to rebut these claims, petitioner has sustained this claim of harassment.

Failure to Timely Correct Defective Floors, Defective Doors, Broken Locks, Missing or Inoperative Smoke Detectors and Carbon Monoxide Detectors, Defective Windows, and Painted Sprinkler Heads Throughout the Building

Petitioner alleged that respondent failed to timely correct defective floors, defective doors, broken locks, missing or inoperative smoke detectors and carbon monoxide detectors, defective windows, and painted sprinkler heads throughout the building. The allegation is sustained.

This allegation is asserted as something of a catchall, with numerous conditions alleged without detail or description of how they affected the tenants. There was little testimony about the conditions. However, violations were issued for the following conditions, some prior to the inquiry period, and remained open at the time of the hearing (Pet. Ex. 4). The violations include missing and defective smoke and carbon monoxide detectors, defective wood floor, doors to rooms 6, 8, and 26 that were not self-closing, defective counterbalances in the windows, broken door locks, and painted sprinkler heads (Pet. Ex. 4 at 4-10). These violations remained open as of October 17, 2012.

On the basis of the violation history alone, petitioner may establish that respondent has interrupted or discontinued "essential services" that interfere with or disturb the tenants' "comfort, repose, peace, or quiet," by failing to promptly make repairs throughout the common areas and private rooms of the building. This tribunal has recognized that violations are *prima facie* evidence of harassment. *Stephenson*, OATH 2945/10 at 10, citing *Wulliger*, OATH 782/06 at 12 (finding "sufficient documentary proof as an initial matter to support the Department's allegations based on a codified presumption of intentional harassment"); *see also Dep't of Housing Preservation & Development v. Davron*, OATH Index No. 1533/11 at 16 (Dec. 21, 2011), citing *Dep't of Housing Preservation & Development v. Beinert*, OATH Index No. 1470/08 at 13 (Nov. 18, 2008) (open violations as to essential services may be *prima facie* evidence of harassment); *Dep't of Housing Preservation & Development v. Scharf*, OATH No. 2062/07 at 23 (Mar. 31, 2008); and *Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07 at 15 (May 16, 2007). This invokes the presumption that respondent failed to provide these services with the intent to cause the tenants to vacate. *Wulliger*, OATH 782/06 at 13. The burden then shifts to respondent under the statute to rebut this presumption. Larry Tauber offered general denials with respect to some of these conditions but, in all, I found his testimony insufficient. Respondent offered no documentary evidence that these conditions

were corrected or repairs made. Thus, respondent failed to rebut the presumption that the interruption of these services was intended to interfere with the tenants' rights.

I therefore found the evidence sufficient to sustain the allegation.

Failure to Timely Correct Defective Plaster and Paint Throughout the Building

Petitioner alleged that respondent failed to correct defective plaster and paint throughout the building. This allegation should be dismissed.

The closed violation report indicates three violations were placed in 2002, long before the inquiry period (Pet. Ex. 5 at 15, Pet. Ex. 31 at 12, Pet. Ex. 32 at 14). Two of the violations were "not complied" as of May 2008, a date that also precedes the inquiry period (Pet. Ex. 31 at 12, Pet. Ex. 32 at 14). The third violation, also from 2002, indicates there was a re-inspection in February 2010, and the violation was closed due to owner compliance on March 3, 2010 (Pet. Ex. 5 at 15). The tenants provided general testimony about defective plaster and paint in the building. Photographs taken by Hill in 2012 that showed peeling plaster in the second floor bathroom was rebutted by respondent's more recent photo of the bathroom (Pet. Ex. 26A, B, C; Resp. Ex. D-13). Hill's photographs of missing plaster and exposed wood beams in the basement was not the subject of a violation (Pet. Ex. 26G, H, I), nor did Hill indicate he reported the condition to the owner or to authorities (Tr. 154-56).

I found this evidence insufficient to sustain the allegation.

Failure to Secure Water Closet resulting in HPD Emergency Repair

Petitioner alleged that respondent failed to secure the second floor public toilet which required HPD to repair the hazardous condition. This allegation should be sustained.

HPD administers an emergency repair program ("ERP") through which it employs contractors to correct violations that have not been corrected by the owner, despite notification (Tr. 310). A landlord has 24 hours to correct a C violation and 10 days to certify its completion (Tr. 308). When a C violation is issued, HPD's callback unit attempts to notify the owner by phone and then sends a notice of violation by mail. After 10 days, if the owner has not certified that a correction was performed,⁸ ERP investigates and sends a contractor to perform the work (Tr. 311).

⁸ See Admin. Code § 27-2115(f)(7) (failure to file certification of compliance "shall establish a prima facie case that such violation has not been corrected").

On June 30, 2008, several weeks prior to the inquiry period, a C violation was issued to respondent for failure to "properly secure the loose water closet compartment" on the second floor (Pet. Ex. 5 at 44). The loose toilet bowl created a "fall hazard" (Resp. Ex. A). HPD's records show that the owner did not file a certification of compliance and the violation was not closed until August 25, 2008 (Pet. Ex. 5 at 44). HPD's inspector testified that, according to the data, August 25 is likely the date that the repair work was completed and verified by an HPD contractor (Tr. 315, 391). That date happens to fall within the inquiry period which commenced on August 17, 2008. Thus, petitioner's proof shows that the condition existed for approximately one week during the inquiry period. Petitioner contends that HPD was forced to correct the condition due to the landlord's inaction, a claim that respondent did not rebut.

Mr. Tauber denied receiving any complaints about the second floor toilet during the inquiry period (Tr. 691). He also denied being aware of any violation issued or emergency repair made to the toilet by HPD during the inquiry period (Tr. 690-91). Tauber provided a photograph of the toilet as it appears now, apparently stationary (Resp. Ex. D-8), and testified that the toilet worked perfectly when he last inspected it, a month before the hearing. There is no allegation the condition is ongoing.

The Housing Maintenance Code provides that a failure to file a certification of compliance "shall establish a prima facie case that such violation has not been corrected." Admin. Code § 27-2115(f)(7). Respondent failed to file a certificate of compliance for the NOV issued for this condition and petitioner established that HPD, not respondent, corrected the condition. Respondent offered no evidence that the condition was remedied by respondent or by others before the inquiry period began and, therefore, failed to rebut petitioner's evidence. To the extent that the failure to repair the loose toilet condition was not corrected until after the window period commenced, the condition constitutes the "interruption or discontinuance" of an essential service as defined under the anti-harassment law. Admin. Code § 27-2093(a)(2).

Failure to Clean and Maintain Community Bathrooms

Petitioner alleged that respondent failed to maintain the community bathrooms and timely repair defective fixtures, doors and skylights. This allegation is sustained in part.

The Superintendent

Pedro Hernandez has been employed as the building superintendent for three and a half years (Tr. 510). His responsibilities are to clean the building, take out the garbage and make

repairs. He works in the building Monday through Friday and responds when emergencies arise. He comes to the building each morning and returns in the evening to prepare the garbage and recycling for the next day, placing it in cans in front of the building in a designated area (Tr. 523). He said that, since garbage is picked up daily, he does not put the garbage out when the can is not full. However, he also stated that garbage pick up is three times a week (Tr. 558).

Notably, Hernandez stated that he cleans the building once a week (Tr. 517). He checks the boiler two or three times a week (Tr. 527). Hernandez said he last cleaned the building the Friday before his testimony (Tr. 550).

Hernandez is also responsible for six other Manhattan buildings: 242, 244 and 248 West 21st Street, 212 West 20th Street, 29 West 27th Street, and 114 East 28th Street, where he resides (Tr. 525-26). Excluding repairs, Hernandez said he generally spends eight to fourteen hours per week at 246 West 21st Street doing maintenance work, which is more time than he spends at the other buildings (Tr. 526). He said he responds to tenant complaints in less than one day (Tr. 519). Tenants either call him or they catch him as he is cleaning the building. If they need him for an emergency in the middle of the night, they can call his cell phone which is posted at the building entrance; he has keys to the basement and the boiler room.

Larry Tauber was aware of the six other buildings Hernandez is responsible for and he estimated the seven buildings contain approximately 111 units (Tr. 743-44). With respect to the workload, Tauber said it does not "take very long to sweep and mop a building" and Hernandez is able to take care of all "five or six almost on a daily basis" (Tr. 743). As for cleaning the four community bathrooms at the building, he said that did not take very long either.

The Housing Maintenance Code requires a person who performs janitorial services for a multiple dwelling of nine or more units to "reside in or within a distance of one block or 200 feet from the dwelling," whichever is greater, unless the owner lives there. Admin. Code § 27-2054 (Lexis 2013) (ALJ Ex. 5). Since none of the owners live in the building, Hernandez's residence on East 28th Street violates the code requirement.

Lannie Hill and the other tenants said no one is in charge of regular maintenance of the building. Hill disputed that Hernandez was a super, citing the fact that he does not live in the building, and said Hernandez only collects trash there (Tr. 201). At the time of the hearing, he had not seen Hernandez in the building in months. (By contrast, Tauber said that Hernandez was "at the building quite frequently, so he sees most of the tenants on a regular basis" (Tr. 721)).

Tauber testified that he receives notice of the need for repairs from Hernandez, and from computerized calls made by HPD as generated by actual tenant complaints (Tr. 592). He has also received complaints directly from one of the tenants and from the SRO Law Project (Tr. 593). After receiving a complaint or Notice of Violation, he "immediately" instructs Hernandez to inspect and make repairs if necessary. Tauber visits the premises to inspect himself "on many occasions." He stated that the super often was denied access when attempting to make repairs (Tr. 594). Respondent did not specify or document unsuccessful attempts to gain access to tenant units (Tr. 721).

The tenants all offered testimony about a general failure to clean and maintain the community bathrooms.

Ms. Jativa who has lived in her first floor room for 20 years testified that she regularly cleans the first floor bathroom and she purchases the supplies to do so (Tr. 207-09). She knows that the super does not clean the bathroom because, if she does not clean it, it becomes dirty (Tr. 210). She said the toilet is unstable and moves because the floor needs repair. She has reported the problem to the landlord several times. She recalled being in meetings with the landlord's attorney when she and other tenants complained of conditions in the building (Tr. 218-19).

Mr. Spevak who also lives on the first floor said there is no attempt by the landlord to clean the bathroom facilities on his floor and he, Jativa, and other tenants clean it (Tr. 243, 249). He said the toilet was not securely fastened to the floor and it "rocked back and forth," but he did not complain to the landlord about it. He also said the corridors and stairs were not kept clean, and no one had swept the stairs in more than a year (Tr. 243).

Mr. Banegas and Mr. Hill, both of whom live on the fourth floor, said Mr. De La Vega cleans the toilet and shower rooms on their floor (Tr. 80-82, 265). Hill said he saw the super clean the toilet room on the fourth floor only once, in 2009 or 2010, in accordance with a court agreement. Hill said that the lock on the toilet room door did not work and Banegas put his own lock on the door for the tenants' safety (Tr. 81), but Banegas made no complaint about the toilet room door which he said locked (Tr. 266-67). Both Hill and Banegas testified that the shower room door did not close properly and could not be locked when the tenants showered (Tr. 127, 266-67). Hill said the condition of the shower room door is the same today.

A number of violations were issued during the inquiry period for conditions in the community bathrooms. NOVs issued on June 21, 2010, for a broken or defective door handle on

the first floor community bathroom door and a leaky or defective faucet in the third floor shower were "not complied" as of September 16, 2011 (Pet. Ex. 4 at 6). An NOV issued June 21, 2010, for a broken or defective locking device on the first floor community bathroom was not complied until September 16, 2011 (Pet. Ex. 5 at 36). NOVs issued August 3, 2010, for a broken or defective hot water valve at the third floor shower and a missing door handle at the first floor community bathroom were complied by December 1, 2010 (Pet. Ex. 5 at 37, 38). An NOV issued August 2, 2011, for a missing door handle in the fourth floor community bathroom was complied on September 16, 2011 (Pet. Ex. 5 at 39). An NOV issued August 2, 2011, for broken or defective fire retardant material around the skylight in the fourth floor community bathroom was complied by September 16, 2011 (Pet. Ex. 5 at 40). NOVs also were issued in June and August 2010, for defects in the skylights in the community bathrooms (Pet. Ex. 5 at 36, 38).

According to a DHCR inspection on November 19, 2010, the fourth floor shower room door was "off alignment" with "door hinges in need of repair" (Pet. Ex. 18 at 10; Tr. 59). At that time, the fourth floor toilet room door opened and closed properly and had a slide bolt to lock it from the inside (Pet. Ex. 18 at 10). The third floor shower room was "not maintained" with "brown stains on the wall tiles" and the hot water faucet missing (Pet. Ex. 17 at 3; Pet. Ex. 18 at 5). At a second DHCR inspection on December 23, 2010, the third floor shower room faucet hot water handle was missing, as was the sink, and the shower room door failed to close fully (Pet. Ex. 19 at 5). These findings were cited against the owner in an order issued by DHCR on May 2, 2011, that directed the owner to restore these services and reduced rent for the tenants (Pet. Ex. 17 at 3, 6).

Hernandez did not indicate an awareness of the violations that were issued. He testified that he received complaints two years ago about locks on the bathroom doors from second floor and fourth floor tenants, and he made the repairs (Tr. 518-19). He said all the bathroom doors and shower room doors have locks, some have a sliding lock closed from the inside and some have another form of lock.

Larry Tauber testified that respondent corrected deficiencies where they found them after the tenants sued several years ago for faulty bathroom locks and other issues (Tr. 693). According to Tauber, when the building was inspected by DHCR on July 27, 2010, no violations were issued for the second floor toilet room and shower room doors, the third floor shower room

door, or the fourth floor bathroom door (Tr. 603-07). Respondent offered photographs of the current condition of the community bathrooms (Resp. Ex. D).⁹

Pursuant to his own recent inspection, Tauber said the second floor toilet and shower rooms have self-closing doors and functioning locks; respondent offered a photograph of the self-closing mechanism on the toilet room door (Tr. 639, 691-92; Resp. Ex. D-12). None of the second floor tenants testified at the hearing. Though Hill photographed peeling plaster in the second floor bathroom in 2012 (Pet. Ex. 26A, B, C), he did not report the condition (Tr. 183). I found respondent's recent photo of the bathroom was sufficient rebuttal evidence (Resp. Ex. D-13). Petitioner did not sustain the allegation of defects to the second floor community bathroom.

Tauber denied that he received complaints about the fourth floor bathroom during the inquiry period; however, respondent was issued NOVs in 2010 and 2011 (closed as of October 2012) for conditions in the fourth floor bathroom including a broken flushing apparatus, defective waste line connection at the washbasin, a missing door handle and defective fire retardant material around the skylight (Pet. Ex. 5 at 39, 40).

Tauber said the shower room has a functioning lock and the toilet room has a self-closing door and functioning lock (Tr. 680-81, 692-93), and he produced a photograph of the fourth floor shower room door and self-closing mechanism, which he said closed and locked (Resp. Ex. D-20; Tr. 681). Although Hill and Banegas disputed that the shower room door closed properly and locked, the photo shows the self-closing mechanism and latch on the door. I find that respondent rebutted petitioner's evidence as to locks in the fourth floor bathroom.

Respondent offered a photograph of the toilet room to rebut Jativa's and Spevak's testimony that the first floor toilet is unsteady and continues to wobble (Tr. 634-35). Indeed, the photo shows a toilet that seems level above a tiled floor that does not appear to need repair (Resp. Ex. D-8). Respondent rebutted the allegation as to the wobbly toilet.

Aside from repairs, I considered the tenant testimony that the super in general failed to clean the community bathrooms.

⁹ Petitioner objected to the admission of these photographs which were not produced until the final day of trial, despite a discovery order having been issued early in the case. Respondent asserted a right to rebut allegations that any condition continues to exist with photographs of the current condition; I ruled that any photographs offered to rebut a claim made by petitioner or testimony of a tenant that a particular condition continues to exist would be allowed in evidence (Tr. 608, 685, 758). I subsequently ruled on disputes as to which photographs were pertinent rebuttal evidence. Exhibits D-10, D-11, D-14 and D-17 were withdrawn by respondent (Resp. Citation for Supplemental Photographs at 3-4).

While there are no violations for lack of cleanliness in the bathrooms, the law does require the owner to keep the community bathrooms clean. The Administrative Code provides that the owner of a dwelling "shall maintain the public parts in a clean and sanitary condition." Admin. Code § 27-2011 (Lexis 2013). The Multiple Dwelling Law provides that "[t]he owner of every multiple dwelling or part thereof shall thoroughly cleanse and keep clean at all times . . . every public or service part thereof, including every room, passage, stair, floor, window, door, wall, ceiling, *water-closet or toilet compartment*, cesspool, drain, hall and cellar in such public or service part. Mult. Dwell. Law § 80 (Lexis 2013) (emphasis added). Section 248 of the Multiple Dwelling Law incorporates by reference this cleanliness standard, stating "the owner shall maintain the dwelling in conformity with section eighty relating to cleanliness." Mult. Dwell. Law § 248(14).

Although Hernandez testified that he spent several hours a week in the building, he stated that he cleaned it only once a week. Given the responsibility the superintendent undertook to maintain seven buildings with multiple units, the minimal time allotted to cleaning is not surprising. Hernandez could not possibly maintain cleanliness in four community bathrooms servicing 10 SRO tenants by cleaning -- by his own admission -- one time per week. And the bathrooms are not the only public areas in the building that require cleaning. Respondent's assertion that the bathrooms in the photographs were clean due to respondent's efforts was self-serving and unconvincing. I found more credible the tenants' testimony that they themselves cleaned the bathrooms; as tenants with such long tenures in the building, they credibly asserted the need to maintain clean bathroom space. Thus, although respondent offered current photographs showing clean bathrooms (*see* Resp. Ex. D-8), the photographs did not establish the owner's efforts to clean nor rebut the tenant's claims of neglect.

Thus, I find that petitioner proved that respondent failed to clean the community bathrooms and such failure constitutes harassment. *See Dep't of Housing Preservation & Development v. Carone*, OATH Index Nos. 1302/08, 1303/08 & 1304/08 at 23 (June 30, 2008) (owner's protracted failure to undertake necessary repairs and maintain sanitary conditions, despite repeated tenant complaints, was "sufficient to support a finding that the deprivation of services was intended to harass the tenants to vacate"); *Dep't of Housing Preservation & Development v. Hersh*, OATH Index No. 921/05 at 21 (Jan. 12, 2006) (evidence supported finding that owner failed to keep bathrooms clean).

Failure to Correct Broken Electrical Fuse Box

Petitioner alleged that respondent failed to correct a broken electrical fuse box. This allegation should be dismissed.

When he visited the building in September 2011, Investigator Sequinot was taken to the third floor fuse box where one of four fuses was missing; he reported the "fuse box had a broken socket with tape over it" (Pet. Ex. 33 at 5). Mr. Banegas believed it was a dangerous situation. Sequinot testified that it was a "potential hazard" and he removed the electrical tape and replaced it (Tr. 450, 495-96). Banegas was with the investigator as he took photographs of the fuse box with black tape inserted where a fuse should have been (Pet. Exs. 28A, 28B; Tr. 258, 262, 264, 282). Banegas said the condition occurred in 2011. He heard a neighbor scream and ran down to the third floor, where he saw a spark come from the fuse box as the neighbor tried to put a fuse in the box. He called Hernandez who removed the fuse but never replaced it (Tr. 284).

Hernandez was aware the fuse was missing from the fuse box, and he said that he put the tape inside the socket. He blamed the condition on a fourth floor tenant who, he said, would take fuses from the third floor when he overloaded the fuses in his unit (Tr. 554-56). He said he knew this because he marked the fuses to identify them and found a marked fuse in the tenant's unit (Tr. 557). Hernandez said he replaced the blown fuses when necessary, so there was no need for a tenant to remove a fuse himself (Tr. 558).

Though skeptical of Hernandez's explanation for covering the fuse socket with tape rather than inserting a new fuse, I did not find sufficient evidence to sustain the allegation. Petitioner's claim of an electrical hazard was belied by the fact that the tenants appeared not to have reported the condition, and no violation had been issued. The witness testimony was not clear whether the claimed hazard was created by the fact that the socket was left empty, or was covered by tape, or was not properly covered with tape. Sequinot, who testified that he removed the tape but then he replaced it, did not demonstrate knowledge of electricity so as to make clear what he believed constituted the hazard. If there was a defect in the fuse box itself such that it created an electrical hazard, this was not proven. *See Dep't of Housing Preservation & Development v. Pascal*, OATH Index No. 626/06 at 3 (Apr. 5, 2006) (heat complaints made during inquiry period that did not result in the issuance of a violation insufficient to demonstrate harassment).

Filing a Frivolous Lawsuit against Tenant

Petitioner alleged that respondent filed a frivolous lawsuit against tenant Harvey Spevak. This allegation is sustained.

In March 2011, Chelsea Partners, LLC commenced a proceeding against Harvey Spevak, alleging non-payment of rent for the months of January, February, and March 2011 (Pet. Ex. 14). In the settlement stipulation filed in April 2011, Mr. Spevak agreed to pay one month's rent "in settlement of any and all arrears through, and including, April 2011." Spevak testified that the amount he agreed to pay was, essentially, April's rent which had not been sought in the suit (Tr. 245-46). Thus, there was no judgment awarded and no agreement to pay rent for the months claimed in the lawsuit, January through March, because a prior court order had granted the tenants a rent abatement for those months (Tr. 243-44). Thus, the landlord sued him for rent arrears that Spevak did not owe.

The tribunal has held that prosecution of a proceeding that is brought with knowledge that it is "without legal foundation" constitutes harassment under section 27-2093(a)(4) of the Administrative Code. *Dep't of Housing Preservation and Development v. Mamudoski*, OATH Index No. 771/01 at 18 (Feb. 21, 2002); *Dep't of Housing Preservation and Development v. Mendoza*, OATH Index No. 556/05 at 4-5 (Feb. 17, 2005) (commencement of holdover proceeding against tenant, which was improper because she was entitled to a lease, was harassment); *Dep't of Housing Preservation and Development v. Nesbitt*, OATH Index No. 1505/04 at 8 (Nov. 4, 2004) (commencement of eviction proceeding against SRO tenant by falsely claiming the premises were not rent stabilized constituted harassment); *see also Dep't of Housing Preservation and Development v. Bernardi*, OATH Index No. 416/09 at 32-33 (Mar. 19, 2009) (not harassment where court action filed by owner sought rent amount that was still a matter of legal dispute). In *Mamudoski*, the owner filed a non-payment proceeding demanding over \$26,000 from an SRO tenant after the tenant's attorney told the owner that rent was not due and provided the owner with a determination of the DHCR that awarded \$30,000 in damages to the tenant for rent overcharge. OATH 771/01 at 8. The tribunal credited testimony showing that the owner had been told about the rent overcharge credits awarded by DHCR, over his denial that he knew the non-payment proceeding he initiated was "without legal foundation at the time he brought" it. OATH 771/01 at 20.

Respondent offered no rebuttal to the evidence that no rent was owed by Spevak. It is clear that the document settling the non-payment proceeding commenced against Spevak that he was not held responsible for the three months' rent sued for. In the absence of any explanation by respondent, this agreement is tantamount to a concession that its non-payment proceeding was "without legal foundation." Petitioner's evidence therefore proves harassment.

Generally Interrupting and/or Discontinuing and Decreasing Essential Services

Petitioner asserts that respondent neglected the tenants by allowing flood water "to collect in the basement from an unrepaired leak" (Reply at 7). Although the evidence unquestionably established there was a basement flood in August 2011, there was insufficient evidence of neglect. The allegation should be dismissed.

Lannie Hill testified that he first noticed the flood in the basement shortly before Hurricane Irene; he believed the leak started on Friday because he noticed the water around 6:00 p.m. on Saturday when the water was "ankle deep" (Tr. 129-30, 139).¹⁰ The photos he took that day show water covering the basement floor and a wheelbarrow filled with water that is dripping from a pipe on the ceiling (Pet. Ex. 24). Debris is floating in the water (Tr. 136). Hill went into the basement because he could feel the humidity in the air as he entered the building, and Mr. Banegas had expressed concern (Tr. 131, 170). Once Hill saw the water, he was concerned the building was in a flood zone and, with a storm surge, the water in the basement could reach the electrical box and cause a fire (Tr. 137, 166). Hill called 311 (Tr. 172).

Edan Banegas was exiting the building around 5:00 p.m. when he heard a loud noise and smelled smoke coming from the basement (Tr. 271). The smoke was very hot and humid – like a cloud or like steam (Tr. 288-89). Alarmed that the boiler might explode and concerned about the approaching hurricane, he called some neighbors, who were very nervous. He also called the Fire Department and the super; both Hernandez and the Fire Department arrived (Tr. 137, 171).

Pedro Hernandez said he was not called to the building but was already there checking the boiler when he discovered that "a hot water pipe broke" (Tr. 511, 527). When he called the plumber, it was after 2:00 p.m. and the company would not send someone out because the hurricane was coming, so he "closed the main faucet" which he later described as a "tiny little valve" that shut off the water before it reached the broken pipe (Tr. 511, 528, 530). The tenants

¹⁰ A National Hurricane Center report posted on Sunday, August 28, 2011, reported that the center of Hurricane Irene moved over New York City at 9:00 a.m. that day (ALJ Ex. 4 at 1).

were not affected, he said, because the pipe serviced rooms that were already vacant. The tenants did not allude to any loss of service that day.

Hernandez admitted there was a lot of water in the basement. When shown a photo of the flooded basement (Pet. Ex. 24-C), he said the water was from the hurricane, not from the broken pipe, and the photo must have been taken after the hurricane (Tr. 512-13). He did not explain how he arrived at this conclusion. Although he was sure the leak occurred "the very same day that the hurricane arrived," he was not sure which day that was, Saturday or Sunday (Tr. 533). The plumbers came to repair the broken pipe days later, on a Monday after the hurricane. He let them in and left as they worked (Tr. 534). He said there was a lot of water on the floor of the basement even after they repaired the leak; he said the water on the floor must have been sewer backup. They used a pump to remove the water after repairs were completed (Tr. 513).

Hernandez denied that the wheelbarrow had been placed beneath the broken pipe to catch the leak runoff; he said it was in the basement for storage and the leak happened to occur above it (Tr. 529-30). He said there has been no water in the basement since that time (Tr. 534).

I was unconvinced by much of Hernandez's testimony, as I detected an attempt to protect his employer by his conclusion that the basement flood was caused exclusively by the hurricane and was not caused by the busted pipe, even though he acknowledged the hot water pipe had burst and was leaking into the basement which was flooded when he arrived.

Though obviously a serious condition, the record did not show that this condition resulted from respondent's neglect, as opposed to an untimely emergency caused by a busted pipe, the hurricane, or some combination of both. Nor was there evidence of prolonged disrepair. There was no indication the tenants had reported basement leaks in the past, or that such leaks had been an ongoing condition in need of repair, or that such leaks interrupted their services. No violations were issued for the condition.

The evidence did not support petitioner's catch-all allegation that other essential services were interrupted or discontinued.

In sum, the evidence showed widespread neglect of the building, with numerous violations issued and very little evidence that any work was done, except when ordered by a court. Not a single document was entered in evidence as evidence of a bill paid to a worker or contractor for labor or materials for work done in the building. I was unable to rely on the testimony of respondent's witnesses in large measure. Mr. Hernandez depends upon his

employment with respondent for his livelihood. I believed that such a competing self-interest likely colored his testimony. Moreover, he seemed to have little connection to the building as it was described by the tenants or depicted in the numerous violations. As an owner, Mr. Tauber has an obvious interest in the outcome of this hearing. His credibility collapsed around his testimony about the false certifications, indicating that he mistakenly misrepresented on sworn certifications who allegedly conducted corrective work for the owner because he did not know his superintendent's last name.

In light of the foregoing, I find that petitioner established that harassment occurred during the inquiry period commencing August 17, 2008, by proof of the owner's failure to secure the front door, failure to repair recurring roof leaks, failure to secure the door leading to the bulkhead by the roof, failure to provide 24-hour access to the heating system (a C violation that remains uncorrected), issuance of false certifications that conditions were corrected, making veiled threats and intimidating tenant Lannie Hill, failure to correct defective floors, doors and windows, broken locks, missing or inoperative smoke and carbon monoxide detectors, and painted sprinkler heads in the building, failure to repair a toilet that required emergency repair by HPD (a C violation), failure to clean the community bathrooms, and filing a frivolous lawsuit against tenant Harvey Spevak. With respect to these acts and omissions, respondent failed to rebut the presumption of harassment set forth in section 27-2093(a) of the Administrative Code. *See Stephenson*, OATH 2945/10 at 10 (CONH rescinded where violation history, totaling 76 violations issued during the window period established that respondent interrupted or discontinued "essential services," which interfere with or disturb the tenants' "comfort, repose, peace, or quiet," in the building); *Tauber*, OATH 675/07 (CONH rescinded due to acts of harassment occurring after its issuance); *Hersh*, OATH 921/05 (CONH denied due to failure to provide services and threats made by owner's agent).

Based upon my findings, I recommend that the certificate of no harassment be denied.

FINDINGS AND CONCLUSIONS

1. Petitioner has proven the following statutory acts or omissions occurring at 246 West 21st Street which fall within the definition of harassment contained in section 27-2093(a) of the Administrative Code: (i) failure to provide a secure front door into the building from the street, (ii) failure to repair recurring roof leaks, (iii) failure to secure the door leading to the

bulkhead by the roof, (iv) failure to provide 24-hour access to the heating system, (v) falsely certifying that conditions were corrected, (vi) making veiled threats and intimidating a tenant, (vii) failure to correct defective floors, doors and windows, broken locks, missing or inoperative smoke and carbon monoxide detectors, and painted sprinkler heads in the building, (viii) failure to secure the second floor public toilet which required HPD to repair the hazardous condition, (xi) failure to clean the community bathrooms, and (x) filing a frivolous lawsuit against a tenant.

2. The legal presumption that these acts and omissions were committed with the intent to cause the lawful occupants to surrender or waive their rights to their occupancy was not rebutted by respondent, pursuant to section 27-2093(b) of the Administrative Code.

RECOMMENDATION

I find that harassment occurred at the premises during the inquiry period. Accordingly, a certificate of no harassment should be denied.



Tynia D. Richard
Administrative Law Judge

August 27, 2013

SUBMITTED TO:

MATTHEW M. WAMBUA
Commissioner

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HPD v. Hersh, OATH Index No. 921/05 (Jan. 12, 2006)

Dep't of Housing Preservation & Development v. Hersh

OATH Index No. 921/05 (Jan. 12, 2006)

Owner's application for certificate of no harassment for single room occupancy building denied where the evidence showed the owner failed to keep the public hallways and bathrooms clean, failed to adequately exterminate vermin, and failed to make repairs. Judge also found that owner or one of his agents threatened at least two tenants with a baseball bat in an effort to force them to vacate the building.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**
Petitioner
- against -
MARK HERSH
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This is a proceeding commenced by petitioner, the Department of Housing Preservation and Development, pursuant to Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2005). Petitioner seeks a finding that harassment of tenants occurred at the premises, 611 West 112 Street, New York, New York, during the period commencing on September 26, 1999, and ending September 26, 2002.

On September 17, 2002, respondent Mark Hersh, the owner of the SRO building, filed an application with HPD for a certificate of no harassment. Following a series of meetings and discussions between the owner and Department personnel, the Department agency head ultimately denied the application, finding reasonable cause to believe that, commencing on September 26, 1999, and continuing during the 36-month inquiry period ending September 26, 2002, the owner engaged in harassment of the tenants. After issuing a written determination to this effect on November 19, 2004, petitioner scheduled the matter for a hearing before this tribunal.

On April 12, 2005, this tribunal denied respondent's pretrial motions, seeking, *inter alia*, dismissal of the petition, and immediate issuance of a recommendation that a certificate of no harassment based upon various attacks on the agency's processing of his application. *Dep't of Housing Preservation & Development v. Hersh*, OATH Index No. 921/05, mem. dec. (Apr. 12, 2005).

The hearing in this matter went forward on September 6, 7, 8, and 9, and October 24, and 25, 2005. Petitioner called an investigator and four other witnesses, as well as presenting 12 affidavits from current and former tenants. Respondent testified and also called as witnesses one of his attorneys and a business associate. Respondent also presented a number of affidavits from employees working at the building in 1999 through 2002. The parties submitted post-hearing memoranda on November 18, 2005.

For the reasons discussed below, I find that petitioner's proof is sufficient to find that the owner harassed various tenants between September 1999 and September 2002. The application for a certificate of no harassment was therefore properly denied.

ANALYSIS

Some of the background facts concerning the building at 611 West 112th Street were undisputed. The premises is a single room occupancy multiple dwelling with 135 SRO units and two class A apartments (Pet. Ex. 1). It has been owned by respondent Mark Hersh since 1984.

The petition (ALJ Ex. 1) alleges that the owner harassed the tenants in some 19 different ways: (1) the failure to keep the public hallways of the premises clean and free of garbage; (2) the failure to keep the public bathrooms clean; (3) the failure to repair the ceiling in the public bathroom used by unit #123; (4) the unexplained departure of occupants from the premises during the inquiry period; (5) the failure to provide heat and hot water in October 2002 and February and March 2004; (6) the failure to properly exterminate for vermin, rats, roaches and water bugs; (7) the failure to repair a hole and a broken floor in unit # 331; (8) the failure to protect the tenant of unit #331 from sexual harassment by an agent of the applicant; (9) the failure to provide the tenant in unit #331 with a key to the entrance door; (10) threats to the tenant in unit #541 that he could "pay someone to mess him up"; (11) the use of a baseball bat to threaten tenants; (12) statements to Mexican tenants that the Immigration Service was coming to the premises; (13) overcharges on rent; (14) overcrowding; (15) failure to make repairs in unit

#123 of a hole in the floor and a window; (16) asking tenants when they would vacate the premises; (17) refusing to accept rent from the tenants; (18) statements to tenants that they had to vacate the premises and (19) causing tenants to forego their legal rights.

Petitioner's evidence in support of its claim that Mr. Hersh harassed the tenants at the premises consisted of three types of evidence: eyewitness accounts from several witnesses who visited the building during the relevant time period, written affidavits from 11 former tenants, one current tenant, and a caseworker, and violations issued by the Department during this period concerning the conditions. Respondent vigorously challenged the credibility and reliability of all of this proof, and offered the statements of owner Mark Hersh, as well as the affidavits of employees and service contractors, indicating that none of the tenants had been mistreated and the building had been adequately maintained.

Pursuant to section 27-2093(a) of the Administrative Code, "harassment" is defined as conduct by or on behalf of an owner of a single room occupancy multiple dwelling that includes: "(1) the use or threatened use of force which causes or is intended to cause [a lawful tenant] to vacate his or her unit or to surrender or waive any rights therein; (2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy." N.Y.C. Admin. Code § 27-2093(a) (Lexis 2005).

Additionally, section 27-2093(b) creates a presumption against an owner of a single room occupancy multiple dwelling in that, whenever a statutory act or omission falling within the definition of harassment is proven, it "shall be presumed" that such acts or omission were "committed by or on behalf of the owner" of the multiple dwelling and "that such acts or omissions were committed with the intent to cause a person lawfully entitled to occupancy of [an SRO unit] to vacate such unit or to surrender or waive a right" in such lawful occupancy. Thus, if acts of harassment are proven, a rebuttable presumption of intent applies, and the issue to be determined is whether respondent successfully rebutted the presumption. *See Dep't of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00, at 2-3 (Dec. 7, 2000).

Because at the time of the hearing the building was virtually empty, the focus of much of the hearing evidence consisted of the conflicting reasons offered by the parties for the departure of most of the tenants. According to proof offered by petitioner, the tenants were mostly poor Mexican immigrants who were bullied out by the owner's refusal to clean or maintain the building and occasionally by overt threats to do them physical harm if they stayed. According to respondent, most of the occupants departed of their own volition, despite the owner's exemplary management of the building and prompt response to all tenant complaints.

It was undisputed that, in the months preceding the filing of the application for a certificate of no harassment in late 2002, the occupancy of the building was drastically reduced. As related in the owner's application (Pet. Ex. 1 at questions 17 and 18), as of September 1999, there were only 16 vacant SRO units, with 119 units occupied. Less than three years later, in June 2002, there were 130 vacant SRO units and only 5 occupied SRO units (Pet. Ex. 1 at question 18). According to the owner's application, 32 SRO units were vacated from September 17, 1999 to September 17, 2000; 20 more SRO units were vacated from September 18, 2000, to September 17, 2001; and 61 more SRO units were vacated between September 18, 2001, and June 30, 2002, several months before the application was filed. Within six months of filing his application for a certificate of no harassment, two more SRO units were vacated. As of November 2005, there were only three occupied SRO units in the building (Tr. 398; Resp. Exs. P & Z).

Eyewitness Testimony

Petitioner presented four witnesses who visited the premises during the inquiry period. Two of these witnesses, Alex Schafran and Derrick Manigo, were employed by groups who assisted SRO tenants. Mr. Schafran, who, at the time of the hearing, resided in upstate New York where he worked for a community development program and a small real estate company, was an organizer at the West Side SRO Law Project from July 2000 to July 2003 (Tr. 594). He recalled that, in 2001, two tenants from 611 West 112th Street came to the Law Project's office separately (Tr. 584). Tenant Lorraine Chabak described a hole in the floor that allowed rats into her unit, a broken window and a dirty bathroom with peeling paint, mold, and mildew. She told Mr. Schafran about an infection on her leg that she said was caused by rat bites. The other tenant, Desmond Giddings, complained of cracked and peeling paint, a cracked floor and an inadequately cleaned bathroom with mold and mildew (Tr. 585). After interviewing the tenants,

Mr. Schafran himself visited the premises in the fall of 2001. At the time of his visit, Mr. Schafran observed a hole in the floor and broken window in Ms. Chabak's unit and a "terrible odor" in both Ms. Chabak's common bathroom and the bathroom used by Mr. Giddings (Tr. 5878). He also saw that the building appeared to be full of occupants (Tr. 594). Mr. Schafran later met with tenants Juan Maldonado Martinez and Deborah Howell, who provided affidavits concerning the building conditions (Tr. 587, 626-627, 609-610).

Mr. Schafran visited the building again in early 2002 (Tr. 586, 599). In March 2002, he heard from the tenants that the landlord was trying to remove them from the building. From March to June 2002, Mr. Schafran made numerous visits to the building, often with Mr. Giddings (Tr. 599). Mr. Schafran, who is fluent in Spanish, spoke to other occupants at the building and on the street nearby (Tr. 586, 588). During his visits, he observed that the public areas in the building were worse than any other building he had visited during his two years of work at the Law Project (Tr. 588). The paint was cracked and peeling, the floors were cracked and broken, and there was always a stench of urine in the halls. On his visits, he observed overcrowding in rooms occupied by people who appeared to be Mexican or Central American, with multiple bunk beds and sometimes mattresses on the floor (Tr. 587). Mr. Schafran did not recall observing any person cleaning or repairing the premises (Tr. 637).

Mr. Schafran contacted the management with regard to the tenants' concerns and, after little action was taken, contacted the Department (Tr. 600-608). He and his colleagues took affidavits from the occupants and former occupants as to their experiences with living in the building and dealing with its management (Tr. 652-656). Mr. Schafran believed, based upon comments made to him by the various occupants, that only a handful of tenants sought the Law Project's help because there was a pervasive climate of fear at 611 West 112th Street (Tr. 612, 639). Mr. Giddings told him that he had witnessed tenants being harassed and that management told Mr. Giddings himself to get out of the building (Tr. 664). Mr. Schafran talked to other tenants on the street, who told him that the landlord announced that the building was being closed and that the Department inspectors were really from federal immigration (Tr. 664-665).

Mr. Manigo, a case manager at Goddard-Riverside Community Center since 1999, also testified in response to a subpoena from petitioner. The Center serves clients who are mentally ill, providing them with assistance in the community. As a case manager, Mr. Manigo first visited 611 West 112th Street in April 1999 because two of his clients, Watley Blacks and Leroy

Welch, lived in the building in Room 644 and Room 531 respectively. After that, Mr. Manigo visited these clients about twice a week. Mr. Manigo arranged for payment of his clients' rent and bought them food and clothing (Tr. 1038-1044, 1065, 1089).

Mr. Manigo recalled that, in September 1999, 611 West 112th Street was dirty, smelly and infested with roaches and mice. Because the mailboxes were not secure, his clients' mail was directed to the Center office. Mr. Manigo paid rent on behalf of his clients and complained to Angela Edwards and Sybil Harris about conditions in the rooms and the public areas, which included vermin, the lack of adequate security (which resulted in Mr. Blacks's room being broken into), and a hole in Mr. Blacks's ceiling. He saw roaches in the halls and never saw an exterminator at the premises. He noticed foul smells in the halls, the elevator and the bathroom. The rooms and halls were dark and many lights were broken. The elevator did not always operate. On a couple of occasions, he saw a man he thought was the super and Angela Edwards, the desk clerk, mopping the elevator or the stairs with a dirty mop. He observed more than one occupant in rooms occupied by people who appeared to be Mexican. In the room next to Mr. Blacks's room, Mr. Manigo saw five people sleeping on mattresses and he saw a couple who lived in another room on the floor (Tr. 1040, 1059-1061, 1099, 1103, 1100-1101, 1110).

When the conditions were not improved, he asked to speak to Mr. Hersh directly, but was repeatedly told that Mr. Hersh was not at the premises. After he recognized who Mr. Hersh was, he asked Ms. Edwards why she had told him that Mr. Hersh was not there. She said that Mr. Hersh had instructed her not to let Mr. Manigo speak with him and also said that Mr. Hersh was not going to make any repairs because he was trying to get the people to move out of the building. Ms. Harris told Mr. Manigo much the same thing (Tr. 1040, 1045-1052, 1064, 1108).

Mr. Manigo ultimately spoke to Mr. Hersh, who was pleasant. However, no action was ever taken in response to the conversations. Mr. Blacks reported to Mr. Manigo that Mr. Hersh was trying to get Mr. Blacks to move out and to sign a paper. Mr. Manigo spoke to Mr. Hersh, who denied knowing what Mr. Manigo was talking about (Tr. 1053). After that, Angela Edwards told him that he should get his clients out of the building, because Mr. Hersh walks around the building during the night with a bat threatening the tenants. Mr. Blacks also told Mr. Manigo that Mr. Hersh came to his door with a baseball bat, trying to get him to move out (Tr. 1053, 1073). At some point, Sybil Harris would not accept the rent for Mr. Manigo's clients, telling Mr. Manigo that Mr. Hersh had told her not to take it. Mr. Manigo then spoke to Mr.

Hersh, who acted as if he was unaware of any instructions regarding not accepting rent and told Ms. Harris to accept the rent. Mr. Manigo indicated that, while she was signing the rent receipt, Ms. Harris made a sarcastic face and mouthed "he told me not to take it" (Tr. 1054).

Mr. Blacks was hospitalized on two occasions. When he returned from his first hospitalization, Mr. Blacks told Mr. Manigo that Mr. Hersh's employees told him he could not enter the building. Mr. Manigo returned to the building with Mr. Blacks and was met by Ms. Harris in the front hall. She told them that Mr. Blacks couldn't stay there. Mr. Manigo and Mr. Blacks nevertheless went to Mr. Blacks's room, where they found that the door had been broken into. Although Mr. Manigo reported the broken door immediately, it took weeks for it to be repaired (Tr. 1055, 1074, 1089). In July or September 2001, Mr. Blacks was hospitalized with tuberculosis for six months. After Mr. Blacks was hospitalized, Mr. Manigo returned to the room to see if the hole in the ceiling had been fixed or the building improved. When he found that the repairs had not been made, Mr. Manigo found alternative housing for Mr. Blacks and did not bring him back to the building (Tr. 1056-1058, 1070, 1116). Shortly after that, Mr. Manigo's other client, Leroy Welch, was moved out of the premises by Mr. Manigo because of lice infestation. Mr. Manigo stated that, after Welch was deloused in the hospital, the lice did not return in his new housing (Tr. 1070, 1102).

Mr. Manigo explained that his clients are mentally ill and it is his job to protect them. It was for this reason that he assisted in the drafting of the affidavits which the clients signed (Tr. 1095-1096).

Cynthia Doty, who also appeared in response to a subpoena, had been the legislative associate and special assistant for state Assembly member Ed Sullivan from 1994 through December 2002. She was familiar with the premises because the office had received calls over the years about the conditions at the building from constituents, service providers, and the West Side SRO Law Project (Tr. 82-83). During the fall of 1999, the complaints concerned the disrepair and neglect of the building, trash, rats, broken windows, noise, and mistreatment and intimidation of the tenants who were clients of various service providers such as The Bridge (Tr. 84-86).

Ms. Doty testified that she was inside the premises on a visit in late 1999 or early 2000 with a group of community representatives. They were met by Mr. Hersh, who took them to a newly painted vacant room on an upper story and to the basement. Ms. Doty observed tenants in

the halls and was told by Mr. Hersh that the reason the group could only see that vacant room was because the building was otherwise occupied. The basement was filled with cat boxes and smelled of urine (Tr 87-88). In June 2002, after Ms. Doty received a call from Mr. Schafran telling her that the building was being emptied, she visited the premises again. However, there was nobody at the front desk and she could not get in (Tr. 89, 102). Her only other visit to the premises was during the fall of 2002, when she went with Mr. Schafran to visit Lorraine Chabak on the first floor of the building. On that occasion, the electricity was off in Ms. Chabak's room, there was a hole in the ceiling of the bathroom, the bathroom was dirty, no hot water came out of either faucet in the bathroom sink and the general environment was very intimidating. Ms. Doty also heard construction noises in the building. At that time, Ms. Chabak told Ms. Doty that she was being harassed and that the owners were not making repairs in her room or the common bathroom (Tr. 89-90, 93-95, 99-101).

On another occasion, Ms. Doty recalled being introduced to Mexican occupants of the building on the corner of Broadway and 112th Street by Mr. Schafran. These occupants complained about the overcrowding, the broken windows, and acts of intimidation by the building management (Tr. 106, 112). Although she was aware that Mr. Hersh contended that all the problems were created by the tenants, Ms. Doty did not observe the tenants causing any problems during her visits. The local police precinct told her that they were not aware of a drug problem in the building and she herself never saw any drug dealing at the building (Tr. 106-107).

Petitioner also called as a witness Paul Chevigny, a professor at New York University Law School and a resident and coop board member at a nearby building, 400 Riverside Drive. Mr. Chevigny testified that in 1999 and the years following, he observed broken windows and windows in disrepair, trash in front of the premises and in the rear courtyard, and rats emerging from the premises. He also noted that, during that period, there was noise from parties at the building (Tr. 13-14, 76). In the fall of 1999, Mr. Chevigny and other community members met to discuss how best to improve 611 West 112th Street. Mr. Chevigny attended a meeting with representatives of public officials and service providers. At that meeting, Elizabeth Kane, the former director of the West Side SRO Law Project, spoke about clients that had been locked out of the premises and about the fact that the Law Project could not find tenants to proceed against the owner, because the tenants had been intimidated. Ms. Kane said that one tenant, who had

previously complained about the conditions at the premises, was beaten up (Tr. 40-41, 76). A representative from The Bridge, an organization which works with mentally ill people, stated that Mr. Hersh took clients' SSI checks and charged the clients a fee to cash them (Tr. 16).

As a result of the meeting, a group of people arranged with Mr. Hersh to take a tour of the premises in November 1999. During that visit, the group had to take the stairs because the elevator was not working. Mr. Chevigny observed broken and rotted windows, a bad smell of urine throughout the building, graffiti on the walls in the halls, dirty stairways and bathrooms. The group was taken to the basement, which had a terrible odor of cat urine and garbage. On the upper floors, they were not able to see any of the occupied rooms, but were taken instead to two vacant rooms that appeared to have been freshly painted. While they were visiting the vacant rooms, some occupants came out of their rooms. One occupant said, "Do something. He charges a lot of money and doesn't do anything for us" (Tr. 18-21).

Mr. Chevigny stated that the conditions at the building remained the same for some time after their visit. More recently construction debris was carried out of the building, construction materials were carried in and some repairs appear to have been made (Tr. 24).

The Affidavits

Thirteen affidavits (Pet. Ex. 16) were collected by the Westside SRO Law Project and submitted to the Department in December 2002. The affidavits, described in detail below, chronicle a history of inadequate and indifferent maintenance, even after repeated complaints, and various aggressive actions and statements by the landlord.

A tenant, Alan Wexler, wrote that leaks to his ceiling and the bathrooms were not fixed. The hot water and electricity were inadequate and the heat was erratic. Mr. Wexler said that, beginning in August 2001, Mr. Hersh and an employee named Sybil Harris, who worked at the front desk, told him that he had to move out, that the City was closing the building and that, if he didn't take \$200 to move, he would be put out on the street. Mr. Wexler opined that, due to the "terrible conditions," Mr. Hersh should no longer be allowed to run the building.

In her affidavit, Lenora Mac wrote that she resided in the building from 1994 through March 2001, when she was "illegally" evicted. She recalled filthy conditions, rotten window frames and doors, a broken bed, and rats and roaches. She complained to Mr. Hersh but nothing was done.

In an affidavit translated from Spanish to English by a Project employee, Andres Pineda stated that he resided at the premises from the summer of 2001 until 2002, renting a small room, which he identified as 5D, for \$180 a week. The halls and bathrooms were extremely dirty and never cleaned. His complaints to Ms. Harris brought no response. Mr. Pineda stated that in late 2001 or early 2002, Ms. Harris started to tell the tenants that they had to move because Mr. Hersh was going to renovate the building. He wrote that he did not understand he had a right to stay so he left the building.

Fidel de la Rosa Rodrigues wrote in another affidavit translated into English that he moved into the building in 1998 and paid about \$150 a week, but that his rent was repeatedly increased. He stated that the conditions were "awful," although he provided no details. He wrote that Sybil told him during the summer of 1999 that people from immigration would be inspecting the building and she warned that people without papers would have problems. He spent as little time as possible at the building after that. Although the warnings about immigration stopped, in March 2002, Sybil told him and others that the landlord was going to renovate the building and that they had to leave. Mr. Rodrigues stated that he did not know his rights and that he left the building at that time, although he had nowhere to go.

Carolyn Bradley stated that she resided in the building from around 1997 until January 2002, when she was evicted. She stated that Mr. Hersh sometimes carried a baseball bat when he threatened people about the rent or told them that they needed to leave the building and that Mr. Hersh would lend people money and then demand more than they owed him on check day. She wrote that many Mexican tenants were overcharged and packed as many as five into a single room. She also stated that Mr. Hersh accused her of being a prostitute and told her to move out.

In his translated affidavit, Juan Maldonado Martinez wrote that he lived at the premises from 1986 to March 2002, although he was not listed as a tenant in Mr. Hersh's application. In his affidavit, Mr. Martinez stated that bathrooms and hallways were filthy, filled with leaks and vermin. He shared a room with his brother and cousin, had to pay over \$700 a week, and got no rent receipts. The lack of receipts was cited by Legal Aid attorneys as weakening their legal claim to be tenants. Mr. Martinez stated that, in January 2002, management told them that they had to leave because the building was being shut down for renovation.

Henry Silver wrote that he lived at the premises for 20 years, leaving in 2001. He stated that there was never enough heat or hot water and insects and mice were "everywhere." He left

the building after being hit by a bat during an argument with Mr. Hersh and two other management employees concerning Mr. Silver's overdue rent.

In his affidavit, also translated from Spanish to English, Jorge Cardenas wrote that he resided at the premises from 1999 until 2002. There was no hot water and the bathrooms were filthy. Roaches and mice were "everywhere." Mr. Cardenas frequently complained to Sybil, and was told he needed to pay an additional \$20 per week if he wanted clean bathrooms. Doors were insecure and Mr. Cardenas's room was burglarized. Mr. Cardenas said that in March 2002, Sybil and two other men told the tenants that they had to leave because of renovations. Mr. Cardenas left because he did not know his rights.

Lorraine Chabak described living at the premises for three years. She wrote that she had a broken window and floor with rats and vermin entering her unit, and rats crawling over her bed at night. The common bathroom had no ceiling, was dirty, and was infested with mice. When Ms. Chabak complained about these conditions to Sybil, Sybil told her if she wanted better conditions she should pay more rent. Ms. Chabak recalled being "verbally harassed" by Mr. Hersh and Sybil about moving out. She also stated that she witnessed Mr. Hersh and his agents harassing other tenants. Ms. Chabak noted that, as of June 2002 when she wrote the affidavit, the building was being cleared and the management was refusing her rent.

Desmond Giddings wrote that he has lived in the building since 1994. He related that Mr. Hersh and Sybil told him that they wanted him out and that, if he didn't leave, he would be thrown out. Mr. Giddings saw building management refuse to accept occupants' rent. He heard Mr. Hersh tell the Mexican tenants that they had to leave and, if they didn't, he would call the INS. Mr. Giddings stated that Mr. Hersh put several people into a single room and charged them each about \$200 per week. He also witnessed Mr. Hersh charging mentally ill tenants to cash their benefit checks.

In a handwritten affidavit, Deborah Howell also wrote of receiving sexual propositions from the building's desk clerk. She noted that before March 2002 most of the rooms were filled, and after March she was the only tenant in her "section." Ms. Howell described missing tiles, dirty halls, and holes in the walls and bathroom ceiling. She stated that repairs were seldom made and she was without heat or hot water at the time of the affidavit. She also stated that the front door was kept locked and that the landlord refused to give her a key.

In another affidavit translated from Spanish to English, Carlos Manzano stated that he lived in the premises from June 2001 until April 2002. He wrote that the public areas had feces on the walls and were seldom cleaned. There were rats in the building. In his unit, he frequently had no heat in the winter and peeling plaster and paint due to leaks. In April 2002, he came home to find that his key to the front door did not work and that there was a sign saying that the building was closing. His neighbors told him that the occupants had to leave because management stated that immigration authorities would be at the building and they would be deported. Mr. Manzano and other tenants were afraid of being deported and left.

Derrick Manigo, a case manager at the Goddard-Riverside Community Center, wrote that between 1999 and 2001 he had two clients who resided at 611 West 112th Street. In 2001, one client had a hole in the ceiling through which rain water would flood the room. Although Mr. Manigo asked the management to repair conditions in his clients' rooms, Mr. Hersh and his agents failed to respond. Mr. Manigo reported that one of his clients told him that, beginning in 2000, Mr. Hersh and his employees told the client that he had to get out or they would kick him out, that a management employee named Angela told Mr. Manigo to get his clients out because Mr. Hersh was never going to fix anything and was trying to get everyone out of the premises. A management employee named Sybil told Mr. Manigo that Mr. Hersh was closing the building and, on one occasion, tried to stop his client from returning to the building.

The Violations

Petitioner presented records showing that 611 West 112th Street has a history of housing maintenance code violations. Petitioner submitted records (Pet. Ex. 5) indicating that, at the time the no-harassment application was filed on September 26, 2002, there were 145 violations of record against the premises on the Department database: 21 of these violations were "C" or immediately hazardous violations; 68 were "B" or hazardous violations; and 56 were "A" or non-hazardous violations. The violations related to problems with painting and plaster on walls and ceilings in rooms and public hallways on various floors, illegal alterations without permits on various floors, inadequate lighting near the entrance door, dirty public hallways and stairs, the lack of signs indicating the maximum occupancy for the SRO units, accumulation of rubbish on the roof and in the courtyards, failure to have a resident manager at the premises, mold and mildew in all of the community bathrooms, painted sprinkler heads, vermin and roaches in

various parts of the building, rats in the yards of the premises, occupancy of one room by four people, and broken windows in various parts of the building.

The Department database for closed and open violations (Pet. Ex. 6 at pp. 2-4) further revealed that, as of November 14, 2002, there were 150 open violations, including violations for lack of hot water at the third story community bathroom and for lack of heat in Room 331; mice, rats and rodents in Room 331; a broken floor in Room 331 and failure to clean the public hallways and stairs. There were open violations for the failure to have a resident manager on the premises; for broken windows throughout the building including on the first floor; for accumulation of rubbish and rats in the court yard; for inadequate lighting at the front entrance; for painted sprinkler heads; for a water leak in the third story community bathroom; for a few rooms still arranged to be occupied by more than two people; and for some plastering and painting violations dating back to 2000.

The closed violation summary report (Pet. Ex. 7) for November 14, 2002, indicated that other violations had existed during the inquiry period. Of the 534 violations indicated as having been closed, 49 had been immediately hazardous, 387 hazardous and 98 non-hazardous. The conditions included numerous broken and defective windows and floors; broken and defective sprinkler heads; multiple problems with paint and plaster since 1993; vermin, flies and roaches in various areas; broken ceiling fixtures; broken and defective floors and doors; leaks from the roof into the 6th story community kitchen and public halls; garbage and household items stored in the public halls; rats and rodents in the yards; dirty community bathrooms and public hallways; mold and mildew in some SRO units; various rooms arranged to be occupied by more than 2 persons; rubbish and refuse throughout the cellar; leaky faucets in various community bathrooms; various community bathrooms nailed shut so that the occupants could not use them. Although these conditions had been corrected by November 2002, there had been open violations for them during the inquiry period.

In 2001, HPD commenced a Housing Part proceeding, *Dep't of Housing Preservation and Development v. 611 West 112th Street Realty Corp.*, HP No. 1451/01, seeking an order directing the correction of housing maintenance code violations of record at the premises as of October 18, 2001. The owner agreed to correct those violations pursuant to a consent order (Pet. Ex. 3), executed on January 17, 2002.

Respondent's Evidence

Owner Mark Hersh vehemently denied that any of the tenants of the premises during 2001 or 2002 were ever harassed or that the building was poorly maintained. Instead, he insisted that most of the building was cleaned several times per day and blamed the conditions noted by Ms. Doty and Mr. Chevigny on the tenants. During his approximately two and one-half days of testimony, he stated that his company has owned the premises since 1975. Since September 1999 he has spent 3 to 15 hours per day in the building (Tr. 397). He stated that he personally responded to tenant complaints about their neighbors, acting as a referee and encouraging them to "try and get along" (Tr. 399). He described a small office near the entrance of the building, with a desk and a glass window (Tr. 399-400). This is usually staffed by building employees Sybil Harris or Karl Khouri (Tr. 400). He called the statements that the building was dirty "ridiculous" (Tr. 404).

Garbage was put out by the building staff three times per week, but the bags would often be ripped open. One building employee was assigned to do nothing but collect garbage in the building all day and performed this task eight to ten times per day (Tr. 407-08). Mr. Hersh denied ever seeing rats in the building and stated that he has always retained an exterminator to service the building, telling the exterminator he did not want to have a problem (Tr. 410). He admitted that there were roach problems in the building, but insisted these were caused by tenants leaving open food and garbage in their rooms (Tr. 411). Some tenants would not give the exterminator access to their units because they feared the spray might harm their cats (Tr. 412). He termed Ms. Howell's complaints about vermin and lack of hot water and heat to be "absolutely false" (Tr. 469). He noted that, in 2002, he had sued Ms. Howell because she kept bags of garbage in front of her door (Tr. 447).

Mr. Hersh stated that all tenant complaints about needed repairs were promptly inspected by the building superintendent and then repaired (Tr. 408-09). He stated that all utility bills were promptly paid, and produced a summary (Resp. Ex. M) of his 2000-2002 Con Edison payments to corroborate this. He did recall that, between 1999 and 2002, the boiler went down one day and could not be repaired until the next morning (Tr. 426-27).

Mr. Hersh contended that Mr. Doty's testimony reflected her desire to "punish" him and thereby win a seat in the state Assembly by demonstrating how she was "protecting" tenants (Tr. 503, 509). She also had a reputation for opposing the purchase of neighborhood buildings by

Columbia University, an entity that Mr. Hersh believed also wanted to purchase his own building (Tr. 510). He contended that it would take from one to two minutes for hot water to reach Ms. Chabak's unit (Tr. 516).

Mr. Hersh explained that he paid tenants to leave as a business decision, because it was cheaper than evicting them (Tr. 544). He insisted that Sybil Harris was an "elderly" woman who walks with a cane and that it was "ridiculous" to suggest that she could beat up a much younger man (Tr. 484-85).

Adam Bailey, Mr. Hersh's attorney since around 2000, visited the premises around the time nonpayment actions against Ms. Howell and Ms. Chabak were commenced. He described the building as "nice" and "livable" but "not immaculate" and "not perfect" (Tr. 913). The lobby needed painting. Mr. Bailey saw an employee sweeping the floors and also saw Ms. Harris watching television at the front desk (Tr. 915). Although he was not allowed inside Ms. Chabak's room, he could see that it was filled with boxes. Near Ms. Howell's room he checked the common bathroom and found the fixtures to be working properly (Tr. 914). Mr. Bailey was aware that, following their departure from the premises, both Ms. Chabak and Ms. Howell moved into managed care facilities (Tr. 916-18). He recalled that he reached a buyout agreement with Mr. Giddings, but Mr. Giddings failed to come to Mr. Bailey's office to sign the agreement and receive his buyout payment (Tr. 922).

Mr. Bailey insisted that he supplied the Department with documents showing nonpayment proceedings against most of the departing tenants (Tr. 898). At the hearing, respondent supplied documents (Resp. Exs. WW and CCC) showing legal actions undertaken against eight tenants: Ms. Howell, Ms. Chabak, Ms. Bradley, Maria Silver, William Albertson, Lee Stevens, Leo Smith, and Watley Blacks.

Alan Lapes testified that, at the time of the hearing, he leased two buildings from Mr. Hersh at an annual rental of \$240,000 and \$400,000 respectively (Tr. 1028-1030). In addition, Mr. Lapes sold plumbing supplies to Mr. Hersh in the amount of from a couple of hundred dollars to \$10,000 a month (Tr. 1032).

Mr. Lapes testified that he installed toilets and other plumbing in the building in 1997 (Tr. 1014-1016). He also said that he negotiated a deal with Desmond Giddings to give him a larger, front room on the second floor. Mr. Giddings told him that he was offered \$30,000-

40,000 to move by Mr. Hersh, but that he wanted at least \$50,000. According to Mr. Lapes, Mr. Giddings is satisfied with his present situation (Tr. 1017-1018).

Respondent submitted the affidavits of two employees who worked at the building during the inquiry period. In his affidavit (Resp. Ex. LL), Karl Khouri stated that he worked at the building as a desk clerk from around 1997 until "recently," and actually lived there from 1990 until 1997. He was "astounded" at the vandalism of the tenants, who regularly urinated in the halls, left garbage everywhere, and scrawled graffiti in the halls and stairwells. He saw that management "fought constantly" to keep the property clean and always made repairs as soon as they were requested. He asserted that he did not know Mr. Pineda, Mr. Rodrigues, Mr. Martinez, Mr. Manzano, Mr. Manigo, or Mr. Cardenas. He indicated that the building management did not allow "unregistered guests" into the building. He stated that there was no room 5D at the premises, as indicated in the Pineda affidavit. He stated that "no" room was occupied by more than two tenants. He stated that Mr. Giddings expressed regrets about making the statements in his affidavit and "was pressured" into signing it against his will. Ms. Howell refused to give the landlord's workers access to complete repairs.

In her affidavit (Resp. Ex. AA), Ms. Harris stated that cleaning was done daily by the six-person staff and that repairs were always made promptly. She stated that she is 70 years old and incapable of threatening anyone with a baseball bat. Twenty-six out of the thirty paragraphs in Ms. Harris's affidavit are identical to those contained in the Khouri affidavit.

Respondent submitted an affidavit (Resp. Ex. N) from Raymond Lecil, president of a boiler repair company named RL & A Services. He stated that he had maintained the boiler at the premises for the last seven years and that it had never been out of service for more than 24 hours during this time.

In yet another affidavit (Resp. Ex. DD), Joseph Delia, president of a fuel company, stated that he furnishes both heating oil and maintenance service to the premises for twenty years. During that time, "except for one incident," Mr. Delia was not aware that there have been any problems with the heat or hot water.

Analysis of the Evidence

In assessing the proof offered by petitioner, it is apparent that the quality of the proof varied widely. On the one hand, the detailed and highly credible testimony of Mr. Schafran, Mr. Manigo, Ms. Doty, and Mr. Chevigny provided a vivid and highly reliable portrait of the

conditions in the building during the inquiry period. All four of these witnesses had no interest in the outcome of the proceeding and provided candid measured accounts regarding their observations. I found their testimony entirely credible and sufficient to support a few of the allegations regarding the building conditions. Specifically, this testimony supports a finding that the owner failed to keep the public hallways and bathrooms clean, failed to adequately exterminate vermin, and failed to repair holes in the ceiling.

On the other hand, as zealously argued by respondent and his attorney, the tenant affidavits offered to support the majority of the allegations presented a welter of credibility issues requiring careful examination. As hearsay, they are unquestionably entitled to less weight than live testimony. Four of the affidavits were translated into English from Spanish, providing yet another degree of possible error or misinterpretation.

Respondent submitted statements from several of the affiants which contradicted or qualified portions of the affidavits. Respondent submitted an original sworn statement (Resp. Ex. S) from Ms. Howell, dated February 13, 2003, but not sworn to until February 21, 2003. In this statement, Ms. Howell indicated that she was moving out in exchange for a payment of \$10,000 from the landlord. She also stated, "In no way have I been harassed or forced to leave the premises" and that she had "no problems" or pending repairs in her apartment. The statement was apparently made as part of a settlement agreement (Resp. Ex. P) in a nonpayment action against Ms. Howell. In addition, respondent submitted a number of notices (Resp. Exs. Q and R) to Ms. Howell, indicating that the landlord had attempted to complete repairs to her unit when she was not at home. Respondent also presented a signed, undated release and statement from Mr. Wexler (Resp. Ex. H), indicating that he was accepting \$2,500, releasing the landlord from all claims, and had never been "harassed, threatened, intimidated, coerced, pressured, forced or menaced" by the landlord. In a letter (Resp. Ex. RR) dated September 22, 2004, Mr. Giddings wrote to petitioner's attorney indicating that he did not "object" to the issuance of a certificate of no harassment to Mr. Hersh."

In settlement of a nonpayment action for some \$3,700 in rent arrears, Ms. Bradley agreed to vacate her unit in January 2002 (*see* Resp. Ex. BB). Respondent also submitted a copy of a nonpayment petition (Resp. Ex. Y) and negotiated check (Resp. Ex. Z) to Ms. Chabak, indicating that she vacated her unit in December 2002 in exchange for \$4,000.

Respondent offered other attacks on the accuracy of the affidavits. Mr. Hersh insisted that Ms. Mak vacated her unit in 1997, prior to the inquiry period (Tr. 520; Resp. Ex. I). He denied that Ms. Mak moved back into the building after this eviction (Tr. 524). He denied that Mr. Pineda or Mr. Rodrigues ever lived in the building and insisted that the unit designation of "5D" given by Mr. Pineda did not refer to any unit in the building. He insisted that he had reviewed rent records to confirm this, although such records were notably never offered (Tr. 525-26). Respondent insisted that both Ms. Chabak and Ms. Howell suffered from emotional problems and later went into managed care facilities.

Respondent also submitted copies of written affidavits (Resp. Exs. T and U) from two tenants who indicated that they were not harassed. In identical statements both dated January 21, 2003, Randolph Scott and Richard Cohoes wrote that they were tenants at the premises, that they always had hot water and heat, that they had never seen rats or rodents in the building, that the landlord "responds immediately" to requests for repairs, that other tenants turned off water for no reason, that they were "happy" the front door was locked because it provided added security, and that "certain tenant agencies" have encouraged tenants not to pay rent but that both Mr. Scott and Mr. Cohoes were "happy" living in the building.

Yet there were an imposing number of factors which suggested that the tenant affidavits were accurate and reliable. Except for Mr. Pineda and Mr. Rodrigues, respondent did not dispute that the individuals named in the affidavit lived in the building; several, in fact, were on the list of former tenants which he submitted as part of his application. The statements of the tenants that most of the occupants were Mexican is consistent with the fact that 58 of the 116 former occupants listed in the owner's application have Hispanic surnames. It is true that the affidavits were prepared as part of an effort by the Westside SRO Project to pressure the owner to improve conditions in the building. However, at the time the affidavits were written, most of the tenants had already left the building and had no interest in any litigation against the landlord. The tenants' recounting of the poor maintenance of the building was significantly corroborated by the highly credible testimony of petitioner's four witnesses who visited the building during the inquiry period and gave vivid accounts of the squalid conditions they saw. The statements as to the adverse conditions was further corroborated by the considerable amount of violations dating back to the inquiry period, many of which specifically confirmed complaints framed by the tenants.

The additional statements offered by respondent did not significantly undermine the statements in petitioner's affidavits. It was apparent that these later affidavits were drafted by respondent's attorney to be used in support of the application and that the tenants were compelled to sign the affidavits in order to receive their buyout compensation. There is thus considerable reason to conclude that the tenants' motives in signing these buyout affidavits was more their desire to secure monetary compensation than to accurately relate the facts concerning their tenancy. Moreover, in the case of Ms. Howell, her statement that she moved out voluntarily in February 2003 and had no problems at that time did not contradict her affidavit indicating that there had been problems in 2002 and earlier.

The Scott and Cohoes affidavits also seemed of marginal weight. The fact that these two tenants were "happy" in the building and apparently had no complaints did not contradict the other tenant statements of very different experiences. According to the testimony of Mr. Hersh, these two tenants submitted these affidavits as a "favor" and without payment of money (Tr. 483). However, he later conceded that the affidavits themselves were typed by Mr. Bailey's secretary and were signed by the two tenants later (Tr. 489, 491). The fact that these two affidavits were clearly written by respondent's attorney also limited their reliability somewhat, particularly when contrasted to petitioner's affidavits which were more detailed and less contentious narratives from the individual affiants.

The only evidence submitted by respondent which directly contradicted the tenant statements consisted of the testimony of Mr. Hersh. Mr. Hersh's testimony raised a number of credibility problems. First and foremost, unlike most of the other witnesses who testified, he had an obvious and compelling financial incentive to deny the allegations in order to procure the certificate of no harassment and continue with his plan to renovate the building.

Mr. Hersh's testimony concerning the conditions in the building during the inquiry period was so at odds with the observations of the other eyewitnesses that it was not believable. In the face of substantial evidence that hallways and bathrooms in the building were dirty and saturated with foul odors and vermin, Mr. Hersh insisted that his employees cleaned several times per day and that he had never seen a single rat, let alone the parade of rats observed by Mr. Chevigny. Confronted with the testimony that repairs to various units went unattended to, he testified that all repairs were invariably made as soon as possible and produced copies of notices purporting to excuse the failure to address repairs by denial of access by the tenants.

There were other inconsistencies and incongruities in Mr. Hersh's testimony which undermined his credibility. He stated that he was present at the premises nearly every day, even though his company owns a total of 35 to 40 buildings, including four other buildings in Manhattan (Tr. 674-76). He stated that he did not believe he was "legally allowed" to monitor the number of days that a guest stayed in the apartment of one of his tenants (Tr. 793). When asked about whether his employees checked the identity of everyone who entered the building, he asked what was meant by "check the identity," said that the question was "somewhat misleading," and then accused petitioner's attorney of "trying to trap me [to] say something I don't want to say" (Tr. 794). When challenged as to his purported lack of knowledge as to whether more than two people lived in any of the rooms and asked whether his desk clerks would be aware of someone who stayed in a room for 30 or more days, he insisted he did not understand the question (Tr. 794). Mr. Hersh's denial that much of the building was dirty and fetid was inconsistent with the statements from Mr. Khouri and Ms. Harris, conceding that the building was unclean due to the vile habits of the tenants.

Both Mr. Hersh and his attorneys charged that the Department's denial of the owner's application was due solely to the vindictiveness of petitioner's attorney and Mr. Hersh frequently alluded to these accusations in declining to answer questions. On redirect examination, he professed to be frightened of counsel for petitioner due to her "vindictiveness" and fear that she would put his employees "in jeopardy" if he provided all their names (Tr. 855). He asked for an "assurance" that petitioner's attorney would not prosecute these employees and, only when his own attorney ordered him to answer the question, did he provide the names (Tr. 856-57).

Due to these multiple problems, I did not credit Mr. Hersh's testimony concerning either the conditions in the building or his interactions with the various tenants. The testimony of respondent's other two witnesses, Mr. Bailey and Mr. Lapes, was credible. However, the statements of these two witnesses did not challenge the accuracy of petitioner's proof as to either of these critical issues.

The affidavits of Ms. Harris and Mr. Khouri, like the Scott and Cohoes affidavits, were both nearly identical and for that reason seemed unreliable. This suggested that they were both written by the attorney rather than the signators. All four of these affidavits produced by respondent contrasted with the tenant affidavits. The tenant affidavits all sounded original because they contained unique details and language. This confirmed the testimony of Mr.

Schafran that each affidavit was based upon interviews with the tenants, which were later typed up from notes and provided to the tenants to sign. By contrast, the four affidavits from respondent took on much the same partisan tone as Mr. Hersh's testimony, attacking the truthfulness of other witnesses and blaming tenants for all of the maintenance problems. I therefore gave these affidavits very little weight.

Petitioner's evidence was thus sufficient to support findings on many of the allegations concerning the conditions of the building during the inquiry period. As indicated above, the credible testimony of Mr. Schafran, Mr. Manigo, Mr. Chevigny, and Ms. Doty supports a finding that the owner failed to keep the public hallways and bathrooms clean, failed to adequately exterminate vermin, and failed to repair holes in the ceiling. The statements from Mr. Pineda, Mr. Rodrigues, Mr. Manzano, and the testimony of Mr. Manigo also support a finding that the owner and his employees told the tenants they had to vacate the building because it was being renovated. The credible observations of Mr. Schafran and Mr. Manigo, supported by the statements from Ms. Bradley and Mr. Martinez and several violations, indicate that the landlord permitted three or more occupants to stay in a single room in bunk beds.¹

The credible testimony of Mr. Schafran and the statements of Ms. Chabak also supported a finding that the owner failed to promptly repair a hole in Ms. Chabak's floor and a broken window.

While the tenant descriptions of the conditions in the building during the inquiry period were corroborated by other reliable evidence, such as the eyewitness observations of Mr. Chevigny and Ms. Doty and the violations, the accusations that either Mr. Hersh or his employees threatened the tenants with a baseball bat rested upon hearsay alone. The statements, contained in the Silver affidavit and also in the hearsay remarks recalled by Mr. Manigo, were unsubstantiated by other proof. The observation by Mr. Silver, who was evicted by Mr. Hersh, seemed suspect as possibly motivated by rancor concerning the eviction.

However, the hearsay remarks recounted by Mr. Manigo seemed credible. The remarks were made by Ms. Edwards, one of the landlord's employees, who had no apparent motive to lie, and by Mr. Manigo's client, Mr. Blacks. The three remarks all corroborate one another and are

¹ Despite Mr. Hersh's assertion that multiple occupants were permitted in an SRO building, there would appear to be little question that occupancy by more than two people in a single room is expressly prohibited by Administrative Code section 27-2075 (1) (no more than two occupants permitted in "an apartment in a class A or class B multiple dwelling or in a tenant-occupied apartment in a one- or two-family dwelling" with a livable area of less than 160 square feet).

further corroborated to some degree by the numerous tenant statements regarding Mr. Hersh or Ms. Harris telling them that they had to move out because the building was being renovated. I have therefore concluded that petitioner's proof was sufficient to support a finding that either Mr. Hersh or another building employee threatened at least two tenants with baseball bats in an effort to force them to vacate the building.

The proof on a number of the allegations seemed too thin to support findings. As to the charge that the owner's employees threatened the tenants with fictitious immigration inspections, the statement of Mr. Rodrigues, reporting that in 1999 Ms. Harris warned him about an anticipated immigration inspection, did not sound like an effort to force him to leave the building. And the statement of Mr. Manzano, that his neighbors mentioned the possibility of an INS inspection, sounded more like rumor than reliable evidence. Admittedly, the statement of Mr. Giddings that he overheard Mr. Hersh threaten to call INS if a tenant did not leave would, if fully credited, supported a finding that such a threat was made. In addition, issuance of such threats sounded like a highly effective means of forcing immigrant tenants to vacate rapidly, and would serve to explain the rapid evacuation of this building in 2001 and 2002. However, due to the second-hand hearsay nature of the remark and the adverse effect of Mr. Giddings's later statements on the general credibility of his hearsay, I have concluded that this affidavit can be given little if any weight. Due to these factors, the hearsay proof was found insufficient to sustain the allegation concerning immigration threats.²

I found the statements of Ms. Bradley and Mr. Martinez insufficient to support a finding that tenants were "overcharged" rent. Ms. Bradley offers only a conclusory accusation without attesting to any knowledge as what the legal rent was for the units or what amounts were actually paid. Mr. Martinez's statement, while specifically asserting that he and two relatives paid \$700 per week for a single room, is uncorroborated.

Ms. Chabak's claim that her bathroom lacked a ceiling was confusing. The statement did not support the allegation that the ceiling had a "hole;" nor is it clear that either Ms. Chabak or Mr. Schafran complained about this problem to the landlord. I therefore found that this allegation was unproven.

² The threats concerning federal immigration were also mentioned by Mr. Schafran, who said that some unidentified tenants mentioned the issue to him (Tr. 665). However, this double or perhaps triple hearsay, like the statement of Mr. Manzano, was more rumor than recollection of a specific remark.

Ms. Howell's statement that she was temporarily without heat and hot water in October 2002 is insufficient to establish that the owner failed to promptly resolve this problem. This allegation should also be dismissed.

Ms. Howell's complaints about the floor in her unit, unlike the similar complaints of Ms. Chabak, were not corroborated by any other evidence either as to the condition or the owner's failure to repair it. This allegation has also not been proven.

Ms. Howell's statement as to being denied a key to the entrance of the building was also uncorroborated by any of the other multiple tenant statements. Her statement was consistent with other proof that the front door was generally kept locked and unlocked by the employee seated at the front desk. However, petitioner's proof did not make it clear that this practice was illegal. Nor did Ms. Howell's statement indicate whether she had once had a key and lost it or whether she had requested a key from the owner. I therefore found the proof insufficient to support the allegation that the owner denied Ms. Howell a key in derogation of her rights.

Ms. Howell's charges of sexually suggestive remarks by one of the owner's employees are also uncorroborated. Nor is there any indication that Ms. Howell complained about this behavior to Mr. Hersh, precluding a finding that the owner was responsible for the employee's misbehavior. This allegation has not been proven.

The allegation concerning threats to the tenant in unit 541 evidently refers to Mr. Giddings (*see* Resp. Ex. MM). As noted above, there are numerous factors which undermine the reliability of Mr. Giddings's affidavit. Furthermore, this affidavit mentions no specific threats made to him but rather accuses the owner generally of "harassment" and of "making it clear" that he wanted Mr. Giddings to move out. These statements were too vague to sustain the allegation that the owner threatened Mr. Giddings.

In sum, based upon petitioner's proof, I found that six of the allegations have been proven, as indicated above.

The final issue is whether respondent's evidence was sufficient to rebut the presumption that the owner's actions were intended to force the tenants to vacate the building and give up their rights. Respondent offered little evidence to rebut the presumption of an illegal intent, choosing to contend instead that all of the allegations in the petition were false. The evidence that the owner paid utility bills and contracted with an exterminator did not rebut petitioner's proof that the building was inadequately cleaned and that the vermin infestation in the building

was unacceptable. It is apparent that the primary motive behind the owner's inadequate maintenance, refusal to perform repairs, and issuance of threats to the tenants was to coerce them into leaving the building. In fact, this was precisely what the building employees told the tenants and Mr. Manigo – that the owner wanted the building empty so he could move forward with the renovations. The alternative explanation offered by respondent as to the reasons for the departure of the tenants was that they were evicted due to nonpayment of rent or other unlawful actions. In fact, respondent's records indicate that only 8 out of the 114 tenants who left the building from 1999 to 2002 did so pursuant to litigation by the landlord. A more plausible explanation, one fully supported by the evidence here, is that the owner's campaign of intimidation and harassment was successful and that most of the tenants left due to the horrible conditions and repeated threatening actions and statements by the owner and his staff.

For all these reasons, I conclude that the owner's application for a certificate of no harassment was properly denied, and that the petition should be granted.

John B. Spooner
Administrative Law Judge

January 12, 2006

SUBMITTED TO:

SHAUN DONOVAN
Commissioner

APPEARANCES:

DEBORAH RAND, ESQ.
Attorney for Petitioner

LAW FIRM OF ADAM LEITMAN BAILEY, P.C.
BY: ADAM LEITMAN BAILEY, ESQ.
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Attorneys for Respondent

HPD v. Kaplan, OATH Index No. 1246/19 (Mar. 18, 2021)

Dep't of Housing Preservation & Development v. Kaplan
OATH Index No. 1246/19 (Mar. 18, 2021), *adopted*, Comm'r Dec. (Apr. 22, 2021), **appended**

The Department established that during the three-year inquiry period the tenants were harassed with the intent of having them vacate the Building. ALJ recommends that respondent's application for a certificate of no harassment be denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**
Petitioner
-against-
MICHAEL KAPLAN
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

Petitioner, the Department of Housing Preservation and Development ("the Department" or "HPD"), brought this proceeding under section 27-2093 of the Administrative Code, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2021). Respondent Michael Kaplan, owner of a building located at 179 East 94th Street, New York, New York (the "Building"), applied for a certificate of no harassment ("CONH") on September 1, 2017. Petitioner alleges that respondent and prior owners committed acts of harassment against the tenants during the inquiry period and seeks a denial of respondent's application for a CONH (ALJ Ex. 1). Respondent denied that he harassed the tenants.

During a three-day trial, petitioner relied upon documentary evidence and the testimony of five witnesses, including one of the tenants. Respondent testified in his own behalf and presented documentary evidence and testimony from his architect and the super. The parties submitted post-trial memoranda, after which the record was closed.

ANALYSIS

Respondent filed an application for a CONH on September 1, 2017 (ALJ Ex. 5). Before issuing a CONH, the Department must certify that there has been no harassment of the lawful occupants of the premises within the inquiry period, which runs from three years prior to submission of the owner's application through the date that HPD issues a final determination on the application. Admin. Code § 27-2093(c); 28 RCNY § 10-01 (Lexis 2021). The Department focuses on any acts of harassment that have occurred during the three-year inquiry period regardless of when the current owner purchased the Building. Thus, if tenants have been harassed by the current and/or previous owners during the three-year period, the CONH will be denied. Even a single act of harassment may be sufficient to deny the CONH. *See Dep't of Housing Preservation & Development v. Mendoza*, OATH Index No. 556/05 at 7 (Feb. 17, 2005). An applicant can rebut the presumption of harassment by a preponderance of the credible evidence during a due process hearing. *See Dep't of Housing Preservation & Development v. Avid*, OATH Index No. 801/08 at 3 (Apr. 4, 2008).

On November 14, 2018, HPD issued an "initial determination" that there was "reasonable cause" to believe that harassment of the lawful occupants of the Building occurred during the inquiry period, which commenced on September 1, 2014 (ALJ Ex. 5, Ex. A). HPD filed a petition with this tribunal on December 17, 2018 (ALJ Ex. 1), which it amended on March 5, 2019 (ALJ Ex. 3), and again on August 8, 2019 (ALJ Ex. 5), alleging that the prior owner, respondent, and their agents committed various acts of harassment during the inquiry period, including:

- removing a communal kitchen, causing a reduction in services;
- failing to properly repair a broken lock on a tenant's door;
- failing to provide safe and adequate supply of electric services to one of the tenants and the entire third floor;
- illegally converting the premises to hotel rooms contrary to the certificate of occupancy;
- failing to provide emergency egress for the tenants;
- commencing frivolous proceedings against lawful occupants intending them to vacate and surrender their occupancy rights to their units;
- informing an occupant that she should move because rooms on her floor were going to be rented to ten black men with AIDS;
- demanding occupants move because the building was being converted to offices;
- telling a tenant who was complaining about inadequate heat that she was only cold because she was new to the United States;
- repeatedly banging on a tenant's door and demanding he move out of the building; notifying a tenant that his rent would no longer be accepted;
- failing to maintain general cleanliness of the common areas and bathrooms;

- misrepresenting to a tenant that he was required to vacate his unit within five days due to a partial vacate order;
- unlawfully taking an elderly tenant's key and preventing his caretaker access to the building;
- ordering a tenant not to leave his apartment when the landlord brings guests to the subject building; and
- generally interrupting, discontinuing and/or decreasing essential services and repairs

(ALJ Ex. 5). Respondent filed an answer to the petition and each of the amended petitions, denying that he harassed the tenants (ALJ Exs. 2, 4, 6).

The building in question is a 4-story brownstone located in the Upper East Side ("the Building"). The legal configuration of the Building is 19 class B units and one class A unit (Pet. Ex. 1; Tr. 86). Respondent purchased the Building in October 2014, with the intention of renovating it and flipping it for profit. Respondent presumed that the Building was vacant; however, he was mistaken. It was full of tenants (Tr. 335). Respondent asserted that once he became aware it was an SRO Building and that he was unable to remove the tenants, he decided to use the Building for charitable purposes (Tr. 344).

Respondent testified that he was looking for a "couple of opportunities" in 2014, after selling his company, which he had operated for 30 years (Tr. 326). A childhood friend introduced him to Reginald Beauvais, a skilled businessman, who was looking for a potential investment partner to purchase a residential property. Mr. Beauvais maintained that he would "handle everything" for the investor (Tr. 326-27). Respondent testified that his friend contacted him in late 2014, about 48 hours before respondent was departing for an overseas "charity mission," to tell him that Mr. Beauvais had found a "fabulous" opportunity to purchase a building on the Upper East Side. All respondent would have to do was buy the deed and foreclosure for four million dollars and he would make a lot of money on the property (Tr. 328-29).

Respondent wired the money by the close of business the next day and the following day left on a trip to Israel. Respondent did not participate in the closing or pre-purchase inspection. Indeed, he did not see the Building until after he returned to New York. The official purchaser of the property was 179 94th Street, LLC. Although both Mr. Beauvais and respondent were owners of the company, Mr. Beauvais did not provide any money for the purchase (Resp. F; Tr. 329, 386). After investing in the property, respondent learned that Mr. Beauvais was not as skilled a businessman as he was led to believe (Tr. 327).

Respondent testified that he thought he was purchasing an empty building because the sellers had represented that the Building would be “tenant-free” (Tr. 331, 387-88). Additionally, respondent relied on Mr. Beauvais to take care of everything and ensure that the Building did not have any tenants. He was surprised the first time he went to the Building to learn that it was “full of tenants” (Tr. 335, 388). Mr. Beauvais and respondent contacted the seller’s attorney, who promised that the buyout agreements would be forthcoming. However, they never materialized (Tr. 335).

When they did not receive the buyout agreements, respondent and Mr. Beauvais unsuccessfully tried to contact the seller and his attorney. After repeated fruitless attempts to speak to the seller and/or his attorney, respondent and Mr. Beauvais hired a law firm to sue the seller and obtain advice on buying out the tenants. The lawsuit against the seller was initiated in 2015 and was still pending during this trial. While working on the papers for the lawsuit, respondent’s attorney discovered that not only did the seller fail to buy out the existing tenants, he secretly leased another unit right before the closing to Ms. Hassan. According to respondent, Ms. Hassan paid \$5,000 upfront to the seller’s attorney and was given a 15-year lease at \$400 per month (Tr. 338-40, 399, 410).

Respondent testified that in addition to continuing to work full-time, he was busy with a charity his family created in 2007, called the Yashar Foundation (“Yashar”). Respondent is the founder and sole shareholder of Yashar, whose mission is to help feed the “impoverished and underprivileged by delivering hot meals to their home” (Tr. 327, 341). Yashar tutors children, helps finance surgical procedures and medical care for uninsured individuals, and provides counseling and shelter for battered wives (Tr. 341, 389). The charity started out of respondent’s home with respondent, his children, and neighbors, packing boxes of food in his driveway. Respondent testified that “[Yashar] kind of remained active, but we weren’t as big or as bold as we wanted to be in making that much, you know, charity kindness” (Tr. 342, 388).

Respondent’s “significant liquidity event” in 2014, when he sold his business, allowed him to write “a very healthy check to the Yashar Foundation and it gave [the charity] the ability to explode and help hundreds and hundreds of families versus the tens of families” (Tr. 343). The charity was operating out of different locations because it did not have a centralized space. Consultations with charity recipients occurred in different spiritual advisors’ offices and food packaging took place in multiple locations in Manhattan and Brooklyn (Tr. 343-44, 388).

As the legal costs mounted with respect to the Building, respondent offered buyouts to the three remaining tenants. Respondent believed that it was in the best interest of at least one of the tenants to move because he was 84 years old and had tremendous mobility issues. He posited that all of the elderly tenants would have been better off if they allowed him to move them around the corner to an elevator building (Tr. 348). Respondent's attorney made several offers over a two-year period to the tenants' attorney. Finally, one of the tenants, Mr. Schwatzman, decided to take a buyout and moved to another building over a year after respondent brought an eviction proceeding against him (Tr. 358, 395).

Mr. Michonski and Mr. Doyle, the two remaining tenants, however, never replied to respondent's buyout offers. Respondent found it hard to believe that these tenants were not interested in a buyout. According to respondent, Mr. Doyle had conveyed sympathy that this situation was causing respondent "a lot of anguish" but told respondent that his lawyer advised him not to accept a buyout. Respondent postulated that the tenants' attorney was not even conveying the offers to them and described him as a "legal zealot" (Tr. 349-51). Respondent reluctantly admitted, however, that during their conversation, Mr. Doyle had said that moving to another apartment was worrisome to him (Tr. 350).

Respondent's former attorney suggested that he turn the Building into Yashar's global headquarters. Since the tenants' attorney was uncooperative regarding buyouts, respondent agreed that his only recourse, was to move his charity into the Building and evict the tenants under a seldom used provision of the Rent Stabilization Code (Pet. Ex. 20; Tr. 351). The attorney drafted papers leasing the entire Building to Yashar, so that they could officially move the charity into the Building. Respondent thought it was the "perfect opportunity" since they were already "stuck" with the Building (Tr. 345). Although respondent's initial plan was to purchase the Building and then flip it to make a large profit, he decided to "go separate ways" from Mr. Beauvais and use the Building for Yashar instead (Tr. 344-47). In 2015, he started legal proceedings to evict the remaining tenants (Tr. 344-47).

Respondent testified that Yashar had started using several rooms on the first floor for offices (Tr. 349). Respondent justified evicting the tenants by anecdotally recounting an incident with Mr. Doyle. An unidentified Yashar employee smelled smoke so he went upstairs to investigate and found Mr. Doyle, who "was not fully dressed," in the corridor smoking. The employee later reported the situation to respondent and expressed concern about bringing someone

seeking charity into the Building and encountering “inappropriately dressed people walking the hallways” (Tr. 352). Although respondent acknowledged that portions of the Building could be used to store food and boxes and to pack the boxes, respondent insisted that it was an “oversimplification” of what Yashar does (Tr. 391). He testified that people needed to have access to the entire Building (Tr. 391).

Brian Sullivan works as a senior staff attorney for Mobilization for Justice, a legal services organization which represents low-income New Yorkers facing legal problems, such as eviction. Over the course of two and a half years, Mr. Sullivan represented multiple tenants that previously and currently live in the Building (Tr. 138-39). Mr. Sullivan testified that it was a very stressful time for the tenants because they were concerned about becoming homeless (Tr. 139-40).

According to Mr. Sullivan, respondent was operating under a pretextual legal theory that permits rent stabilized tenants to be displaced if the building were to be used for the operation of a not-for-profit organization. Mr. Sullivan believed that the owner had no meaningful plan to operate Yashar in the Building and that it was “a ploy” to evict the tenants and then sell the Building for a profit (Tr. 141). Mr. Sullivan maintained that respondent failed to take any meaningful steps to convert the use of the Building as a not-for-profit and Yashar had virtually no presence in the Building. He acknowledged that there was one room on the first floor where Yashar employees were present sporadically but he never observed food being stored in the Building (Tr. 142-43; 152).

Mr. Sullivan testified that a Yashar sign, which appeared to be made of poster board, was affixed to the exterior of the building near the entrance (Pet. Ex. 12; Tr. 146-47). He further testified that at some point Yashar had put signs on some of the interior doors of the Building, but they were poorly affixed and when they fell off, they were just left on the ground. They were not reattached for months, which he believed belied Yashar’s physical presence in the building (Tr. 143). Mr. Sullivan testified that Yashar intended on storing canned food in some rooms, creating a study room, and meeting with clients in the Building, but to his knowledge none of that ever happened (Tr. 143).

Mr. Sullivan contended that Yashar’s plans for the Building were incredible because it is a relatively large building with only three occupied units at the time of the ejection proceedings. The remainder of the Building was vacant and provided ample space to store food, create a study, and meet with clients, without evicting the tenants (Tr. 144). Respondent had made representations

during the ejectment proceeding that he wanted to use the tenants' rooms for storage (Tr. 172). Mr. Sullivan testified that the tenants ultimately prevailed in the ejectment proceeding against Mr. Doyle because Yashar had not successfully established that it was going to operate a not-for-profit facility in the Building (Tr. 141-42).

Mr. Sullivan postulated that a September 2014 e-mail from Mr. Beauvais to Mr. Schwartz, respondent's friend, persuaded the Court that respondent had purchased the property solely as an investment with the intent to flip it (Tr. 151). Mr. Beauvais stated in the 2014 e-mail that he had examined the Building, which could be a potential investment property once the SRO tenants were evicted and the property was renovated (Pet. Ex. 13; Tr. 149-50). Simultaneous to the eviction proceeding, respondent had brought a lawsuit against the seller for fraud in an attempt to rescind the sale, which Mr. Sullivan asserted further undermined respondent's claim that the Building was purchased for charitable purposes (Tr. 153). Mr. Sullivan concluded that if respondent intended on using the Building for a charitable purpose, he would not have initiated a lawsuit to rescind the sale of the Building based on fraud because the prior owner lied about tenants living in the Building (Tr. 166).

Mr. Sullivan testified that two former tenants, Ms. Hassan and Mr. Schwartzman, had accepted buyout offers (Tr. 154-55). Mr. Schwartzman accepted the buyout offer after two years of litigation in Housing Court. The ejectment proceedings against the current tenants, Mr. Doyle and Mr. Michonski, were filed in November 2015 (Tr. 155). The unsuccessful ejectment case against Mr. Doyle concluded in 2018. Shortly thereafter, Yashar discontinued the ejectment proceeding against Mr. Michonski (Tr. 155-56).

Mr. Sullivan described the ejectment proceedings as very taxing on both Mr. Michonski and Mr. Doyle because they are both vulnerable low-income, elderly people, who faced homelessness if they were evicted (Tr. 140, 158). Mr. Sullivan observed that whenever he would discuss the proceedings, both tenants became "visibly distraught" and sad about the prospect of losing a home they had lived in for decades. They were "exceptionally nervous" about where they would live if they were evicted (Tr. 158). Mr. Sullivan testified that in his opinion, the purpose of the proceedings brought against Mr. Doyle and Mr. Michonski was to harass them and make their lives so difficult that they would move out of the Building (Tr. 164-65).

Yashar never turned the Building into a center for the charity because it was unable to remove the tenants (Tr. 353, 394). According to respondent, although the Housing Court Judge

was impressed by Yashar's charitable work, she ruled against them because his former attorney never submitted plans for how the charity was going to use the Building (Tr. 362-63, 397, 408).

Although respondent admitted that the charity could have operated in the Building with the remaining tenants, he did not reconcile his admission with his multiple attempts to empty the Building (Tr. 409). He actually even sought assistance from the City to remove the tenants. During a conversation with the office manager in the Mayor's Office of Special Enforcement ("OSE") about the vacate order and stop work order, respondent asked "[w]hy doesn't the City just remove the people [in the rooms without egress]" and that would solve the problem. He was disappointed to learn that the City does not assist in removing tenants from SRO units (Tr. 358).

Respondent's unsuccessful attempt to evict the elderly tenants, based on the premise of using the Building as the global headquarters for his charity, eventually led him to apply for a CONH on September 1, 2017. Although respondent purchased the Building in late 2015, the inquiry period begins in September 2014. Respondent maintained that he initially learned about violations issued to the former owner, after he purchased the Building. He testified that he hired an expediter and spent "an incredible amount of money" to remove the violations. Respondent estimated that there were originally 30 violations against the Building and the expediter managed to reduce it to eight violations (Tr. 355, 357).

Mr. Michonski, an 86-year old tenant, who has lived on the third floor of the Building since November 1964, testified during the trial. Although he was a bit uncertain on specific details, he was coherent and remembered salient facts. Mr. Michonski unwaveringly testified that he was told to leave the Building on multiple occasions. He testified that two gentlemen that he believed were from Iraq had knocked on his door and told him that he had to leave the Building. He was unsure how they got into the Building. Mr. Michonski testified that he went to an attorney's office and those men never returned to the Building or contacted him again. Mr. Michonski further testified that a man and a woman had knocked on his door on another occasion and told him that he had to leave (Tr. 425-26).

Mr. Michonski sent a letter to the Department in November 2017. Respondent's counsel attempted to impeach Mr. Michonski by demonstrating that he never actually wrote the letter. Although Mr. Michonski acknowledged that he does not have a computer or typewriter and does not know how to type, he credibly testified that the letter was prepared by him with the help of two of his friends, Ms. Barnes and Ms. Nellis (Pet. Ex. 1; Tr. 426, 429). He had discussed with them

what to include in the letter and Ms. Barnes typed it for Mr. Michonski (Tr. 430). Although Mr. Michonski was unable to repeat specifics mentioned in the 2017 letter without reading it again, he credibly testified that the incidents of harassment described in the letter were true (Tr. 431). When asked to provide examples of how believed he was harassed, Mr. Michonski testified that in addition to people banging on his door to tell him to leave the Building, he did not have electricity for a few weeks, and respondent tried to evict him (Tr. 425-26, 437).

Inspections by the Mayor's Office of Special Enforcement

Assistant Chief Inspector Vladimir Pugach, is assigned to the Mayor's Office of Special Enforcement ("OSE"), which is comprised of employees from multiple agencies working together as a task force. Inspector Pugach, is a Department of Buildings' representative on the task force (Tr. 104). He conducted two inspections of the Building, in April 2012 and again sometime in 2015, after respondent purchased the Building (Tr. 83-84).

During the 2012 inspection, Inspector Pugach observed that the prior owner was operating a hostel in the Building and the rooms were overcrowded (Tr. 85-86). He testified that the legal configuration for this property is supposed to be Class B units on the first, second, and third floors, and a class A unit on the basement level. During his first inspection in 2012, he observed the upper floors had multiple, unrelated people residing in the same rooms, sleeping on bunk beds. The basement level was converted into class B units with a cafeteria area (Tr. 86, 117). Inspector Pugach testified that the communal kitchens that were supposed to be located on the second and third floors were removed and converted to bedrooms with doors, which blocked access to the fire escape (Tr. 89-90). Most of the residents would not have a second means of egress if there was a fire in the building (Tr. 85-86).

He submitted a report to the Borough Commissioner and issued violations to the former owner because the Building exceeded its permitted occupancy level and the second means of egress was blocked on the second and third floors. Consequently, the Department of Buildings issued a partial vacate order in 2012 (Tr. 85-86). Inspector Pugach explained that the vacate order would not be lifted until the occupancy was reduced, all of the obstructions to the fire escape were removed, and the owner reinstalled the kitchens on the second and third floors with dedicated gas lines (Tr. 103).

Respondent purchased the Building in late 2014 (Tr. 329). When Inspector Pugach returned to the building in 2015, three years after his first inspection, he issued a violation to respondent for disregarding the 2012 vacate order (Tr. 87). Although occupancy had been reduced, the illegal bedrooms were never removed from the second and third floors, access to the fire escape was still blocked, and the kitchens on the second and third floor were not reinstalled (Tr. 90-91).

Respondent testified that he was present in the Building in 2015, during OSE's inspection. Respondent contended that he asked the inspectors for advice on how to correct the violations but was disappointed to learn that they were not there to help him correct the problems. He was very discouraged when they issued him the same violations that were previously issued in 2012 (Tr. 361).

The next OSE inspection of the Building was three years later, on November 28, 2018 (Tr. 107). Mohammad Yusef, a construction inspector, employed by the Department of Buildings and assigned to OSE, inspected the Building as part of a five-person OSE team, to determine whether the stop work order could be partially lifted for the owner to begin remedial work (Tr. 91, 107, 201-04, 209, 228-29). Inspector Yusef recalled that two or three rooms were still occupied by tenants, but the remainder of the Building was vacated. Since the occupancy level had been remedied and the remaining tenants had a means of egress, the stop work order had been partially lifted to allow the owner to perform remedial work (Tr. 206-07).

The Department's Investigation

Abimael Sequinot, supervising investigator for the Certificate of No Harassment Unit, testified that once an owner files an application for a CONH an investigator is assigned to determine whether former or current tenants had been harassed by a former and/or current owner within the inquiry period. Investigator Sequinot was the assigned investigator for the Building when respondent filed for a CONH in September 2017. Investigator Sequinot testified that in general, he reviews government databases to determine whether any complaints had been filed and conducts internet searches to learn more about the property. In addition, he will visit the property and interview as many current tenants as possible and sends letters to former tenants requesting information regarding the building (Tr. 14). During site visits to a building, he attempts to gain access in order to take photographs of the living conditions and speak to tenants and the building

manager or super (Tr. 15). Afterwards, he compiles all of the information in a report (Pet. Ex. 1; Tr. 15).

During Investigator Sequinot's first visit to the property on October 19, 2017, he took photographs of the interior and exterior of the Building. He observed that the walls were cracked and the public hall bathrooms were "particularly dirty" but the floors in the public corridors were swept (Tr. 22). Photographs of the first floor public hall bathroom showed that the sink was very soiled and the dirty toilet had cockroaches crawling on the rim (Pet. Exs. 2, 3; Tr. 23-27). Investigator Sequinot asked the super about the bathrooms, but he stated that it was not his job to clean the bathrooms or the public spaces (Tr. 29).

Investigator Sequinot also photographed the partial vacate order that was posted in the Building. Although the vacate order was issued on April 22, 2012, it was still posted on October 19, 2017, because the order had not yet been lifted (Pet. Ex. 4; Tr. 28).

As part of his investigation, Investigator Sequinot spoke with Ms. Hassan on October 23, 2017. She reported several problems with the Building, including the lack of cleanliness of the bathroom and lack of heat. She told Investigator Sequinot, when she had complained to the super about the lack of heat he told her that she felt cold because she was from another country (Tr. 30, 32, 34). According to Ms. Hassan, the super also told her that she should move out of the Building because the owner was planning on moving in "ten black men from the AIDS community" and then subsequently informed her that the Building was being converted to offices (Tr. 33-34).

Investigator Sequinot, also spoke with two other tenants, Mr. Doyle and Mr. Michonski. Mr. Doyle said that everything was fine and he had no issues. Mr. Michonski similarly stated that everything was okay (Pet. Ex. 1; Tr. 21-22). A few weeks later, Investigator Sequinot received a phone call from one of Mr. Michonski's friends, who indicated that Mr. Michonski has been subjected to harassment but the 84-year old tenant was "weary" and did not want to speak with Investigator Sequinot. She informed him that she was helping Mr. Michonski compose a letter regarding the harassment he endured and would send it to him (Pet. Ex. 1; Tr. 47).

In November 2017, Investigator Sequinot received Mr. Michonski's letter, complaining about the condition of the Building, the lack of heat and electricity, and the owner banging on his door to ask him to leave because the Building was being turned into offices (Pet. Ex. 1; Tr. 49, 51). The letter also stated that in 2017, the super told him that he had to leave the Building within five days because a vacate order had been placed on the Building (Tr. 52).

Allegations of Harassment

Respondent denied all of the allegations of harassment in petitioner's second amended petition, maintaining that he did nothing but try to improve the condition of the Building. Petitioner disagreed and charged respondent with failing to timely correct conditions that have caused an interruption of essential services in violation of the Housing Maintenance Code ("HMC") with the intent of causing the tenants to leave the Building.

Failure to Repair Mr. Michonski's Door Lock

Respondent denied failing to repair the broken lock on Mr. Michonski's unit door (Tr. 354). The Open Violation Summary Report indicates that the Department was notified about Mr. Michonski's broken door lock on May 13, 2017 (Pet. Ex. 14). A notice of violation, hazard Class C, was issued on May 15, 2017, for the broken lock. Although Class C violations are supposed to be corrected within 24 hours, as of February 25, 2019, the date on the Open Violation Summary Report, the violation was still open. Respondent testified that two to three weeks after he received the violation regarding the broken lock, he hired a locksmith to replace it (Tr. 354, 402). Respondent failed to provide any invoices to demonstrate that lock was fixed, and other than his testimony, there is nothing in the record to reflect that the information contained in the report was incorrect.

Even if what respondent asserted is true, he acknowledged that it took two to three weeks after receiving the violation to hire a locksmith. This means that the door to Mr. Michonski's room had no lock for at least two to three weeks, if not longer. The Department established that respondent failed to correct this immediately hazardous situation as required, within 24 hours, and as of February 25, 2019, 19 months after the violation was issued it was still classified as an open violation.

Failure to Provide Safe and Adequate Supply of Electricity

Respondent did not testify about failing to provide safe and adequate light in Mr. Michonski's unit based on an incorrect assumption that the Department did not put any evidence in the record regarding this violation (Tr. 354). Respondent argued in his closing brief, however, that even with a showing of an interruption of essential services, such as a lack of electricity, credible weight should be given to the owner's attempts to remedy the situation (Resp. Closing

Brief at 19). Respondent, however, mischaracterized Mr. Michonski's testimony in his closing brief, alleging that Mr. Michonski stated that the electrical issue was remedied quickly (Resp. Closing Brief at 21). This statement is out of context. Mr. Michonski testified that it only took an electrician a few hours to correct the electrical issue, but he meant it only took a few hours to correct the problem once the electrician came to the Building. Respondent is incorrect in asserting that this was a brief interruption of electricity for only a few hours.

There was no electricity in Mr. Michonski's unit for several weeks, even though the remainder of the Building had electricity. In early April 2017, Mr. Michonski notified the super that he had no electricity. The super told Mr. Michonski that the electrical issue was too difficult to fix himself. After a few days without lights, the super provided a light bulb attached to an extension cord plugged into an outlet on another floor, which provided some light to Mr. Michonski's room, but the remainder of the floor, including the corridor, stairwell, and bathroom remained without light. Mr. Michonski's friends learned that he had been living without electricity for several weeks and contacted his local City Councilman and the Department. The Department presented evidence of a 311 call on April 21, 2017, complaining about Mr. Michonski not having electricity in his room (Pet. Ex. 16).

Inspectors came to the Building and issued a Class C violation on April 28, 2017, for a failure to provide a safe and adequate supply of electrical service to Mr. Michonski's unit, amongst other violations (Pet. Ex. 15). Only after the Department became involved was the electricity issue resolved. The closed violation history for the Building, indicates that the violation was eventually closed after HPD intervention, but was designated as "Overdue," which means that the violation was not corrected within the statutory 24-hour time frame (Pet. Ex. 15; Pet. Closing Brief at 12).

Respondent was on notice that Mr. Michonski did not have electricity when the tenant notified the super and several 311 complaints were made regarding the lack of electricity (Pet. Ex. 16). *See Dep't of Housing Preservation & Development v. Bezzant*, OATH Index No. 1529/14 at 5 (Jan. 5, 2015) (owner was on notice of an ongoing condition based on tenants' 311 complaints). Nevertheless, it took weeks to correct the lack of electricity in Mr. Michonski's unit. Initially, the super provided Mr. Michonski with a dangerous makeshift solution of a light bulb on an extension cord. Respondent's response was so slow that Mr. Michonski's friends not only contacted their City Councilman, they made 311 complaints, and the Department issued an immediately hazardous Class C violation. Respondent's claim that he took care of all of the violations as

quickly as possible was disingenuous. Respondent left an octogenarian with mobility issues on the third floor of the Building without electricity for several weeks, creating a hazardous condition. Respondent's attempts to remedy this situation were insufficient and slow. It was unacceptable that this tenant was left without electricity for weeks.

Failure to Correct Conditions That Render the Building Unfit for Human Habitation

Petitioner further alleged that respondent failed to correct conditions which rendered the Building unfit for human habitation. Respondent blamed the former owner, testifying that immediately after purchasing the Building he learned that there were "countless" violations on the Building so he hired an expediter to remove the violations. The violations were reduced from approximately 30 violations to "maybe eight" (Tr. 355). The Department's records reflect that 31 violations were issued by the Department during the inquiry period and at the time of trial, 13 were designated as hazardous (Class B violations), which are required to be corrected within 30 days, and 10 were designated immediately hazardous (Class C) violations, which need to be corrected within 24 hours (Pet. Ex. 1; Pet. Closing Brief at 10). In addition, nine 311 calls were placed to the Department during the inquiry period complaining about the conditions in the Building including no electricity, a lack of heat or hot water, and a hole in the ceiling (Pet. Ex. 16).

Respondent maintained that he actively attempted to deal with correcting all of the violations that he inherited in a timely and responsible manner. In addition to hiring two experts to clear up the violations, respondent spent significant funds to remove violations that were placed on the Building prior to his ownership. Respondent adamantly denied interrupting or discontinuing or decreasing essential services. He testified that he pays all of the utility bills on a timely basis and ensures that the boiler is regularly maintained (Tr. 381). Respondent, however, failed to provide any proof of paying utility bills or boiler maintenance to support his testimony.

It is undisputed that numerous violations were issued to the Building during the inquiry period. This tribunal has held that violations issued to a building is *prima facie* evidence of harassment and invokes the presumption that respondent failed to provide these services with the intent to cause the tenants to vacate. *Dep't of Housing Preservation & Development v. Beinert*, OATH Index No. 1470/08 at 13 (Nov. 18, 2008); *Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07 at 15 (May 16, 2007).

Based on the violation history during the inquiry period alone, the Department established that essential services and repairs were interrupted and/or discontinued and decreased, which disturbed the comfort, repose, peace, and quiet of the lawful occupants. In addition, the Department demonstrated that the failure to correct the conditions rendered the Building unfit for human habitation during the inquiry period. Although it is apparent from the closed violation summary that respondent corrected numerous violations, it is also evident that many of the violations were overdue (Pet. Ex. 15). Respondent readily acknowledged that there were a lot of violations on the Building when he purchased it. Although he blamed the prior owner, he is still accountable because they occurred during the inquiry period. Moreover, respondent's and his witnesses' testimony that conditions were corrected in a timely manner was not credible and unsupported by the record. *Cf. Dep't of Housing Preservation and Development v. Wulliger*, OATH Index No. 782/06 at 13-14 (May 5, 2006) (owner's credible testimony supported by documentation of expeditious repairs rebutted the statutory presumption of intentional harassment). The delay in correcting these conditions revealed an intention to cause the tenants to surrender their rights and vacate the Building.

Illegal Conversion of the Building into Hotel Rooms

Petitioner further alleged that the Building was illegally converted to hotel rooms and the owner failed to provide fire egress. Respondent denied erecting partition walls, renting out any apartments, or blocking fire egress. He attributed all of this to the prior owner. Respondent professed that all he wanted to do was remove the vacate order and stop work order issued to the prior owner in 2012 and that he spent an "incredible amount of money" to do so (Tr. 360).

Inspector Pugach testified that when he returned to the building in 2015, three years after his first inspection, he issued a violation to respondent for disregarding the vacate order (Tr. 87). Inspector Pugach credibly testified that the illegal bedrooms were never removed from the second and third floors and access to the fire escapes was still blocked. Although he may not have created the illegal conditions, they were present during the 3-year inquiry period and as Inspector Pugach noted, the illegal conditions still existed after respondent purchased the Building.

Respondent argued that he cannot be held responsible for failing to correct the conditions for the vacate order because the vacate order was issued in 2012, which is outside the inquiry period. Also, respondent hired someone to take care of the violations on the Building as soon as

he learned that there were multiple violations and respondent's diligent efforts to remedy and remove the vacate order were thwarted by obstacles set in place by City agencies. Respondent's argument that he is not responsible is indicative of his entire perspective with respect to this Building. He claims that he did not create the condition, so he cannot be blamed for it.

While it is true that the vacate order was issued prior to the inquiry period, the conditions that led to the order still existed when respondent purchased the Building and had not been corrected. Since the conditions still existed during the inquiry period, then respondent was responsible for curing them. Indeed, section 27-2140(c) of the Administrative Code provides, that the vacate order shall require that the owner correct the conditions which render the dwelling or part thereof unfit for human habitation within a period of time, not to exceed ten days. Admin. Code § 27-2140(c) (Lexis 2021).

The vacate order was partially issued because of egress issues, but also because the communal kitchens on the second and third floors were removed by a prior owner and converted to bedrooms (Tr. 88). The Department of Buildings partially lifted a Stop Work Order in 2015 for remedial work to be done, which included replacing the kitchens on the second and third floors and removing the doors to three rooms to permit access to the fire escape. Respondent never replaced these kitchens, although he did eventually correct the egress problem.

Petitioner established that the Building was illegally converted to hoteling rooms and that egress was blocked during the inquiry period. Respondent's defense that he was not responsible is without merit. Additionally, he failed to demonstrate that when he purchased the Building he took steps to quickly remedy the violations that led to the vacate order.

Commencing Baseless or Frivolous Court Proceedings

The petition also alleged that respondent engaged in frivolous lawsuits against the tenants. Respondent talked in circles regarding the lawsuits but his main contention was that his prior attorney mishandled it and if he done his job properly, respondent would have been able to convert the Building to Yashar's headquarters (Tr. 362-63). Respondent denied bringing multiple lawsuits against Mr. Doyle or Mr. Michonski, other than holdover cases. He maintained that a lawsuit against Ms. Hassan to prohibit her from using a cupboard in the corridor was justified because she would "leave, how do I say it, undergarments in the hallway, shoes, clothing" (Tr. 365). Respondent testified that it offended Yashar's employees, who took photos and forwarded them

to respondent, who found it “abhorrent” (Tr. 365). His attorney sued Ms. Hassan to make her stop leaving her clothes in the hallway. Ms. Hassan ultimately agreed to vacate her unit pursuant to a buy-out agreement entered into in May 2019, in which she stipulated that she was not harassed by respondent (Resp. Ex. B; Tr. 365-67).

Other than respondent’s lawsuit against Ms. Hassan to prohibit her use of a cupboard located in a public space and leaving her belongings in the hallway, respondent brought holdover/eviction lawsuits against each of the tenants so that the Building could be converted to Yashar’s headquarters. Respondent argued that a single lawsuit does not rise to the level of harassment because the language in section 27-2004(a)(48)(d) of the Administrative Code requires repeated baseless or frivolous court proceedings commenced against lawful tenants. Admin. Code § 27-2004(a)(48)(d) (Lexis 2021).

Here, besides the lawsuit against Ms. Hassan, which resulted in a settlement and buyout, there was only one other legal proceeding brought against the tenants on the same premise of removing them from the Building so that it could be converted to Yashar’s headquarters. Although respondent was unsuccessful in convincing the Civil Court judge, there was a legal foundation for bringing the lawsuits. *Cf. Dep’t of Housing Preservation & Development v. Goldsmith*, OATH Index No. 2118/12 at 27-28 (Aug. 27, 2013) (prosecution of a legal proceeding that is brought with knowledge that it is without legal foundation constitutes harassment). Although it is a seldom used provision of the Housing Maintenance Code, respondent was advised by counsel that this was a legitimate legal theory that could be pursued. Consequently, the lawsuits brought against the tenants do not rise to the level of harassment.

Harassment Intended to Cause Lawful Occupants to Vacate Their Units

Petitioner charged respondent with a catchall violation that he engaged “in conduct which prevents or is intended to prevent any person of the lawful occupancy of such dwelling unit to vacate or waive any rights in relation to their occupancy of such unit” and listed ten examples (ALJ Ex. 5). Respondent denied all of the allegations that he intended to prevent the tenants of lawful occupancy of their units. Respondent insisted that he never harassed any of the tenants (Tr. 368-69). He noted that the HPD investigator spoke with the tenants and came to the same conclusion that respondent had never harassed the tenants (Tr. 368). Indeed, Investigator Sequinot readily

acknowledged that when he met Mr. Michonski and Mr. Doyle, they told him that they did not have any problems with the Building (Tr. 20-22).

Several of the remaining allegations stem from statements made by Ms. Hassan to Investigator Sequinot. Respondent argued that this tribunal cannot consider Ms. Hassan's prior representations regarding harassment because she entered into a buy-out agreement in 2019, in which she stated that she had not been harassed and any prior complaints she filed were withdrawn with prejudice. While the agreement between Ms. Hassan and respondent may be binding upon them, it does not bind petitioner nor this tribunal. It was permissible for petitioner to present evidence of Ms. Hassan's prior complaints filed with the Department and the notices of violation issued to the Building as a consequence of her complaints. The Department is not legally foreclosed from denying the certificate of no harassment, if it possessed evidence of harassment within the inquiry period. *Dep't of Housing Preservation & Development v. Hersh*, OATH Index No. 921/05 at 3 (Apr. 12, 2005).

Informing Ms. Hassan That Black Men With AIDS Were Moving Into the Building

Respondent denied petitioner's allegation that he harassed Ms. Hassan by telling her that ten Black men with AIDS would be moving into the Building and living on her floor (Tr. 368-69). Respondent testified that he had only spoken to Ms. Hassan on two occasions and he never said such a thing because he does not speak like that (Tr. 369). Since Ms. Hassan did not testify, petitioner based these allegations on Investigator Sequinot's testimony and his investigative report regarding what Ms. Hassan told him (Pet. Ex. 1; Tr. 32).

Petitioner's only evidence in support of this allegation is hearsay. Petitioner's reliance on *Dep't of Housing Preservation & Development v. Domb*, OATH Index No. 586/09 (Apr. 17, 2009), *aff'd sub nom. Domb v. Cestero*, 89 A.D.3d 517 (1st Dep't 2011) to assert that tenants' hearsay statements are admissible is misplaced. This tribunal, including the ALJ in *Domb*, has held that while hearsay is admissible, it must be "carefully scrutinized as to its reliability and sufficiency to meet petitioner's burden of proof." *Domb*, OATH 586/09 at 25. *See also, Health & Hospitals Corp. (Lincoln Medical & Mental Health Center) v. Huling*, OATH Index No. 1359/05, at 5 (July 22, 2005); *see also Dep't of Correction v. Tatum*, OATH Index No. 2062/04 (July 19, 2005), *modified on penalty*, Comm'r Dec. (Aug. 28, 2005) (declining to sustain charge based solely on hearsay evidence, in light of contrary trial testimony).

Not all hearsay statements are considered reliable. “Clearly, the more central the hearsay is to an agency’s case, the more serious the question of basic fairness and the more critical the question of reliability may become.” *Calhoun v. Bailer*, 626 F.2d 145, 150 (9th Cir. 1980), *cert. den.*, 452 U.S. 906 (1981); *see also Transit Auth. v. Maloney*, OATH Index No. 500/91 at 24 (Apr. 19, 1991), *aff’d sub. nom. Maloney v. Suardy*, 202 A.D.2d 297 (1st Dep’t 1994) (“where the statements of the hearsay declarants are central to an agency’s case and there is question about the declarants’ credibility, this tribunal has been loath to place much stock in those statements because they have not withstood the test of cross-examination”).

Ms. Hassan’s hearsay statements are central to establishing this particular allegation. I find her hearsay statement that she was told that Black men with AIDS were moving into the Building was unreliable and insufficient to meet petitioner’s burden in this instance. *Cf. Dep’t of Housing Preservation & Development v. Re*, OATH Index No. 632/05 (May 3, 2005) (hearsay statements of two tenants as to lack of heat and hot water, illegal construction work, and verbal coercion, together with history of housing code violations, established that tenants had been harassed by the owners).

Demanding Lawful Occupants Move Because the Building was Being Converted to Offices

Petitioner further alleged that respondent demanded that the lawful occupants of the Building move from their rent stabilized units because the Building was being converted to offices. Ms. Hassan told Investigator Sequinot that the super informed her that the Building was going to be converted to offices (Tr. 34). Mr. Michonski similarly stated in his letter that he was informed that he had to leave because Yashar needed the whole Building for office space (Pet. Ex. 1). Ms. Hassan’s hearsay statement and Mr. Michonski’s letter were corroborated by respondent’s testimony. But, the best evidence in support of this allegation was respondent’s lawsuits to evict the tenants so that his charity could use the Building for Yashar’s offices and storage space. Petitioner successfully established that the tenants were told that they had to move because the Building was being converted to offices.

Failing to Address Heat Complaints and Comment About Why Ms. Hassan was Cold

Respondent adamantly denied petitioner’s next allegation that he ignored Ms. Hassan’s complaints about the lack of heat and that she was told that she was only cold because she was

new to the United States. He maintained that he would never say such a horrible thing to anyone (Tr. 368-69). Respondent testified that he has the boiler maintenance records and fuel oil delivery receipts from the first day he purchased the building to present and that no one ever complained about the heat at any time (Tr. 369-70). Despite his claims of having such records respondent failed to provide them to support his testimony.

Investigator Sequinot testified that on March 14, 2019, while he was investigating Ms. Hassan's heat complaint, he observed and photographed plastic sheeting hanging from the ceiling to the floor in the public hallways. He stated that both Ms. Hassan and the super informed him that the plastic sheeting was put up to keep the hallways warmer because the Building is drafty and cold. In addition to Investigator Sequinot's testimony and photographs, there were several 311 complaints about a lack of heat (Pet. Exs. 6, 7, 16; Tr. 37-38, 40, 44). Petitioner successfully demonstrated that respondent failed to address complaints regarding adequate heat. It failed, however, to establish that respondent told Ms. Hassan that she was cold because she was from another country. Her hearsay statements to Investigator Sequinot were insufficient to meet petitioner's burden.

Repeatedly Banging on Mr. Michonski's Door and Demanding he Move Out

Petitioner alleged that Mr. Michonski was harassed by someone repeatedly banging on his door and demanding he move out of the Building. Respondent testified that he never asked anyone to vacate their unit because of the vacate order or for any other reason (Tr. 376). Respondent further denied "banging" on Mr. Michonski's door and demanding that he move out. Mr. Michonski stated in his letter that respondent and/or someone affiliated with respondent banged on his door and told him to move out of the Building (Pet. Ex. 1; Tr. 425-26).

Mr. Michonski unwaveringly testified that he was told to leave the Building on multiple occasions. He testified that two gentlemen that he believed were from Iraq had knocked on his door and told him that he had to leave the Building. Mr. Michonski testified that he went to an attorney's office with the men and then they never returned to the Building or contacted him again. Mr. Michonski further testified that a man and a woman had knocked on his door on another occasion and told him that he had to leave (Tr. 425-26).

Mr. Michonski may have been unclear about the identities of the individuals, who banged on his door and demanded that he move out, but he credibly testified that it happened on more than

one occasion before and after respondent purchased the Building. Respondent's denial that he knocked on Mr. Michonski's door to try to get him to leave the Building was less than credible and he did not address whether the former owner or respondent's former associate Mr. Beauvais, both of whom promised to rid the Building of tenants, harassed Mr. Michonski by banging on his door and demanding that he leave. Respondent's testimony regarding his initial plans to flip the Building and Mr. Beauvais' interest in making sure the tenants moved out of the Building and that he went to the Building multiple times to speak to the tenants about buyouts, lends even more credence to Mr. Michonski's testimony that he was harassed in this manner (Tr. 338).

Notifying Mr. Michonski that his Rent Payments Would Not be Accepted

Petitioner charged respondent with harassment by notifying Mr. Michonski that his rent payments would no longer be accepted. Although, this allegation was included in Mr. Michonski's letter, he did not testify about paying rent or being told that his rent will no longer be accepted. Respondent was dismissive of the allegation, stating "I don't know who came up with that" (Tr. 373). The statement in Mr. Michonski's letter that respondent refused to accept his rent without any corroborating evidence or testimony by Mr. Michonski or any other witness during the trial was insufficient to meet respondent's burden with respect to this charge.

Failing to Maintain the Cleanliness of the Bathrooms

Respondent was charged with failing to maintain the general cleanliness of the common areas and bathrooms. Investigator Sequinot inspected the Building in 2017 and 2019 and found the bathrooms on both occasions to be similarly filthy. The photographs of the soiled sink and the cockroaches walking on the rim of the dirty toilet bowl corroborated his testimony. During both inspections, the super informed Investigator Sequinot that it was not his job to clean the bathrooms.

Respondent praised the super of the Building and commended him for keeping the interior of the Building "immaculate" (Resp. H; Tr. 373). During cross-examination, however, respondent testified that the super told him that he did not believe it was his job to clean the bathrooms. Respondent told the super if they are part of the public area, then it is his job to clean the bathrooms (Tr. 401). Respondent did not dispute Investigator Sequinot's testimony regarding this allegation. To the contrary, he corroborated the investigator's testimony that the super did not clean the

bathrooms. Respondent is required to keep the community bathrooms clean. See *Dep't of Housing Preservation & Development v. Goldsmith*, OATH Index No. 2118/12 at 25 (Aug. 27, 2013).

Instead of disputing that the bathrooms were dirty, respondent blamed the tenants for the dirty conditions. Respondent testified that the only person who uses the bathroom on the third floor is Mr. Michonski and the super regularly cleans the bathrooms. Similarly, the only person who uses the bathroom on the second floor is Mr. Doyle. In an effort to shift blame for the dirty condition of the bathrooms, respondent submitted photographs of Mr. Michonski and the interior of his unit. He alluded that Mr. Michonski is a dirty person and the living conditions inside his unit are deplorable (Resp. Ex. G; Tr. 370-72). Respondent then contended that Mr. Doyle's unit is even dirtier than Mr. Michonski (Tr. 372). Since Mr. Michonski and Mr. Doyle live in such squalor, respondent maintained that they could not legitimately complain that the bathrooms were dirty.

Respondent cited *Department of Housing Preservation and Development v. Porres*, OATH Index No. 627/06 at 20 (June 16, 2006) for the premise that the owner's failure to clean the public bathrooms was insufficient to find that the tenants were deprived of an essential service so as to give rise to a presumption of harassment. Respondent, relying on *Porres*, maintained that deficient janitorial services neither disturbed the tenants or interfered with their ability to live in the Building (Resp. Closing Brief at 22). This case can be distinguished from *Porres*, in which the ALJ found that the tenants' generalized statements that the owner failed to clean the halls and bathrooms were insufficient to find that the tenants were deprived of an "essential service" and determined that the tenants were just impatient with how long it was taking to remedy the situation. *Porres*, OATH 627/06 at 20.

In contrast, Investigator Sequinot testified that although it had been two years since he had last been at the Building, the bathrooms were in the same grimy condition. Photographs taken in March 2019, showed that the sinks and toilets were just as filthy as they were in 2017 (Pet. Ex. 5; Tr. 38). When Investigator Sequinot asked the super again about the condition of the bathrooms, he told him, much the same as he did in 2017, that it was not his job to clean the bathrooms (Tr. 45-46). Investigator Sequinot's testimony and photographs of the roach infested dirty bathrooms goes far beyond the generalized tenant complaints in *Porres*. Indeed, Investigator Sequinot issued violations for the dirty bathrooms.

Respondent had difficulty veiling his disgust with the tenants' filthy living conditions and hygiene. He even complained about the super's cat possibly dirtying rooms and leaving toys around (Tr. 400). Regardless of what respondent thinks about the cleanliness of the tenants' rooms, it does not excuse him of the responsibility of keeping the bathrooms clean. Moreover, he admitted that he knew the super was not cleaning the bathrooms and was aware that it was the owner's responsibility to maintain the cleanliness of the bathrooms because he told him that he had to clean them. Respondent's claim that deficient janitorial services neither disturbed the tenants nor interfered with their ability to live in the Building is belied by the cockroaches crawling around the toilet seats. This is not only disturbing, at a minimum, it interfered with their ability to use the bathrooms.

Misrepresentations to Mr. Michonski that a Vacate Order Required him to Move in Five Days

Petitioner further alleged that Mr. Michonski was misinformed in January 2017, that he had to vacate his unit in five days pursuant to a partial vacate order that included his unit. Respondent denied the allegation (Tr. 375-76). The super similarly denied ever asking Mr. Michonski to leave the Building and testified that as far as he knew, respondent had not asked him to leave either (Tr. 442). Mr. Michonski's November 2017 letter to the Department provides a very detailed description of what occurred. The letter recounts that the super knocked on Mr. Michonski's door on January 5, 2017, and informed him that a vacate order was issued for the entire Building and that he had to leave by January 10, 2017. The letter states that the super told Mr. Michonski that he could not show him the vacate order because one of the other tenants removed it.

Mr. Michonski was so concerned about having to vacate his home in five days that he immediately contacted his friends and together they contacted their local City Councilman Ben Kallos. Councilman Kallos's office reached out to the Department, the Department of Buildings, and the Fire Department to no avail because there was no record of the Vacate Order. The letter further describes the anguish that Mr. Michonski suffered and his fear of leaving the Building because he did not think he would be able to come back inside the Building and return to his room. Instead, he waited in his room "in agony" the entire day, waiting for someone to appear and tell him that he had to leave (Pet. Ex. 1).

Mr. Michonski testified that he was informed about the vacate order and was told that he would have to leave but he could not remember who he had spoken to but postulated that it might have been the super. Mr. Michonski credibly testified that the information in the letter was accurate. He further testified that in the end, nothing happened because Ms. Nellis contacted their City Council Member and he never heard about it again (Tr. 434). It is not surprising that Mr. Michonski, an 86 year old man, had some trouble remembering the exact details of what occurred two years earlier. He was firm, however, that someone knocked on his door and told him that he had to leave the Building within five days because of a vacate order that he never saw. The fact that Mr. Michonski and his friends contacted a City Councilman for assistance, makes it even more believable that this actually occurred. Respondent's and the super's blanket self-serving denials that this happened is far less credible than Mr. Michonski's testimony and a letter sent to the Department the same year as the incident.

Unlawfully Taking Mr. Michonski's Front Door Key and Preventing his Caregiver Access

With respect to the front door of the Building, the Department alleged that respondent took Mr. Michonski's key away from him and prevented his caretaker from entering the Building. Respondent denied taking anyone's keys away from them. He testified that the cylinder in the lock on the front door broke and the lock needed to be changed. After the locksmith fixed the lock, the super gave both tenants a new key to the door. Respondent further testified that the super told the tenants that the Building does not give keys to anyone who does not live in the Building. Respondent contended that the super is basically there 24/7 and that he is "happy" to open up the door to let people in and out (Tr. 376).

Mr. Michonski's letter to the Department indicated that he had given a key to the front door to a friend of his, who helps him with errands and takes him to doctor's appointments. Mr. Michonski has limited mobility, which makes it difficult for him to walk from the third floor to open the front door of the Building for his friend. Mr. Michonski's friend returned the key, when she was asked for it. There is nothing in the letter that states that Mr. Michonski's key to the front door was taken from him, only from his friend. Moreover, Mr. Michonski testified that he has always had a key to the front door of the Building and no one has ever taken it away from him (Tr. 434-35). Petitioner failed to provide evidence that respondent harassed Mr. Michonski by taking away his front door key.

Ordering Mr. Michonski Not to Leave His Unit When Guests Were in the Building

Respondent is further charged with ordering Mr. Michonski not to leave his apartment when the landlord brings guests to the Building. Petitioner failed to provide any evidence with respect to this allegation.

Removing the Communal Kitchen

Finally, respondent was charged with causing the communal kitchen to be inaccessible to the lawful occupants, preventing them from cooking or storing food. The communal kitchen located in the basement of the Building was one of the most contentious issues during the trial. Investigator Sequinot returned to the Building on March 14, 2019, because Ms. Hassan had contacted the Department to complain about the owner removing the public kitchen located on the basement level of the Building (Tr. 34-35). Ms. Hassan told Investigator Sequinot that she used the kitchen to prepare her daily meals. During his visit to the Building, Investigator Sequinot asked the super about the kitchen and he confirmed that the only kitchen in the Building was removed (Tr. 35, 44-45). Investigator Sequinot went to the basement level and observed that the kitchen had been removed (Pet. Ex. 8).

Respondent emphatically stated that he was told to remove the kitchen by someone from OSE and blamed the Department's refusal to issue the CONH because he removed the kitchen. Respondent argued that he was directed by one City agency to remove the kitchen and then another City agency refused to issue the CONH because he followed the prior agency's directive.

Inspector Pugach from OSE testified that when he last visited the Building in 2015 the configuration of the basement level was the same as it was during his 2012 inspection. There was a communal kitchen or cafeteria in the basement (Tr. 96-98). Inspector Pugach testified that he never told the owner, verbally or in writing, to remove the communal kitchen in the basement nor did he issue a violation for it being there. He further testified that he would not have the authority to direct the owner to remove the kitchen (Tr. 98-99).

Inspector Yusef from OSE participated in the November 2018 inspection. He testified that according to Department of Buildings' records, there should have been a "Class A" apartment in the basement level of the Building. A "Class A" apartment is a single apartment with a private bedroom, bathroom, and kitchen that is self-enclosed within the unit (Tr. 219). The kitchen in a "Class A" apartment is not for communal use (Tr. 221).

Inspector Yusef testified that in 2018, the basement level was not configured as a "Class A" apartment, because it had a communal kitchen. He further testified that the purpose of the 2018 inspection was to determine whether the egress issues on the second and third floor were corrected so that the stop work order could be partially lifted. Inspector Yusef maintained that OSE was not there to inspect the basement because there were no violations placed on the basement level apartment or the communal kitchen. Moreover, there would be no need to remove the kitchen to have the stop work order partially lifted. Inspector Yusef repeatedly testified that it was not his role to instruct the owner to remove the kitchen on the basement level of the Building. At most, he would inspect the Building to see if it is in compliance with the Building Code. If it was not in compliance, he would issue a violation. He does not advise owners on how to remediate a violation (Tr. 208, 210).

Contrary to the inspectors' testimony, respondent insisted that the only reason that the communal kitchen in the basement of the Building was removed was because OSE ordered him to remove it. Respondent, however, was unable to produce a written order. Investigator Sequinot acknowledged that respondent informed him another City agency had told him to remove the kitchen but he did not investigate the accuracy of the owner's representation (Tr. 62-63).

Respondent hired Harold Tischler, a building consultant, contractor, plumber, and expeditor, to correct the violations on the Building so that the vacate order and stop work order could be lifted. Respondent testified that he spent a lot of money to correct the violations. He maintained that he did not perform any work on the Building other than to make repairs (Tr. 360).

Mr. Tischler's testimony was difficult to follow. He skipped from one issue to another and contradicted himself several times. Mr. Tischler testified that his goal was to lift both the vacate and stop work orders so that the Building could be put in compliance (Tr. 256). He acknowledged that the partial vacate order was placed on the Building due to an egress issue (Tr. 261). According to Mr. Tischler, access to the fire escape was blocked by a room with a door that locked. Once the door was removed, the egress problem was corrected (Tr. 262). Mr. Tischler testified that all the owner needed to do to have the vacate order lifted was to remove anything that obstructed egress (Tr. 283). He also acknowledged that the November 2018 OSE inspection was to make sure that the illegal conditions were cured and that there was no longer a problem with egress (Tr. 257).

Mr. Tischler's testimony became more confusing when he tried to explain why the communal kitchen in the basement was removed. Mr. Tischler had reviewed the I-Card for the

Building, which provided the original layout of the Building (Tr. 244). The basement level was classified on the I-Card as a "Class A" apartment (Tr. 252-53). Mr. Tischler testified that if the owner wanted to legalize the Building and obtain a Certificate of Occupancy, the basement would need to be reconfigured to be in conformity with its original use. In order to legalize the Building, the owner would need to file an Alteration 1 application with the Department of Buildings to make the repairs (Tr. 253-54). However, before the owner can obtain the necessary permits to make the repairs, he would need to apply for and obtain a CONH. Mr. Tischler reiterated that he would not be able to get the legalization plans approved by the Department of Buildings without first submitting a CONH (Tr. 254).

Mr. Tischler, however, offered contradictory testimony about submitting plans to OSE and the Department of Buildings to show that the Building was in compliance before obtaining a CONH (Tr. 250-51). Mr. Tischler further testified that the plans for the basement level, which were certified by the Department of Buildings, did not include a communal kitchen (Pet. Ex. 11; Resp. Ex. D; Tr. 248).

According to Mr. Tischler, during the 2018 OSE inspection, he went through the entire building with the inspector, who was "unhappy" about the communal kitchen on the basement level. Mr. Tischler maintained that the inspector told him that the kitchen had to be removed so that basement was in compliance with the plans he had submitted to the Department of Buildings (Tr. 246, 251, 255-56, 263-64, 298, 303).

Mr. Tischler acknowledged that he did not understand why the kitchen needed to be removed (Tr. 264). Since the OSE inspector insisted it had to be removed, Mr. Tischler asked the inspector to lift the stop work order because if he removed the kitchen while the stop work order was in place, the owner would be fined for doing the work. He asserted that the inspector said, "no I want you to remove it and I'll come back again" (Tr. 247). Mr. Tischler complied and removed the kitchen. In sum, Mr. Tischler contended that he submitted plans to DOB on respondent's behalf, which were approved prior to receiving a CONH. Since the approved plans did not include the existing kitchen in the basement, the inspector said the kitchen needed to be removed to conform to the plans (Tr. 301). Even though the stop work order was still in place, respondent illegally removed the communal kitchen without a permit.

Mr. Tischler admitted that the inspector did not issue a violation that required the kitchen to be removed. Instead, violations were issued for work that was performed without a permit and

for illegally installed water and waste lines in the kitchen area (Tr. 288, 316). Mr. Tischler contended that the illegal water and waste lines had to be legalized or removed, which he believed justified removing the entire kitchen along with the water and waste lines (Tr. 271, 277, 285). When asked if it was possible to legalize the water and waste lines instead of removing them, he said "I'm sure we could have done it, but it was easier to just remove them" (Tr. 286). Mr. Tischler initially maintained that the kitchen was illegally installed without a permit and since he could not legalize it, "the only remedy, to [his] knowledge, was to remove it" (Tr. 305). Mr. Tischler, however, later testified that respondent did not have to remove the "illegal" kitchen to correct the Department of Building's "issue" with the illegal waste line and water line "since [the Class A apartment] was not being occupied, [respondent] didn't have to address that, and there was [sic] no violations on [the basement] apartment" (Tr. 309).

Respondent felt compelled to try to rehabilitate his own witness's testimony. Indeed, respondent testified that Mr. Tischler, his expert witness, was confusing and had trouble explaining what had occurred so he would clarify what actually happened (Tr. 356, 366). He hired Mr. Tischler's firm to assist in removing the stop work order and the partial vacate order. Respondent maintained that they had to revert the Building back to its prior status, which was a two-year process (Tr. 377).

The first set of plans submitted to the Department of Buildings were rejected and it took time for them to be modified and approved. Once the plans were approved an appointment for an inspection was scheduled with OSE. Respondent testified that the inspector noted that the egress issue had been addressed. He asserted that when they went downstairs to the basement the inspector looked at the plans and said that the kitchen had to be removed because it was not on the approved plans. When Mr. Tischler asked how the kitchen could be removed if the stop work order was in place, the inspector arranged for a "partial rescind" (Tr. 378-79).

Respondent contended that the inspector said "you have to remove [the kitchen] from the building and you have to cap the water lines and make them flush with the wall" (Tr. 379). According to respondent, the inspector said he would lift the stop work order if they remove the kitchen. Respondent immediately arranged with a contractor to remove the kitchen, which cost him \$5,000 (Tr. 379). Respondent was dismayed that he followed the inspector's orders to remove the kitchen but he could not get the Building inspected again because his permit triggered an audit (Tr. 380).

Respondent's and Mr. Tischler's insistence that they were instructed to remove the communal kitchen by an OSE Inspector was contradicted by two OSE inspectors. Inspector Yusef testified that no one from OSE told the owner to remove the kitchen (Tr. 209). He explained that if the kitchen needed to be removed, the owner's architect would have to issue a plan to the Department of Buildings for review. If the Department of Buildings approved the plan to remove the kitchen, it would issue a permit (Tr. 210-11, 230). Inspector Yusef further testified that removing the kitchen in the basement level apartment would not have resulted in the vacate order being lifted because the basement was not part of the vacate order (Tr. 236).

Inspector Pugach testified that respondent had only filed for a permit to do remedial work, not to remove the kitchen. When the inspector went to the premises in 2018, he inspected the Building and the plans and granted a partial work order to allow the owner to complete the remedial work (Tr. 115, 123). Inspector Pugach unwaveringly testified that there was no order to remove the kitchen (Tr. 115). He further testified that the presence of the kitchen in the basement was not considered a violation (Tr. 124).

Respondent was unable to produce anything in writing that OSE directed him to remove the kitchen from the basement. Mr. Tischler's testimony was baffling and hard to follow, but most of all it was illogical. At first Mr. Tischler explained that respondent would need to obtain a CONH to obtain work permits from the Department of Buildings to alter the Building. Then he contradicted himself by testifying that the Department of Buildings had already approved plans without a CONH and since the plans did not have a communal kitchen, OSE ordered the owner to remove the communal kitchen without obtaining a work permit, which Mr. Tischler acknowledged would be illegal. But, respondent went ahead and removed the kitchen anyway because he was allegedly told to do so.

In contrast, both OSE witnesses credibly testified that there were no violations on the basement. Inspector Pugach's inspection in 2015 and Inspector Yusef's inspection in 2018, were specifically to determine if the illegal occupancy was corrected and whether the obstructions blocking the second means of egress had been removed so that the vacate order could be partially lifted. The inspections had nothing to do with the basement so there would have been no reason to remove the kitchen in the basement.

In spite of the inordinate amount of time spent at trial discussing the removal of the communal kitchen, respondent's belief that this was the sole reason for the Department denying

his application for a CONH is mistaken. The removal of the kitchen was but one of many factors that the Department considered and found to be grounds for denying the CONH. Respondent was unable to establish any legitimate reason for removing the kitchen in the basement. Accordingly, the removal of the only kitchen in the entire Building should be deemed harassment.

Respondent Failed to Rebut the Presumption of Harassment

Section 27-2093(b) of the Administrative Code creates a rebuttable presumption that any proven acts of harassment that occurred during the inquiry period were “committed by or on behalf of the owner . . . with the intent to cause a person lawfully entitled to occupancy of [an SRO room] to vacate such unit or to surrender or waive a right” in such lawful occupancy. Acts of harassment committed during the inquiry period warrant denial of the CONH application even if committed by the prior owner(s), and regardless of the current owner’s fault. *See Dep’t of Housing Preservation & Development v. Bryant*, OATH Index No. 149/07 at 4 (Jan. 5, 2007), *aff’d*, 2007 N.Y. Misc. LEXIS 9224 (Sup. Ct. N.Y. Co. 2007); *Dep’t of Housing Preservation & Development v. Freid*, OATH Index No. 1567/04 at 11 (Feb. 3, 2005); *Dep’t of Housing Preservation & Development v. Fenelon*, OATH Index No. 1525/04 at 5 (Oct. 6, 2004), *aff’d*, Index No. 5111/05 (Sup. Ct. Kings Co. July 12, 2005). Respondent may rebut the presumption of harassment by successfully establishing that any statutorily-defined acts of harassment at the premises were not intended to cause lawful occupants to vacate their rooms, or surrender or waive their rights to their rooms. *See Dep’t of Housing Preservation & Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 at 12 (Dec. 29, 2006); *Dep’t of Housing Preservation & Development v. Rice*, OATH Index No. 1838/04 at 11 (Mar. 23, 2005).

The petition clearly states that “the alleged acts of harassment were done or caused by the applicants, applicants’ agents, *present owners or prior owners* or their agents, and occurred within the time September 1, 2014 to the present” (emphasis added) (ALJ Ex. 5). Respondent seemed to presume since he did not commit any wrongdoing, only the prior owner should be held accountable. Even if this were true, which it is not, the inquiry period extends three years back from the time the application was filed. As such, if the prior owner harassed the tenants any time after September 1, 2014, then it negatively impacts respondent’s ability to receive a CONH. It is well settled that any acts of harassment during the inquiry period are attributed to the current owner, even if those acts were committed by prior owners. *Dep’t of Housing Preservation &*

Development v. Bernardi, OATH Index No. 416/09 at 3 (Mar. 19, 2009); *Bryant*, OATH 149/07 at 4.

It is undisputed that prior owners committed acts of harassment, such as illegally converting the Building into a hostel and failing to provide emergency fire egress. In addition, petitioner established that people were repeatedly banging on Mr. Michonski's door and telling him to move out of the Building. Respondent admitted that the prior owner and his former business partner told him that they were going to get rid of the tenants. This supports the testimony from Mr. Michonski and Mr. Sullivan that the tenants were asked to leave the Building and that several individuals knocked on Mr. Michonski's door telling him to vacate.

Acts of harassment also occurred after respondent purchased the Building. Petitioner established that respondent failed to timely correct conditions that caused an interruption of essential services with the intent of causing the lawful occupants to vacate their units. See Admin. Code §§ 27-2093(a), 27-2004(48)(b), 27-2004(48)(b-2). The evidence and credible testimony provided by Mr. Michonski demonstrated that not only his room but the entire third floor was without electricity for several weeks. Mr. Michonski's testimony was corroborated by the 311 complaints and the issuance of an immediate class "C" violation.

Respondent failed to address this interruption of an essential service in a timely manner. Instead of immediately remedying the situation by hiring an electrician, days after it was brought to his attention, the super provided Mr. Michonski with an extension cord and a light bulb. In addition to the electrical issues, there were other proven acts of harassment which occurred after respondent purchased the Building, such as heat violations, filthy bathrooms, banging on tenants' doors to tell them to move out, and failing to fix the lock on Mr. Michonski's door. Respondent's self-serving and unsupported denial of intending to cause the tenants to vacate the Building was insufficient to rebut the presumption of harassment.

Respondent portrayed himself as a "novice building owner," who suffered at the hands of Mr. Beauvais, the prior owner of the Building, his former attorney, the tenants' attorney, the Department of Buildings, OSE, and the Department. His self-description of being a charitable person who wanted to create a global headquarters in this Building for a charity to help underprivileged individuals is belied by his efforts to evict the septuagenarian and octogenarian tenants who probably could have benefited from his charity.

Respondent asserted in his closing brief that petitioner attempted to impugn his motives while attempting “to cast Doyle and Michonski, the occupants subject to two identical holdover proceedings, in as vulnerable a light as possible” (Resp. Br. at 4-5). Petitioner did not attempt to cast the senior tenants in “as vulnerable a light as possible” because it did not have to. The two low-income, elderly individuals, one in his seventies and the other in his eighties, who have lived in this Building for over 30 and 50 years each, have endured squalid living conditions. Yet, they were forced to continue living in squalor so that they did not end up homeless. “The Anti-Harrasment Statute’s declaration of findings and intent states that SRO occupants ‘are generally poor and elderly, and often suffer from physical and mental infirmities and social problems which make them particularly vulnerable to . . . harassment’” *Dep’t of Housing Preservation & Development v. Beinert*, OATH Index No. 1470/08 at 12 (Nov. 18, 2008) citing New York City Local Law 19, § 1 Act of May 31, 1983, no. 19, 1983 N.Y. City Local Laws.

Respondent’s real purpose was not to convert the Building into Yashar’s headquarters. To the contrary, respondent’s primary interest in the Building was to renovate it, flip it, and make a profit. The only way to do that would be to remove the tenants from the Building. Even Judge Katz, who adjudicated respondent’s holdover proceeding against Mr. Doyle on the grounds that Mr. Doyle’s room was needed for as a storage room for the charity, questioned respondent’s credibility and found that his true intent was to flip the Building to make a profit. Although respondent sought to evict the tenants on the theory that the Building was going to be used for his charity, he never stopped pursuing his lawsuit against the seller to rescind the sale based on misrepresentations that the Building was unoccupied. Moreover, during this proceeding, respondent testified that if he receives the CONH, he intends on selling the Building because this has been a “painful” experience for him and he wants to move on (Tr. 411).

If respondent had been sincere in creating a headquarters for Yashar, he would and could still do so, even with two elderly tenants living on the upper floors of the Building. But, respondent is now pursuing multiple ways of divesting himself of the Building, with no explanation as to where Yashar will operate. The only way to interpret this is that respondent never had any intention of using the Building as Yashar’s headquarters, but instead tried to use his charity as a pretext to evict the tenants.

I find that the tenants were harassed during the inquiry period with the intent to cause them to vacate the Building.

FINDINGS AND CONCLUSIONS

1. Petitioner established that respondent failed to properly repair a broken lock on the door of room 18.
2. Petitioner established that respondent failed to provide safe and adequate supply of electrical service to the fixtures located in room 18 and the third floor and failed to timely repair this immediately hazardous condition.
3. Petitioner established respondent failed to correct conditions which rendered the dwelling or part thereof unfit for human habitation within the required period of time.
4. Petitioner established that the Building was illegally converted to hoteling rooms and that there was not proper emergency fire egress for the occupying tenants.
5. Petitioner did not establish that it commenced repeated baseless or frivolous lawsuits against the occupying tenants as defined in the Administrative Code.
6. Petitioner did not establish that Ms. Hassan was informed that she should move because rooms on her floor would be rented to ten black men from the AIDS community.
7. Petitioner established that respondent or his agent demanded that the lawful occupants move from their rent stabilized units because the Building was being converted to offices.
8. Petitioner established that Ms. Hassan's heat complaints were not properly addressed but failed to establish that she was told she was only cold because she was new to the United States.
9. Petitioner established that respondent and/or his agent repeatedly banged on Mr. Michonski's door and demanded that he move out of the Building.
10. Petitioner did not establish that Mr. Michonski was notified that his rent would no longer be accepted.
11. Petitioner established that respondent failed to maintain the general cleanliness of the bathrooms.
12. Petitioner established that Mr. Michonski was told in January 2017, that he was required to vacate his unit within five days due to a partial vacate order that did not include his unit.

13. Petitioner did not establish that respondent and/or his agent took Mr. Michonski's front door key to the Building and prevented his caretaker access to the Building.
14. Petitioner established that respondent caused the communal kitchen to be inaccessible to the lawful occupants from December 2018 to present.
15. Petitioner did not establish that respondent and/or his agent ordered Mr. Michonski not to leave his apartment when the landlord brings guests to the Building.
16. Petitioner established that respondent generally interrupted and/or discontinued and decreased essential services and repairs disturbing the comfort, repose, peace and quiet of the lawful occupants.

RECOMMENDATION

I recommend that the application for a certificate of no harassment be denied.

Kara J. Miller
Administrative Law Judge

March 18, 2021

SUBMITTED TO:

LOUISE CARROLL
Commissioner

APPEARANCES:

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**CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT**

**FINAL DETERMINATION UPON APPLICATION FOR A
CERTIFICATION OF NO HARASSMENT PURSUANT TO SECTION 27-2093
OF THE NEW YORK CITY ADMINISTRATIVE CODE**

Application No.: 94/17

Applicant(s): MICHAEL KAPLAN

Premises: 179 East 94 Street,
Manhattan, New York 10128
Block: 01523 Lot: 0032

Inquiry Period: September 1, 2014 to the present pursuant to Section 27-2093 of the New York City Administrative Code.

Action: Denied, after a hearing.

Duration: No application for a Certification will be accepted for three (3) years from the date of April 22, 2021.


AnnMarie Santiago, Deputy Commissioner
Department of Housing Preservation & Development

ACKNOWLEDGEMENT

STATE OF NEW YORK)

)ss.:

COUNTY OF NEW YORK)

On the 22 day of April in the year 2021, before me the undersigned, AnnMarie Santiago, personally appeared, personally known to me or proven to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed this instrument.

RONIT JOSEPH
Notary Public, State of New York
No. 02106371480
Qualified in Richmond County
Commission Expires Feb. 28, 2022


NOTARY PUBLIC

SEAL

HPD v. Mamudosk, OATH Index No.: 771/01 (Feb. 21, 2002)

Dep't of Housing Preservation and Development v. Mamudosk

OATH Index No. 771/01 (Feb. 21, 2002).

Summary: 1. Petitioner, Department of Housing Preservation and Development ("HPD") introduced ample evidence to support finding of harassing actions taken by landlord within three-year period before filing for a certificate of no harassment. HPD also introduced evidence of significant harassment actions taken after filing for certificate. Although not necessary to reach a determination in this case, such evidence should be able to be relied upon in order not to frustrate legislative intent of anti-harassment statute.

Statutory presumption of intent not rebutted by respondent whose testimony was largely uncorroborated and at times was contradicted by respondent's own witnesses.

SUZANNE P. CHRISTEN, *Administrative Law Judge*

This is a proceeding commenced by petitioner, the Department of Housing Preservation and Development ("HPD"), pursuant to Local Law 19 of 1983, the Single Room Occupancy anti-harassment statute. Petitioner seeks a finding that harassment occurred at the premises, 106-108 West 83rd Street, New York, New York, during the thirty-six month period prior to the date of the submission of an application for a certificate of no harassment by the owners, Galip and Ali Mamudoski. Under the law, an owner of an SRO building must obtain a Certificate of No Harassment from HPD prior to obtaining an alteration permit from the Department of Buildings. N.Y.C. Administrative Code § 27-2093 (Lenz & Riecker CD-ROM 2001).

On April 19, 2000, the Mamudoskis filed an application with HPD for a Certificate of No Harassment. Therefore, the inquiry period at issue commenced on April 19, 1997. By determination dated October 2, 2000, HPD found reasonable cause to believe that harassment occurred at the premises during the inquiry period. The matter was referred to me in accordance with Title 48, Chapter 1 and Title 28, Chapter 10 of the Rules of the City of New York, for hearing pursuant to sections 27-198 and 27-2093 of the Administrative Code.

Petitioner alleges that the acts and conditions of harassment by the respondent owner included interruption or discontinuance of essential services, including failure to maintain the bathrooms and public areas of the buildings in a clean and sanitary condition; failure to provide adequate lighting in public hallways; and failure to make necessary and required repairs. The owner is also charged with being verbally abusive to tenants, initiating improper eviction proceedings, commencing renovation work without obtaining a permit first, and advising tenants that they would not be living at the premises much longer and that they should vacate. Further, it is alleged that the landlord failed to make a bill payment and a required security deposit payment to Con Edison, causing shutoff notices to be sent to the tenants, who were forced to make the payment themselves to avoid termination of electrical services.

A hearing on this matter was held on June 14 and 15, 2001 and February 6 and 8, 2002. Petitioner

presented seven witnesses, including two tenants, an employee of Project Reach Out, the Director of the Goddard Riverside Community Center, the former Project Director and a second employee of the West Side SRO Law Project, and an HPD inspector. Respondent Ali Mamudoski testified on behalf of respondents. Respondents also presented testimony from the buildings' superintendent, Veronica Fernandez, and four tenants.

ANALYSIS

Mark Draxdorf, a social worker employed by Project Reach Out, works with some of the tenants who live at 106 and 108 West 83rd Street (Tr. 14-16). In late October 1999, Mr. Draxdorf was informed by the superintendent, Ms. Fernandez, that the building had been sold to Galip and Ali Mamudoski.

After the new owners took over, conditions in the building began to deteriorate. The hallways, stairways and bathrooms stopped being cleaned. Mr. Draxdorf spoke to the superintendent about this and was told that the new owners had let the building cleaner go, and that the bathrooms were going to have to be cleaned by the tenants themselves (Tr. 18).

Mr. Draxdorf also spoke to one of the new owners, Galip Mamudoski, who asked Mr. Draxdorf "when we would be out - - meaning the people that we worked with in the building, when we would be moving out of the building, and had commented to me that he didn't understand why people would be staying, that things were so bad, the building was so bad that he didn't understand why people would be staying in the building" (Tr. 18-19).

Mr. Draxdorf took photographs of various conditions of disrepair in the building about which he and the tenants complained to the landlord and its agents. The photographs, taken in May 2000, depict the fourth floor hallway in 108 West 83rd Street (Tr. 26; Pet. Ex. 2), the public bathroom on the fifth floor of 108 West 83rd Street (Tr. 22-23; Pet. Exs. 3, 4), the building at 108 West 83rd Street (Tr. 23; Pet. Ex. 5), the staircase from the first to the second floor of 106 West 83rd Street (Tr. 24; Pet. Ex. 6), Room 15 at 108 West 83rd Street (Tr. 24; Pet. Ex. 7), Room 3E in 106 West 83rd Street (Tr. 25, Pet. Ex. 8), fourth floor hallway wall of 108 West 83rd Street (Tr. 25, Pet. Ex. 9), the ceiling of Room 15 in 108 West 83rd Street (Tr. 27; Pet. Ex. 10), Room 35 in 108 West 83rd Street (Tr. 27-30; Pet. Exs. 11, 12), the fourth floor hallway in 108 West 83rd Street (Tr. 30; Pet. Ex. 13), the third floor hallway in 108 West 83rd Street (Tr. 31; Pet. Ex. 14), the third floor hallway floor at 108 West 83rd Street (Tr. 31; Pet. Ex. 15), the third floor hallway wall at 108 West 83rd Street (Tr. 32; Pet. Ex. 16), the floor of Room 26 in 108 West 83rd Street (Tr. 33; Pet. Ex. 17), the ceiling of Room 21 in 108 West 83rd Street (Tr. 33; Pet. Ex. 18), a wall of Room 26 in 108 West 83rd Street (Tr. 35; Pet. Ex. 19), a corner of Room 24 in 108 West 83rd Street (Tr. 35; Pet. Ex. 20), the third floor public bathroom in 108 West 83rd Street (Tr. 36; Pet. Ex. 21), the bathtub in the third floor bathroom in 108 West 83rd Street (Tr. 37; Pet. Ex. 22), the second floor bathroom in 108 West 83rd Street (Tr. 37; Pet. Ex. 23), a doorway from the hall to the stairwell on the third floor in 108 West 83rd Street (Tr. 38; Pet. Ex. 24), a stairway window in 108 West 83rd Street (Tr. 38; Pet. Ex. 25), the first to second-floor staircase in 108 West 83rd Street (Tr. 39; Pet. Ex. 26), Room 3E in 106 West 83rd Street (Tr. 39; Pet. Ex. 27), the sink in Room 3A in 106 West 83rd Street (Tr. 39; Pet. Ex. 28), a hallway in 106 West 83rd Street (Tr. 39; Pet. Ex. 29), the window and sink area of Room 35 in 106 West 83rd Street (Tr. 41; Pet. Ex. 30),

the ceiling of Room 15 in 108 West 83rd Street (Tr. 42; Pet. Ex. 31), the sink in a public bathroom in 108 West 83rd Street (Tr. 43; Pet. Ex. 32), a public bathroom in 108 West 83rd Street (Tr. 44; Pet. Ex. 33), the alleyway between 106 and 108 West 83rd Street (Tr. 44; Pet. Ex. 34), the front of 108 West 83rd Street (Tr. 45; Pet. Ex. 35), the first floor hallway in 106 West 83rd Street (Tr. 45; Pet. Ex. 36), the fourth floor hallway in 108 West 83rd Street (Tr. 46; Pet. Ex. 37), and a fire escape at 108 West 83rd Street (Tr. 47; Pet. Ex. 38).

After Mr. Draxdorf photographed these conditions in May 2000, there was no work done to correct them until late November or early December 2000. That work was begun in response to an HPD action initiated by the tenants in June 2000, by an order to show cause (Tr. 69-70). The certified court records relating to this action were introduced into the record (Pet. Exs. 39-51). While the repairs were being made in late 2000, Mr. Draxdorf spoke to a workman who was putting down linoleum in the hallways. Mr. Draxdorf commented to the workman that the linoleum looked very thin and he was told by the workman that it was only temporary "that in the future, they planned on doing major renovations" (Tr.70).

Mr. Draxdorf also testified about tenant lockouts, including the lockout of tenant James Robinson from his room at 106 West 83rd Street, in February 2001. Mr. Robinson had been in the hospital from early January 2001 and was scheduled to be discharged in February. Mr. Draxdorf went to Mr. Robinson's room to make sure it was ready for his return, but was unable to open the door using the key that Mr. Robinson had given him (Tr. 70-71). On the same day, Mr. Draxdorf attempted to check the room of another tenant of 106 West 83rd Street, Mr. Collier, who was scheduled to return from the hospital. Mr. Collier's key did not open the door to Mr. Collier's room (Tr. 71). Mr. Draxdorf, on occasions prior to Mr. Robinson's and Mr. Collier's hospital stays, had been able to open the doors to their rooms using the keys which they had provided to him (Tr. 72).

On the day that Mr. Robinson was released from the hospital, Mr. Draxdorf accompanied him to his room. They were not able to gain entry using Mr. Robinson's key. Eventually, these tenants were put back into their rooms pursuant to stipulations of settlement entered into with the landlord after the tenants filed orders to show cause (Tr. 72-73; Pet. Exs. 52-55). Another tenant who was also unable to get back into his room after a hospital stay was also placed back in possession after similar proceedings were brought and settled (Tr. 73; Pet. Exs. 56, 57).

In early March 2001, Mr. Eric Barnard, a tenant at 106 West 83rd Street, Room 2D, was ready to come back to his room after a hospital stay. Mr. Draxdorf, after unsuccessfully attempting to enter the room with Mr. Barnard's key, asked Ms. Fernandez whether the lock had been changed and was told that it had been changed, and that she had been ordered to change it (Tr. 74). After this conversation, Mr. Ali Mamudoski called Mr. Draxdorf and told him that the owners did not consider Mr. Barnard to be a tenant any longer. They told Mr. Draxdorf that they had not accepted Mr. Barnard's rent check for the month of March, and that they had plans to fix the room up and rent it to another tenant (Tr. 74-75). Petitioner introduced certified copies of a transcript of a hearing and a decision on punitive damages with respect to the Barnard lockout (Tr. 76; Pet. Ex. 58, 59).

On cross-examination, Mr. Draxdorf testified that prior to the Mamudoski purchase of the buildings at 106, 108 West 83rd Street, when Mr. Draxdorf noticed that something needed to be repaired and

reported it, "it generally was followed up on and repaired" (Tr. 81). The buildings were also cleaned on a daily basis before the Mamudoskis took over, including the stairways and bathrooms (Tr. 81).

Sharon Hayes, who lives at 106 West 83rd Street, testified that she and Vincent James Caruso moved into room 1F on September 3, 1991. Ms. Hayes identified Mr. Galip Mamudoski, whom she referred to as Michael, as her landlord (Tr. 112-113). On four occasions, Mr. Mamudoski offered her roommate, Mr. Caruso, money to move out. The amounts offered ranged from \$5,000 to \$7,000 (Tr. 113). The offer of \$7,000 was accompanied by an "or else" (Tr. 114).

On cross-examination, Ms. Hayes acknowledged that she was not present when the offers were made, but was told of them by Mr. Caruso (Tr. 114). Mr. Mamudoski never offered Ms. Hayes money or told her that he wanted her out.

Stephen Russo, Director of Goddard Riverside Community Center, testified that he is familiar with 106-108 West 83rd Street because his organization pays rent and provides support services for some of the tenants in the building. Mr. Russo is also familiar with the current landlord (Tr. 127). On or about June 8, 2000, Galip Mamudoski appeared at Mr. Russo's office, and insisted on seeing Mr. Russo. Mr. Russo agreed to speak to him. "It was at that time that he said to me that he wanted my help in moving the tenants we supported out of the building" and asked Mr. Russo whether or not he "would cooperate with him in doing that because he had wanted to 'upgrade the building' - - convert the building to one and two-bedroom apartments" (Tr. 128).

In January 2001, Mr. Russo had another conversation with Galip Mamudoski, who threatened to cut off the lights in the building "because he said that we had not paid for a Con Ed bill and, you know, I said to him I didn't really know what he was talking about because I had no - - we had no bill" (Tr. 129). Mr. Russo asked Mr. Mamudoski to mail or fax the bill that he was referring to, but no bill was ever provided (Tr. 129).

On February 6, 2001, Ali and Galip Mamudoski interrupted a meeting that Mr. Russo was holding. Ali Mamudoski said to him, in a threatening tone "'Look, I've got a big investment in this building. I own 51 percent of this building. You are causing me to lose money in this building and you're not acting like a real professional businessman'" (Tr. 131). Mr. Mamudoski went on to complain that a workman had been forced to wait three hours to make a repair because the tenant would not move the furniture in the room. Mr. Russo asked why the workman could not have moved the furniture himself and was told "Look, work with me, work with me, work with me, cooperate with me, you're not acting very professional here. I have an investment to protect" (Tr. 131). According to Mr. Russo, the tone used by Mr. Mamudoski was very threatening, loud and thug-like (Tr. 132).

On February 9, 2001, Mr. Russo spoke to Michael Mamudoski by telephone after two staff members discovered that the locks on two rooms had been changed while the tenants were in the hospital (Tr. 133). During this telephone conversation, Michael Mamudoski said "Well, the tenant was away for two weeks so I thought he wasn't coming back and he was hospitalized" (Tr. 133).

In a telephone conversation with Ali Mamudoski on February 28, 2001, Mr. Mamudoski both implored Mr. Russo to help in moving the tenants out of 106-108 West 83rd Street, and said that he

was interested in making a contribution to Mr. Russo's organization (Tr. 134).

On March 2, 2001, Ali Mamudoski called Mr. Russo and "he was very, very hostile and very nasty over the phone and he basically said to me - - he said 'Look', he said 'Deep in my bones, I'm going to get your organization. You are causing me to lose money here', and he said that 'I'm going to f-kin' get you'" (Tr. 135).

When Mr. Russo would not cooperate with the landlord in moving tenants out of the building, his organization was evicted from the rooms that they had been paying rent on and using as offices from which to run their tenant programs since 1986 (Tr. 140; 141; Pet. Ex. 60).

On cross-examination, Mr. Russo testified that prior to the Mamudoskis becoming the landlords, 106-108 West 83rd Street was "not the best building in the world, but certainly a safe, clean building where we felt comfortable in paying rent and having people housed there" (Tr. 142).

Elizabeth Kane testified that she was the Project Director of the West Side SRO Law Project until February 1, 2001. In that capacity she was familiar with 106-108 West 83rd Street (Tr. 160). She spoke with the current landlords shortly after they sent notices to the tenants stating that late fees of \$25 would be assessed if rent was paid after the fifth of the month. Ms. Kane spoke to Ali Mamudoski about the notices and he informed her that "he was going to clear out the building" (Tr. 161). Mr. Mamudoski also told Ms. Kane that he was going to create one and two bedroom apartments in the building and that he did not believe that SRO tenants were covered by tenant protection laws (Tr. 161).

In November 1999, Joe Vereen, a tenant to whom the Division of Housing and Community Renewal had awarded \$30,000 in damages for rent overcharges, showed Ms. Kane a notice demanding over \$26,000. The notice came from Mr. Mamudoski. Ms. Kane called the Mamudoskis' office, and explained that although it was true that Mr. Vereen was not paying any rent, he did not owe any rent because of the rent overcharge judgement he had been awarded. Despite Ms. Kane's explanation of the history of the Vereen overcharges, and her provision of documents supporting the account she had given to the landlord, Mr. Vereen received another 3-day notice about a month later. She sent a letter in which she let the Mamudoskis know that a second three-day letter had been received and reminded them that there was no basis for a proceeding against Mr. Vereen (Tr. 167; Pet. Exs. 62, 63).

Nevertheless, the landlord went ahead and filed a non-payment proceeding against Mr. Vereen, which Ms. Kane's office assisted Mr. Vereen in defending, and which was ultimately dismissed in January, 2000 (Tr. 168-169; Pet. Exs. 64, 65, 66, 67).

Ms. Kane also testified about a shut off notice posted in the building by Con Edison in March 2000. A member of her staff spoke to Mr. Mamudoski on March 31, 2000, and was told that the bill would be paid. However, as the April, 2000 deadline for payment announced in the notice approached, Ms. Kane called Con Edison to confirm that the bill had been paid, only to learn that it had not been paid and that \$2,100 was due on the buildings (Tr. 171-172; Pet. Ex. 68). Ms. Kane was also informed by Con Edison that the new owners had never registered with Con Edison to set up a new account. Ms.

Kane wrote to the Mamudoskis to inform them that the bill was still outstanding and that the tenants would be forced to pay the bill themselves, as they are allowed to do under the law, and that it would be deducted from their rent (Tr. 173; Pet. Exs. 69, 70, 71, 72).

According to Ms. Kane, from the time that the shut off notice was posted, until the bill was paid, the tenants communicated to her their concern that they would lose electricity and their feeling that they were being pushed out of the building (Tr. 177). Some of the tenants also communicated to her that they had been offered money to relocate, ranging from \$200 to \$2,000 (Tr. 178).

Bennett Henderson, a resident of 106 West 83rd Street, testified that after Galip Mamudoski became the landlord, Mr. Henderson was approached by the landlord's employee, whom he knows as Ronnie, and told that the building was being changed around and he should find a place to stay and take her offer (Tr. 184). After that, the landlord refused to accept Mr. Henderson's rent. "I was one month behind and I explained to his son that I would give him the other month....so that day - - it was the 20th of that month - - and I approached her with the rent and she said that they said they don't want it" (Tr. 185). He then received a little card in his mailbox stating that he should come down for non-payment of rent proceedings. When he arrived at court, the clerk asked him where the rest of the papers were, and told him that he had not been served properly (Tr. 185-186). The non-payment proceeding was still pending as of the date of Mr. Henderson's testimony, but the landlord continued to refuse to accept his rent (Tr. 186-188).

Mr. Henderson also testified that the landlord refused to make needed repairs to his room, including repairs to a leaky sink (Tr. 189).

On cross examination, Mr. Henderson testified that he never received a three-day demand for his rent; he was simply told that they would not take his rent (Tr. 192).

Terry Poe, a tenant organizer for the West Side SRO Law Project, has been involved in providing assistance to tenants of 106-108 West 83rd Street over the past 12 years. More recently, he has been an organizer in the building, in response to a number of eviction cases brought against tenants (Tr. 195).

On January 11, 2000, Mr. Poe met Bernard Cross, a tenant in Room No. 5J at 106 West 83rd Street. Mr. Cross told Mr. Poe that the fifth floor of his building was being demolished. Mr. Poe grabbed his camera and walked to the building with Mr. Cross, and took some pictures of the fifth floor, which was, in fact, being demolished (Tr. 196; Pet. Exs. 72, 73, 74A, 74B). As he was taking pictures, a worker doing the demolition told him that they were planning to tear down all the walls on the fifth floor and turn them into apartments (Tr. 197). Mr. Poe spoke with the superintendent, Ronnie, who told him that the landlord had permits for the demolition work at its offices (Tr. 198). About an hour later, Mr. Poe received a phone call from Galip Mamudoski telling Mr. Poe that he had gotten it all wrong; his insurance company had ordered the work that Mr. Poe saw, and that the walls had been demolished a long time ago (Tr. 198).

Mr. Poe had another conversation with the owner at the beginning of April 2000. That conversation concerned the Con Edison shutoff notices that the tenants had received (Tr. 198). The landlord said

that he knew about the notices and that he would take care of it. A couple of weeks later, the bills still had not been paid. When Mr. Poe asked Mr. Mamudoski about it, he was again told "Don't worry, the electricity will be taken care of" (Tr. 199). Then, Mr. Mamudoski went on to say "that it didn't much matter anyhow because he had an approved plan to renovate the building and by virtue of that fact, he had a right to take all of the tenants to court on holdovers and make them move out" (Tr. 199). Mr. Poe went to the Department of Buildings but was unable to find any record of approved plans or a permit for the fifth floor demolition (Tr. 199).

Petitioner offered a certified copy of a violation relating to the fifth floor that was issued after an inspection on January 25, 2000 (Tr. 208; Pet; Ex. 75).

Galip Mamudoski testified that he became the owner of 106-108 West 83rd Street in October 1999. Prior to acquiring the building, he inspected it, but was not aware of any HPD issued violations against it (Tr. 219). When he received a title report on the building, the title report showed five to six hundred violations (Tr. 220).

Mr. Mamudoski testified that he filed his application for a certificate of no harassment in May 2000 (Tr. 222).

According to Mr. Mamudoski, 106 West 83rd Street is almost empty at present and will soon be completely empty. "I got two tenants from Project Reachout is going to move out by end of the month. 108, Building 108, 108 I got eight apartments empty right now. I take all my tenant I fix the apartment completely, completely and I move my tenant from 106 is going to 108" (Tr. 232).

Mr. Mamudoski initially testified that he started to cure the hundreds of violations in the building in January 2000. Starting with the hallways, he painted, plastered, changed the linoleum, and repaired the windows (Tr. 240-242). He then stipulated to having made these repairs between October 2000 and January or February 2001, after the motion to compel repairs had been brought (Tr. 246).

Mr. Mamudoski denied that he ever offered anyone money to move out or that he or his son ever threatened anybody (Tr. 252-253). He also denied that he had any knowledge, prior to bringing non-payment proceedings against them in 1999, that tenants Joseph Vereen or Betty Holmfelt had won rent overcharge cases and were entitled to long term rent credits (Tr. 262, 265-269, 271-272).

On cross-examination, Mr. Mamudoski acknowledged that when he bought 106-108 West 83rd Street, he wanted to convert it into apartments and that he needed it to be empty to do that (Tr. 274). He also admitted that he owns other rent stabilized buildings and was aware that he needed to check what the legal rents were when he bought 106-108 West 83rd Street, but that he did not do so prior to bringing non-payment cases against tenants (Tr. 276).

Veronica Fernandez testified that she is the superintendent at 106-108 West 83rd Street, and has been superintendent since 1976. In addition to being employed by the Mamudoskis as superintendent, Ms. Fernandez lives in an apartment at the premises, rent-free (Tr. 291, 306).

According to Ms. Fernandez, the building was in very poor condition when the Mamudoskis bought

it. It had over 100 violations at the time (Tr. 291). She testified that Mr. Mamudoski "started doing them, getting them done" when he became the owner (Tr. 299).

With respect to curing the violations, they recovered all the staircases, put down new linoleum, repaired loose steps, plastered and painted the hallways, and painted both buildings. Once they started doing the repairs, the work was continuous until it was all done (Tr. 299-300). Ms. Fernandez could not recall exactly when the work was started, but recalled that it was after the application for a certificate of no harassment was filed.

Ms. Fernandez identified a copy of the DHCR overcharge finding and order with respect to the overcharge claim of Betty Holmfelt (Tr. 294; Pet. Ex. 76) in which Ms. Holmfelt was given credit for more than 80 months' (7+ years) worth of rent payments going forward from August 1997.

On cross-examination, Ms. Fernandez testified that she had a conversation with an HPD inspector about the level of cleanliness of the building on at least one occasion, but could not recall what she had said to him (Tr. 305).

She also acknowledged that when the Mamudoskis took over the building, she gave them all of the records that she had in the office. She was also aware, at the time that respondent brought its 1999 non-payment petition against Ms. Holmfelt, of the Holmfelt overcharge, and that Ms. Holmfelt's correct rent was \$208 not \$385 (Tr. 306-307). She told Mr. Mamudoski that Ms. Holmfelt had a DHCR award in her favor. However, Ms. Fernandez did not "have the papers to give him for her" (Tr. 307, 311) at the time he brought a non-payment petition dated November 22, 1999 (Pet. Ex. 77). He also knew the correct rent for Ms. Holmfelt was \$208 by the time he filed the application for a certificate of no harassment, which lists the correct Holmfelt rent as \$208.00 (Tr. 308). He also knew the correct rent and about her overcharge credit when he filed a second non-payment petition against Ms. Holmfelt in December 2001 (Tr. 309-310; Pet. Exs. 78, 79, 80).

Michael Stackiewicz, a tenant of 108 West 83rd Street, testified that he moved from 106 West 83rd Street into 108 recently. He had lived at 106 since about 1995 (Tr. 312-313). Mr. Mamudoski became the owner in October 1999. He has never harassed Mr. Stackiewicz, and has improved the buildings. Mr. Stackiewicz is not aware of any problems between the landlord and any tenant (Tr. 314).

On cross-examination, Mr. Stackiewicz acknowledged that he is in rental arrears at present of about \$1,100.00, equivalent to two months' worth of his SSI checks. He stated that he had told the superintendent that he would pay his rent once a missed SSI check was replaced (Tr. 315). He testified that the landlord had paid his moving expenses.

John Pora testified that he occupies room 46 in 108 West 83rd Street as a month-to-month tenant. He moved into 106 West 83rd Street in 1998, after his previous place burned down (Tr. 319).

Mr. Mamudoski "straightened the place out" (Tr. 318). Before, Mr. Pora could not get any repairs made. Now, Mr. Pora has a nice room and everything works (Tr. 318). In particular, the window and the sink in his room were fixed, at about the same time, approximately a year and a half ago (Tr.

320). He was in a different room on the fifth floor in building 106 before that, in which there was nothing wrong, but the super asked him to move to the building next door because she wanted to do something with the room. Mr. Pora did not care where he was, as long as he had a room, and so he moved. "She said move. I said yeah, all right, I don't care. As long as I got a room" (Tr. 321).

Mr. Pora further testified that the landlord is "a very nice gentleman because he treated me good" (Tr. 322).

On cross-examination, Mr. Pora testified that he had also moved rooms once within 106, at the request of the superintendent, who said "she wanted to do something with the room" (Tr. 323). He denied that the landlord had pressured him to testify, insisting that he is not the type of person who could be arm-twisted into doing something (Tr. 325). He then identified his signature on a document authorizing the West Side SRO Project to bring a Housing Preservation action in his name against the landlord to correct the terrible conditions in 108 West 83rd Street (Tr. 325-326; Pet. Ex. 81), and acknowledged that he had signed the authorization on his own volition, and had not been pressured into doing so (Tr. 326).

On redirect, Mr. Pora testified that he signed the authorization form without ever reading it and "would never have signed it if he knew that it authorized a lawsuit against the landlord" (Tr. 328). I found this explanation of a prior inconsistent statement by Mr. Pora, unconvincing.

Leroy Garner has been a tenant in room 4J at 106 West 83rd Street since 1972. He is going to move to 108 West 83rd Street, "as soon as they have a room ready for me" (Tr. 330). Prior to Mr. Mamudoski becoming the landlord, conditions in the building were not "too good" (Tr. 331). Now, the hallways have been painted, there is new linoleum, all the cabinets in his room have been painted white, and the bathrooms have been fixed (Tr. 331). "In fact, I don't want to move, he fixed it up so nice, but he say I got to move out and because they're going to do something to the building" (Tr. 331).

Mr. Garner, a man in his seventies who lives on veteran's benefits and social security, was asked on direct to describe respondent's reputation in the building. Mr. Garner testified "Well, like I said before, I very seldom see him. I never heard nothing about him. Nobody - - everybody want to stay, they don't want to move, but we all know we have to move" (Tr. 333).

Gregory Maxwell, a tenant of 108 since 1971, testified that he has seen Mr. Mamudoski come and go in the building recently, but never saw him there two years ago. Mr. Maxwell testified that conditions are fine under Mr. Mamudoski and were fine under the prior landlord also. "It's a good place to live. There's no difference really" (Tr. 335). "All repairs are done quickly and efficiently. No problem whatsoever" (Tr. 334).

Lamont Headley, supervising investigator for the investigation unit of the Housing Litigation Division of HPD, was called as a rebuttal witness by petitioner. Mr. Headley testified that he inspected 106-108 West 83rd Street in connection with respondents' application for a certificate of no harassment (Tr. 338). While at the premises, he spoke with the superintendent, Ms. Fernandez, to whom he said that the building was in need of repair and that the public hallways and bathrooms

were very dirty. When he asked her how many times a week the public areas were being cleaned, Ms. Fernandez told him that it had been reduced to once a week (Tr. 338).

Pursuant to §27-2093(a) of the Administrative Code, harassment is defined as:

any conduct by or on behalf of an owner of a single room occupancy multiple dwelling that includes:

- (1) the use or threatened use of force which causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit in such multiple dwelling to vacate such unit or to surrender or waive any rights in relation to such occupancy;
- (2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy;
- (3) the failure to comply with the provisions of subdivision c of section 27-2140 of article seven of subchapter five of this code which causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to waive any rights in relation to such occupancy; or
- (4) any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit or causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy including but not limited to removing the possessions of any occupant from the dwelling unit; removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

Lenz & Riecker CD-ROM 2001.

Section 27-2093(b) creates a presumption that:

any of the acts or omissions described in paragraphs one, two, three and four of subdivision a of this section which are committed at a single room occupancy multiple dwelling shall be presumed to be committed by or on behalf of the owner of such multiple dwelling and it shall be presumed that such acts or omissions were committed with the intent to cause a person lawfully entitled to occupancy of a dwelling unit in such multiple dwelling to vacate such unit or to surrender or waive a right in relation to such occupancy.

Lenz & Riecker CD-ROM 2001.

Thus, the initial issue in this proceeding is whether HPD has proven that a statutorily defined act of harassment under section 27-2093(a) occurred. If not, respondents' application for a Certificate of

No Harassment must be granted. On the other hand, if acts of harassment have been proven, a rebuttable presumption of intent applies, and the issue to be determined is whether or not respondents can rebut the presumption. *Dep't of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000).

I find that HPD has proven acts of harassment under both subdivisions (2) and (4) of section 27-2093(a). There is ample credible evidence in the record before me of harassment by the landlord during the inquiry period prior to the April 19, 2000 filing date, including failures to repair and provide cleaning services, institution of unlawful eviction proceedings, failure to provide electrical service and commencement of demolition without a permit.

The certified records of HPD's Division of Code Enforcement (Pet. Exs. 41A-D, 42A-D) establish that 106 West 83rd Street had 138 violations after an April 10, 2000 inspection date; 95 after an October 26, 2000 inspection, 116 after a December 4, 2000 inspection, and 126 after an inspection on January 9, 2001. 108 West 83rd Street had 137 violations as of the April 10, 2000 inspection, 141 after the October 26, 2000 inspection, 85 after the December 4, 2000 inspection, and 81 at the inspection on January 9, 2001. The records indicate an overdue status on most of the violations and false certifications of correction on some. The records also establish the failure to provide adequate cleaning services.

Submitted certified court records establish that the Mamudoskis did not undertake to repair longstanding violations in these buildings until forced to do so under threat of contempt, and that they were not corrected until well after April 2000.

Testimony from Ms. Kane and Mr. Poe concerning respondent's failure to pay the Con Edison bill for the buildings in March and April 2000, after Con Edison posted a shut off notice, was corroborated by documentary evidence showing that the bill was paid by the tenants to avoid termination of service, and establishes that the landlord engaged in a course of conduct intended to deprive the tenants of essential electrical service, in order to drive them out of the buildings.

Ms. Kane's testimony concerning the Vereen overcharge and non-payment petition matter was corroborated by documentary evidence of Ms. Kane's pre-petition communications to respondent about the status of the overcharge matter and by certified court records.

Respondent Galip Mamudoski's testimony concerning his lack of knowledge that non-payment proceedings he initiated against two tenants in late 1999, Joseph Vereen and Betty Holmfelt were without legal foundation, was contradicted by the testimony of his employee-witness, Veronica Fernandez. Ms. Fernandez testified that she was aware that these tenants had been awarded overcharge credits by DHCR, and that she so informed Mr. Mamudoski. I credit the testimony of Ms. Fernandez and Ms. Kane, that Mr. Mamudoski was aware of the overcharges, over his denial that he knew that the non-payment proceedings he initiated against these two tenants were without legal foundation at the time he brought them in late 1999.

Thus, I find that petitioner established that these two baseless non-payment proceedings, initiated prior to respondent's filing for a certificate of no harassment, were brought in bad faith, for the

purpose of getting these tenants to leave the building.

The testimony of tenants who testified on behalf of petitioner, to the effect that the landlord was trying to force them out of the building, although hearsay, was corroborated by tenant witnesses presented by respondents, who testified that they had been told by the landlord that they had to move, whether or not they wanted to move. I credit their testimony that such conduct occurred, over Mr. Mamudoski's denials that he or his son engaged in such conduct.

Mr. Poe's testimony concerning illegal demolition on the fifth floor of 106 West 83rd Street in January 2000, is corroborated by the violation summary report showing that a notice of violation was issued on February 14, 2000, indicating that demolition had been done illegally, without filing plans or obtaining a certificate of occupancy to legalize the alterations. I find that such unauthorized demolition did take place within the inquiry period (Pet. Exs. 42C, 75).

HPD's rebuttal witness, Inspector Lamont Headley, credibly testified that he was informed by the superintendent, Veronica Fernandez, that cleaning service had been cut by the Mamudoskis after they took over the buildings. As between Ms. Fernandez's inability to recall making such a statement against the economic interests of her employer and landlord, and Mr. Headley's clear recollection of the statement, I credit Mr. Headley's testimony, and find that essential cleaning services were cut by respondents within the inquiry period.

There is also evidence in the record before me that the owners continued to engage in acts of harassment after April 19, 2000, in what amounts to a campaign to clear tenants out of 106-108 West 83rd Street. Although the Code provision speaks of the three years preceding the date of application, HPD asserts that events between the date of application and the hearing must be considered. It cites to the Commissioner's authority under section 27-2093(f) of the Administrative Code, to look at such matters after a certificate is issued and to suspend and rescind a certificate, as authority for its position. Respondent argues that such evidence, particularly the court findings of intentional lockouts of tenants, documented in various certified court records submitted by petitioner, should not be considered in this proceeding, because they occurred after the date of filing for a certificate of no harassment. Respondent offered no legal authority for its position that prior adjudicated lockouts could not be viewed as intentional acts of harassment under § 27-2093 of the Administrative Code.

I find that the acts of pre-filing harassment proved here are sufficient to justify denial of the application for a certificate of no harassment. Thus, I need not rely on the post-filing conduct to resolve this case. However, I find that the credible evidence of post-filing conduct in the record before me, including the Barnard, Robinson and Collier lockouts, further undercuts the credibility of respondents' claims of lack of intent to harass with respect to the pre-filing acts of harassment.

Moreover, I note that both section 27-2093(f) of the Administrative Code and the declaration of legislative findings and intent of Local Law 19 of 1983, supports the inclusion of post-filing, pre-certification acts, in order to "discourage such unlawful practices by prohibiting the owners of such buildings from profiting from their unlawful acts and practices by denying such owners the building permits necessary to demolish or convert these buildings to more profitable uses where such owners have engaged in harassment". Local Law 19 of 1983, § 1. Not to consider such post-filing conduct

would allow landlords, who were so inclined, to file for the Certificate of No Harassment and then commence a campaign of harassment against their tenants, which is exactly the conduct the legislation is intended to prevent.

In sum, I find that petitioner has sustained its burden of proving acts of harassment with the inquiry period and that respondent failed to rebut the statutory inference of intent. Therefore, I recommend that the application for a Certificate of No Harassment be denied.

P R E S E N T : SUZANNE P. CHRISTEN, *Administrative Law Judge*

T O : JERILYN PERINE, *Commissioner, Department of Housing Preservation and Development*

A P P E A R A N C E S :

RONALD SMITH, *Attorney for Petitioner*

SORRENTINO, THOMAS and SORRENTINO, *Attorneys for Respondent*, By: DOMINICK SORRENTINO

HPD v. Mendoza, OATH Index No.: 556/05 (Feb. 17, 2005)

***Dep't of Housing Preservation
and Development v. Mendoza***
OATH Index No. 556/05 (Feb. 17, 2005)

The Department proved that the respondent committed harassment within the meaning of section 27-2093 of the Administrative Code by filing a holdover proceeding against a month-to-month tenant who should have had a rent stabilization lease. Therefore the respondent's application for a certificate of no harassment should be denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**
Petitioner
- against -
FRED MENDOZA
Respondent

REPORT AND RECOMMENDATION

CHARLES R. FRASER, *Administrative Law Judge*

This proceeding was commenced by the Department of Housing Preservation and Development pursuant to section 27-2093 of the Administrative Code, and was referred to me pursuant to section 10-06 of the Department's rules (title 28, RCNY). The respondent, Fred Mendoza, is the owner of the building at 222 Beach 119th Street, Queens. The Department alleges that Mr. Mendoza committed acts of harassment against tenants in that building, and that therefore his application for a certificate of no harassment pursuant to section 27-198 of the Administrative Code should be denied.

Following trial before me on January 31, 2005, I conclude that the Department proved one of the allegations of harassment, and therefore I recommend that Mr. Mendoza's application for a certificate of no harassment be denied.

ANALYSIS

It was undisputed that the building at 222 Beach 119th Street is a single room occupancy building, and that the building's legal occupancy is for ten residential units: one class A apartment and nine SRO units. When Mr. Mendoza bought the building in 1997, it had already been converted to three class A apartments. The conversion was done illegally, without required approvals from either the Department of Buildings or the Department of Housing Preservation and Development.

The record indicates that Mr. Mendoza knew of the buildings's illegal status early in his ownership of the building, if not before he bought it, and he initiated the process to "legalize" the building - that is, to obtain the requisite approvals for the previous owner's conversion to a three-family house. He retained an architect to draft plans for the Department of Buildings, and he ultimately applied on February 19, 2004, to the Department of Housing Preservation and Development for a certificate of no harassment. That application triggered this proceeding.

The Department alleged in its petition that Mr. Mendoza committed harassment by failing to provide adequate heat, failing to repair a clogged toilet promptly, failing to provide water to the building's sprinkler system, performing illegal construction in the building, and bringing a non-payment proceeding against a tenant "with the intent to have tenant surrender her tenancy" (Petition, ¶ 9; *see also* opening statement: Tr. 5 - 6).¹

The Department relied primarily on the testimony of a former tenant of the building, Flora Onello. Ms. Onello took tenancy in the building in March 2003, without a lease, at a rental of \$750 per month. At some point she lost her job and was no longer able to pay the rent. Then, in early November 2003, she was hospitalized, returning home on December 24, 2003. Mr. Mendoza served pre-litigation notice on Ms. Onello during November 2003, followed by a holdover petition in early January 2004. Ms. Onello represented herself in the holdover proceeding, which the parties settled by so-ordered stipulation dated March 29, 2004.

By that stipulation, Ms. Onello agreed to pay most of her back rent and vacate the building by May 30, 2004, and Mr. Mendoza agreed to waive the remainder of her back rent provided that she vacated timely. That stipulation was subsequently amended by another stipulation dated May

¹ The petition also alleged that Mr. Mendoza made threats of force against tenants. The Department did not argue that allegation at trial, and in any event no evidence was offered to support it.

18, 2004, by which the vacate date was extended one day, to May 31, 2004. Ms. Onello ultimately vacated at the end of July 2004.

Ms. Onello testified that, during the winter of 2003 - 04, her apartment was "freezing cold" (Tr. 8). She testified that the cold was so bad that she sent her teenage daughter to live with a friend, and that the temperature was "below zero" (*id.*). Mr. Mendoza testified that Ms. Onello did complain about the heat from time to time, but that when he went to her apartment with a thermometer, the temperature was always above 69 degrees, which he said is the legally mandated minimum (*see* Admin. Code §27-2029(a)(1) - minimum required temperature is 68 degrees).

Ms. Onello's testimony was problematic in several fundamental respects. For instance, Mr. Mendoza testified without contradiction that the entire building was heated by a single boiler, yet Ms. Onello was the only tenant who complained about the heat. Furthermore, the first of Ms. Onello's recorded heat complaints came shortly after she received the first notices that led to her eviction, thereby giving rise to some skepticism about her motives in making the complaints. Ms. Onello's first recorded complaint was made on December 6, 2003, right in the middle of her six-week hospitalization. Although Ms. Onello testified at one point that she sent her daughter to live with a friend because of the lack of heat, at another point she suggested that she moved her daughter because of her hospitalization. In any event, Ms. Onello did not refer to any other person living in her apartment while she and her daughter were away, and therefore the heat complaints during that time seem questionable.

Moreover, Ms. Onello testified about the heat problem in terms so exaggerated as to be inherently implausible. Her claim that the temperature was "below zero" was incredible on its face, since the outdoor weather in New York very rarely goes below zero, and in any event a temperature that cold would be expected to result in burst plumbing pipes and other serious problems that were not indicated on the record here.

In short, I find Mr. Mendoza's testimony to be the more credible, and I therefore conclude that Mr. Mendoza did not deny heat to Ms. Onello.

Similarly, I conclude that Mr. Mendoza did not delay plumbing repairs for Ms. Onello. Ms. Onello testified that, when she came home from the hospital on December 24, 2003, she found a "major flood" of water and feces in her bathroom (Tr. 10). She called Mr. Mendoza but was unable to reach him for more than a week because he was on vacation. Ms. Onello testified that she ultimately had a friend come and repair the toilet by "snak[ing] it out" (Tr. 11).

Mr. Mendoza testified that Ms. Onello called him one night about the leak, and that he went to her apartment the next day but the leak had already been fixed. He argued that Ms. Onello's description of the "flood" was exaggerated, because such a large spill of water would have leaked to the floors below, but in fact no such leaks were reported. I credited Mr. Mendoza's account over Ms. Onello's.

The record reflects a Department inspector's finding on August 16, 2002, that the building had "no water supply to sprinkler system" (Pet. Ex. 5, p. 15). I nonetheless conclude that the matter was not proved to amount to harassment, for two reasons. First, as the Department conceded in closing arguments, there was no indication that the problem lasted longer than a single day or constituted more than an isolated and brief maintenance and repair problem. Second, although a sprinkler system is presumably an essential service within the meaning of section 27-2093(a)(2) of the Administrative Code, there is no basis to conclude that the water supply problem "interfere[d] with or disturb[ed] or [was] intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit," or that the problem "cause[d] or [was] intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy."

Next, I conclude that the Department failed to prove that any construction work was performed during Mr. Mendoza's ownership of the building. The Department conceded as much during closing arguments, and, in any event, I credited Mr. Mendoza's testimony that the construction work by which the building's SRO units were illegally converted had been done before he bought the building in 1998.

Finally, the Department alleged that Mr. Mendoza committed harassment against Ms. Onello by prosecuting a non-payment proceeding against her.

We have held that prosecution of a "frivolous" eviction action constitutes harassment pursuant to section 27-2093(a)(4) of the Administrative Code. *Dep't of Housing Preservation and Development v. Nesbitt*, OATH Index No. 1505/04 (Nov. 4, 2004); *Dep't of Housing Preservation and Development v. Mamudoski*, OATH Index No. 771/01, at 18 (Feb. 21, 2002) (non-payment proceeding brought "without legal foundation" constituted harassment); *see also Dep't of Housing Preservation and Development v. Greaux*, OATH Index No. 1457/02, at 18 (Aug. 30, 2002)

(owner's wrongful statement to tenant that she had the right to evict tenant constituted harassment). Presumably, prosecution of a well-founded eviction proceeding would not constitute harassment - in other words, if the owner is entitled to a judgement of possession - and, stated conversely, if the tenant is not entitled to remain in possession - then the eviction action neither causes nor is intended to cause the tenant to give up any rights.

Although Ms. Onello, who appeared *pro se* in the eviction proceedings, clearly believed that the proceeding was for non-payment of rent, the court papers show that the proceeding was a holdover proceeding, not a non-payment proceeding (Resp. Ex. G). The theory of the holdover petition was that Ms. Onello was a month-to-month tenant without a lease, and therefore she could be evicted without cause such as non-payment. Mr. Mendoza testified that he wanted to get Ms. Onello out of the building in order to "sell the unit" (Tr. 47), although he presumably meant to refer to sale of the building. He did not specify why removing Ms. Onello would assist in such a sale, but her failure to pay rent is one obvious possibility. Mr. Mendoza did not indicate that he had identified a buyer, and therefore it does not appear that any such buyer had asked that Ms. Onello's unit be vacant. Nor is there any indication that Mr. Mendoza was seeking to vacate the other units.

The Department argued that the building was legally subject to rent regulation, such that Ms. Onello was entitled to a lease. Therefore, the Department contended, Mr. Mendoza's successful holdover proceeding deprived Ms. Onello of the right to the continued occupancy that she should have had if she had been given a lease. Mr. Mendoza pointed out that the building in fact is a three-unit dwelling, and therefore he contended his tenants are not eligible for rent regulation and are not entitled thereby to leases.

The Department's position appears to be the correct one. The legal status of the building is a ten-unit residential building, and, absent authority indicating otherwise, I assume that the legal status of the building controls for purposes of the applicability of rent regulation. If so, then the Rent Stabilization Act governs, *see* Unconsolidated Laws, chapter 249-B, § 5(a), and Ms. Onello was entitled to a lease. During her lease, Ms. Onello would not have been subject to holdover proceedings. Therefore, the holdover proceedings were improperly based, and constituted harassment pursuant to section 27-2093(a)(4) as construed by the cases cited above.

In addition to this reasoning by the Department, there is another reason that Mr. Mendoza's holdover proceeding constituted harassment. Mr. Mendoza's holdover proceeding included a claim for \$3,000 in back rent (Resp. Ex. G, p. 3). But, because Ms. Onello was living in an illegally converted unit, Mr. Mendoza was not entitled to collect rent from her.

Section 301 of the Multiple Dwelling Law prohibits occupancy of a multiple dwelling before issuance of a required certificate of occupancy. Unless and until the appropriate certificate of occupancy is issued legalizing the conversion of the nine SRO units to class A apartments, occupancy other than as SRO units violates section 301. Moreover, section 302(b) of the Multiple Dwelling Law provides that an owner may not recover rent, and may not sue for non-payment of rent, from the residential occupant of a building or unit that is occupied in violation of section 301. For this reason also, I conclude that Mr. Mendoza's holdover proceeding against Ms. Onello caused her to forfeit rights - in this case, the right not to pay rent, or to be sued for rent, for her occupancy of an illegal residential unit.²

In coming to these conclusions, I did not rely on Ms. Onello's testimony that Mr. Mendoza refused to give her forms she required in order to obtain public assistance to cover her rent, or on the Department's argument that such refusal constituted harassment. I think it unlikely that Mr. Mendoza would have refused to help Ms. Onello obtain public assistance, since it was undisputed at trial that he provided her with required documentation by which she obtained two months' rent from Catholic Charities. Mr. Mendoza, who believed he was entitled to evict Ms. Onello at any time as a holdover, had no reason to deliberately frustrate her ability to obtain the resources to pay Mr. Mendoza rental money that he undoubtedly wanted to receive.

Finally, although the petition alleged that Mr. Mendoza brought a non-payment proceeding, whereas in fact his proceeding was a holdover proceeding, it is appropriate to deem the petition to be amended to conform to the proof. Pleadings are intended to give fair notice, and it was clear at trial that Mr. Mendoza had fair notice that his prosecution of eviction proceedings, however denominated, was at issue. Under those circumstances, we have considered it appropriate to amend

² Mr. Mendoza did not argue that the disposition of the holdover proceeding should be given preclusive, collateral estoppel effect here. In any event, the Department was not a party to that proceeding and therefore presumably cannot be bound by the disposition of that proceeding.

the petition, even *sua sponte*. E.g., *Dep't of Parks and Recreation v. Nappa*, OATH Index No. 306/00 (Jan. 25, 2000), *modified on other grounds*, Comm'r Dec. (Feb. 9, 2000) (petition alleged that respondent was under the influence of controlled substance while on duty; proof established that respondent had ingested cocaine at some point, but not necessarily during work time); *Health and Hospitals Corp. (North Central Bronx Hospital) v. Cross*, OATH Index No. 315/97 (Jan. 27, 1997) (petition alleged misconduct on September 23, 1995; proof showed misconduct occurred on September 3, 1995).

FINDINGS AND CONCLUSIONS

1. The Department failed to prove that Mr. Mendoza committed harassment by denying Ms. Onello heat, by failing promptly to repair a clogged toilet, by failing to provide a water supply to the building's sprinklers, or by performing illegal construction work in the building.
2. The Department proved that Mr. Mendoza committed harassment within the meaning of section 27-2093(a)(4) of the Administrative Code by filing and improperly prosecuting a holdover proceeding against Ms. Onello, and by improperly including a claim for unpaid rent in that proceeding.

RECOMMENDATION

The applicable statute and rules provide a single remedy for harassment. Therefore, I recommend that Mr. Mendoza's application for a certificate of no harassment be denied.



CHARLES R. FRASER
Administrative Law Judge

February 17, 2005

SUBMITTED TO:

SHAUN DONOVAN
Commissioner

PHILLIS LU SIMPSON, ESQ.
Attorney for the Petitioner

LUIS F. ECHEVERRIA, ESQ.
Attorney for the Respondent

HPD v. Pedersen, OATH Index No. 1093/08 (Aug. 22, 2008)

Dep't of Housing Preservation & Development v. Pedersen

OATH Index No. 1093/08 (Aug. 22, 2008)

Department proved that owner harassed SRO tenants within the meaning of section 27-2093 of the Administrative Code by depriving occupants of access to the community bathroom, failing to provide adequate heat, failing to make necessary repairs to the public stairways, engaging in threats and intimidation, and filing frivolous lawsuits against a lawful occupant. Owner's application for a certificate of no harassment should be denied.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
- against -
ENOK PEDERSEN
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This is a proceeding commenced by the Department of Housing Preservation and Development ("HPD") as petitioner, pursuant to Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2008). The Department referred this matter pursuant to title 28, section 10-06 of the Rules of the City of New York ("RCNY") (Lexis 2008). Respondent Enok Pedersen is the owner of the premises 21-17 45th Avenue, in Queens, New York. Petitioner alleges that respondent committed acts of harassment against the building's tenants and seeks denial of respondent's application for a certificate of no harassment pursuant to section 27-198 of the Administrative Code.

Trial was held before me on July 9, 2008. Petitioner presented the testimony of two witnesses, an HPD investigator and the complaining tenant. Respondent rested without calling witnesses or submitting documentary evidence. For the reasons set forth below, I find that the certificate of no harassment should be denied.

ANALYSIS

On January 12, 2007, Mr. Pedersen filed with HPD an application for a Certificate of No Harassment ("CONH") in furtherance of his intention to renovate the basement into a garden apartment and to change the first floor designation on the certificate of occupancy from four rooms to one Class A apartment (Pet. Ex. 4, at ¶9). He told an HPD investigator that his eventual goal was to reconfigure the building into a single family dwelling for his three daughters (Tr. 80). Before issuing a CONH, the Department must certify that there has been no harassment of the lawful occupants of the premises within the 36 months preceding respondent's application, an inquiry period that commenced on January 12, 2004. Admin. Code § 27-2093(c) (Lexis 2008). On November 9, 2007, HPD made a finding that there was reasonable cause to believe that harassment of the lawful occupants did occur at the premises during the three-year inquiry period (Pet. Ex. 11).

HPD's petition specifically alleges that the following acts and omissions constitute the owner's harassment during that period:

1. failure to provide access to the second floor community bathroom,
2. failure to replace a missing radiator in unit 8,
3. failure to make necessary repairs to the public stairways,
4. failure to consistently provide an adequate water supply to unit 8,
5. permitting conduct intended to interfere with a lawful tenant's right to use and occupancy of a dwelling unit including but not limited to verbal harassment, verbal threats, and intimidation, and
6. generally interrupting, discontinuing and decreasing essential services.

(ALJ Ex. 1).¹

Under the SRO anti-harassment statute, "harassment" is defined as conduct by or on behalf of an owner of an SRO multiple dwelling that includes among other things:

- (1) the use or threatened use of force which causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit . . . to

¹ Petitioner elicited testimony about conditions alleged as harassment that were not set forth in the petition and gave no reason why they were not timely set forth therein. Such allegations are not considered here due to the lack of adequate notice. See *Murray v. Murphy*, 24 N.Y.2d 150, 157, 299 N.Y.S.2d 175, 181 (1969) ("no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged"); *Dep't of Housing Pres. & Development v. Scharf*, OATH Index No. 2062/07, at 35 (Mar. 31, 2008) (ALJ rejects petitioner's attempt made in closing memorandum to add allegations that respondent harassed SRO tenants by use of premises as hotel for transient tourists, where that allegation had not been made in the petition).

vacate such unit or to surrender or waive any rights in relation to such occupancy;

- (2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy; [or]
- (3) the failure to comply with the provisions of section 27-2140(c) of this code which causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to waive any rights in relation to such occupancy.

Admin. Code § 27-2093(a) (Lexis 2008).

Subsection "b" of section 27-2093 of the Administrative Code creates a presumption that any statutory act or omission defined in section 27-2093(a) was committed with the intent to cause a legal occupant to vacate the unit or to surrender occupancy or waive a right in relation thereto. An owner may rebut the presumption by a preponderance of credible evidence. *See Dep't of Housing Preservation & Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000). Here, respondent failed to put on any proof to rebut the presumption, despite petitioner's evidence of acts depriving the tenant of services.

Respondent has owned the building since 2000 (Pet. Ex. 5). According to the CONH application, Mr. Pedersen is the general partner of the deeded owner, Lyme Street LLC (Pet. Ex. 4). The building has 11 SRO units and one apartment. Zamir Shaikh, one of four current occupants, rents units 6 and 8 at a cost of \$766.56 per month. Also residing in the building at the time the CONH application was filed were John Al, the occupant of unit 10, Muyunda Mubebo, the occupant of unit 9, and Sarah Pedersen, respondent's daughter who occupies four rooms on the first floor (units 1-4) which have been combined into a single apartment and is awaiting a designation. Mubebo and Pedersen pay no monthly rent. The basement, which is designated a Class A apartment, was vacated in 2006 by the death of the occupant (Pet. Exs. 4 & 6).

Failure to provide access to second floor community bathroom

The complaining tenant, Mr. Shaikh, claims that he has been denied use of the second floor community bathroom. Mr. Shaikh occupies two of three SRO units on the second floor,

units 6 and 8 (Tr. 10). There is one community bathroom on the floor. He testified that, until recently, the bathroom had been locked and inaccessible to him since 2003 (Tr. 14-17). A violation, which remains open, was issued on November 25, 2002, for the locked community bathroom on the second floor (Pet. Ex. 2, at 7). Mr. Shaikh said the bathroom was sealed off after Mr. Pederson's daughter reported leaks into her apartment from the bathroom; after the repairs were made, the room was locked and inaccessible to him (Tr. 17-18, 20). When he complained to Mr. Pedersen about the bathroom, he was told to leave if he did not like it. He said that the bathroom was unsealed in February 2008, after this proceeding commenced.

Photographs taken by an HPD investigator in October 2007 show the bathroom door sealed shut by metal braces and a sign on it stating: "This bathroom is temporarily out of order. Please, use third floor bathroom" (Pet. Ex. 12). Mr. Shaikh testified that he also was prevented from using the third floor community bathroom by the occupant of unit 9, who he described as a violent man who physically accosted him whenever he tried to enter the bathroom (Tr. 21-31).

In 2004 and 2005, this tenant, along with friends with whom he often drank beer, scared and verbally and physically intimidated Mr. Shaikh using the third floor bathroom. He said this intimidation occurred more than 100 times. He was advised by a police officer to keep notes of these instances and said that he did so, though he did not offer them in evidence. He said he reported this conduct to the owner but he noted that the owner had visited the building with this tenant, which indicated that he knew about his conduct and was using him as a bully (Tr. 32). Mr. Shaikh said he would go to a store three or four blocks away to use the restroom, and he sometimes urinated into a water bottle in his room. Showering was particularly difficult for Mr. Shaikh who sometimes went to a friend's house or to a small office he uses in Connecticut (Tr. 34-35). He said he succeeded in using the bathroom when the man and his cohorts were not around, but his testimony suggested that the man was often there to torment him. It was unclear why the man was present so frequently and was rarely asleep, at work, or otherwise away from the building.

Mr. Shaikh testified, as he reported to the HPD investigator in 2007, that he developed a medical condition as a result of holding his urine for long periods of time but said he had not seen a doctor and he offered no proof of the condition (Pet. Ex. 8, at 6; Tr. 68-69).

Investigator Wycoff noted the locked second floor community bathroom during both his visits in March and October 2007 (Tr. 96-98). Mr. Shaikh told him that he had been using

bottles to urinate in to relieve himself when he could not make it to the corner deli (Tr. 99). Investigator Wycoff wrote in his report that in June 2007, when he asked why the second floor bathroom was locked, Mr. Pedersen told him that he boarded it up because Mr. Shaikh had allowed water to leak from the second floor bathroom into his daughter's first floor apartment (Pet. Ex. 8, at 1). Pedersen said that Shaikh was a problem tenant who disturbed everyone in the building and that the police had been called on one occasion when he had been belligerent toward guests at a party in the building.

Respondent offered no evidence to dispute petitioner's proof that Mr. Pedersen denied bathroom facilities to Mr. Shaikh. Obviously, Mr. Shaikh was not responsible for waterproofing the second floor community bathroom, thus Mr. Pedersen had no right to ban him from the bathroom because of its leaks. Petitioner established that by failing to provide bathroom facilities, which failure constitutes the discontinuance of an essential service, the owner committed a statutory act that creates a presumption that he intended to cause Mr. Shaikh to vacate the unit or to otherwise surrender his lawful occupancy. Failing to present any evidence to rebut that presumption, respondent is guilty of harassment under the statute. See *Dep't of Housing Pres. & Development v. Bonaparte*, OATH Index No. 930/05, at 16-17 (July 13, 2005) (defaulting respondent failed to rebut statutory presumption); *Dep't of Housing Pres. & Development v. Nesbitt*, OATH Index No. 1505/04 (Nov. 4, 2004) (harassment established where owner failed to testify or offer any evidence to rebut statutory presumption).

It is appropriate to consider the legal doctrine of adverse inference. Although respondent had the opportunity to answer and to contradict petitioner's evidence, he chose not to. Respondent's failure to testify "allow[s] the trier of fact to draw the strongest inference against him that the opposing evidence in the record permits." *Comm'r of Social Services v. De G.*, 59 N.Y.2d 137, 141, 463 N.Y.S.2d 761, 763 (1983); see also *Police Dep't v. Pedalino*, OATH Index No. 2693, at 6 (July 2, 2008) (adverse inference appropriate in civil administrative proceeding reviewing police seizure of vehicle). Although I do not find an adverse inference necessary to establish harassment in this civil administrative proceeding, I still draw such inference from respondent's refusal to testify and take the evidence presented in the light most favorable to petitioner, including all reasonable inferences to be drawn from such evidence.

Failure to replace the radiator in unit 8

Mr. Shaikh testified that he occupies unit 6 as his primary residence and uses unit 8 as a library, where he keeps his collection of books (Tr. 12). He testified that respondent removed the radiator from unit 6 in 2002 after he complained that it was shaking (Tr. 35-36).² He said the owner told him to call HPD to get a new one. The radiator was never replaced. Investigator Wycoff visited the unit on October 11, 2007 and verified the radiator's absence (Pet. Ex. 8, at 17). He introduced a photograph of Mr. Shaikh's unit that shows where his radiator had been located (Pet. Ex. 15). Also in the photograph is a pipe that runs vertically from the floor to ceiling which Mr. Shaikh said gets warm but does not heat the room (Tr. 37-39, 100, 102). Mr. Shaikh said he complained to 311 about the lack of heat when the unit got extremely cold in winter, seven or eight degrees Fahrenheit by his estimate (Tr. 69, 73). When Mr. Shaikh complained to the owner about the lack of heat, Mr. Pederson told him that he had the housing authorities "in his pocket" and that he should leave the building if he was unhappy with the conditions (Tr. 36). Investigator Wycoff confirmed that the pipe was not a proper source of heat and said there was little or no heat when he visited the building.

The evidence that the radiator was missing from Mr. Shaikh's room for the entire inquiry period and that there was no or very little heat was credible and unrebutted. Accordingly, the owner's discontinuance of heat, which is an essential service, constitutes harassment under the statute.

Failure to make necessary repairs to stairways

Mr. Shaikh testified that the stairs between the first and second floors and the stairs between the second and third floors are shaky and the balusters loose, thus creating a dangerous condition (Tr. 50-52; Pet. Ex. 17). Investigator Wycoff noted extensively his observations of the condition of the two sets of stairs and introduced photographs he took on October 11, 2007 (Pet. Exs. 20 & 21; Tr. 85). He noted that the floor boards in the stairs were rotting and the stairs had loose and missing balusters (Tr. 86-88). Wood planks had been attached to the stairs to support the rotting boards, which he noted was a typical temporary solution used during a renovation, but there was no renovation in progress. He said that he has seen buildings vacant from five to 15 years with similar rotting conditions (Tr. 89). He noted that the steps were wobbly, particularly

² The petition alleges unit 8, but the evidence indicated that unit 6 was deprived of heat.

where the balusters were missing or unsupported and that the loose balusters, which failed to secure the step to the rail, could fall over and injure building occupants (Tr. 93).

There were no violations issued, open or closed, for unstable or dangerous stairs. Investigator Wycoff said that, as an investigator, he was not authorized to issue violations, which are issued by Department inspectors (Tr. 105).

Nevertheless, the evidence established that the disrepair of the rotting stairs with loose and missing balusters, created a dangerous condition that constitutes harassment.

Failure to provide adequate water supply to unit 8

Petitioner presented no evidence of this claim. It should therefore be dismissed.

Verbal harassment, threats and intimidation

Mr. Shaikh testified that he received numerous threats of intimidation from the owner consisting of warnings to leave the building and threats that he would be forced out of the building. Mr. Shaikh said he was scared by these threats. Mr. Shaikh believed that the intimidation of the tenant in unit 9, who was also an employee of the owner, was a part of the owner's concerted efforts to get him to abandon his tenancy. He said he first met Mr. Pedersen in 2000 when he introduced himself as the new owner and told him he would have to move out of the building (Tr. 13-14). Mr. Pedersen visited a couple days later and repeated his instruction to move out and told Mr. Shaikh that he would pay him a "couple grand" for moving expenses. Investigator Wycoff confirmed that Mr. Shaikh told him that the owner had been asking him to leave the building since 2000 and that tenants in the building were preventing him from using the third floor bathroom and otherwise trying to make him leave (Tr. 99).

Mr. Shaikh reported that, at a party in 2005, Mrs. Pedersen was overheard telling a guest that she would rather burn down the house than allow "these people" in the building because they were coming into the country "to kill us," allegedly referring to Mr. Shaikh's ethnicity (Tr. 61). He said he overheard this statement from his window above the first floor where the party was located.

Mr. Shaikh testified that, in May 2007, the owner, accompanied by two employees, knocked on his door and offered him \$15,000 to leave the building (Tr. 58-59). Mr. Pedersen told him that he should be ashamed because he was subsidizing his rent. Investigator Wycoff confirmed this \$15,000 offer to get out of the building (Tr. 102). The owner's last buyout offer was in April 2008, when he came to Shaikh's room with one of his employees who appeared to

be a body guard (Tr. 60). Pedersen offered him \$40,000, laughed, and said he had "very big plans" for him. When Mr. Shaikh said that he would not be able to afford another apartment, Mr. Pedersen said he would force him out if he did not leave. The employee stood on the stairs giving the impression that he would not allow Shaikh to leave. Shaikh said he was afraid of Mr. Pedersen because he is a "rich guy" with attorneys, and he has no one but God.

Mr. Shaikh testified that the owner commenced three lawsuits in 2005 and 2006 which, he claimed, were frivolous and harassing and caused him to fear that he would be evicted and homeless (Tr. 53-54). In 2005, the owner sued him for nonpayment of \$4,000 in rent (Pet. Ex. 9). Mr. Shaikh said that respondent's attorneys asked him to enter into a settlement in which he would agree to vacate his unit in exchange for dropping the rent claim; after he refused, the owner voluntarily withdrew the case (Tr. 55-56). In February 2006, Mr. Shaikh was again sued in a holdover proceeding after receiving notice that his tenancy was being terminated because of his repeated refusals to execute a lease (Pet. Exs. 10 & 18). He learned from his Legal Aid attorney that he was not required to sign a lease (Tr. 57-58). The court dismissed the case after the owner failed to appear at trial. Nevertheless, two months later, Mr. Shaikh was served with another notice making the same claim (Pet. Ex. 19).

I credited Mr. Shaikh's testimony that he received numerous threats of intimidation from the owner consisting of warnings to leave the building, and I credited the evidence showing that the owner filed at least two lawsuits filed against Mr. Shaikh asserting frivolous and unsubstantiated claims against him. I find that petitioner proved by a preponderance of evidence that the owner made these threats of intimidation and filed these lawsuits in an effort to force Mr. Shaikh to relinquish his legal occupancy. In light of respondent's failure to rebut these claims, petitioner has sustained this claim of harassment. *See Dep't of Housing Pres. & Development v. Nesbitt*, OATH 1505/04, at 8-9 (claim of harassment sustained by owner's failure to rebut evidence that, among other things, she commenced frivolous lawsuits against a lawful occupant of the premises).

FINDINGS AND CONCLUSIONS

1. The Petitioner established that the owner intentionally interrupted and discontinued essential services to the lawful SRO occupants of the building by (i) depriving occupants of access to the second floor community bathroom, (ii) failing to

provide adequate heat to the occupant of unit 6, and (iii) failing to make necessary repairs to the public stairways.

2. Petitioner established that the owner was guilty of harassment for engaging in verbal threats and intimidation of a lawful occupant and by permitting others to do so.
3. Petitioner established that the owner initiated frivolous eviction proceedings against a lawful occupant, an act that constitutes harassment.
4. Respondent, who declined to testify and put on no direct evidence, failed to rebut the statutory presumption set forth in section 27-2093(b) that the foregoing acts and omissions were intended to cause the lawful tenants of the premises to vacate the premises or to surrender or waive their rights to occupy the premises.

RECOMMENDATION

I find that harassment occurred at the premises during the relevant inquiry period. Accordingly, a certificate of no harassment should be denied.

Tynia D. Richard
Administrative Law Judge

August 22, 2008

SUBMITTED TO:

SHAUN DONOVAN
Commissioner

APPEARANCES:

ANDREA HECHT, ESQ.
Attorney for Petitioner

LAMBERT & SHACKMAN, PLLC
Attorneys for Respondent
BY: THOMAS LAMBERT, ESQ.

HPD v. Serradilla, OATH Index No. 1802/01 (Jul. 18, 2001)

Department of Housing Preservation and Development v. Serradilla

OATH Index No. 1802/01 (July 18, 2001).

DONNA R. MERRIS, *Administrative Law Judge*

This is a proceeding brought by petitioner, the Department of Housing Preservation and Development, pursuant to Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment statute, seeking a finding that harassment occurred at the premises, 419 West 154th Street, New York, New York, during the inquiry period which commenced on October 16, 1997. *See* Administrative Code § 27-2093 (Lenz & Reicker CD-ROM 2000). The local law provides that an owner of an SRO building must obtain a Certificate of No Harassment from the Department of Housing Preservation and Development ("HPD") prior to obtaining an alteration permit from the Department of Buildings. On October 16, 2000, respondent Lisa Serradilla, the owner of a SRO building located at 419 West 154th Street, Manhattan, filed an application with HPD for a Certificate of No Harassment. By determination dated March 5, 2001, HPD found reasonable cause to believe that harassment occurred at the premises commencing on October 16, 1997, thereby necessitating a hearing on respondent's application. A hearing was held before me on May 8, 2001.

Pursuant to § 27-2093(a) of the Administrative Code, "harassment" is defined as conduct by or on behalf of an owner of a single room occupancy multiple dwelling that includes: "(1) the use or threatened use of force which causes or is intended to cause [a lawful tenant] to vacate his or her unit or to surrender or waive any rights therein; (2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of a dwelling unit in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to surrender or waive any rights in relation to such occupancy." Lenz & Reicker CD-ROM 2000.

Additionally, section 27-2093(b) creates a presumption against an owner of a single room occupancy multiple dwelling in that, whenever a statutory act or omission falling within the definition of harassment is proven, it "shall be presumed" that such acts or omission were "committed by or on behalf of the owner" of the multiple dwelling and "that such acts or omissions were committed with the intent to cause a person lawfully entitled to occupancy of [an SRO unit] to vacate such unit or to surrender or waive a right" in such lawful occupancy. Thus, a two-pronged analysis should be employed: first, did petitioner prove a statutorily defined act of harassment as stated in section 27-2093(a)? If not, respondent's application for a Certificate of No Harassment must be granted. However, if acts of harassment are proven, a rebuttable presumption of intent applies, and the issue to be determined is whether or not respondent is able to successfully rebut the presumption. *See Department of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00, report and recommendation at 2-3 (Dec. 7, 2000).

Petitioner alleges the following conditions of harassment. On February 4, 2000, HPD placed an Order to Repair/Vacate on the premises stating that the building was unfit for human habitation and citing the following conditions as a basis for the finding: no second means of egress from building due to a broken sprinkler; exposed electric wires in the walls and ceilings throughout the building; broken windows in the public halls on all floors of the building; defective wood floors in the public halls on all floors throughout the building; no heat throughout the building; no water supply throughout the building; collapsing walls and ceilings in the public halls throughout the building. As a result of the conditions cited, certain tenants were relocated from the building and, at some time during the inquiry period, emergency repairs were done in the building because of the owner/manager's failure to respond to the building conditions (ALJ Ex. 1).

At the hearing, petitioner presented one witness, Lamont Headley, an HPD investigator, and documents relating to the vacating of the premises and the alleged violations, in support of its harassment claim. Respondent testified in her own behalf and presented two other witnesses and documents to support her application.

ANALYSIS

The documents offered by petitioner established the conditions at the premises which led to the issuance of a vacate order on February 3, 2000. According to the order, the broken sprinkler system had blocked the second means of egress from the building, there were exposed electrical wires on all floors, broken windows throughout and defective wood floors on all stories, and certain walls and ceilings were collapsing. In addition, there was no heat nor any water supply in the building. The vacate order provided that, if the owner of the premises did not remove the conditions cited by February 4, 2000, the building would be vacated (Pet. Ex. 1). A summary report of Housing Maintenance Code violations dating from October 1, 1986 through May 13, 1999 lists a total of 105 violations that were unaddressed by the building owner. The violations included: broken window sashes; improper painting of walls and ceilings; accumulations of rubbish and refuse in the cellar; faulty bathroom appliances; inadequate heat supply; and, inadequate hot water supply (Pet. Ex. 3).

Finally, in a letter to the Department dated November 4, 2000, respondent stated that the premises remains vacant because it is currently uninhabitable (Pet. Ex. 2).

Thus, the condition of the building in February 2000 was uncontested. It is also uncontested that the conditions cited in the vacate order have not been removed either by any owner of the premises or by petitioner pursuant to the statute. *See* Administrative Code §§27-2125 and 27-2139 *et. seq.* (Lenz & Reicker CD-ROM 2000).

The Housing Maintenance Code requires the owner of a multiple dwelling to register with the Department of Housing Preservation and Development annually. According to Department documents, the last valid registration was filed on March 11, 1996 (Pet. Ex. 4) and the last valid registration date was March 28, 1996 (Pet. Ex. 3). *See* Administrative Code § 27-2097 (Lenz & Reicker CD-ROM 2000).

Lawful Occupants

While the vacate order has an attached listing of occupants to be relocated, whether or not the building was lawfully occupied by the named individuals is in contention. The names on the vacate order are: Leo Bond; Nathan (no last name); Ronnie Hatch; Tarig Abdus; William Webb; Benjamin Boylon; and, Wilbert Grimes (Pet. Ex. 1, pg. 2). At the hearing, Lamont Headley, a supervising investigator for the Department, testified that, during his investigation of the application for a certificate of no harassment, he visited the premises and found the building vacant. Mr. Headley did not recall the date of his visit to the building. When he reviewed the vacate order, Mr. Headley found the list of occupants and attempted to contact the individuals named. He was able to reach only one by telephone, Mr. Abdul Salam. According to Mr. Headley's testimony, Mr. Salam told him that he had lived in the building for ten years and that his rent was \$100 per week. Mr. Salam also told Mr. Headley that the "super" ran the building, collected the rents and paid the Con Edison bills. Mr. Salam told Mr. Headley that electric and gas services were cut off because the bills were not paid (Tr. 23-26).

On cross examination, Mr. Headley testified that he did not ask Mr. Salam if he paid the rent regularly or, for how long the rent was set at \$100 per week. In addition, Mr. Headley testified that Mr. Salam did not indicate that he had ever been threatened physically or verbally to leave the building, nor was Mr. Salam ever asked to move. According to Mr. Headley's testimony, the only issue he discussed with Mr. Salam was the loss of electric and gas service (Tr. 28). As to the named occupants on the vacate order, Mr. Headley testified that his attempts to contact them were unsuccessful. Mr. Salam did tell Mr. Headley that four or five other tenants had lived in the building (Tr. 30).

Mr. Bertel Kent, the individual known as the "super" of the premises, testified that he first moved into the building in 1987. Soon after Mr. Kent moved into the building, the owner, Ms. Ida Leid, suffered a stroke and was subsequently taken to the Greater Harlem Nursing Home. *See* Resp. Ex. D. As Mr. Kent was the building superintendent for Ms. Leid, he asked her to make him "caretaker" so that Mr. Kent could collect rents from the tenants and take care of the property (Tr. 61-62). Mr. Kent was given a power of attorney and attempted to collect rents and pay the maintenance and services bills. According to Mr. Kent's testimony, the occupants did not pay rents regularly and, when they did give him money, it would be in sums of \$25.00 or \$50.00 to help pay the Con Edison bills (Tr. 62-63). There were only four tenants in the building and it was Mr. Kent's understanding that the rent was \$50.00 per week. In order to pay the bills and do some maintenance work, Mr. Kent would borrow money from friends (Tr. 63).

It was Mr. Kent's contention that the occupants were all addicted to crack cocaine (Tr. 63). He observed the occupants in the lobby of the building engaging in what he believed to be illegal activity. Among other things, there was prostitution and he observed daily fights as well as the destruction of property within the building. About three years ago, one tenant assaulted Mr. Kent. He attempted to evict that tenant, but was unsuccessful. From 1987 until the time of the vacating of the building in 2000, Mr. Kent did not engage in any physical force or violent behavior in an attempt to coerce any tenant to leave the building (Tr. 64).

As to the named tenants, Mr. Kent testified that he knew Mr. Abdul Salam as a tenant who never paid rent regularly and that Mr. Kent never knew Mr. Salam to have a steady job. In addition, Mr. Kent observed Mr. Salam using drugs in the building. Mr. Leo Bond was a tenant who also did not regularly pay rent. Mr. Kent did not know of a person named Nathan as living in the building. Mr. Ronnie Hatch, according to Mr. Kent was a user of crack cocaine (Tr. 65-66). Mr. William Webb was not a tenant in the building, but was a friend of Mr. Wilbert Grimes. Mr. Grimes was observed by Mr. Kent using drugs in the building hallway and it was Mr. Grimes' room to which the drug traffic directed itself, according to Mr. Kent's testimony. Mr. Kent was not familiar with the name Benjamin Boylin and did not recognize it as anyone he ever knew in the building (Tr. 66). Thus, of the seven named occupants given to the Department at the time of the issuance of the vacate order, Mr. Kent could identify only four: Mr. Salam, Mr. Bond, Mr. Hatch and Mr. Grimes as tenants.

Mr. Kent testified also that the tenants threatened him and told him to leave the building. In addition, individuals in the building would continually break the locks on the rooms and the lock in the main entryway and destroyed portions of the interior of the building. Tenants would break windows and destroy the wood portions of the building and they would stuff the toilets with food and newspapers, actions which destroyed the plumbing (Tr. 68-69). The precipitating event which caused the issuance of the vacate order was, according to Mr. Kent, the main pipe of the sprinkler system broke and the water could not be turned off. The Fire Department was called, came into the building and shut off the main water valve. Mr. Kent was instructed to make repairs, but was unable to accomplish them. Inspectors from the HPD came to the building and Mr. Kent asked the Department to do the repairs. The Department declined because the building was in such poor condition. The vacate order was issued and Mr. Kent and the tenants who were there were removed. According to Mr. Kent's testimony, the men did not want to leave the building (Tr. 67- 68). Mr. Kent testified that there was, until such time as the sprinkler pipe broke, always heat in the building (Tr. 70).

At the hearing, there was testimony from Martin Smith, deputy director housing specialist for New York City Councilman Stanley Michaels. According to Mr. Smith, various neighbors of the building at issue have called Councilman Michaels' office to complain about the activity around the building and the general disrepair of it (Tr. 54). More particularly, one neighbor, Dennis Derrick, a member of the local Community Board, complained about the foot traffic in and out of the building at all hours of the night. Mr. Smith testified that he discussed the activity at the building with officers of the 30th Police Precinct as well (Tr. 56).

The definition of harassment in the Housing Maintenance Code provides, in all of its sections, that the conduct by an owner or by anyone on behalf of the owner must affect "any person lawfully entitled to occupancy of a dwelling unit." Administrative Code § 27-2093 (Lenz & Reicker CD- ROM 2000). Regulations promulgated by the Department governing the approval of alteration permits for single room occupancy multiple dwellings define a lawful occupant as, "an individual or family to whom a dwelling unit has been rented by the owner or his agent and who has been in occupancy for more than 30 days or who has entered into a lease with respect to such dwelling unit." *See* 28 RCNY § 10-02 (Lenz & Reicker CD-ROM 2000). *See also* Administrative Code § 27-2004 (a)(9).

Respondent argues that the occupants of the building were not lawful because of the evidence that they were engaging in illegal activities. While tenants may be evicted on the ground that the leased premises are used for illegal activity (*see* Real Property Actions and Proceedings Law § 715; Real Property Law § 231), the issue here is whether or not the occupancies were lawfully created in the first instance and whether the occupancy has been continuous for more than 30 days. While there is no evidence that any leases were in place at any time, the credible testimony of Mr. Kent established that Messrs. Bond, Hatch, Grimes and Salam had been occupants.

At the hearing, the parties stipulated that the material presented by the Department was for the purpose of establishing only that some individuals presented themselves for relocation; not for the purpose of establishing an existing lawful occupancy (Tr. 87). Thus, petitioner provided a copy of a document purported to be a New York State Tax check stub addressed to Leo Bond at 419 W. 154th Street, New York, NY, dated November 5, 1999, a document from Con Edison addressed to Wilbert Grims (*sic*) at 419 W. 154 Street for electric use from December 14, 1999 to January 14, 2000, a food stamp application listing Mr. Grimes' address as 419 West 154th Street, and, a Social Security Administration document addressed to Morgan Naylor at 419 W. 154th Street (Pet. Ex. 6). Mr. Kent testified that Mr. Naylor was an "old man on social security" who left on his own (Tr. 72). The Department offered no evidence as to any arrangement between the occupants and the owner in terms of the occupants' renting the space or the rent to be paid for the use of the space.

It can be inferred from Mr. Kent's testimony that Mr. Bond, Mr. Grimes and Mr. Salam were there for more than 30 days. Mr. Kent's testimony was that he understood the rents to be \$50.00 per week, however, the occupants' payments were sporadic at best and usually in increments of \$25.00 or an amount the occupant may have chosen to give him. However, the definition of lawful occupant does not require proof of regular payment of rent. It refers only to whether or not the owner or an agent of the owner agreed to rent an SRO unit to an individual and, if so, whether the individual has remained for 30 days. It cannot be contested that the four men named by Mr. Kent were tenants as that term is defined.

I find, therefore, that those occupants of the building, Messrs. Bond, Hatch, Grimes and Salam were lawfully entitled to their occupancy as defined in the Department regulations.

Ownership

Respondent, Lisa Serradilla, testified as to the acquisition of the building and her subsequent research of the building's history. In March 2000, Ms. Serradilla and her husband were looking for a property to purchase. While driving on 154th Street, they saw a large "For Sale" sign on the building designated 419 West 154th Street. Ms. Serradilla contacted the real estate agent listed on the sign and made an appointment to view the house. The agent, Randolph Evans, showed the property to Ms. Serradilla. As described above, Ms. Serradilla saw water damage to the interior walls, paint and plaster peeling and chipped, clearly, the water sprinkler pipe had been leaking, there were holes in the ceilings and floors, windows were boarded up, and the bathrooms were all filthy (Tr. 34-35). When she approached the second floor, a barbecue grill was standing on the landing. In the individual rooms, the walls were grease splattered and conditions were filthy. Generally, the building was in disrepair and strewn with debris (Tr. 35). The building was vacant

and Ms. Serradilla wanted to purchase the house for the purpose of living there with her husband and for having space to house her mother-in-law (Tr. 37). Ms. Serradilla closed on the purchase of the building on September 18, 2000 (Tr. 38).

Ms. Serradilla, during the pendency of closing on the property, had engaged an architect and contractor for purposes of renovation. Within a week of closing, the contractor informed Ms. Serradilla that, in order to get the required permits to do the renovation, she would have to obtain a certificate of no harassment (Tr. 39). In the course of making the application for the certificate, Ms. Serradilla discovered that the house was a class B multiple dwelling. She learned also that the house was purchased in 1942 by Adalia and Frank Lied and that Adalia Lied was the owner of the house until January 2000. The Lieds converted the uses in the building to a class A apartment and either seven or eight class B units. They installed a sprinkler system and registered the house with the Department of Housing and Community Renewal ("DHCR"). Over the years, Mrs. Lied continued to register the building, as required, and made rent increase requests, the last in 1986 (Tr. 40; Resp. Exs. B, C). Respondent's exhibit C indicates that a violation at the premises was waived and cleared on September 23, 1988 (Tr. 41). At the time of Ms. Serradilla's inquiry at DHCR, she was told that there was no record of registered units or tenants in 2000 (Tr. 42).

In discussions with individuals who live on the same block as the building in issue, Ms. Serradilla was told that the neighbors, in recent years, made continuous complaints to the police department concerning activity at the house and that petitions asking to close the building were circulated in the neighborhood. Ms. Serradilla learned that Mr. Kent had been designated caretaker of the house and attempted to locate him through the real estate agent from whom she purchased the property (Tr. 43). In her discussions with Mr. Kent and through her review of the code violations reports from HPD, Ms. Serradilla learned that the conditions in the house deteriorated over a period of ten or more years (Tr. 44). Prior to March 2000, Ms. Serradilla had never met Randolph Evans, the individual from whom she purchased the property (Tr. 46).

On cross examination, Ms. Serradilla testified that the water-logged plaster in the rooms on the first floor has been removed, but the room dividing studs remain in tact. In addition, much of the debris has been removed. On advice from the electrician, plumber and general contractor, it was Ms. Serradilla's testimony that, in order to make the building habitable, every wall must be opened up to install new water and heating pipes and all new electrical wiring (Tr. 48-49). During the course of the purchase, a title search revealed an outstanding tax bill of \$16,000.00. It was Ms. Serradilla's understanding that the seller was to pay that balance at the closing of the purchase. In addition, the title search revealed outstanding building violations. Ms. Serradilla agreed with the seller that they were purchasing the building, as is, with the understanding that she would have to repair the building to remove the violations (Tr. 50-51).

Allen Young, an attorney who represented the seller on the sale of the property to Ms. Serradilla, testified that the principals of the real estate corporation, the seller, are Randolph Evans and Bert Jefferson. Mr. Young, prior to March 2000, had never met Ms. Serradilla or her husband, Richard Noble. While Mr. Young never physically saw the building, it was his understanding that it was vacant at delivery to Ms. Serradilla (Tr. 76-77). It was Mr. Young's testimony that, as an experienced manager of residential property, the economics of the building were not viable. If

four occupants paid \$50.00 per week in rent regularly, the annual income of \$9,600.00 would not begin to cover the cost of operating the building. Mr. Young estimated that expenses would be as much as \$24,000.00 annually. According to Mr. Young's testimony, absent sufficient income, buildings fall into benign neglect because of the inability to make repairs on a regular basis (Tr. 78-79).

On cross examination, Mr. Young testified that he had represented the real estate corporation in its purchase of the building. Mr. Young believed the building was purchased "somewhere in the vicinity of 1999" (Tr. 80). Had he recorded the deed, it is Mr. Young's testimony that a registration would also have been filed with DHCR because the deed could not otherwise have been recorded (Tr. 80). However, Mr. Young could not recall specifically filing any documents in relation to the purchase of the building by the real estate corporation (Tr. 81). Mr. Young could not testify as to whether the building was vacant when his client initially made the purchase (Tr. 82). At the closing which transferred the ownership to Ms. Serradilla, Mr. Young became aware that the building was vacant (Tr.83).

Petitioner argues that the real estate corporation, respondent's predecessor owner, engaged in activity which resulted in the issuance of the vacate order. It is petitioner's argument that the real estate corporation hid the fact of their ownership by failing to register the building and by failing to inform Mr. Kent, the caretaker, of their ownership (Tr. 94). As the building was not sustainable when the real estate corporation purchased it, their only purpose was to then sell it to an unsuspecting buyer (Tr. 95). Pursuant to the Administrative Code, according to petitioner's argument, the failure of the real estate corporation to fix the building and cure the vacate order is an act of harassment (Tr. 95).

As an alternative defense, respondent argues that there was no showing of intent to harass the occupants as contemplated by the statute (Tr. 93).

The record before me clearly establishes that the owner, Ms. Leid and the subsequent caretaker Mr. Kent, did not engage in any conduct intended to harass the occupants of the building as that act is contemplated by the statute. There is no evidence of the use of force or threats directed at any of the occupants intended to cause the occupants to vacate the premises or waive any rights they may have had in their occupancy. Additionally, it cannot be concluded from the record before me that conduct during Ms. Leid's ownership intentionally caused the interruption or discontinuance of essential services with the intention of terminating the occupancy of the tenants. *See Department of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000). Indeed, it is the very credible testimony of Mr. Kent that, even on the day the vacate order was executed, he did not want to leave the building. The failure to maintain the habitability of the building from 1989 to February 2000 was not intentional; it was a tragic inability to cope with the circumstances following Ms. Leid's removal to a nursing home and Mr. Kent's inability to manage the occupants who, clearly, were not interested in the maintenance of the building. The credible evidence established that the contrary was true. The occupants were destructive and failed to make any regular rental payments, if indeed they made any rental payments.

It is the purchase and subsequent sale of the building by the real estate corporation and Mr. Evans that petitioner argues provides grounds for not issuing the Certificate of No Harassment. The ordinance provides that, if an owner fails "to comply with the provisions of subdivision c of section 27-2140 . . . which causes or is intended to cause such person lawfully entitled to occupancy of such dwelling unit to vacate such unit or to waive any rights in relation to such occupancy;" the failure constitutes an act of harassment. *See* Administrative Code § 27-2093(a)(3) (Lenz & Reicker CD- ROM 2000). Section 27-2140 articulates the effect of vacate orders and requires the owner to correct the conditions which have caused the vacate order to be issued within ten days. Administrative Code § 27-2140(c) (Lenz & Reicker CD-ROM 2000). Thus, it is petitioner's contention that the real estate corporation purchased the building prior to issuance of the vacate order, failed to remedy the hazardous conditions of the building before and after issuance of the vacate order and, thereby engaged in illegal harassment, which runs to the new owner.

The most credible testimony to evidence the real estate corporation's ownership is that of respondent to the effect that the deed from Ms. Leid to the real estate corporation may have been recorded in January 2000. Mr. Young's testimony that the corporation may have purchased the property sometime in 1999, while not particularly reliable because of his failure to remember whether or not the deed was recorded following the purchase, finds some corroboration in respondent's testimony that the deed showing the real estate corporation's ownership was recorded as of January 2000. Clearly, respondent purchased the property from the real estate corporation and, to respondent's knowledge, the corporation owned the property when she first viewed it in March 2000, only one month after the execution of the vacate order. I found respondent's testimony to be credible that the deed showing the corporation's ownership was recorded as of January 2000. Thus, a preponderance of the evidence militates in favor of a conclusion that the real estate corporation purchased the building from Ms. Leid prior to the issuance of the vacate order.

What is troubling here is that Mr. Kent had no knowledge of the sale of the building to the real estate corporation. The breaking of the sprinkler pipe which led to the issuance of the vacate order in February 2000 clearly occurred during the real estate corporation's ownership. Yet, Mr. Kent believed he had no recourse following the pipe break and that no funds were available to fix the pipe and restore the water supply and heat to the building. Had Mr. Kent known that the ownership of the building had been transferred to the real estate corporation, he would likely have contacted the corporation. Indeed, he would likely have made some arrangement with the corporation as to his own status as caretaker/super. The corporation did nothing during its tenure of ownership to either notify Mr. Kent and the other tenants or to remedy any of the conditions in the building.

Following the issuance of the vacate order, the corporation did nothing to repair the broken water pipe as required by the ordinance. This failure, in addition to the corporation's failure to notify Mr. Kent and the other tenants of its ownership and the marketing of the building immediately following the vacate order, leads only to the conclusion that the corporation had no interest other than resale of the property. While section 3 of the ordinance contains the rebuttable presumption of intent as to harassment that is present throughout the ordinance, there is no evidence before me that could lead to a conclusion that the real estate corporation had no intent to harass the

occupants of the building. Thus, the only logical conclusion to be drawn is that the real estate corporation's hiding of their ownership and ignoring the requirement to repair following the vacate order, were acts of harassment as contemplated by the ordinance.

I find, therefore, that harassment occurred during the stated inquiry period from October 1997 to October 2000. Pursuant to the ordinance, the Certificate of No Harassment may not be issued.

I acknowledge the difficulty this finding presents for this applicant. Unfortunately, the ordinance provides no alternative for a taker in due course who comes with clean hands as is the status of this respondent.

The facts in the instant proceeding present an unusual scenario and one of first impression before this tribunal. Clearly, the intention of the ordinance is to provide protection for tenants of single rooms in multiple dwellings from owners who would unlawfully cause those tenants to vacate and then develop the property for profit, thereby diminishing an already dwindling single room occupancy housing stock. The prior case before this tribunal involved a present owner who was an owner of long standing and a tenant of long standing currently in residence. *See Department of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000). In the instant proceeding, the evidence is clear that the building is currently uninhabitable and requires an extensive and expensive renovation. Moreover, there is no evidence before me that the prior tenants are awaiting a return to the building. While it is understood that the ordinance contemplates preservation of the multiple dwelling housing stock, consideration of the realities of the present situation, *e.g.*, an uninhabited, uninhabitable building with a current owner demonstrating a desire and ability to rehabilitate and return the property to productive use, albeit personal use, is worthy of contemplation here. Unfortunately, the ordinance makes no provision for the forging of a remedy other than the non-issuance of a certificate in these circumstances.

P R E S E N T: DONNA R. MERRIS, *Administrative Law Judge*

T O: JERILYN PERINE, *Commissioner*, Department of Housing Preservation and Development

A P P E A R A N C E S:

ELIZABETH BOLDEN AND RONALD SMITH, *Attorneys for Petitioner*

NATHAN BAROTZ, *Attorney for Respondent*

HPD v. Tauber, OATH Index No. 675/07 (May 16, 2007)

Dep't of Housing Preservation & Development v. Tauber

OATH Index No. 0675/07 (May 16, 2007)

Certificate of no harassment for single room occupancy building should be rescinded given evidence of harassment after issuance of certificate.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT**

Petitioner
- against -
LARRY TAUBER
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a proceeding commenced by petitioner, the Department of Housing Preservation and Development ("HPD"), pursuant to Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2006). Petitioner seeks to rescind a certificate of no harassment ("CONH") that was issued to respondent, Larry Tauber, for 246 West 21st Street, New York, New York ("the building") on January 13, 2004, but suspended on September 8, 2006. Petitioner seeks a finding that harassment occurred at the premises during the inquiry period, defined as March 20, 2004 to the date of the hearing.

Petitioner served respondent with a notice of suspension of the CONH on September 13, 2006, and filed a petition to revoke the CONH with this tribunal on September 25, 2006. On November 27, 2006, petitioner and respondent mutually scheduled a trial for January 24 and 25, 2007. Subsequently, respondent filed a motion to dismiss the matter based on petitioner's failure to hold a hearing within thirty days of issuing a notice to rescind. Administrative Law Judge Alessandra F. Zorgniotti issued a memorandum decision on December 18, 2006, denying the motion because respondent had consented to the delay in holding the trial. *Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07, mem. dec. (December 18, 2006). The matter was reassigned for trial.

A hearing was held before me on January 24, 2007, and continued on January 25, February 5, and February 13, 2007, at which time the record was closed. Petitioner presented the testimony of six witnesses, including one HPD employee and five tenants of the building. Respondent testified in his own behalf, and also presented the testimony of George Guzman, the building's superintendent. For the reasons set forth below, I find that harassment occurred at the premises during the inquiry period. I recommend the CONH be suspended.

ANALYSIS

Introduction

Under the Administrative Code, a CONH may be rescinded if the Commissioner finds that harassment occurred on the premises after the CONH was issued, and prior to commencement of substantial work pursuant to an alteration permit or demolition permit. Admin. Code § 27-2093(f) (1) (LEXIS 2006). Section 27-2093(a) of the Administrative Code defines harassment as follows:

any conduct by or on behalf of an owner of a [SRO] multiple dwelling that includes . . . the interruption or discontinuance of essential services, which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of any person lawfully . . . in use or occupancy of such dwelling unit and causes or is intended to cause such person . . . to vacate such unit or to surrender or waive any rights in relation to such occupancy . . . or any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit.

Admin. Code § 27-2093(a) (LEXIS 2006). Section 27-2093(b) of the Administrative Code creates a presumption that any statutory act defined in 27-2093(a) was committed with the intent to cause a legal tenant to vacate the unit. An owner may rebut the presumption by a preponderance of credible evidence. *Department of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00, at 2-3 (Dec. 7, 2000).

The building in question is a turn of the century building with five floors and 29 rooms in total. Each floor has a shower room and bathroom (Tr. 388). The building is owned by Chelsea Partners, LLC, of which respondent and his siblings, Michael Tauber and Florence Goldsmith,

and Florence's husband, Barry Goldsmith, are partners (Tr. 373).¹ Respondent has managed the building since June of 2000. He has been in the real estate business for over 30 years, and has owned SRO buildings in the past. He has received certificates of no harassment for several other buildings which he owns, including 150 West 76th Street and 252 West 21st Street. In May 2005, a "PC Filing Prefiling Checklist" and "Technical Report" was filed with the Department of Buildings seeking to increase the size of the building in question from four stories and a basement to six stories, with a recreation area on the roof, and to deepen the structure from 40 feet to 30 feet (Pet. Ex. 5, 20, 21).

Respondent acquired a CONH for the building on January 13, 2004 (Pet. Ex. 4). HPD alleges respondent committed 19 separate forms of harassment between March 19, 2004 and the present, as follows:

1. Failure to provide a superintendent at the premises
2. Failure to provide adequate cleaning services to the premises
3. Bringing frivolous lawsuits against tenants to get them to vacate the premises
4. Verbally abusing tenants by calling them derogatory names
5. Making substandard repairs
6. Failure to repair the intercom and buzzer system
7. Failure to dispose of garbage properly
8. Excavating without permits
9. Failure to repair leaks in the roof which have caused ceilings to collapse
10. Failure to respond to emergencies at the building, i.e. restoring circuit breakers
11. Failure to plaster and paint
12. Failure to repair a broken window frame
13. Failure to replace a light fixture
14. Failure to repair broken ceramic tile
15. Failure to refit the entrance door
16. Failure to exterminate for roaches
17. Failure to remove outstanding Housing Maintenance Code violations against the property
18. Failure to provide adequate lighting at the front entrance
19. Generally interrupting and/or discontinuing essential services without prior notice to tenants and making premises inhabitable and unsafe during construction

(Pet. Ex. 6).

Respondent denies all of petitioner's allegations, and maintains he did not harass the tenants. He claims that he made a good faith effort to fix various problems in the building, closing over 105 violations. Petitioner contends, however, that respondent essentially did too

¹ Additionally, although respondent testified that his father, Joshua Tauber, is not a partner of Chelsea Partners, Joshua Tauber was listed as a partner on the application for a CONH (Pet. Ex. 1).

little, too late, and that even if respondent made improvements to the premises, he did so only after the tenants sued him in Civil Court in 2005. Petitioner presented its case through a combination of tenant testimony, and documentary evidence as to the litigation and violation history.

The Litigation History

It is not disputed that on February 10, 2005, tenants, represented by the West Side SRO Project ("SRO Project"), filed an order to show cause in the Housing Part of Civil Court seeking an order requiring respondent to correct violations throughout the building (Pet. Exs. 12). Annexed thereto was a Building Summary Report showing 50 violations relating to tenant units and public areas of the building, including a leaking roof and a defective bulkhead door to the roof; defective entrance doors to individual rooms, bathrooms and showers; loose floor coverings; broken floor and ceiling tiles; walls and ceilings needing repair, plastering and painting; and inadequate lighting (Pet Ex 12). By consent order issued on March 8, 2005, Judge Gerald Lebovits found that the listed violations existed and were violations of the Housing Maintenance Code and Multiple Dwelling Law. The consent order gave respondent 30 days to cure violations in tenant units and 45 days to cure violations in common areas (Pet. Ex. 13). On March 25, 2005, respondent filed an order to show cause objecting to a provision of the March 8, 2005 order, making respondent responsible for moving the tenants' personal belongings while repairs were made in their rooms (Pet Ex. 14). On April 5, 2005, the parties entered into a stipulation of settlement providing access dates to tenants' rooms and resolving issues relating to moving the tenants' belongings while work was being done (Pet Ex. 15).

On July 26, 2005, the tenants filed a motion for contempt, alleging that respondent failed to meet his obligations under the March 8, 2005 consent order (Pet. Ex. 16). The contempt motion alleged, *inter alia*, that respondent failed to appear for almost all of the access dates set forth in the April 5, 2005 stipulation or otherwise arranged between the tenants and owner. Attached thereto was an HPD printout showing 99 violations to the building as of July 25, 2005 (Pet Ex. 16). A final stipulation of settlement was issued on November 28, 2005, which named 17 remaining violations to be addressed (Pet. Ex. 19). Those violations included inoperative intercoms in rooms 8, 14, 16, 23, 26 and 27; leaks from the roof into the ceiling of rooms 23 and 26; broken light switches and fixtures; leaks and needed repairs in the third and fourth floor

shower and toilet rooms; lack of a smoke detector and a blocked sprinkler head on the third floor. The stipulation also required respondent to repair numerous "alleged conditions" in tenant rooms and common areas.

The Housing Maintenance Violations

Petitioner presented violation reports illustrating the Housing Maintenance Code violations on the building. As indicated by Milagros Molina, Deputy Director of HPD's Enforcement Services Callback Unit, violations are classified as class A, class B, or class C, with class A viewed as the least serious and class C as the most serious. Class A violations must be corrected within 90 days, class B violations within 60 days, and class C violations within 30 days, with the exception of those class C violations which are considered "dire," such as heat or hot water violations, which must be corrected within 24 hours (Tr. 41-42).

The Closed Violations Report for the building indicates that 105 violations that were placed on the building beginning in January of 1977 have been closed. Approximately 90 of these violations were closed or dismissed during the inquiry period (Pet. Ex. 11). However, the violation history reveals that respondent closed the majority of these violations after August of 2005, following the filing of the tenants' July 26, 2005 contempt motion (Pet. Ex. 11). Respondent took several years to address certain violations, some of which were severe. Many of the violations closed in August of 2005 were certified as overdue, including a violation directing that the entrance door to the building be refit, issued in 1993, and a violation directing replacement of the bulkhead door to the roof, issued in 2002 (Pet. Exs. 11, 23). Overdue violations also included: broken shower tiles reported in 1999, and closed in 2006; an inoperative intercom, reported in 2002, and closed in 2005; violations requiring respondent to abate the nuisance of roaches and mice, issued in February of 2005, and closed in September of 2006 and August of 2005, respectively (Pet. Ex. 11).

Also closed in August of 2005, were violations regarding inoperative intercoms in rooms 16, 23 and 26, issued in February and June of 2005; lighting in the fourth floor hall, issued in August of 2004; painting of the walls and ceilings of the second floor public hall and fourth floor showers, issued in 2002; and inoperative faucets in the fourth floor shower room, issued in August of 2004. There were also several violations that were not closed until December of 2005, regarding fire retarding walls and ceilings in the second and third floor bathrooms and halls,

issued in March of 2005. Other violations were not closed until September of 2006, including: painting and plastering of the third floor public hall and bathroom, and the first floor shower room and bathroom, issued in 2002; fixing ceramic tiles in the second floor shower, issued in 1999 and again in 2002; abating painted-over sprinkler heads on the second and fourth floor halls, issued in September of 2005; and repairing windows in rooms 23, 26 and 27, issued in February of 2005.

There are 35 open violations named in the Violations Summary Report for the building (Pet. Ex. 10). Violations issued on July 10, 2006, direct respondent to repair the roof so that it will not leak over the fourth floor public hallway and over the ceiling in the "first room from north located at [apartment] PA, fourth story, first apartment from east at south" (Pet. Ex. 10). Additional violations issued on January 16, 2007, direct respondent to repair the roof and bulkhead as to prevent leaks in rooms 23 and 26, which are on the fourth floor of the building, as well as the public hall stairway on the fourth floor. Twelve painting and plastering violations also remain, dating from 2002, and including the walls and ceiling of rooms 16, 23 and 26, as well as the fourth floor and second floor bathrooms (Pet. Ex. 10).² Other open violations include a defective sprinkler head in room O, dating back to 1993; a painted-over sprinkler head in room 15, from 2002; torn floor vinyl throughout the building, broken floor tiles and ceramic floor, from 2002, 2005 and 2006, respectively; a defective intercom in room 15, from 2002; and failure to provide adequate lighting at the front entrance of the building, from 2004. There are also four violations for failing to refit entrance doors to individual units, bathrooms and bathtub compartments on all four stories, and the basement stairway to the cellar; the violations pertaining to the bathrooms, bathtub compartments, and basement stairway date to 1979 (Pet. Ex. 10).

The Tenant Testimony

Petitioner presented the testimony of five tenants. Each tenant testified to the conditions in their individual rooms. The tenants were consistent in testifying that the respondent was slow in making repairs and that the repairs were substandard. They asserted that little, if any, work was done to their rooms prior to the summer of 2005, although most acknowledged that substantial work was done in their rooms thereafter. A number of tenants stated that all the

² One of these violations dates to January 1982.

conditions were fixed, while others contended that problems still persisted in their rooms as of the hearing dates.

Lonnie Hill, the occupant of room 26 for the past 12 years, testified that in 2004, his room had a leak from the ceiling, and a broken window frame, intercom and light switch. Repairs were made to the window frame and the ceiling was plastered in the winter of 2005, and again in the summer of 2005. However, the repairs made to the window frame were inadequate: initially pieces of wood from construction debris were used to shore up the window frame; another repair on the window was made in the summer of 2005, which was slightly better, but there was still a rotted wood frame underneath (Tr. 49-50). Additionally, the ceiling had to be replastered and repainted because of continuing leaks (Tr. 49). Mr. Hill acknowledged that the light switch and intercom were repaired in the winter of 2005 (Tr. 50). He asserted that, currently, his deadbolt does not work, and the ceiling continues to leak (Tr. 55).

Mr. Hill also testified to conditions in the room occupied by his neighbor, Ernest Marks, who lives on the second floor of the building. However, it was unclear how many times he had been in Mr. Marks' room: he testified only that he observed Mr. Marks' room in 2004, and again a week prior to the hearing. In 2004, he saw paint and plaster peeling; the sprinkler head was painted over and the intercom did not work (Tr. 59, 60).

Mercedes Jativa, the occupant of room 8 for 14 years, testified that throughout 2004, the conditions in her room were "very bad" (Tr. 105). Paint and plaster were peeling, the window did not open and close properly, floor tiles were loose, the intercom was inoperative, and her faucet was leaking, as it had been prior to 2004 (Tr. 118, 122; Pet. Ex. 1). According to Ms. Jativa, prior to November of 2005, the superintendent had made inadequate attempts to fix her faucet. He had used old parts and the faucet would break again days after his attempts (Tr. 111, 126, 128). In November of 2005, her faucet, intercom and window were finally repaired (Tr. 111, 113).

Jorge De La Vega, the occupant of room 23 for 18 years, described the conditions in his room as "terrible" during 2004 (Tr. 186). The sink did not drain properly because of a clogged pipe, and the faucet was constantly dripping, sometimes gushing (Tr. 186). The ceiling was leaking, causing plaster to fall. "[Plaster] would fall on the bed, it would fall on me . . . it would be all over the floor" (Tr. 187). The radiator valve was broken, and the window was very old, had broken panes and was difficult to open and close (Tr. 186-187). Also, between July and

November of 2005, the door to his room was broken; it would get stuck and not open properly. Mr. De La Vega contended that he was robbed as a result of the faulty door (Tr. 192, 193).

According to Mr. De La Vega, before the tenants contacted the SRO Project, he asked respondent directly to make repairs. Respondent never came to his room, but the superintendent made several repairs that were inadequate. For example, the pipes were unclogged several times. The walls were plastered and the faucet was tightened. However, the walls began to peel soon after the plastering, because of leaks from the roof, and the faucet began leaking despite being tightened (Tr. 188, 193). Mr. De La Vega acknowledged that after the Civil Court proceedings began respondent made efforts to correct the problems in his room, but asserted that the repairs were "mediocre" in quality (Tr. 190). For example, three window panes were replaced and the window frame was puttied. Mr. De La Vega asserted that this was not sufficient, and that he needs a new window (Tr. 221, 222). Similarly, he contended that although the ceiling was replastered several times, plaster continued to fall down due to continuing leaks. He asserted that, as of January 2007, the faucets are dripping again, the ceiling is still "falling," and he needs a new window (Tr. 204-205). He also alleged that the owner said that his rent would be increased by forty percent if the window in his room was replaced (Tr. 220).³

Further, Mr. De La Vega testified that he risks blowing a fuse in his room if he uses more than one appliance at a time (Tr. 223). He cited several occasions where his power went out for extended periods of time, including July 19, 2006 (Tr. 243, 247). On the evening of July 19, 2006, he phoned Mr. Guzman, the superintendent, after his power went out. Mr. Guzman replied that the power outage was not an emergency and could be taken care of the next morning (Tr. 203). Mr. De La Vega admitted using the outlets in the hallway for electrical power when the power went out in his room (Tr. 246). He also testified that power outages were not limited to his unit but were a "floor-wide or building-wide problem" (Tr. 243).

Harvey Spevak, the occupant of room 10 for more than 20 years, testified that in 2004, his room needed painting and plastering, the window panes were shattered and the door was cracked. On March 14, 2005, when respondent inspected room 10, he gave respondent three access dates when repairs could be made. Mr. Spevak was home on the second and third dates, but respondent did not appear (Tr. 306). In early April of 2005, the door to room 10 was repaired. No other repairs were made in May or June, which caused Mr. Spevak to feel ignored

³ It appears that Mr. De La Vega referred to respondent's father as making this comment (Tr. 220).

(Tr. 307). However, by about August of 2005, repairs were made to the ceiling and window in room 10, and by 2006 all needed repairs to his room were completed (Tr. 307).

Gonzalo Meija, the occupant of room 6 for the past 13 years, testified that about three years before this hearing, the window in his room broke. He attributed the broken window, variously, to construction work being done outside the building, or some type of accident, possibly involving a tree (Tr. 142). It was unclear from his testimony how long the window was broken, and whether the window was repaired less than a month after he informed respondent (Tr. 151, 154), or whether it was fixed several months after Mr. Meija called 311 on the matter (Tr. 148). Mr. Meija also asserted that the sewer line from his sink is "not good" and has leaked onto the floor for the past three years (Tr. 144).

The tenants also testified to problems in the common areas of the building. A common thread underlying their testimony was that respondent failed to correct leaks from the roof and fix the entrance door to the building so that it closed properly, which permitted strangers to enter the building. Both Mr. De La Vega and Mr. Hill attributed the leaks in their rooms and in the common hallways to leaks from the roof. They acknowledged that repairs have been made to the roof, but asserted that they were not durable (Tr. 51, 86, 90, 192-93). Indeed, according to Mr. Hill, there were still leaks throughout the building several weeks prior to the hearing (Tr. 55).

With regard to the front door, Mr. Spevak indicated that there is still a space between the edge of the front door and the flange, so that the door opens without much force and without use of a key (Spevak Tr. 297). Mr. Hill agreed that the entrance door still needs repair, that it does not close properly and there is a problem with the latch (Tr. 101-102). Ms. Jativa also stated that the front door was damaged and often left open, and that she had observed strangers in the building on or about Thanksgiving of 2006, and called the police (Tr. 109). Mr. Spevak, similarly, contended that no one feels safe or secure in the building due to the entrance door (Tr. 311). He claimed that on about ten occasions in 2006, he noticed clothes in the bathroom, and items such as newspapers and beer cans left in the shower room, and that in the summer of 2005, a non-resident locked himself in one of the shower rooms (Tr. 70, 298-299). Likewise, Mr. Meija testified that he observed strangers entering the building, and that although he uses a key to open the front door, the door is loose (Meija Tr. 148, 159).

Additionally, Mr. Spevak testified that for two consecutive summers, in 2004 and 2005, the front door was kept open by a hook so that construction workers working on an adjoining

building could carry cement blocks back and forth through the entrance door of the building (Tr. 310, 319). The workers had access to the building's toilet and shower rooms and were "constantly in and out" (Tr. 298). Mr. Spevak occasionally unhooked the front door so it would shut (Tr. 300). Mr. Spevak testified that he wrote a letter to respondent at some point after 2004 about the front entrance door, but that the letter was disregarded (Tr. 321). Ms. Jativa, similarly, testified that she complained to the superintendent about the entrance door to no avail. According to Ms. Jativa, the superintendent replied that the landlord had already fixed the door, and that if she saw strangers in the building she should call the police (Tr. 112).

Ms. Jativa and Mr. Hill also testified as to torn linoleum in the hallway, although Mr. Hill acknowledged that the floors in the public hallway and in the lobby were fixed in the summer of 2005 (Tr. 50). Both described problems in the shower room. According to Ms. Jativa, problems which persisted into the summer of 2005 involved a general lack of cleanliness, a broken light fixture, peeling paint, and a door that would not close (Tr. 44, 109). Ms. Jativa testified that she currently cleans the bathrooms herself (Tr. 111). She recalled that there had been a cleaning woman in the past who did not clean the bathrooms (Tr. 106, 111). Mr. Spevak corroborated Ms. Jativa's testimony that she cleans the toilet and shower areas on their floor, although he testified that he had noticed workers cleaning the bathroom between 2004 and 2006 (Tr. 319).

Mr. Hill also asserted, based on a conversation with Mr. Marks during the summer of 2006, that the shower room on the fourth floor was not usable for a week during this time period. Mr. Marks said that a ladder had been left in the shower for a week while repairs were being made to the ceiling, which had collapsed due to leaks (Tr. 61, 63, 64). Mr. Marks asked Mr. Hill to look at his shower to tell if it had been replastered; when Mr. Hill did so, he saw a ladder in the shower (Tr. 62). Mr. Hill also testified that neither he nor Mr. Marks notified the superintendent or respondent of the situation because they "assumed" the superintendent would see the ladder and inform respondent (Tr. 75-76).

Respondent's Case

Respondent testified that he has done substantial work to correct the violations and fix the problems in the building. After entering into the consent order in March of 2005, he undertook "a program" to make all necessary repairs, both in the individual rooms and in the hallways (Tr. 380). As part of this program, he prioritized the repairs to be made, addressing the most serious

problems first. He scheduled work for the access dates delineated in the stipulation, but there were numerous occasions when the tenants were not there at the agreed-upon dates or times, or were there only after 4:00 p.m., when his employees stop working. In those instances, he scheduled new access dates (Tr. 380). There were numerous repairs made between the first consent orders and the summer of 2005, when the tenants took him back to court: these included repairs in tenants' individual rooms as well as repairs to common areas, such as painting and spackling hallways, walls, and ceilings, laying new linoleum tile, and fixing cracked tiles in the shower areas (Tr. 382). Then, after the summer of 2005, additional repairs were done, including an upgrade of the intercom system, and plumbing repairs in the bathrooms (Tr. 382; Resp. Exs. D, E). Repairs to the roof and front door were also made. Respondent had various employees who made these repairs, including masons, tilers, painters and plasterers, and he also subcontracted work out to electricians and plumbers (Tr. 379).

Respondent testified that repairs were made in many of the individual rooms subsequent to the March 2005 consent order. With regard to Mr. Hill's room, number 26, respondent testified that he had problems getting access. Mr. Hill wrote him a letter dated July 27, 2006, asking respondent to communicate with him solely by mail. It was not until mid-July or early August of 2006, that respondent and Hill were able to arrange a date for inspection of room 26. At that time, Mr. Hill pointed out problems in the room and took photographs of respondent, who was taking photographs of the items which Mr. Hill indicated needed repair. About a week later, the superintendent completed other repairs, including painting and spackling of the ceiling, and tightening a light fixture and a sprinkler pipe (which did not really need tightening). Respondent personally repaired the deadbolt to Mr. Hill's door, which he and Mr. Hill tested and Mr. Hill agreed had worked fine (Tr. 381, 423-25; Resp. Exs. 11, 12). Subsequently, he replaced the window in room 26 because it was still in disrepair (Tr. 391-392).

In Mr. De La Vega's room, room 23, prior to the November 2005 stipulation of settlement, respondent replaced the radiator valve and light switch, and made repairs to the window and sink. He did not replace the window because it was unnecessary. He is aware that an open violation currently exists regarding the door to room 23, and that a new front door to the room has not yet been installed (Tr. 381, 443, 444). In Mr. Marks' room, respondent's workers repaired the sink and intercom (Tr. 381). Respondent presented a letter signed by Ernest Marks, dated August 22, 2005, stating, "I am no longer in need of any further repairs" (Resp. Ex. A).

In terms of the common areas, respondent corroborated Mr. Hill's testimony that there was repair work done on the ceiling in the shower room on Mr. Marks' floor. Unlike Mr. Hill, however, respondent testified that the ceiling did not fall down, but that part of it was removed because a bubble had formed in the plaster, indicating that there was a leak in the shower above that needed to be fixed. Respondent acknowledged, moreover, that it took about a week for the plumber to come to replace the lead bend in the pipe. During that time, however, his worker covered the ceiling with a black plastic tarp, so that the shower was operational (Tr. 413-15; 438-40).

With regard to the roof, respondent explained that violations for the roof date back to 2004, and have been closed and re-opened again because roof repairs are tricky and often involve several attempts before the problem is cured. Depending on the age and the condition of the roof, "sometimes you can resolve the situation once and you don't have the recurrence for years. And sometimes, it's a hit and miss process because the leak could be 20 feet away from where the actual moisture is showing in an area" (Tr. 389). According to respondent, however, the roof only leaked in one area, over Mr. Hill's and Mr. De La Vega's units; thus, it was not necessary to replace or repair the entire roof (Tr. 449). After March of 2004, because respondent had observed cracks or fissures along the bulkhead opening up to the roof, he had flashing cement laid on the bulkhead to repair the cracks and stop the leaks. Flashing cement and roofing paper was also put on a large section of the northwest section of the roof, which covered Mr. Hill's room (Tr. 386). In August of 2006, respondent instructed Mr. Guzman to put flashing cement on the east wall of the bulkhead and the east wall of the building, which he believed would prevent water from leaking into the hallway or into Mr. De La Vega's unit, located directly below that area (Tr. 388). After the January 16, 2007, violations regarding the roof were issued, respondent re-inspected the roof and put down more flashing cement (Tr. 388). Mr. Guzman corroborated respondent's testimony regarding the recent repairs; since that time he has not seen any further damage, although he indicated that he would have to "wait for rain" to see if the repair held up (Tr. 356, 269).

With regard to the front door to the building, respondent testified that a new entrance door to the building was not installed because it was not required. Instead, respondent made several improvements to the door. In the spring of 2004, respondent supervised the installation of an electronic release mechanism, which permits the door to open through use of a buzzer.

During that time, respondent also installed a "j-bar," which prevents the door from being opened by items such as credit cards. Additionally, respondent installed a self-closing hinge on the entrance door, which causes the door to close and lock automatically after it opens. Because new linoleum prevented the door from closing properly, respondent's father shaved the door down to fit. Respondent stated that he always uses a key to enter the building and has never seen anyone push the door open without a key. He claimed he was unaware that Mr. Guzman told Ms. Jativa to call the police regarding strangers in the building. Respondent also testified that he has never gotten letters from the tenants or reports from any of his building employees about strangers in the shower rooms or bathrooms, and that during the 75 or so visits that he made to the building during the inquiry period, he has never seen strangers in the shower rooms or bathrooms (Tr. 378, 416).

Respondent also testified that in 2004, the superintendent for the building was Juan Sosa, and that the cleaning lady was Rita Hernandez. Ms. Hernandez cleaned the bathrooms once or twice a week and the public hallways three times a week. Respondent hired George Guzman, the current superintendent, in 2005 to replace Mr. Sosa, who had quit. When Ms. Hernandez stopped working at the building in October of 2005, Mr. Guzman assumed her responsibilities (Tr. 377). Mr. Guzman testified that he has worked for respondent for five years, and that he has been the superintendent of 246 West 21st Street for a year and a half. He is present at the building five days a week for several hours each day, and his duties include taking out the garbage three times a week, sweeping and mopping the floors twice a week, and cleaning the bathrooms and shower rooms once a week. He is also the superintendent at four other buildings on West 21st Street which respondent owns, and divides his time between all five buildings (Tr. 353, 354, 360).

With regard to Mr. De La Vega's testimony concerning July 19, 2006, Mr. Guzman testified that Mr. De La Vega telephoned him about 9:00 p.m. to say that the electricity was out, and that it was an emergency. He acknowledged telling Mr. De La Vega that it was not an emergency, but he nevertheless went to the building about half an hour to an hour later to reset the circuit breaker in the basement and turn on the electricity. He did not inform Mr. De La Vega that he would be returning to the building because he "just wanted to avoid . . . arguing with him" (Tr. 371). After resetting the circuit breaker, he went upstairs to check the hallway and Mr. De La Vega's room and determined that the electricity was on (Tr. 358). He observed a

“fridge and several things,” and wires in the hallway, belonging to Mr. De La Vega. He knew of no other instances in the past year and a half when electricity was out in the building (Tr. 371). Respondent testified that on several occasions Mr. De La Vega plugged appliances into the hallway outlets via extension cords, including occasions when the electricity was operating properly (Tr. 421-422).

Conclusions

As noted above, petitioner has alleged that respondent engaged some 19 separate types of harassment. Petitioner has failed to put forth any evidence in support of allegations 1, 3, 7 and 8. There was no evidence that respondent filed any lawsuits against tenants to force them to vacate the premises, failed to properly dispose of garbage on the premises, or excavated on the premises without a permit. There was also no evidence that respondent failed to provide a superintendent at the premise during the window period. The building received a violation in 1979 for failing to have a superintendent, but that was closed in 2002. Respondent testified without rebuttal that in 2004, Juan Sosa was the superintendent, who was replaced in 2005 by George Guzman. Mr. Guzman testified as well that he is the superintendent at this building.

As to most of the other allegations, however, the HPD violation history establishes the requisite factual predicate. It is undisputed that, as of the time of trial, there were 35 open housing maintenance code violations against the property, albeit not 41, as petitioner posits in allegation 17. Most of the other allegations deal with failure to make repairs, or replace broken or defective items, as needed – for example, failure to repair the intercom and buzzer system (allegation 6); failure to repair leaks in the roof (allegation 9); failure to plaster and paint (allegation 11); failure to repair a broken window frame (allegation twelve); failure to replace a light fixture (allegation 13); failure to repair broken ceramic tiles (allegation 14); failure to refit the entrance door (allegation 15); failure to exterminate for roaches (allegation 16); and failure to provide adequate lighting at the front entrance (allegation 18). As discussed above, at 6, the list of open violations indicates that the building is still problematic in many of these areas, including painting, plastering, failure to fix an intercom and ceramic tiles, adequate outside lighting, failure to refit entrance doors to individual units, bathrooms, bathtub compartments, and the basement stairway, and leaks from the roof and bulkhead.

Additionally, although it is apparent from the closed violation summary that respondent did substantial work on the building in 2005, as he testified, it is also apparent that many of the violations that he closed at this time or subsequently were overdue, some long overdue. As discussed above, at 5-6, these include violations for the intercom, painting/plastering, lighting, leaks in the roofs and ceilings, broken windows and tiles, refitting the entrance door to the building (dating to 1993, closed August 29, 2005) and failing to get rid of roaches. As to the roof, it was not until August 29, 2005, that a violation issued April 24, 2002, requiring respondent to replace the broken or defective roof door at the bulkhead with a new door, was closed.

Thus, on the basis of the violation history alone, petitioner has established that respondent has interrupted or discontinued "essential services," which interfere with or disturb the tenants' "comfort, repose, peace, or quiet," by failing to promptly make repairs throughout the common areas and private rooms of the building. This invokes the presumption that respondent failed to provide these services with the intent to cause the tenants to vacate. *See, e.g., HPD v. Wulliger*, OATH Index No. 782/06, at 13 (May 5, 2006) (finding "sufficient documentary proof as an initial matter to support the Department's allegations based on a codified presumption of intentional harassment").

The burden shifts to respondent under the statute to rebut this presumption. Any analysis as to whether respondent has rebutted this presumption must include an analysis of the relative credibility of the trial witnesses. In determining credibility, factors to be considered include "witness demeanor, consistency of a witness' testimony, supporting and corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, at 2-3, OATH Index No. 678/98 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Here, I credited much, but not all, of the testimony of the tenants. There was a consistent thread running through much of their testimony -- that although the owner fixed many of the violations in their rooms, he did not do so until 2005, or later, after the tenants sued in Civil Court, that some of the repairs were substandard, and that there are continuing serious problems with the roof and with the entrance door to the building. In terms of problems with the individual rooms, I credited Mr. Hill's testimony that in 2004, there were several items needing

repair which were not fixed until the summer of 2005, including a leaky ceiling, and a broken window frame, intercom, and light switch. These items were all listed in the November 28, 2005, stipulation of settlement (Pet. Ex. 19) and the repair violation history indicates that they were repaired in the summer of 2005. I also credited Ms. Jativa's testimony that it took until November of 2005, to repair her faucet, intercom, and window. This testimony was consistent with the affidavit which she signed on July 12, 2005, and which was attached to the July 26, 2005, motion for contempt (Pet Ex. 16). I credited Mr. De La Vega's testimony, as corroborated by the closed violations report, that he had problems with clogged pipes, a leaky faucet, and plastering walls, and leaks in 2004.⁴ This testimony was also consistent with his affidavit, signed on February 7, 2005, and attached to the February 10, 2005, order to show cause (Pet. Ex. 12).

I did not, however, credit all of Mr. De La Vega's and Mr. Hill's testimony with regard to problems in their individual rooms. In particular, I did not credit Mr. Hill's testimony that his neighbor, Ernest Marks, had no access to a shower for a week because the ceiling in the shower room on his floor collapsed and the superintendent left a ladder in the shower for a week after starting to make repairs. Although hearsay is admissible in administrative hearings, it must be sufficiently reliable and probative to be credited. See *People Ex Rel Vega v. Smith*, 66 N.Y.2d 130 (1985); *Triple A Auto Driving School, Inc. v. Foschio*, 107 A.D.2d 641, 484 N.Y.S.2d 566 (1st Dep't 1985), *aff'd*, 65 N.Y.2d 755 (1985). Here, although Mr. Hill testified that the ceiling in the shower room collapsed, he did not testify that he actually saw the collapsed ceiling; rather, this appears only to be what Mr. Marks told him. Similarly, although he asserted that he saw a ladder in Mr. Marks' shower during this time period, he did not indicate whether this was on one occasion, or over a period of days, or for an entire week. Thus, his testimony was too vague to constitute reliable evidence either that the shower room ceiling collapsed or that Mr. Marks was without a shower for a week. Additionally, Mr. Hill's testimony that neither he nor Mr. Marks notified the superintendent of the situation because they "assumed" that he would see the ladder was problematic, because it is contrary to "common sense and human experience" that someone who could not use his shower for a week would simply be silent instead of complaining to the superintendent and/or building owner.

⁴ As noted below, however, I did not credit his testimony that the window and leaky faucet problems remained through November 2005 (Tr. 193).

Instead, I credited Mr. Tauber's testimony, which was detailed and cogent, that the ceiling did not fall down, but that part of the ceiling in the shower room was removed because a bubble had formed in the plaster, indicating that there was a leak in the shower above that needed to be fixed. Mr. Tauber testified without rebuttal that during the week before the plumbing repair was made, his worker covered the ceiling with a black plastic tarp, so the shower was operational (Tr. 361).

Likewise, while I credited a significant portion of Mr. De La Vega's testimony, as to leaks from the ceiling, plastering, and painting problems, I did not credit his testimony that all of the problems in his room remained through November of 2005 (Tr. 193), because the closed violation reports indicate that violations for his window and faucet were closed in August of 2005 (Pet. Ex. 11). It was apparent from his testimony that Mr. De La Vega wanted a new window, not merely repairs to his window, but, because the window violation was closed by HPD, I concluded that the condition of his window did not necessitate its replacement. I thus credited respondent's testimony that the appropriate repairs were made (Tr. 389).

I also did not fully credit Mr. De La Vega's testimony regarding the power outage on July 19, 2006. Although he initially testified that he left the building because it was too hot, and went to the park to sleep, Mr. De La Vega subsequently changed his testimony to indicate that he slept in the park on another occasion (Tr. 249). It appeared, therefore, that he remained at home on the evening of July 19, 2006. He did not indicate whether his electricity was restored that evening, as Mr. Guzman testified, or the next morning. Additionally, I did not credit Mr. De La Vega's testimony that there were frequent power outages on his floor, because Mr. De La Vega was the sole tenant among the five tenants who testified to make this assertion, and because he did so in the course of becoming defensive when cross-examined about whether he used multiple appliances in his room and plugged in his appliances into electrical outlets in the hallway (Tr. 243-46). Along these lines, while Mr. De La Vega claimed that he risks blowing a fuse if he uses more than one appliance at a time (Tr. 323), respondent testified in some detail that on multiple occasions he has seen the electricity in Mr. De La Vega's room running properly while many appliances were turned on, and he has even seen Mr. De La Vega plug appliances into the hallway to use the electrical power from the hallway (Tr. 262, 368).

In terms of overall problems with the common areas of the building, I concluded that there was a marked consistency between the tenants as to repairs which were needed or

conditions which existed in the common areas of the building, including leaks into the fourth floor rooms and hallways, a lack of cleanliness in the bathrooms, and a defective entry door to the building. Much of this testimony was corroborated by the violation reports. Additionally, although respondent did not admit the existence of all of the complained-of items in 2004, he acknowledged that there were many repairs that needed to be made, which were taken care of after the filing of the tenant's lawsuit. The violation history also indicates that close to fifty repairs were made in August of 2005, after the initiation of the lawsuit, and indeed, after the tenants' July 26, 2005, motion for contempt.

As to the roof, Mr. Hill and Mr. De La Vega, whose rooms were on the top floor, both testified that the ceiling in their room has continued to leak, despite repairs having been made, causing the walls and ceilings to need repeated replastering and repainting. Their testimony was consistent with each other, and with the record of open and closed violations, including the three new violations placed on the building in January of 2007, relating to roof leaks, replastering and repainting. Their testimony was also corroborated by the fact that a violation requiring respondent to replace the bulkhead door (concededly the area of the roof most vulnerable to leaks) was placed on April 24, 2002, but not closed until August 29, 2005, over three years later. Mr. De La Vega was particularly animated in describing how plaster continues to fall from the ceiling into his room, because of leaks from the roof. Mr. Hill, also, testified that the ceiling in his room had to be repainted and replastered because of recurring leaks. Thus, I credited Mr. De La Vega's and Mr. Hill's testimony that there were persistent problems with the roof.

In so doing, I fully considered, and partially credited, Mr. Tauber's testimony that he took repeated measures to address the roof leaks. In particular, I credited his testimony that he covered a large portion of the roof along the bulkhead with felt roofing paper and flashing cement, and that he took steps to address the January of 2007 violations relating to the roof. And I credited respondent's testimony that roof repairs sometimes require several attempts before the leaks are stopped. However, repairs were not made until August of 2005 to correct two violations relating to the roof. One violation, as noted above, was from 2002 and required respondent to replace the broken or defective roof door at the bulkhead with a new door. This astonishing delay bespeaks a certain amount of neglect, at least prior to August of 2005, particularly because it was plain that the bulkhead was the spot on the roof most vulnerable to leaks. The door to the bulkhead opened up onto the roof; the bulkhead developed cracks and

fissures; and water leaked down into the fourth floor hallway and Mr. De La Vega's and Mr. Hall's room. Thus, Mr. Tauber's statement that roof repairs are difficult because the source of the leaks can not always be pinpointed was inapposite.

As for the front door of the building, I credited the testimony of both Ms. Jativa and Mr. Spevak that there were recurring problems with the front door – people forcing their way in, non-residents using the shower room and leaving clothes or other personal items behind, complaints to the superintendent going unanswered. I also credited the testimony of Mr. Spevak that the front door was kept open by a hook for periods of time extending over two consecutive summers, so construction workers could have unfettered access to the building. Mr. Meija also testified, albeit in less detail, that the door did not work properly. Mr. Meija's and Mr. Spevak's testimony regarding the front door was particularly compelling, because both acknowledged that all of the repairs needed in their room were made. Thus, while neither seemed to embellish their testimony, each asserted that there were continuing problems with the front door.

Respondent's testimony that he made several improvements to the door, including the installation of the j-bar, while credible and while corroborated by two photographs which respondent introduced (Tr. 87, 397-98; Resp. Ex. C, G1), was insufficient to rebut the tenants' testimony that the front door was loose and could be forced open without a key, thus permitting unauthorized access to the building.

In terms of the testimony relating to cleaning services provided to the building, I credited Ms. Jativa's testimony that she finds the bathroom on her floor to be dirty and has been cleaning it herself. However, I also credited Mr. Spevak's testimony that he has seen building employees who had cleaned the bathroom and shower on their floor from 2004 to 2006. Although Mr. Guzman and respondent both testified that Mr. Guzman cleans the bathrooms, it was apparent that Mr. Guzman had multiple responsibilities, for five different buildings, and it appeared plausible that he did not clean the bathrooms either as often as he testified or as thoroughly as Ms. Jativa would have liked. I also credited Mr. Spevak's testimony that on numerous occasions in 2006, he saw items abandoned in the bathroom and shower room, including beer cans, shredded newspapers, and clothes, which speaks to a certain failure to adequately clean the premises.

In sum, although respondent made a substantial number of repairs to the building, the bulk of the repairs did not begin until after the filing of the tenants' lawsuit to compel repairs in

February of 2005. The inference to be drawn is that repairs were made solely because of the tenants' lawsuit, and their subsequent contempt motion. Notably, the building had 50 violations in February of 2005, but 99 violations in July of 2005, when the contempt motion was filed. It was not until August of 2005, when confronted with the motion for contempt, that respondent closed most of these violations. This is some seventeen months after the start of the inquiry period, which began in March of 2004. It is true that respondent became much prompter at responding to new violations at the building. For example, he complied with violations relating to painted sprinkler heads, a defective intercom system and a missing smoke detector in a prompt manner, within the applicable time frames (Pet. Ex. 11). However, notwithstanding the substantial repairs made, new violations issued and existing problems remain, according to many of the tenants. Mr. Hill and Mr. De La Vega were adamant about continuing problems with leaks and peeling and falling plaster, and Ms. Jativa, Mr. Hill, Mr. Meija and Mr. Spevak asserted that there were continuing problems with the front door to the building. And, as noted above, as of the time of trial, there were 35 open violations.

Thus, based upon the record before me, I find that respondent has not met his burden of rebutting the presumption that, during the inquiry period, he acted with the intent to force tenants to vacate the building. A finding of harassment is appropriate given the numerous repairs needed throughout the building during the window period, both in individual units and in common areas, the delay in making repairs and removing violations, and the continuing nature of some of the problems, as alleged by petitioner in allegations 2, 5, 6, 9, and 11-18. The number of violations in the building, and amount of repairs needed during the inquiry period speak as to the interruption and/or discontinuance of essential services as alleged generally in allegation 19.

This finding is not without several caveats. First, as to allegation 9, while the evidence established that petitioner did not promptly or adequately address problems with roof leaks, I do not find sufficient reliable evidence in the record that the roof leaks caused ceilings to actually collapse. There is, however, sufficient evidence that the roof leaks have caused pieces of plaster to fall from the ceiling. Second, as to allegation 19, respondent is correct (see Tr. 451) that there are not violations against the building as to the failure to provide services such as gas, electricity, and heat. Many cases in which certificates of harassment have been denied have involved, among other building-wide problems, the failure to provide such services. See, e.g., *Dep't of Housing Preservation and Development v. Nyameke*, OATH Index No. 1796/04 (May 2, 2005)

(plumbing, heating and electricity not in proper order, leaks throughout building, extensive repairs needed). However, the evidence here was overwhelming that there were pervasive, serious problems adversely affecting living conditions and safety throughout the building, many continuing until repairs began in the summer of 2005. Moreover, conditions involving the leaky roof and loose front door persist. Under all these circumstances, therefore, a finding of harassment is warranted. *See Matter of 235 Hotel LLC v. Dep't of Housing Preservation and Development*, 309 A.D.2d 587, 765 N.Y.S.2d 360 (1st Dep't 2003) (witness testimony concerning the "deplorable physical condition of their individual living areas and the common bathrooms and kitchens . . . constituted substantial evidence that the applicant either discontinued or interrupted essential services constituting harassment").

Several additional allegations of harassment remain. Petitioner has alleged that respondent failed to respond to emergencies in the building, for example, with regard to restoring circuit breakers (allegation 10). However, I find the evidence insufficient to support this allegation, largely because of a lack of clarity in Mr. De La Vega's testimony, discussed above at 17, regarding the owner's response to power outages.

Finally, petitioner has alleged that respondent committed harassment by "verbally abusing tenants by calling them derogatory names" (allegation 4). The evidence as to such name-calling is limited to Mr. Hill's testimony that Michael Tauber, respondent's brother and his partner, came to his room at some point in 2005 to inspect for repairs during which he stated, "you people are animals," put his finger in Mr. Hill's face, and added, "there will be no more due process . . . it is my pleasure if you use this toilet . . . this shower. . . it is my pleasure if you sleep here . . . I am the law now. . . . I am the landlord (Tr. 48). Michael Tauber did not testify but respondent testified that when he asked his brother about the purported comments, Michael Tauber denied making them. I credited Mr. Hill's testimony that the comment was made. Mr. Hill seemed genuinely struck by the nature of the comment, in which Michael Tauber appeared to refer, derisively, to the ongoing housing court litigation ("there'll be no more due process") and to re-assert his own authority over the tenants notwithstanding any mandates arising out of the litigation ("I'm the king here."). Considered in context, this comment constituted harassment within the definition of Administrative Code section 27-2093(a). *See Matter of Mauro v. Division of Housing and Community Renewal*, 309 A.D.2d 678, 765 N.Y.S.2d 868 (1st Dep't

2003) (harassment includes verbal abuse); *see also Matter of 235 Hotel LLC v. Dep't of Housing Preservation and Development*, 309 A.D.2d 587, 765 N.Y.S.2d 360 (1st Dep't 2003).

Petitioner also focused on other purported comments by respondent, or members of his family, although they did not involve the use of "derogatory names," as alleged. These comments consisted of buy-out offers made to Mr. Meija, Mr. Spevak, and Mr. De La Vega in 2004 (Tr. 145, 147, 305, 196-97), none of which rose to the level of actionable harassment. Although repeated buy-out offers can, coupled with a unit's "deplorable condition over a lengthy period of time," give rise to a presumption of harassment, *Vaughan v. Michetti*, 176 A.D.2d 144, 574 NYS2d 30, 31 (1st Dep't 1991), here it was undisputed that respondent made a buy-out offer only on one occasion to each tenant, and that he did so after beginning to make many repairs to the building after the filing of the tenants' lawsuit (Tr. 145, 147, 156, 199). The case is closer with regard to the buy-out offer made to Mr. Spevak, because Mr. Spevak testified that, in the course of their conversation, respondent said, in an "almost wistful" manner, "you know what I'd like to do with this building? I'd like to tear it down" (Tr. 305). Such a comment could easily be intimidating, and Mr. Spevak testified that he felt "shaken" about the idea of having to move (Tr. 305). However, given Mr. Spevak's characterization as respondent as being "almost wistful," as well as the one-time nature of the buy-out offer, this one-time statement was not sufficient to trigger the presumption of harassment.

Finally, petitioner put forth evidence of an incident between Mr. De La Vega and respondent, on July 22, 2005, in which respondent, concededly, had called the police after a dispute with Mr. De La Vega over when or whether Mr. De La Vega would vacate room 25, to which he had been temporarily moved so that repairs could be made in room 23, pursuant to the consent order. It was undisputed that Mr. Guzman, the superintendent, had visited Mr. De La Vega earlier in the day in room 25, telling him that repairs were done in room 23 and it was ready to be re-occupied, and that Mr. De La Vega had declined to move. Mr. De La Vega testified that he indicated that he would not move until he spoke to the owner. It was not contested that shortly thereafter, respondent arrived at room 25. After some conversation, respondent called the police who said there was nothing they could do. Mr. De La Vega's attorney, Kevin Cremin, Esq., of the West Side SRO Project telephoned while this was going on, and spoke with respondent. Either a few days later, or by the end of the following week, Mr. De La Vega moved back to room 23.

The parties differed as to precisely what transpired before respondent called the police. According to Mr. De La Vega, when respondent arrived at his room, he began "yelling" that Mr. De La Vega needed to leave immediately, and began to push the door to the room open, leading Mr. De La Vega to yell back and say that respondent could not come in, before permitting him to enter a few steps. Mr. De La Vega testified that he wanted to discuss staying in room 25, but that respondent offered him three options and gave him the weekend to think about it. The options included a \$30,000 buy-out, staying in room 25, or moving to room 23. Respondent then called the police because Mr. De La Vega would not move (Tr. 419).

According to respondent, the door to the room was open, so he was able to walk in. He denied giving Mr. De La Vega three options, explaining that room 25 was about 35 % bigger than room 23, and he had no reason to permit Mr. De La Vega to stay in the larger room. Respondent also testified that Mr. De La Vega said he had no intention of moving back into room 23, that he knew how to use the system, and that respondent would have to take him to court. At this point respondent called his attorney, who was unavailable. Then respondent telephoned the police (Tr. 364).

It is apparent that Mr. De La Vega and respondent had a heated debate over whether Mr. De La Vega could remain in room 25, to which he did not have a lease, and that each man became angry and agitated. Respondent's reaction was to call the police. While this reaction was precipitous, and ill-advised, given the history of litigation and respondent's knowledge that Mr. De La Vega was represented by counsel, calling the police under these circumstances did not constitute harassment under the Administrative Code.

In sum, I find that evidence as to verbal harassment and the recent buy-out offers insufficient to establish harassment, except with regard to the comments attributed to Michael Tauber by Mr. Hill. I find that petitioner established a *prima facie* case of harassment during the inquiry period, commencing in March of 2004, and that respondent failed to rebut the presumption. I recommend, therefore, that the certificate of no harassment be revoked.

FINDINGS AND CONCLUSIONS

1. There was an interruption and discontinuance of essential services that interfered with the comfort, repose or quiet of the lawful tenants residing at 246 West 21st Street during the inquiry period commencing March 20, 2004.
2. The interruption and discontinuance of essential services was intended to cause the lawful tenants at 246 West 21st Street to vacate or to surrender or waive any rights in relation to their units.

RECOMMENDATION

Accordingly, the previously issued certificate of harassment should be revoked.

Faye Lewis
Administrative Law Judge

May 16, 2007

SUBMITTED TO:

SHAUN DONOVAN
Commissioner

APPEARANCES:

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Attorney for Petitioner

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KARA RAKOWSKI, ESQ.

Janes v. Paddell, 132 N.Y.S. 379 (NY Sup. Ct., App. Term, 1911)



As of: September 12, 2025 3:02 PM Z

Janes v. Paddell

Supreme Court of New York, Appellate Term

December, 1911, Decided

No Number in Original

Reporter

74 Misc. 409 *; 132 N.Y.S. 379 **; 1911 N.Y. Misc. LEXIS 656 ***

Jane M. Janes, Landlord-Respondent, v. Timothy F. Paddell, Tenant-Appellant, and Others, Under-tenants.

Prior History: [***1] Appeal by the tenant from a final order of the Municipal Court of the city of New York, borough of Manhattan, third district, awarding possession of the premises to the landlord on the ground of non-payment of rent.

Disposition: Final order reversed and proceeding dismissed, with costs to tenant.

Core Terms

tenant, landlord, rent, ejectment, election, lease, remedies, ejectment action, summary proceeding, dispossess, proceedings, forfeiture, commencement of the action, final order, non-payment, terminated, accrued, relation of a landlord, pay rent, irreconcilable, instituted, trespasser, tendered, broken, lessee

Case Summary

Procedural Posture

Appellant tenant sought review of a decision of the Municipal Court of the City of New York (New York), which entered an order awarding possession of premises to respondent landlord, on the ground of non-payment of rent, in the landlord's summary proceeding to recover possession.

Overview

The tenant had tendered the rent due each month, and the landlord had refused to accept it. The landlord had previously commenced an action of ejectment to recover possession of the premises. The landlord argued on appeal that the commencement of the ejectment action did not constitute an election of remedies. The court reversed the trial court's order. The court stated that the ejectment action treated the tenant

as a trespasser, and that the assumption of such a position was absolutely inconsistent with the assertion by the landlord in the summary proceeding that the relation of landlord and tenant was existing when the latter proceedings were instituted. The court was of the opinion that the institution of the action of ejectment constituted an election by the landlord to pursue a remedy inconsistent with the right to maintain summary proceedings, and that such election constituted a bar. The court stated that a landlord could not be permitted to refuse rent from a tenant and then dispossess the tenant for non-payment of the rent, and that the tender of the rent was, under such circumstances, equivalent to performance of the condition to pay rent.

Outcome

The court reversed the order of the trial court granting possession of the premises to the landlord, and dismissed the landlord's summary proceeding to dispossess the tenant.

LexisNexis® Headnotes

Contracts Law > Remedies > Election of Remedies

HN1 Remedies, Election of Remedies

The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses of action were open for obtaining relief, to his first election; where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim.

Real Property Law > ... > Landlord's Remedies &

74 Misc. 409, *409; 132 N.Y.S. 379, **379; 1911 N.Y. Misc. LEXIS 656, ***1

[Rights > Eviction Actions > General Overview](#)[Reenter & Terminate](#)[Real Property Law > Torts > Trespass to Real Property](#)[HN4\[↓\]](#) [Landlord's Remedies & Rights, Eviction Actions](#)[HN2\[↓\]](#) [Landlord's Remedies & Rights, Eviction Actions](#)

When there are two existing and substantially inconsistent remedies, the adoption and pursuit of one of them by a party excludes him from the benefit of others. This rule applies in cases arising between landlord and tenant. After bringing ejectment to enforce a forfeiture the landlord cannot hold the tenant other than as a trespasser.

In serving a complaint in an action of ejectment upon a tenant, in which the landlord claims a forfeiture and a termination of the tenant's estate, the landlord irrevocably precludes himself from subsequently asserting that the relation of landlord and tenant exists between him and the tenant.

[Contracts Law > Types of Contracts > Lease Agreements > General Overview](#)[Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > General Overview](#)[Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > General Overview](#)[HN5\[↓\]](#) [Landlord's Remedies & Rights, Eviction Actions](#)[Estate, Gift & Trust Law > Wills > Failure of Bequests > General Overview](#)

The institution of an action of ejectment constitutes an election by the landlord to pursue a remedy inconsistent with the right to maintain summary proceedings, and such election constitutes a bar to the summary proceeding.

[Real Property Law > Landlord & Tenant > General Overview](#)[Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > General Overview](#)[Real Property Law > Landlord & Tenant > Landlord's Remedies & Rights > Rent Recovery](#)[HN6\[↓\]](#) [Landlord's Remedies & Rights, Eviction Actions](#)[Real Property Law > Landlord & Tenant > Lease Agreements > Assignments](#)

A landlord cannot be permitted to refuse rent from the tenant and then dispossess the tenant for the non-payment of the rent. The tender of the rent is, under such circumstances, equivalent to performance of the condition to pay rent.

[HN3\[↓\]](#) [Types of Contracts, Lease Agreements](#)

It is provided by N.Y. Code Civ. Proc. § 1504 that when six months' rent or more is in arrear, upon a grant reserving rent, or upon a lease of real property, and the grantor or lessor, or his heir, devisee, or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear, or re-entry on the property.

Headnotes/Summary

[Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > General Overview](#)

Headnotes

[Real Property Law > Landlord & Tenant > Landlord's Remedies & Rights > Power to](#)

Landlord and tenant: Termination of relation -- Breach of covenant or condition: Re-entry and recovery of possession by landlord -- Summary proceedings; Statutory provisions -- Relations of parties -- Previous termination; Defenses and grounds of opposition -- Tenders and offers to pay rent.

The institution of an action of ejectment against a tenant

74 Misc. 409, *409; 132 N.Y.S. 379, **379; 1911 N.Y. Misc. LEXIS 656, ***1

for failure to pay rent, upon the ground of condition broken, terminates the relation of landlord and tenant; and, while the action is pending, the landlord cannot maintain summary proceedings for nonpayment of rent.

The legal effect of the commencement of the action of ejectment is equivalent to an actual re-entry by the landlord and terminates *ab initio* the estate of the tenant; and, if he continues to remain in possession, he may be dispossessed by a writ of assistance which, as matter of right, will follow a judgment in favor of [***2] the landlord in the action of ejectment.

Where a landlord repeatedly refuses to accept rent from his tenant, he cannot maintain summary proceedings to dispossess the tenant for nonpayment of said rent.

Counsel: Everett V. Abbott, for appellant.

Frederick L. C. Keating, for respondent.

Judges: Seabury, J. Guy and Cohalan, JJ., concur.

Opinion by: SEABURY

Opinion

[*409] [**380] Seabury, J. This is a summary proceeding to recover the possession of real property on the ground of the non-payment of rent. The proceeding resulted in a final order in favor of the landlord. The petition is dated June 29, 1811, and alleges that there was then due and unpaid the sum of \$ 5,000 which had accrued as rent during a period beginning September [*410] 1, 1909, and including June, 1911. The answer of the tenant admits that the rent has accrued, but denies the allegation of the petition that the rent has not been paid, "except so far as that he admits that the landlord has prevented the tenant from paying over to her the various sums of money" alleged to be due as rent. The answer also sets up two separate defenses. The first defense alleges that the landlord has waived payment of the rent. The second defense [***3] alleges that the rent accruing for the period mentioned has been paid to the tenant's use by some person or persons to the tenant unknown. The answer also pleaded a counterclaim.

Although the record in this case discloses several erroneous rulings excluding proper evidence offered on

the part of the tenant, it appears that, in October, 1909, the tenant tendered the rent then due in cash, and that the landlord refused to accept it, and subsequently, at the end of each month, the tenant sent a check for the rent then due to the landlord or her agent, and that in each instance the check was returned and its acceptance refused. The checks themselves were offered in evidence by the counsel for the tenant, in order to show that the tenant made a *bona fide* attempt to pay the rent reserved in the lease as it accrued; but, upon objection being made that the checks were "incompetent and irrelevant," the court excluded them. The tenant also established that the landlord had commenced an action of ejectment to recover the possession of the premises in question, on the ground of condition broken in the failure to pay rent, and that the landlord had also brought an unsuccessful summary proceeding [***4] against the tenant on the alleged ground that the latter was holding over after the expiration of his term. If we disregard the errors in the rulings upon the questions of evidence and attempt to get at the merits of the case, we must first consider whether the landlord, prior to the institution of the present proceeding, had elected to pursue a remedy inconsistent with the institution of this proceeding. [HN1](#) [↑] "The doctrine of election, usually predicated of inconsistent remedies, consists," said Judge Gray in [Mills v. Parkhurst, 126 N.Y. 89, 93](#), "in holding the party, to whom several courses of action were [*411] open for obtaining relief, to his first election; where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the [**381] other." The election of remedies is indicated, not merely by the form of the action, but [***5] by the cause of action itself. "This choice," says Pomeroy, "does not relate to the external form of an action; it relates to the very cause of action itself, -- to the unchangeable rights which are to be protected and enforced by the judicial proceeding." Code Rem., § 110. [HN2](#) [↑] When there are two existing and substantially inconsistent remedies, the adoption and pursuit of one of them by a party excludes him from the benefit of others. [Crossman v. Universal R. Co., 127 N.Y. 34](#). This rule applies in cases arising between landlord and tenant. Judge McAdam, in giving examples of cases where the doctrine applies, states, upon the authority of [Stuyvesant v. Davis, 9 Paige Ch.](#)

74 Misc. 409, *411; 132 N.Y.S. 379, **381; 1911 N.Y. Misc. LEXIS 656, ***5

427, that "after bringing ejectment to enforce a forfeiture the landlord cannot hold the tenant other than as a trespasser." 2 McAdam Landl. & Ten. (4th ed.), 1053, § 300.

The action of ejectment which the landlord instituted against the tenant was upon the ground of condition broken, and the institution of such an action necessarily terminated the relation of landlord and tenant. At common law, when the landlord sought to take advantage of a breach of condition, which breach worked a forfeiture, he made an entry upon [***6] the land. The theory upon which this was done was that it required as solemn an act to defeat as to create an estate. The effect of such an entry was "to reduce the estate to the same plight, and to cause it to be held on the same terms as if the estate to which the condition was annexed had not been granted." 2 Washb. Real Prop. 14.

HN3[↑] It is now provided, by section 1504 of the Code of Civil Procedure, that "When six months' rent or more is in arrear, upon a grant reserving rent, or upon a lease of real property, [*412] and the grantor or lessor, or his heir, devisee, or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear, or re-entry on the property." This section of the Code, while differing somewhat in phraseology, is substantially a re-enactment of section 30, title 9, chapter 8, part 3 of 2 Revised Statutes.

In commenting upon the provision of the Revised Statutes referred to, Dwight, C., in Samson v. Rose, 65 N.Y. 411, 417, said: "In the lease in controversy in the present case, there was an express agreement that the landlord might [***7] re-enter for non-payment of rent. If there had been an actual re-entry for condition broken at the time when the action of ejectment was brought, the title of the Tripps (tenants) would have been defeated *ab initio*, and the land, with all its accretions, would have been vested in the plaintiff. As the commencement of the action is made, by the above cited statute, equivalent to a re-entry, the landlord must be conclusively presumed to have taken possession at the moment of the service of the complaint in this action."

When the right of distress for rent existed, it was repeatedly held, both in England and in this State, that the landlord, after treating the occupier of the land as a trespasser by suing him in ejectment, could [***382] not

afterward distress upon him for rent. Bridges v. Smyth, 5 Bing. 410.

In Jones v. Carter, 15 Mees & Welsb. 718, it was held that, when a lessor served a declaration in ejectment upon the lessee, he could not sue for rent or covenants broken, although the action of ejectment had not been determined. In the course of the opinion in that case, Baron Parke said: "Without inquiring whether an ejectment be a real action, the bringing of which and the counting [***8] in which would, according to the authority of Lord Coke, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to [*413] consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty after that time."

The remarks of Chancellor Walworth in Stuyvesant v. Davis, *supra*, are significant in this connection. That was a case where the landlord had commenced an action of ejectment against his tenant to enforce a forfeiture for the non-performance of a condition of the lease and then commenced an action in equity to restrain the tenant from collecting and the sub-tenant from paying to the tenant any rents due or to become due. In the course of his opinion the chancellor said: "If the complainant elects to proceed at law to enforce the forfeiture of the [***9] lease, for the non-payment of the taxes and assessments, he cannot in the meantime treat the lessee as his tenant and rightfully in possession of the premises, so as to obtain an equitable claim to the accruing rents by virtue of his lease. For by bringing an ejectment suit for the forfeiture, he has chosen to treat the lessee and his sub-tenants as trespassers, from that time. The claim to the accruing rents, therefore, is wholly inconsistent with his proceeding at law to enforce the forfeiture." Again, in the same opinion, the chancellor said: "While the landlord is proceeding in his ejectment suit to enforce the forfeiture, this Court will not entertain a bill to give to him a remedy for the recovery of his rent, or his damages for the non-payment of the assessments; which remedy is wholly inconsistent with that proceeding."

HN4[↑] In serving a complaint in an action of ejectment upon the tenant, in which the landlord claimed a

forfeiture and a termination of the tenant's estate, the landlord irrevocably precluded himself from subsequently asserting that the relation of landlord and tenant existed between him and the tenant. The ejectment action commenced in September, 1909, treated the [***10] tenant as a trespasser. The assumption of such a position was absolutely inconsistent with the assertion by the landlord in this proceeding that the relation of landlord and tenant was existing in June, 1911, when these proceedings were instituted. The ejectment action disaffirmed [*414] the lease. The dispossession proceedings affirmed the lease. In the language of Buller, J., in *Birch v. Wright*, 1 Term. R. 378, the landlord "cannot be permitted to blow both hot and cold at the same time."

[**383] The court below held that the commencement of the ejectment action was not inconsistent with maintaining summary proceedings to dispossess the tenant on the ground "that the proof of an action in equity by the landlord in this proceeding cannot be held to be an election on her part." It is sufficient to overcome this reasoning, to assert the elementary proposition that the action of ejectment is an action at law and not in equity. Nor is the case of *Houston Mercantile Co. v. Powell & King*, 72 Misc. 358, at all analogous to the case at bar, as the court below supposed. While it is true "that an election of remedies is determined by the commencement of an action and not by the result of it" (*Matter [***11] of Garver*, 176 N.Y. 386), the doctrine of election applies only when a choice is made between two remedies which proceed on opposite and irreconcilable claims of right. In the case of *Houston Mercantile Co. v. Powell & King*, *supra*, the court held, merely, that there was no such irreconcilability between an action in equity asking the court to declare a lease annulled and the institution of dispossession proceedings, because the action to have the lease annulled was not equivalent to a rescission of the lease. In the case at bar, the natures of the remedies pursued by the landlord are entirely different. The legal effect of the commencement of the action of ejectment on the ground of condition broken is, both in legal theory and by statutory enactment, equivalent to an actual re-entry by the landlord and terminates *ab initio* the estate of the tenant. If, in spite of such termination of the tenant's estate, he continues to remain in possession, the law provides the method for his dispossession by writ of assistance which, as a matter of right, will follow the rendition of a judgment in favor of the landlord in the action of ejectment. Summary proceedings cannot, under such circumstances, [***12] be invoked against the tenant on the ground of his failure to pay rent.

because such a proceeding can only be predicated upon the existence of the relation of landlord [*415] and tenant. While both remedies, *i. e.*, the action of ejectment on the ground of breach of condition by the tenant and summary proceedings, seek the same object, *i. e.*, the dispossession of the tenant, they are fundamentally antagonistic and irreconcilable in legal theory. The commencement of one (ejectment) terminates *ab initio* that relation of landlord and tenant the existence of which is a *sine qua non* to the institution of the other (summary proceeding).

We are of the opinion, therefore, that HN5[↑] the institution of the action of ejectment constituted an election by the landlord to pursue a remedy inconsistent with the right to maintain summary proceedings and that such election constitutes a bar to the present proceeding.

The counsel for the landlord contends that, even though there has been an election of remedies, the landlord is entitled to a final order in her favor because of the non-payment of rent by the tenant. This proposition is self-contradictory. If there has been an election [***13] of remedies by the landlord by reason of the commencement of the action of ejectment, such an election necessarily precludes the landlord from instituting this proceeding. The landlord being thus barred from instituting this proceeding, it is incomprehensible that she is entitled [***384] to a final order in her favor. If, however, for the sake of argument, we treat this proposition as a paradox, it does not aid the landlord. The evidence shows that the tenant tendered the rent, and that it was refused, and that he subsequently sent the rent to the landlord at the end of each month, and that it was each month returned to the tenant. On one occasion when the rent was tendered in cash to the landlord she refused to accept it, saying, "I have already received the rent." And, upon being asked at that time from whom she had received it, she replied, "I don't know who it was, but I know my son-in-law called on me and said he was given a check for the month's rent and deposited it at the Northern Bank to my account." On the trial an attempt was made by the counsel for the tenant to ascertain who it was who had paid the rent but this attempt was frustrated by the rulings of the trial judge. While [***14] payment by one of the debt of another does not operate to [*416] discharge the debtor unless the payment was made on behalf of the debtor, it is evident, I think, that HN6[↑] a landlord cannot be permitted to refuse rent from the tenant and then dispossess the tenant for the non-payment of the rent. The tender of the rent is, under

such circumstances, equivalent to performance of the condition to pay rent. This principle has long been recognized.

In Sheppard's "Touchstone" (p. 142) it is said: "If lands be granted, on condition to pay money, and the money is tendered according to the condition, but either nobody is ready to receive it, or it is refused; this is a good performance of the condition. And after a man hath once refused the money so tendered to him according to the condition, he hath no remedy in law to recover it, except it be money lent upon a mortgage."

In view of the tender and willingness of the tenant to pay the rent and the repeated refusals to accept it by the landlord, we think that it is evident that she should not be permitted to predicate proceedings to dispossess the tenant upon the fact that the rent has not been paid.

Counsel for the respondent insists that [***15] the final order rendered against the tenant and in favor of the landlord cannot be disturbed. Thus, in his brief, he says: "If it were true that the ejectment would bar these proceedings and that these proceedings (by demand necessary in order to bring them) bar the ejectment, we would then have the curious situation in which the landlord would be without possession, without rent and without a remedy to procure either. She could not get possession by ejectment, since demand for rent and the summary proceedings would bar her. She could not get her rent, since there would be no lease and no rent would be due; neither could she for the same reason have recourse to summary proceedings "

We do not think that this statement accurately describes the situation of the landlord.

If, however, the counsel for the landlord correctly describes the situation of his client, her present position is the result solely of her own acts and her effort to pursue inconsistent and irreconcilable remedies, and we are under no obligation [*417] to do violence to established rules of law to protect the landlord from her own blunders in procedure, [**385] especially as it seems to us that she has been led into [***16] these blunders in her effort to subject her tenant to a series of vexatious attacks. It does not appear to us that her situation is one of undue hardship. She complains that she has not been paid the rent, and yet she admitted that she has received rent from some one other than the tenant. She was offered the rent by the tenant and deliberately refused it, apparently for no other purpose than to make it appear that the tenant was in default, so that she might dispossess him. She has instituted

ejectment proceedings which are still pending, and the present is her second attempt to dispossess the tenant, her first attempt being unsuccessful. *Janes v. Paddell*, 67 Misc. 420.

In ejectment she claims the lease terminated in September, 1909, while in these proceedings she asserts that it was valid and subsisting in June, 1911. By reason of her inconsistent and vexatious course, she has involved her tenant in legal difficulties from which she now insists he shall not be relieved because, if he is, she can think of no new course open to her which would not be inconsistent with some attitude which she has already assumed. In view of the conclusions which we have reached, it is unnecessary [***17] for us to consider the ruling of the trial judge in dismissing the defendant's counterclaim.

It follows, therefore, that the final order appealed from should be reversed and the proceeding dismissed, with costs to the tenant.

Guy and Cohalan, JJ., concur

Final order reversed and proceeding dismissed, with costs to tenant.

Matter of Leon St. Clair Nation v. City of New York, 902 N.Y.S.2d 22
(2010)



[Matter of Leon St. Clair Nation v City of New York](#)

Court of Appeals of New York

March 22, 2010, Argued; April 29, 2010, Decided

No. 63

Reporter

14 N.Y.3d 452 *; 928 N.E.2d 404 **; 902 N.Y.S.2d 22 ***; 2010 N.Y. LEXIS 612 ****; 2010 NY Slip Op 3471

[1] In the Matter of Leon St. Clair Nation, Respondent, v City of New York et al., Appellants.

Prior History: Appeal, by permission of the Court of Appeals, from a judgment (denominated decision and order) of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 10, 2009, in a proceeding pursuant to [CPLR article 78](#) (transferred to the Appellate Division by order of the Supreme Court, entered in New York County). The Appellate Division judgment, insofar as appealed from, modified, on the law, a determination of respondent Commissioner of the New York City Department of Buildings (DOB) which had (1) adopted the administrative law judge's finding that petitioner negligently submitted false photographs and documents to the DOB, (2) revoked petitioner's professional certification privileges, and (3) refused to accept any application or other document submitted by petitioner to DOB, pursuant to Administrative Code of the City of New York § 26-124 (c), for two years to be followed by a three-year probationary period. The modification consisted of vacating the penalty imposed pursuant to Administrative Code § 26-124 (c).

[Matter of St. Clair Nation v City of New York, 60 AD3d 468, 874 NYS2d 452, 2009 NY App Div LEXIS 1726 \(N.Y. App. Div. 1st Dep't, 2009\)](#), reversed.

Disposition: [****1] Judgment, insofar as appealed from, reversed, with costs, and petition dismissed in its entirety.

Case Summary

Procedural Posture

Respondent Commissioner of the New York City Department of Buildings (DOB) appealed a judgment by the Appellate Division (New York) that, inter alia,

granted petitioner engineer's CPLR art. 78 petition and found that Administrative Code of the City of NY § 26-124(c) could not be applied retroactively to bar the engineer from submitting any documents to the DOB for two years, together with a three-year probationary period.

Overview

In 2004, the engineer placed his seal on digitally altered photographs submitted to DOB in connection with a pavement plan for a building under construction. Thereafter, he attested the accuracy of a falsified photograph in support of another pavement plan for a separate property, and offered a false application to DOB for alterations to a nonexistent second floor of a third parcel. The Court of Appeals found, inter alia, that although the engineer's inability to file papers with DOB for a future period of time was predicated on prior false filings, it did not render the Commissioner's application of Administrative Code of the City of NY § 26-124(c) retroactive. Based on the engineer's repeated certification and submission of false materials, the Commissioner's determination did not shock the conscience. Accordingly, the engineer was not entitled to art. 78 relief.

Outcome

The judgment was reversed, and petition was dismissed in its entirety.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Fraud Against the Government > False Statements > General Overview

Governments > Local Governments > Licenses

14 N.Y.3d 452, *452; 928 N.E.2d 404, **404; 902 N.Y.S.2d 22, ***22; 2010 N.Y. LEXIS 612, ****1; 2010 NY Slip Op 3471, *****3471

[HN1](#) **Fraud Against the Government, False Statements**

See Administrative Code of the City of NY § 26-124(c), recodified in 2008 with minor changes in wording as [Administrative Code of the City of NY § 28-211.1.2](#).

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN2](#) **Effect & Operation, Retrospective Operation**

Retroactive operation of legislation is not favored by courts, and statutes will not be given such construction unless the language expressly or by necessary implication requires it.

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN3](#) **Effect & Operation, Retrospective Operation**

A statute is not retroactive when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events.

Governments > Local Governments > Licenses

Torts > Malpractice & Professional Liability > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN4](#) **Local Governments, Licenses**

Where the requirements for engaging in specified professional activity are changed to govern future professional eligibility, a statute does not operate retroactively in any true sense even though its application may be triggered by an event that occurred prior to its effective date.

Criminal Law & Procedure > ... > Fraud Against the Government > False Statements > Penalties

Governments > Local Governments > Licenses

Torts > Malpractice & Professional Liability > General Overview

[HN5](#) **False Statements, Penalties**

Administrative Code of the City of NY § 26-124(c) authorizes the Commissioner of the Department of Buildings (DOB) to refuse to accept applications or documents from "any person" found to have knowingly or negligently submitted falsified materials to DOB. By its terms, the provision aims to regulate future professional eligibility. The underlying purpose of the code provision is to promote public safety given the vast number of documents filed with and relied upon by DOB each year.

Headnotes/Summary

Headnotes

Statutes -- Retroactive Application of Statute -- Statutory Provision Applicable to Future Transactions Based on Events Occurring Prior to Effective Date

1. The penalty imposed upon petitioner licensed engineer by the Commissioner of the New York City Department of Buildings (DOB) whereby, pursuant to Administrative Code of the City of New York § 26-124 (c) (recodified as [Administrative Code § 28-211.1.2](#)), the Commissioner was authorized to refuse to accept any application or other document submitted by petitioner to the DOB for a period of two years followed by a three-year probationary period, and which was based on negligent acts committed by petitioner prior to the enactment of the statutory provision, did not amount to an improper retroactive application of the provision. Where the requirements for engaging in a specific professional activity are amended to govern future eligibility, a statute does not operate retroactively notwithstanding that its application may be triggered by an event which occurred prior to its effective date. Administrative Code § 26-124 (c), enacted for the purpose of promoting public safety and preventing the waste of taxpayer money by eliminating the filing of false information with the DOB, authorizes the Commissioner to refuse to accept applications or documents from any person found to have knowingly or negligently submitted false materials. By its terms, section 26-124 (c) aims to regulate future professional activity. The fact that petitioner's inability to file papers

14 N.Y.3d 452, *452; 928 N.E.2d 404, **404; 902 N.Y.S.2d 22, ***22; 2010 N.Y. LEXIS 612, ****1; 2010 NY Slip Op 3471, *****3471

with DOB for a future period of time was predicated on prior false filings did not render the Commissioner's application of the provision retroactive.

Constitutional Law -- Ex Post Facto Law -- Statutory Provision Applicable to Future Transactions Based on Events Occurring Prior to Effective Date

2. Administrative Code of the City of New York § 26-124 (c) (recodified as [Administrative Code § 28-211.1.2](#)), pursuant to which the Commissioner of the New York City Department of Buildings (DOB) was authorized to refuse to accept any application or other document submitted by petitioner licensed engineer to the DOB for a period of two years followed by a three-year probationary period, did not constitute an unconstitutional ex post facto law as applied to petitioner even though the penalty imposed under the provision was based on negligent acts committed by petitioner prior to the enactment of the statutory provision. Administrative Code § 26-124 (c) was enacted for the purpose of promoting public safety and preventing the waste of taxpayer money by eliminating the filing of false information to the DOB. Under the statute, the Commissioner is authorized to refuse to accept applications or documents from any person found to have knowingly or negligently submitted false materials. Thus, by its terms, section 26-124 (c) aims to regulate future eligibility, and the fact that petitioner's inability to file papers with DOB for a future period of time was predicated on prior false filings did not render the statute an ex post facto law as applied to him.

Municipal Corporations -- Permits -- Penalty for Filing False Information with New York City Department of Buildings

3. The determination by respondent Commissioner of the New York City Department of Buildings (DOB) to refuse to accept any application or other document submitted to the DOB by petitioner licensed engineer for two years followed by a three-year probationary period (Administrative Code of City of NY § 26-124 [c] [recodified as [Administrative Code § 28-211.1.2](#)]) based upon petitioner's negligent certification of the accuracy of altered photographs in connection with two separate properties and submission of a deceptive application for alterations in connection with a third property did not shock the conscience, inasmuch as it was based on petitioner's repeated certification and submission of false materials.

Counsel: Michael A. Cardozo, Corporation Counsel,

New York City (Cheryl Payer and Stephen J. McGrath of counsel), for appellants. The Appellate Division erred in holding that the withdrawal of petitioner's filing privileges for two years is a retroactive application of Administrative Code of the City of New York § 26-124 (c) (now [Administrative Code § 28-211.1.2](#)) which is a regulatory and not a penal statute. ([Matter of Miller v DeBuono](#), 90 NY2d 783, 689 NE2d 518, 666 NYS2d 548; [Forti v New York State Ethics Commn.](#), 75 NY2d 596, 554 NE2d 876, 555 NYS2d 235; [People v Weinberg](#), 83 NY2d 262, 631 NE2d 97, 609 NYS2d 155; [Matter of Abrams v Brady](#), 77 NY2d 741, 573 NE2d 556, 570 NYS2d 468; [Matter of Allied Grocers Coop v Tax Appeals Trib.](#), 162 AD2d 791, 557 NYS2d 707; [Matter of Springer v Whalen](#), 68 AD2d 1011, 415 NYS2d 106; 47 NY2d 710; [Flemming v Nestor](#), 363 US 603, 80 S Ct 1367, 4 L Ed 2d 1435; [De Veau v Braisted](#), 363 US 144, 80 S Ct 1146, 4 L Ed 2d 1109; [Landgraf v USI Film Products](#), 511 US 244, 114 S Ct 1483, 128 L Ed 2d 229; [Calder v Bull](#), 3 Dallas [3 US] 38, 61 L Ed 648.)

Gregory Chillino, New York City, and Stuart A. Klein for respondent. Respondents-appellants' imposition of Administrative Code of the City of New York § 26-124 (c) is unconstitutional and otherwise unlawful. ([Matter of Mulligan v Murphy](#), 14 NY2d 223, 199 NE2d 496, 250 NYS2d 412; [People v Oliver](#), 1 NY2d 152, 134 NE2d 197, 151 NYS2d 367; [Majewski v Broadalbin-Perth Cent. School Dist.](#), 91 NY2d 577, 696 NE2d 978, 673 NYS2d 966; [Fernandez-Vargas v Gonzales](#), 548 US 30, 126 S Ct 2422, 165 L Ed 2d 323; [Landgraf v USI Film Products](#), 511 US 244, 114 S Ct 1483, 128 L Ed 2d 229; [People v O'Brien](#), 111 NY 1, 18 NE 692; [Garzo v Maid of Mist Steamboat Co.](#), 303 NY 516, 104 NE2d 882; [Buccino v Continental Assur. Co.](#), 578 F Supp 1518; [Matter of Cortland-Clinton, Inc. v New York State Dept of Health](#), 59 AD2d 228, 399 NYS2d 492; [Matter of Garcia v Department of Educ. of City of N.Y.](#), 18 Misc 3d 503, 852 NYS2d 639.)

Judges: Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Opinion by: GRAFFEO

Opinion

[***23] [**405] [*454] Graffeo, J.

We conclude that the Commissioner of the New York

City Department of Buildings (DOB) properly relied on New York City Administrative Code § 26-124 (c) in refusing to accept any [*455] documents submitted by petitioner, a professional engineer, for two years, followed [2] by a three-year probationary period.

Petitioner Leon St. Clair Nation is an engineer licensed by the New York State Department of Education. In 2004, he [**406] [***24] placed his seal on digitally altered photographs submitted to DOB in connection with a pavement plan for a building under construction in Brooklyn. In early 2005, petitioner attested the accuracy of a falsified photograph in support of another pavement plan for a separate Brooklyn property. The following year, he offered a false application to DOB for alterations to a nonexistent second floor of a third Brooklyn parcel.

As a result of these filings, DOB commenced an administrative proceeding before the [****2] New York City Office of Administrative Trials and Hearings seeking to revoke petitioner's professional certification privileges. Following a hearing, the Administrative Law Judge (ALJ) found, by a preponderance of the evidence, that petitioner had negligently certified the accuracy of the altered photographs and submitted a deceptive application, resulting in a recommendation that his professional certification privileges be rescinded.

The DOB Commissioner adopted the ALJ's recommendation and revoked petitioner's certification privileges with respect to the agency's "Limited Supervisory Check and/or Professional Certification Program" (see [1 RCNY 21-01](#)). Relying on a recently enacted provision--Administrative Code § 26-124 (c) -- the Commissioner further precluded petitioner from filing any application or document with DOB, whether in connection with the Limited Supervisory Check/Professional Certification Program or otherwise, for two years, effective January 15, 2008, to be followed by a three-year probationary period.

Petitioner responded by commencing this [CPLR article 78](#) proceeding challenging the Commissioner's determination. He argued that the determination was not supported [****3] by substantial evidence; that the revocation of his certification privileges was excessive; and that Administrative Code § 26-124 (c) was inapplicable because it was enacted in 2007 after he engaged in the acts charged against him.

Upon transfer of the proceeding to the Appellate Division, that Court modified to the extent of vacating

the penalty imposed pursuant to Administrative Code § 26-124 (c), and otherwise confirmed the determination ([60 AD3d 468, 874 NYS2d 452 \[1st Dept 2009\]](#)). The Court held that substantial evidence supported the [*456] Commissioner's determination that petitioner negligently certified the accuracy of submissions and that the Commissioner's revocation of certification privileges did not shock the judicial conscience. But the Court held that Administrative Code § 26-124 (c) could not be applied retroactively by the Commissioner to bar petitioner from submitting any documents to DOB for two years, together with the three-year probationary [3] period. We granted DOB leave to appeal ([12 NY3d 713, 910 NE2d 1008, 883 NYS2d 178 \[2009\]](#)).¹

New York City Administrative Code § 26-124 (c) provides, in relevant part:

"In addition to any other penalty provided by law, the commissioner may refuse to accept any application or other document . . . that bears the signature of any person who has been found, after a hearing at the office of administrative trials and hearings pursuant to the department's rules, . . . to have knowingly or negligently falsified or allowed to be falsified [**407] [****25] any certificate, form, signed statement, application, [or] report."²

Adopted by the Legislature in 2007, this provision was designed to "promote public safety and prevent the waste of taxpayer dollars by eliminating the repeated filing of false information relating to the construction and repair of buildings in New York City" (Senate Introducer Mem in Support, Bill Jacket, L 2007, ch 542, at 8, reprinted at 2007 McKinney's Session Laws of NY, at 2041).

DOB argues that the Appellate Division erred in concluding [****5] that Administrative Code § 26-124 (c) was inapplicable in this proceeding. Relying on [Matter of](#)

¹Petitioner has not challenged in this Court the Appellate Division's conclusions that the determination was supported by substantial evidence and that revocation of petitioner's certification [****4] privileges under the Limited Supervisory Check/Professional Certification Program did not shock the conscience.

²Pursuant to Local Law No. 8 (2008) § 21 of the City of New York, New York City Administrative Code § 26-124 (c) was recodified with minor changes in wording as [Administrative Code § 28-211.1.2](#).

Miller v DeBuono (90 NY2d 783, 689 NE2d 518, 666 NYS2d 548 [1997]), DOB submits that the Commissioner's refusal to accept documents from petitioner for a future period of time did not amount to an improper retroactive application of the provision. We agree.

It is well settled under New York law that retroactive operation of legislation "is not favored by courts and statutes will not [*457] be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584, 696 NE2d 978, 673 NYS2d 966 [1998]). But it is also true that "[a] statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events" (*Forti v New York State Ethics Commn.*, 75 NY2d 596, 609, 554 NE2d 876, 555 NYS2d 235 [1990]) [4] [internal quotation marks and citation omitted]).

In *Miller*, a nurse aide physically abused a nursing home patient in 1991. After a hearing, the Commissioner of Health sustained the charge of patient abuse. Pursuant to 10 NYCRR 415.4 (b) (1) (iii) (b), enacted after the incident took place, the nurse aide was fired and prohibited [****6] from future employment with any nursing home. She commenced a CPLR article 78 proceeding, challenging the Commissioner's retroactive enforcement of a regulation barring future employment once a finding of abuse had been lodged with the Nurse Aide Registry.

In rejecting the nurse aide's contention, we concluded in *Miller* that the regulation had not been inappropriately applied retroactively. We reasoned that "where the requirements for engaging in specified professional activity are changed to govern future professional eligibility, a statute does not operate retroactively in any true sense even though its application may be triggered by an event which occurred prior to its effective date" (90 NY2d at 790 [internal quotation marks, citations, brackets and emphasis omitted]). We further explained that the provision was a safety measure designed to regulate future employment by precluding nursing homes from hiring nurse aides who had been previously found guilty of abuse. As a result, the Commissioner's application of the regulation was not improper merely because the nurse aide's disqualifying conduct occurred before its promulgation.

[1, 2] The *Miller* rationale controls the question of retroactivity [****7] in this case. Administrative Code §

26-124 (c) authorizes the Commissioner to refuse to accept applications or documents from "any person" found to have knowingly or negligently submitted falsified materials to DOB. By its terms, the provision aims to regulate future professional eligibility. And similar [**408] [***26] to the regulation at issue in *Miller*, the underlying purpose of the code provision is to promote public safety given the vast number of documents filed with and relied upon by DOB each year. The fact that petitioner's inability to file papers with DOB for a future period of time is predicated on prior false filings [**458] does not render the Commissioner's application of the provision retroactive.³ Hence, contrary to petitioner's position, "the principles of statutory construction which require clear expression of a legislative intention to make a new provision retroactive are inapplicable here" (*Forti*, 75 NY2d at 610 [citations omitted]).

[3] The Commissioner therefore [****8] properly relied on Administrative Code § 26-124 (c) in determining that DOB would preclude petitioner from submitting any documents for two years, with a three-year probationary period thereafter. Based on petitioner's repeated [5] certification and submission of false materials, we further conclude that the Commissioner's determination does not shock the conscience (see *Matter of Kelly v Safir*, 96 NY2d 32, 38, 747 NE2d 1280, 724 NYS2d 680 [2001], rearg denied 96 NY2d 854, 754 NE2d 773, 729 NYS2d 670 [2001]).

Accordingly, the judgment of the Appellate Division, insofar as appealed from, should be reversed, with costs, and the petition dismissed in its entirety.

Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Judgment, insofar as appealed from, reversed, etc.

End of Document

³ [2] For the same reason, we reject petitioner's contention that Administrative Code § 26-124 (c), as applied to him, constitutes an ex post facto law in violation of the Federal Constitution (see *Forti*, 75 NY2d at 610 n.4).

London Terrace Gardens, L.P. v. Heller, 975 N.Y.S.2d 710 (1st Dep't, 2009)



Positive

As of: July 24, 2025 3:24 PM Z

London Terrace Gardens, L.P. v Heller

Supreme Court of New York, Appellate Term, First Department

October 23, 2009, Decided

570560/09.

Reporter

40 Misc. 3d 135(A) *; 975 N.Y.S.2d 710 **; 2009 N.Y. Misc. LEXIS 6785 ***; 2009 NY Slip Op 52858(U) ****

[****1] London Terrace Gardens, L.P., Petitioner-Landlord-Appellant, against Kenneth Heller, Respondent-Tenant-Respondent.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

notice, tenant, nonprimary, termination notice, regulation, eviction, premises, rent control, terminate, holdover, purposes, grounds, resides, tenancy

Headnotes/Summary

Headnotes

[*135A] [**710] Landlord and Tenant--Summary Proceedings--Generic and Conclusory Notice of Termination.

Judges: [****1] PRESENT: McKeon, P.J., Shulman, Hunter, JJ.

Opinion

Landlord appeals from an order of the Civil Court of the City of New York, New York County (Gerald Lebovits, J.), dated May 18, 2009, which granted tenant's motion to dismiss the petition in a holdover summary proceeding.

Per Curiam.

Order (Gerald Lebovits, J.), dated May 18, 2009, affirmed, with \$10 costs.

The notice of termination underlying this nonprimary residence holdover proceeding broadly states that tenant has not "maintained an ongoing, substantial, physical nexus with the [rent controlled] premises for actual living purposes"; that tenant has "failed to spend more than 183 days out of the preceding year residing at the premises, as confirmed and substantiated" by unidentified building employees; and that "[n]o building personnel [have] seen [tenant] at the subject premises for [more than] one year." In such unparticularized form, the termination notice was too generic and conclusory to satisfy the requirements of New York City Rent and Eviction Regulations ([9 NYCRR section 2204.3](#)) that the notice state the ground upon which the tenant's eviction is sought, as well as "the facts necessary to establish the existence of such ground." [****2] While an allegation that a tenant primarily resides at a specified alternate location is not the sine qua non of pleading sufficiency in every nonprimary residence case (see *Price v Chelsmore Apts.*, NYLJ, March 8, 1996, at 25, col 2 [App Term, 1st Dept]), the absence of such an allegation was fatal in these circumstances, where the notice did not "otherwise state[] case-specific facts tending to establish this particular tenant's alleged nonprimary residence" (*id.*).

To uphold the studiously vague termination notice here under review would, for all practical purposes, eviscerate the plain language of the governing notice regulation and undermine its salutary purpose to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts. Granted, the need for facts in a nonprimary residence notice served upon a tenant who obviously "knows whether he or she is utilizing the apartment as [****2] his or her primary residence," may be less compelling than in the counterpart situation involving a notice seeking to terminate a tenancy on owner use grounds,

40 Misc. 3d 135(A), *135(A); 975 N.Y.S.2d 710, **710; 2009 N.Y. Misc. LEXIS 6785, ***2; 2009 NY Slip Op 52858(U), ****2

where "only the owner knows what his or her true intentions are" ([Hirsch v Stewart](#), 63 AD3d 74, 80-81, 877 N.Y.S.2d 285 [2009]). [***3] This circumstance, however, should not serve to trump the express terms of the notice regulation, which require a recitation of the "necessary" facts in "[e]very ... notice to a tenant to vacate or surrender possession of a housing accomodation" ([9 NYCRR 2204.3](#) [emphasis added]), without differentiating among the various types of grounds for terminating a rent controlled tenancy.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Decision Date: October 23, 2009

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Mak v. Yun Pan Lee, 824 N.Y.S.2d 763 (1st Dep't, 2016)

Mak v Yun Pan Lee

[*1] Mak v Yun Pan Lee 2006 NY Slip Op 51408(U) [12 Misc 3d 142(A)] Decided on July 21, 2006 Appellate Term, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 21, 2006

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

PRESENT: Davis, J.P., Gangel-Jacob, Schoenfeld, JJ

570104/06.

Nancy Mak, Petitioner-Landlord-Appellant,

against

Yun Pan Lee and Chung Him Lam, Respondents-Tenants-Respondent

Landlord appeals from an order of the Civil Court, New York County (Ulysses B. Leverett, J.), dated August 20, 2004, which, inter alia, granted tenant's cross motion to dismiss the petition in a nonprimary residence holdover proceeding.

PER CURIAM:

Order (Ulysses B. Leverett, J.), dated August 20, 2004, affirmed, without costs.

The notice of nonrenewal underlying the within nonprimary residence holdover proceeding, stating only that tenant was "living at another [unspecified] location," without setting forth any case-specific allegations, failed to satisfy the notice requirements of Rent Stabilization Code (9 NYCRR) §2524.2 (b) and governing precedent (see Berkeley Assoc. Co. V Camlakides, 173 AD2d 193 [1991], affd 78 NY2d 1098 [1991]).

This constitutes the decision and order of the court.

Decision Date: July 21, 2006

Rose Associates v. State Division of Housing & Community Renewal,
121 A.D.2d 185 (1st Dep't, 1986)



Caution

As of: October 24, 2025 3:41 PM Z

Rose Associates v. State Div. of Housing & Community Renewal, Office of Rent Admin.

Supreme Court of New York, Appellate Division, First Department

June 5, 1986

No Number in Original

Reporter

121 A.D.2d 185 *; 503 N.Y.S.2d 13 **; 1986 N.Y. App. Div. LEXIS 58203 ***

In the Matter of Rose Associates, Respondent, v. State Division of Housing and Community Renewal, Office of Rent Administration, Appellant

court found that the determination of the commissioner was not arbitrary or capricious or in violation of law, and reinstated it. The evidence established that the tenant was not required to file city income tax returns and that it was beneficial to file a joint return with her husband, whose address was listed.

Core Terms

tenant, primary residence, apartment, landlord, income tax return, resident, subject premises, tax return, instituted, regulation, decontrol, driver's license, legal obligation, violation of law, sworn statement, joint return, three year, documentation, registration, capricious, reinstated, obligated, annulled, credible, dividend, neighbor, listing, card

Outcome

The court reinstated the determination of the commissioner and reversed the petition of the landlord.

LexisNexis® Headnotes

Case Summary

Procedural Posture

Respondent commissioner sought review of an order of the Supreme Court, New York County (New York) that granted petitioner landlord's N.Y. C.P.L.R. art. 78 petition and annulled the housing department's determination that the apartment was the tenant's primary residence.

Family Law > ... > Property

Distribution > Characterization > Separate Property

HN1 Characterization, Separate Property

It is perfectly legitimate for a husband and wife to establish two separate residences. It is equally certain that one spouse may maintain a separate dwelling as his or her primary residence.

Overview

The landlord instituted proceedings to decontrol the rent-controlled apartment, alleging that it was not the tenant's primary residence. The commissioner issued an order finding that the apartment was the tenant's primary residence and denied the landlord's application for decontrol. The landlord instituted a N.Y. C.P.L.R. art. 78 petition seeking to overturn the ruling as arbitrary and capricious and in violation of the law, claiming that the commissioner's determination did not comport with the requirements of New York City, N.Y., Rent and Eviction Reg. § 18 that required proof that the tenant either filed a city resident income tax return at the claimed primary residence or that the tenant was not legally obligated to file such tax return. The appellate

Judges: [***1] Concur -- Murphy, P. J., Sandler, Fein, Kassal and Ellerin, JJ.

Opinion

[*185] [**14] Judgment, Supreme Court, New York County (Francis N. Pecora, J.), entered June 20, 1985, which granted petitioner's CPLR article 78 petition and annulled an order of the State Division of Housing and Community Renewal, issued November 13, 1984, which had denied petitioner's administrative appeal of an order of the District Rent Administrator denying petitioner's

Demetrios Mestousis

121 A.D.2d 185, *185; 503 N.Y.S.2d 13, **14; 1986 N.Y. App. Div. LEXIS 58203, ***1

application for decontrol of the subject apartment, based upon a finding that the apartment was occupied by the tenant as her primary residence, unanimously reversed, on the law, the article 78 petition denied, the proceeding dismissed, and the determination of the State Division of Housing and Community Renewal reinstated, without costs.

Petitioner landlord instituted these proceedings to decontrol the subject rent-controlled apartment on January 8, 1982. Its application alleged that the subject premises were not the tenant's primary residence and that instead she resided with her husband at another Manhattan address. The tenant answered by alleging that the subject apartment has always been her primary residence since she first [***2] moved there in 1954. She also claimed that an identical proceeding instituted by the landlord on the same grounds in 1974 was denied by the City Rent Commissioner and that the circumstances have not changed since then.

In response to the Deputy Commissioner's request for documentation, the tenant submitted the following items listing the subject premises as her address -- voter registration card, driver's license, bills from various utilities, credit cards, bank and dividend statements, and letters from two neighbors within the subject building stating that they often see her in the building and have known her as a resident neighbor for many years. The tenant submitted an affidavit that she would not supply a copy of her income tax return as she did not earn sufficient income but admitted that she filed a joint income [*186] tax return with her husband, for his benefit, listing only the husband's address.

Based on this evidence, the District Rent Administrator issued an order finding the subject apartment to be the tenant's primary residence and denied the landlord's application for decontrol.

[**15] Upon the landlord's protest, the Deputy City Rent Commissioner requested [***3] that the tenant submit updated documentation of a similar nature, which she did. The Deputy Commissioner also held a hearing at which the tenant testified credibly that she and her husband maintained separate identities and lifestyles since their marriage in 1971 and that she has used the subject apartment as her own primary residence, sleeping there at least five nights per week on the average, keeping her extensive wardrobe there, and maintaining a fully stocked kitchen.

At the hearing, petitioner landlord presented the testimony of two of its employees, the managing agent

and the superintendent, who merely stated that they had not seen the tenant in the building during the past three years. Of course, this testimony is hardly dispositive on the issue of whether the tenant did in fact live there.

On this record, there is clearly substantial evidence to support the Rent Commissioner's finding that the subject apartment was the tenant's primary residence and the denial of the landlord's application.

The landlord instituted this article 78 petition seeking to overturn the ruling as arbitrary and capricious and in violation of the law, claiming that the Commissioner's determination [***4] did not comport with the requirements of New York City Rent and Eviction Regulations § 18 which, *inter alia*, requires proof that the tenant either filed a New York City resident income tax return at the claimed primary residence or that the tenant was not legally obligated to file such tax return.

Special Term granted the petition and annulled the determination, finding that the tenant did not offer satisfactory proof that she was not obligated to file city tax returns. The court held that the husband's filing of a joint Federal return contradicted the tenant's sworn statement that she was not legally obligated to file any tax returns.

[*187] Initially we must note that [HN1](#) it is perfectly legitimate for a husband and wife to establish two separate residences. It is equally certain that one [***5] spouse may maintain a separate dwelling as his or her *primary* residence. (E.g., [Newport Apts. Co. v Schechter](#), 124 Misc 2d 760, *affd* 127 Misc 2d 793 [App Term, 2d Dept]; [Coronet Props. Co. v Brychova](#), 122 Misc 2d 212, *affd* 126 Misc 2d 946 [App Term, 1st Dept]; cf. [Matter of Gladwin v Power](#), 21 AD2d 665, *affd* 14 NY2d 771.)

In the instant case, the tenant submitted competent proof that she used the subject address for every element of residency required by the regulation -- driver's license, voting registration, and the like. She also established by her uncontradicted testimony and other proof that she actually lived in the premises. The final requirement of the regulation, that she file a New York City resident income tax return or prove that she was not obligated to do so, was met by the sworn

*As then in effect. Primary residence cases are now commenced in a court of competent jurisdiction and governed by Administrative Code of the City of New York § Y51-3.0 (e) (2) (i) (10) (L 1983, ch 403, § 42).

statement that her income was below that required for the filing of a return.

The tenant, an actress, testified that she had only worked in one four-week-long engagement during the previous three years. Her only other income consisted of dividends on modest investments. Her husband paid all of her expenses. The tenant swore that she was not required to [***6] file city income tax returns and her accountant submitted an affidavit to that effect.

The accountant's affidavit also established that it was beneficial to the husband to file a joint Federal tax return and that for the purposes of the joint return only one address, the husband's, was listed.

This is a credible reason for the filing of the joint return and in no way detracts from the proof that the subject premises were the tenant's primary residence. (See, [Coronet Props. Co. v Brychova, supra](#).)

[**16] Accordingly, the determination of the Commissioner was not arbitrary or capricious or in violation of law, and it should be reinstated.

Sadowsky v. City of New York, 732 F.2d 312 (2nd Cir., 1984)



Sadowsky v. New York

United States Court of Appeals for the Second Circuit

March 8, 1984, Argued ; April 19, 1984, Decided

No. 84-7055

Reporter

732 F.2d 312 *; 1984 U.S. App. LEXIS 23347 **

HAROLD SADOWSKY, VINCENT RUISI, CHELSEA WEST ASSOCIATES, Plaintiffs-Appellants, v. CITY OF NEW YORK, ANTHONY GLIEDMAN, as Commissioner of the Dept. of Housing Preservation and Development of the City of N.Y., Defendants-Appellees

Prior History: **[**1]** Expedited appeal from an order of the United States District Court for the Southern District of New York, Robert L. Carter, Judge, denying a motion for a preliminary injunction against the enforcement of one aspect of a New York City ordinance governing the renovation and demolition of single room occupancy dwellings.

Disposition: Affirmed.

Core Terms

harassment, certificate, district court, multiple dwellings, demolition, injunction, certification requirements, renovate

Case Summary

Procedural Posture

Appellant building owners sought review of a decision of the United States District Court for the Southern District of New York, which denied appellants' motion for a preliminary injunction against the enforcement by appellee, city and housing commissioner, of one aspect of N.Y. City, N.Y., Ordinance, Local Law 19, which governed the demolition of single room occupancy dwellings.

Overview

Appellant building owners owned single room occupancy buildings (SRO's). N.Y. City, N.Y., Ordinance, Local Law 19 governed SRO's and required that no harassment of tenants occur during a three-year

period before application for renovation or demolition approval. A waiver was allowed if the SRO's were purchased and recorded prior to the ordinance's approval. Appellants recorded their SRO's after that date. They argued that the recordation requirement caused a taking and, thus, violated U.S. Const. amends. V and XIV. The trial court denied a preliminary injunction against the enforcement of the ordinance by appellees, city and housing commissioner. On appeal, the court affirmed and held that appellants did not prove that all economically viable uses were precluded because another developer might have been able to afford the project. Appellants might have cut losses by refusing to close or recoup losses incurred prior to closing through court action. The character of the governmental action was valid; it preserved housing for those in need. Thus, appellants did not succeed in making the requisite showing on the merits of their argument that the recordation provision was a taking.

Outcome

The court affirmed the decision of the trial court, which denied appellant building owners a preliminary injunction against appellees, city and housing commissioner, of an ordinance that required three years of no harassment of tenants in single room occupancy buildings (SRO's) before they were demolished. Appellants did not prove that the recording provision caused a taking.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN1 Coercion & Harassment, Elements

The occupants of single room occupancy buildings (SROs) are generally poor and elderly, and often suffer from physical and mental infirmities and social problems which make them particularly vulnerable to harassment, N.Y. City, N.Y., Ordinance, Local Law § 1, and it is the policy of the city to encourage the preservation of these dwellings as housing resources for such occupants and to protect these occupants against such harassment. The general thrust of the § 1 is to set up a scheme under which the presence of tenant harassment is investigated before plan approval or permits are issued for the renovation or demolition of any SRO, and under which harassment is to be penalized where it is found to have occurred. To that end, the law requires that owners obtain a certification of no harassment. 4 N.Y. City Charter & Admin. Code Ann. § D26-40.06 (Supp. 1983-1984).

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN2 Housing & Public Buildings, Low Income Housing

Under certain circumstances, a waiver of the certification requirement is to be granted despite a determination that harassment occurs during the inquiry period. The waiver is available where the Commissioner of the Department of Housing Preservation and Development finds that the owner of record of the multiple dwelling with respect to which such certification is sought is the owner of record of such multiple dwelling prior to May 15, 1983 or enters into a contract of sale for the purchase of such multiple dwelling which is recorded prior to May 5, 1983. 4 N.Y. City Charter & Admin. Code Ann. § D26-40.06(e)(1)(a).

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

Real Property Law > Financing > Mortgages & Other Security Instruments > Deed in Lieu of Foreclosure

Real Property Law > Financing > Foreclosures > General Overview

HN3 Housing & Public Buildings, Low Income Housing

In order to grant a waivers of the certification requirement, the Commissioner of Housing Preservation and Development must find that the purchaser or owner of record is not the owner of record when the harassment took place and did not participate in or encourage the harassment on the premises, and that the purchase is bona fide and not intended to effect an evasion of the statute. On an alternative ground altogether, a waiver may be provided where the owner acquires the multiple dwelling by sale pursuant to foreclosure by mortgage or pursuant to a deed in lieu of such foreclosure.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 Injunctions, Preliminary & Temporary Injunctions

On a motion for a preliminary injunction, a showing must be made of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Inverse Condemnation > Regulatory Takings

HN5 Fundamental Rights, Eminent Domain & Takings

The [U.S. Const. amend. V](#) is deemed to allow state and local governments broad power to regulate housing conditions without paying compensation for all resulting economic injuries. A taking is less likely to be found when the challenged interference with a property interest arises from some public program adjusting the benefits and burdens of economic life to promote the common good, than when the interference entails a physical invasion of the property by the government.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN6 Fundamental Rights, Eminent Domain & Takings

There is a multi-factor inquiry generally applicable to nonpossessory governmental activity. The factors accorded particular significance in this inquiry are: (1) the economic impact of the regulation on the claimant and, particularly, (2) the extent to which the regulation interferes with distinct investment-backed expectations, and (3) the character of the governmental action.

Counsel: Marvin E. Frankel, New York, New York, (Greg A. Danilow, Andrea M. Likwornik, Kramer, Levin, Nessen, Kamin & Frankel, New York, New York), for Plaintiffs-Appellants.

Margaret G. King, Assistant Corporation Counsel, New York, New York, (Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York, Michael Gage), for Defendants-Appellees.

Judges: Timbers and Cardamone, Circuit Judges, and Tenney, Senior District Judge.

Opinion by: TENNEY

Opinion

[*314] TENNEY, District Judge:

Harold Sadowsky and Vincent Ruisi are general partners in the limited partnership, Chelsea West Associates, which owns two vacant and run-down single room occupancy buildings ("SRO's") in New York City. Sadowsky, Ruisi and Chelsea West Associates take this expedited appeal from an order denying **[**2]** their application for a preliminary injunction. They sought to enjoin enforcement as against them of one aspect of a local ordinance, New York City Local Law 19, Act of May 31, 1983, no. 19, 1983 N.Y. City Local Laws ("Law"). The Law governs the renovation and demolition of SRO's, and requires certification that no harassment of tenants has occurred on the premises during a three-year inquiry period preceding application for plan approval or permits for renovation or demolition. However, a waiver of the certification requirement may be granted for those SRO's purchased under contracts

entered into *and recorded* prior to the date on which the bill was approved by legislative committee.

Appellants allegedly entered into a contract to purchase the SRO's at issue prior to the cutoff date but did not record the contract. They now contend that the recordation requirement results in a violation of their *fifth* and *fourteenth amendment* rights. Since we agree with the court below, *578 F. Supp. 1577*, that appellants have failed to make a showing which would entitle them to a preliminary injunction, we affirm.

Background

On March 18, 1983, appellants allegedly entered into a written **[**3]** contract to purchase two vacant SRO's at 332-334 West 19th Street in Manhattan. On May 5, 1983, a **[*315]** committee of the New York City Council ("Council") held hearings on and recommended passage of the proposed Law. The court below noted that the committee's action on the bill on May 5th received significant news coverage. On May 12th the bill was adopted by the full Council, and on May 31st it was signed by the Mayor.

The Law's declaration of findings and intent states that *HN1* the occupants of SRO's "are generally poor and elderly, and often suffer from physical and mental infirmities and social problems which make them particularly vulnerable to . . . harassment," Law, *supra*, § 1, and states further that "it is the policy of the city to encourage the preservation of these dwellings as housing resources for such occupants and to protect these occupants against such harassment." *Id.* The general thrust of the new Law is to set up a scheme under which the presence of tenant harassment will be investigated before plan approval or permits will issue for the renovation or demolition of any SRO, and under which harassment will be penalized where it is found to have occurred. **[**4]** To this end, the Law requires that owners obtain a "certification of no harassment," 4 N.Y. CITY CHARTER & ADMIN. CODE ANN., ch. 26, tit. D, subtit. IV, art. 40, § D26-40.06 (Williams Supp. 1983-1984) ("§ D26-40.06"), before converting such properties "to more profitable uses." Law, *supra*, § 1. The City's Department of Housing Preservation and Development ("DHPD") will not provide such certification unless it is determined that there has been no harassment of the occupants during the three-year period preceding the application for certification. See § D26-40.06(c), (d)(3). If it is found that harassment has occurred during this inquiry period, certification will be denied and the application for plan approval or for an

^{*} Of the Southern District of New York, sitting by designation.

732 F.2d 312, *315; 1984 U.S. App. LEXIS 23347, **4

alteration or demolition permit will be rejected. Furthermore, for a period of three years following the date of denial of certification, no further application for plan approval or for an alteration or demolition permit will be considered by the City. See 3-A N.Y. CITY CHARTER & ADMIN. CODE ANN., ch. 26, tit. C, pt. II, art. 1, sub-art. 118.0, § C26-118.8(b)(5), (7) (Williams Supp. 1983-1984).

HN2 Under certain circumstances, however, a waiver of **[**5]** the certification requirement will be granted despite a determination that harassment has occurred during the inquiry period. The waiver is available where the Commissioner of the DHPD finds that "the owner of record of the multiple dwelling with respect to which such certification is sought was the owner of record of such multiple dwelling prior to May fifth nineteen hundred eighty-three or had entered into a contract of sale for the purchase of such multiple dwelling which was recorded prior to [May 5, 1983]. . . ." § D26-40.06(e)(1)(a) (emphasis supplied). **HN3** In order to grant a waiver on these grounds, the Commissioner must also find that the purchaser or owner of record was not the owner of record when the harassment took place and did not participate in or encourage the harassment on the premises, and that the purchase was bona fide and not intended to effect an evasion of the statute. See § D26-40.06(e)(1)(b). On an alternative ground altogether, a waiver may be provided where the owner acquired the multiple dwelling by sale pursuant to foreclosure by mortgage or pursuant to a deed in lieu of such foreclosure. See § D26-40.06(e)(2).

On June 24, 1983, over **[**6]** three weeks after the Law was signed, appellants allegedly closed on the two SRO's on West 19th Street. Subsequently, appellants submitted their applications for certification of no harassment and requested a waiver of the certification requirement for each building on the ground that they had contracted to purchase the properties before the May 5th cutoff date. The DHPD, however, rejected the waiver applications on the ground that the contract had not been timely recorded. The agency also informed appellants that there was reasonable cause to believe that harassment had occurred on the premises during the inquiry period, and that a hearing would be held on the matter. The latter hearing was held on February 16, 1984, and a decision was issued on April **[*316]** 5, 1984. The hearing officer concluded that harassment had occurred during the relevant period, and that certification should not be granted to appellants. According to the statutory scheme, the penalties for harassment will now come into play and, since

appellants have already been denied a waiver, the three-year moratorium on development will be imposed.¹

[7]** Appellants brought suit in the district court seeking, *inter alia*, preliminary injunctive relief from enforcement of the statute on the ground that, as applied to them, it effected a taking without just compensation in violation of the fifth and fourteenth amendments. The lower court found that the Law was a valid exercise of the City's police powers, and that the buildings on the property would have a remaining economically viable use as SRO's if the three-year moratorium on development were imposed. Applying the general standards regarding takings as set out in Agins v. City of Tiburon, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980), and Andrus v. Allard, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979), the court found that appellants had not raised a substantial question going to the merits, and that they had failed to make the showing required for preliminary injunctive relief. We agree.

Discussion

HN4 On a motion for a preliminary injunction, a showing must be made of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and **[**8]** a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). Appellants argue that the court below erred in determining that they had failed to make an adequate showing regarding the merits of the underlying action, and that they have shown irreparable harm, an issue which the district court did not reach. Like the court below, we find it unnecessary to reach the issue of irreparable harm since appellants have shown neither a likelihood of success on the merits nor the presence of serious questions going to the merits.

Initially, however, we must address the fact that for the first time on appeal appellants raise a full-blown due process claim based on the four-factor test set out in Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on other grounds*,

¹ The contention that appellants' claim is premature because there has been no finding of harassment is, of course, made inapposite by the issuance of the administrative decision. Thus, we have no cause to address the ripeness question.

[446 U.S. 359, 64 L. Ed. 2d 354, 100 S. Ct. 1723 \(1980\)](#), and recently applied by this court in [Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 \(2d Cir. 1984\)](#) ("*Textile Workers*").² Since the district court has not had an opportunity [**9] to consider this argument, and since the merits of appellants' claims will again be considered by the district court at the trial of the main action, we decline to consider it now. See [Radix Org., Inc. v. Mack Trucks, Inc., 602 F.2d 45, 48 \(2d Cir. 1979\)](#); [Adato v. Kagan, 599 F.2d 1111, 1116 \(2d Cir. 1979\)](#); [Women in City Gov't United v. City of New York, 563 F.2d 537, 542 \(2d Cir. 1977\)](#). Appellants further argue, however, that the recordation provision of the waiver clause is arbitrary and irrational, and thus violates the [Due Process Clause of the fourteenth amendment](#). This argument, unlike the argument based on the *Nachman* factors, was adequately presented to the court below, and may be considered on this appeal.

[**10] [**317] Appellants' claim that the recordation requirement is arbitrary and irrational is, however, easily disposed of. This requirement, as the district court found, is reasonably designed to avoid collusive backdating of contracts by purchasers and sellers. The fact that the requirement may work a harsh result in a particular case is not grounds for finding that it should be denied enforcement as arbitrary and capricious. See [Wickard v. Filburn, 317 U.S. 111, 129-30, 87 L. Ed. 122, 63 S. Ct. 82 \(1942\)](#). Thus, appellants' contention that the recordation requirement violates the Due Process Clause is without merit.

As for the [fifth amendment](#) claim, appellants argue that the Law effects a taking without just compensation and that the recordation provision must be enjoined from application as against them in order to bring the Law as applied into compliance with the amendment. Appellants contend first that the district court erred in ruling that the Law as applied to them substantially

advanced a valid legislative purpose, and, second, that it erred in ruling that the Law did not destroy the economically viable uses of their property for the purpose of the [Takings Clause](#).

[**11] As a starting point we note that [HNS](#) the [fifth amendment](#) is deemed to allow state and local governments broad power to regulate housing conditions without paying compensation for all resulting economic injuries. See [Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 73 L. Ed. 2d 868, 102 S. Ct. 3164 \(1982\)](#), and the cases cited therein. Further, a taking is less likely to be found when the challenged interference with a property interest "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," [Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 \(1978\)](#) ("*Penn Central*"), than when the interference entails a physical invasion of the property by the government. See *id.* But these principles, however basic, do not take us far in our analysis. The evaluation of whether a taking has occurred is essentially a factual inquiry, see *id.*, which nevertheless calls "as much for the exercise of judgment as for the application of logic." [Andrus v. Allard, 444 U.S. at 65](#). There is therefore no precise rule as to when there has been a taking, and the inquiry involves [**12] a weighing of public and private interests. See [Aqins v. City of Tiburon, 447 U.S. at 260-61](#).

[HN6](#) There is, however, a "multifactor inquiry generally applicable to nonpossessory governmental activity." [Loretto, 458 U.S. at 440](#) (citing [Penn Central, supra](#)). The factors accorded particular significance in this inquiry are: (1) "the economic impact of the regulation on the claimant and, particularly, (2) the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." [Penn Central, 438 U.S. at 124](#).

As to the first factor, regarding economic impact, it is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred. See [Andrus, 444 U.S. at 66](#); [Penn Central, 438 U.S. at 125](#). Further, "'taking' challenges have . . . been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." *Id.* (citing [Miller v. Schoene, 276 U.S. 272, 72 L. \[**13\] Ed. 568, 48 S. Ct. 246 \(1928\)](#)). In this case, appellants presented evidence

² In *Textile Workers*, we summarized the *Nachman* factors as follows:

(1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens.

[Textile Workers, 725 F.2d at 850](#) (citing [Nachman, 592 F.2d at 960](#)).

to show severe economic hardship, based on the anticipated financial drain caused by having to support the buildings for three years without altering their prior use. The court below concluded, however, that appellants had not established that all economically viable uses of the property would be precluded by the three-year moratorium since, "if plaintiffs cannot financially undertake the project, [*318] another developer might be able to do so." ³ Opinion filed Jan. 12, 1984, 83 Civ. 8389, slip op. at 6 (RLC) ("slip op."). In the lower court's view, neither the fact that appellants might have to sell their property because of financial hardship under the statute, nor the fact that appellants might be unable to recoup their costs required a finding that a taking had occurred.

[**14] The district court did not err in making this determination. In *Pompa Const. Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983) ("*Pompa*"), we affirmed the district court's determination that a local zoning law did not effect a taking of appellants' land despite the fact that the law permanently prohibited the commercial use for which appellants had purchased the property. ⁴ There, the district court found that several beneficial and economically viable uses of the property remained feasible under the challenged ordinance. We said that

³ Appellants argue that there was no evidence in the record regarding the marketability of the properties in question, and that the district court was therefore in error in reasoning that the properties might be sold. Since, however, appellants had the burden to show that economically viable uses were not available, the court did not abuse its discretion in determining that, where appellants did not show unmarketability, sale of the properties was a possible use.

⁴ Although in *Pompa* the application of a local ordinance was challenged under the fourteenth rather than the *fifth amendment*, we applied the *fifth amendment* taking analysis set out in *Agins*:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 72 L. Ed. 842, 48 S. Ct. 447 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

447 U.S. at 260 (quoted in *Pompa*, 706 F.2d at 421).

"the key question," *id.* at 424, was not whether a particular remaining use would be profitable for appellants, but rather whether appellants could sell the property to someone for that use. *Id.*

[**15] Under the second factor in *Penn Central* -- interference with "distinct investment-backed expectations," 438 U.S. at 124 -- appellants' argument is also weak. Since appellants purchased the properties weeks after the Law was signed, and over three months after it first received publicity in the news media, they had no basis at the time of closing for an expectation that there would be no obstacles to the development of their real estate. To be sure, appellants allege that by the closing date they had already made a sizable monetary investment in the property. But they might nevertheless have cut future losses by refusing to close, just as they might have sought to recoup losses incurred prior to closing through court action, if necessary. Thus, on the record before the district court, the equities relevant to appellants' investment expectations do not appear to favor appellants' request for preliminary relief. Furthermore, to the extent that appellants did have expectations, however ill-advised, of immediate and unimpeded development of the property, it must be recognized that, while the zoning law at issue in *Pompa* imposed a permanent prohibition against a certain use, [*16] the Law here imposes a prohibition which is temporary; after three years' time it will no longer restrict the property.

The third factor, regarding the character of the governmental action, weighs in favor of appellees' position. The parties appear to agree that the Law as a whole has a valid, even admirable, purpose. As for the contested recordation requirement, we agree with the district court that it does advance a reasonable legislative purpose and that it is valid as a "reliable way of ensuring that the applicant had, in fact, obtained his interest in the premises before the public was placed on notice of [the Law's] regulatory requirements." 578 F. Supp. at 1580. Further, the Law applies to all purchases in plaintiffs' position. Appellants will therefore "share with other owners the benefits and burdens of the city's exercise of its police power." *Agins*, [*319] 447 U.S. at 262. In light of the equities in this case, discussed *supra*, it would appear that, to the extent that appellants bear a significant burden as a result of this legislation, "that is [within limits] a burden borne to secure 'the advantage of living and doing business in a civilized community.'" [*17] *Andrus*, 444 U.S. at 67 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422, 67 L. Ed. 322, 43 S. Ct. 158 (1922)) (Brandeis, J.,

dissenting)). Thus, appellants have not succeeded in making the requisite showing on the merits of their argument that the Law's recordation provision has caused a taking in this case.

Finally, while we agree with the district court that the application of the recordation requirement in this case has troublesome consequences in that "the buildings might remain vacant and prove an eyesore to the surrounding community and that plaintiffs might be penalized for harassment they did not perpetrate," [578 F. Supp. at 1581](#), we find that as a general matter the equities do not favor appellants. Under the legislative scheme implicit in the Law, statutory certainty serves as a deterrent to harassment. That is, in SRO's where harassment is found, the City will refuse to authorize renovation or demolition for three years. Further, since the certification requirement runs with the land, this certainty inhibits the prospects of selling these buildings for redevelopment purposes. Out of step with this quite obvious scheme, appellants proceeded to close **[**18]** on the purchase of two vacant SRO's despite the fact that appellants did not meet the new Law's requirements for a waiver of certification. Appellants now seek extraordinary equitable relief from the court. They ask the court to prevent a harm which they themselves might have prevented, had they chosen to act consistently with the legislative scheme. Indeed, had they refused to close on the purchase, the prior owners would have been left with the property and with the problem -- now in appellants' hands -- of how to sell or otherwise realize income on that property under the newly enacted Law.

Affirmed.

Vaughan v. Michetti, 176 A.D.2d 144 (1st Dep't, 1991)



Cited

As of: October 24, 2025 3:43 PM Z

Vaughan v. Michetti

Supreme Court of New York, Appellate Division, First Department

September 17, 1991

No. 43689

Reporter

176 A.D.2d 144 *; 574 N.Y.S.2d 30 **; 1991 N.Y. App. Div. LEXIS 11748 ***

Application of Causewell Vaughan, Petitioner, For Judgment pursuant to Article 78 of the C.P.L.R., v. Felice Michetti, as Commissioner of the Housing and Preservation Department of the City of New York, Respondent

Prior History: [***1] Determination of respondent Housing Commissioner, dated June 28, 1990, which denied petitioner's application for a "certificate of no harassment," is unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of the Supreme Court, New York County [Ira Gammerman, J.] entered December 24, 1990), is dismissed, without costs or disbursements.

above-noted acts constituted "harassment" within the meaning of the *Administrative Code 27-2093* is supported by substantial evidence.

The penalty imposed, that of barring petitioner from renewing his application to alter or demolish any of the units in the subject premises for a three year period following the date of the denial of the "certification of no harassment," is mandated by [Administrative Code 27-198\(b\)\(7\)](#), and does not shock the court's sense of fairness.

We have considered petitioner's remaining claims and find [*145] them to be without merit.

Core Terms

harassment, tenant, certification, demolish

Judges: Sullivan, J.P., Milonas, Ross, Asch, Smith, JJ.

Opinion

[*144] [**30] Petitioner, the owner of a single room occupancy building, sought a permit to alter or demolish one or more of the units therein. The evidence adduced at the hearing established that during the three-year [**31] period preceding petitioner's application for a "certification of no harassment," one of the tenants was made to feel "threatened" by the making of repeated buyout offers. Additionally, this particular tenant's unit was permitted to remain in a deplorable condition over a lengthy period of time, despite requests by the tenant to the owners to ameliorate the situation.

The hearing officer's decision to credit the testimony of the tenant is generally unreviewable [***2] by the courts, (see [Silberfarb v. Bd. of Coop. Educational Svcs.](#), 60 NY 2d 979), and the determination that the

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Demetrios Mestousis

Windemere Owners, LLC v. Mullu, 2013 N.Y. Slip. Op. 31714(U) (Civ. Ct., N.Y. County, 2013)

Windemere Owners, LLC v Mullu

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

July 30, 2013, Decided

Index No.: L-T 51163/2013

Reporter

2013 N.Y. Misc. LEXIS 3322 *; 2013 NY Slip Op 31714(U) **

[**1] WINDEMERE OWNERS, LLC, Petitioner-Landlord -against- BIZU RIKI MULLU, 666 WEST END AVENUE, APT 16L, NEW YORK, NY 10025, Respondent-Tenant Windemere Owners, LLC v Mullu

Notice: THIS OPINION IS UNCORRECTED AND NOT SELECTED FOR OFFICIAL PUBLICATION.

Counsel: [*1] For Petitioner: CULLEN & TROIA, PC, New York, New York.

For Respondent: HOUSING CONSERVATION COORDINATORS, Shawn Blumberg, Esq., New York, New York.

Judges: HON. SABRINA B. KRAUS.

Opinion by: SABRINA B. KRAUS

Opinion

DECISION & ORDER

BACKGROUND

The underlying summary nonpayment proceeding was commenced by **WINDEMERE OWNERS, LLC** (Petitioner) against **BIZU RIKI MULLU** (Respondent), the Rent Stabilized tenant of record based on allegations that Respondent failed to pay rent that was past due for 666 West End Avenue, Apt 16L, New York, NY 10025 (Subject Premises).

PROCEDURAL HISTORY

Petitioner asserts an oral demand for the rent was made. The petition is dated December 24, 2012, and

seeks \$7750 in arrears for a period from June 2012 through December 2012 at a monthly rate of \$1,000.00 per month. Respondent appeared *pro se* and filed an answer on January 24, 2013. The proceeding was originally returnable on February 4, 2013. On March 1, 2013, counsel for Respondent appeared, and made a motion for summary judgment and related relief. On July 30, 2013, the court heard argument and reserved decision on the motion.

[**2] PRIOR RELATED PROCEEDINGS

Windemere v Sucharewicz Index Number 63654/2011

Petitioner commenced this summary holdover proceeding [*2] against the prior tenant of record based on non-primary residence. Respondent was named and sued as an undertenant. Petitioner issued a notice of termination dated January 20, 2011. The notice asserted that Respondent was living in the Subject Premises as an unauthorized occupant, and that she had attempted to tender rent for the Subject Premises that Petitioner had refused. That proceeding was initial returnable in April 2011.

The named tenant never appeared in that proceeding. Respondent appeared through counsel and asserted a written answer. The answer asserted *inter alia* that Respondent had been the sole occupant of the Subject Premises since November 2008, that Petitioner was aware of said fact and that Petitioner had accepted rent from Respondent through December 2010. The answer also asserted illusory tenancy and rent overcharge.

On October 5, 2011, the parties through counsel submitted a stipulation discontinuing said proceeding without prejudice. By that date Petitioner had already started a second holdover proceeding against the same parties for the same cause of action.

**Windemere Owners LLC v Sucharewicz, Index
Number 82557/2011**

In the second proceeding, Petitioner relied on [*3] the same notice of termination dated January 20, 2011. The proceeding was initially returnable October 4, 2011. Respondent appeared through counsel and filed a written answer, asserting she was the permanent regulated tenant by virtue of having resided in the Subject Premises for at least six months and having requested a lease, Respondent also asserted rent over charge and illusory tenancy.

[**3] On November 30, 2011, Respondent moved for summary judgment. The motion asserted that Respondent was the permanent regulated tenant of the Subject Premises. Respondent submitted an affidavit asserting the named tenant had permanently vacated in 2006, and that since November 2008 she had tendered rent which Petitioner had accepted. Respondent's motion was supported by copies of cancelled checks Petitioner had cashed from her for rent from December 2008 through November 2010.

Petitioner never filed opposition papers to said motion. Instead the parties entered into a stipulation dated March 28, 2012, marking the proceeding off calendar, pursuant to a stipulation which provided that if Petitioner failed to serve opposition papers within 45 days the proceeding would be deemed withdrawn without prejudice.

Petitioner [*4] never filed any opposition papers and the proceeding was never restored. This proceeding followed.

DISCUSSION

Respondent's motion for leave to serve an amended answer is granted on consent. The amended answer is deemed served and filed.

Respondent had moved to dismiss based on the fact that there is no lease agreement between the parties, but withdrew that branch of the motion on the record. The petition alleges that Respondent is in possession pursuant to a written lease agreement, but Petitioner acknowledges that this is false and Respondent has never been provided with a written lease agreement. Petitioner however has not cross-moved to correct said defect.

Respondent seeks summary judgment in part based on the uncontested claim that the rent sued for has been offered and refused. Petitioner fails to address this claim at all in its opposition papers, therefore the court must accept as an uncontested fact that the rent was offered and [*4] returned. Annexed to Respondent's moving papers is Petitioner's breakdown of rent arrears as of January 2013 (Ex H). This starts with a zero balance prior to December 2010 and shows a payment for each month in the amount of \$1000, including the months [*5] sued for in the petition, except the months of December 2010 through May 2011 and the month of January 2012. Respondent shows proof that rent was tendered for each of these months, with the exception of January 2012, and that Petitioner returned the rent for each of the months.

Specifically, on February 7, 2011, Petitioner's counsel rejected and returned three checks from Respondent for rent, check number 249 dated December 1, 2010, tendered for December 2010 rent, Check number 132 dated January 1, 2011, tendered for January 2011 rent, and a third check. In June 2011 another three rent checks were rejected by Petitioner because Petitioner did not recognize Respondent as the tenant of record, all three being bank checks for \$1000 each for March-May 2011.

Moreover, Petitioner, in arguing that the \$1000 rent is legal in this case asserts that based on the fact that Petitioner has alleged it has registered Melody Sucharewicz as the tenant of record in 2011 and 2012 with DHCR in the annual rent registrations. Thus, even now, in this proceeding, Petitioner denies Respondent was the tenant of record before 2012, but sues for rent from 2010. Rent which it is uncontested has been offered and [*6] refused.

Respondent argues that the foregoing uncontested facts preclude Petitioner from maintaining a summary proceeding for the failure to pay rent for these months and that Petitioner is relegated to a plenary action for said claims.

In [Janes v Paddell 74 Misc. 409, 132 N.Y.S. 379 \(App Term, 1911\)](#) the court held that where a tenant continuously offered to pay rent, but the landlord refused to accept the same, he could not maintain summary proceedings to recover possession for nonpayment of rent. In that case there [**5] was also an issue regarding election of remedies, which is not present in the case at bar, but the court irrespective of said issue still addressed the tender and refusal of rent

as a defense to a summary nonpayment proceeding.

New York, New York

The court held in pertinent part "... a landlord cannot be permitted to refuse rent from the tenant, and then dispossess the tenant for the nonpayment of the rent. The tender of the rent is under such circumstances equivalent to performance of the condition to pay rent." The court went on to conclude :

Hon. Sabrina Kraus

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In view of the tender and willingness to pay the rent and the repeated refusals to accept it by the landlord, we think that it is evident that she should not be permitted [*7] to predicate proceedings to dispossess the tenant upon the fact that the rent has not been paid.

[Id at 416.](#)

Similarly in [16 Apartment Associate Inc.v. Lewis 24 Misc3d 127\[A\], 889 N.Y.S.2d 884, 2009 NY Slip Op 51265\[U\]](#) the court found that based on the refusal of the landlord to accept DSS checks, the landlord failed to establish a default in rent and the nonpayment proceeding could not be maintained pursuant to [RPAPL 711\(2\)](#) (see also [Matter of Albany v White 46 Misc2d 915, 261 N.Y.S.2d 361](#) holding proper tender of rent bars entry of a final judgment).

Based on the history of the rejected payments, and the uncontested facts that the rent sought was timely tendered and refused, the court finds that Petitioner has forfeited the right to maintain this nonpayment proceeding for all months sued for except January 2012. Put otherwise out of the 7 months of arrears alleged due, Respondent has established a defense to all but one month.

Respondent asserts there was no proper rent demand and this requires dismissal of the proceeding. Petitioner submits an affidavit from Besin Beskovic, who asserts he personally [**6] demanded \$8000 in rent from Respondent at the Subject Premises on December 13, 2012. Assuming that said demand was made, which Respondent disputes, [*8] such a demand would be an invalid predicate for this proceeding as in December 2012 Petitioner only had the right to seek one month of arrears in this summary proceeding.

Based on all of the foregoing, Respondent's motion for summary judgment is granted and the proceeding is dismissed.

Dated: July 30, 2013