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FIDEL F. DEL VALLE
COMMISSIONER / CHIEF JUDGE

FAYE LEWIS
ADMINISTRATIVE LAW JUDGE
212-933-3013

July 9, 2015

Hon. Vicki Been
Commissioner
NYC Department of Housing Preservation & Development
100 Gold Street, 3rd Floor
New York, New York 10038

Re: *Dep't of Housing Preservation & Development v. Lewis,*
OATH Index No. 2675/14

Dear Commissioner Been:

The above referenced preceding concerning a single room occupancy multiple dwelling was referred to me to hear and report. My report and recommendation and the record of the proceeding are enclosed for your review and final decision.

Upon taking final action in this matter, please have your office send a copy of your decision to the Office of Administrative Trials and Hearings so that we may complete our files.

Very truly yours,

Faye Lewis

Faye Lewis
Administrative Law Judge

FL: nz

Encl.

c: Janeice Brown-Spitzmueller, Esq.
Daniel Phillips, Esq.

Dep't of Housing Preservation & Development v. Lewis

OATH Index No. 2675/14 (July 9, 2015)

Petitioner did not prove that owner committed acts of harassment within the meaning of section 27-2093 of the Administrative Code. Owner's application for a certificate of no harassment should be granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
-against-
MAURICE LEWIS
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a proceeding commenced by petitioner, the Department of Housing Preservation and Development ("the Department" or "HPD"), pursuant to Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment statute. Admin. Code § 27-2093 (Lexis 2015). The Department referred this matter pursuant to title 28, section 10-06 of the Rules of the City of New York ("RCNY"). Respondent, Maurice Lewis, is the owner of a building located at 169 Washington Park, Brooklyn, New York ("the building"). Petitioner alleges that respondent committed acts of harassment against an SRO tenant in the building, and seeks denial of respondent's application for a certificate of no harassment ("CONH") pursuant to section 28-107.4 of the Administrative Code.

At a hearing held over three days, petitioner presented the testimony of two witnesses: Marlene Palomino, a long-term tenant in the building, and Anthony Wycoff, an associate investigator in HPD's anti-harassment unit. Respondent testified and also presented the testimony of Aaron Harnly, another building tenant. Both parties presented documentary evidence. The record was held open until June 3, 2015, for the submission of closing briefs

which included argument on respondent's liability for purported acts of harassment committed in the building by his son, Jarrel Lewis.

For the following reasons, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent harassed a lawful occupant of the building. Therefore, I recommend that respondent's application for a CONH be granted.

ANALYSIS

Respondent filed an application for a CONH on December 23, 2013 (Pet. 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 2014).

On May 30, 2014, the Department issued an "initial determination" that there was "reasonable cause" to believe that harassment of the lawful occupants of the premises occurred at the building during the inquiry period (ALJ Ex. 1 at Ex. A).

The Department then filed a petition on June 8, 2014, alleging that respondent committed various acts of harassment during the inquiry period, including failing to provide essential services such as heat and hot water, an operable stove and refrigerator, electricity, adequate cooking gas, and a functional flushing apparatus in the community bathroom. The Department also contends in its petition that respondent's son, Jarrel Lewis, poured a combination of oil and urine on Ms. Palomino, placed her in fear of imminent danger or harm, and generally interfered with and disturbed her comfort, repose, peace and quiet (ALJ Ex. 1). The Department asserts that respondent is liable under the statute for acts of harassment committed by his son (Pet. Post-Trial Br. at 10-12).

Respondent disputes the allegations of harassment. Instead, respondent contends that he tried to resolve problems in Ms. Palomino's unit, but was hampered by her refusals to provide access. Further, respondent asserts that he cannot be held liable for the purported conduct of his son, Jarrel Lewis, because there was no evidence that Jarrel acted as his agent (Resp. Post-Trial Br. at 2-4).

Section 27-2093(a) of the Administrative Code defines harassment as follows:

> (1) the use or threatened use of force which causes or is intended to

> cause [a lawful occupant] to vacate his or her unit or 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 [a lawful occupant] and (ii) causes or is intended to cause such [lawful occupant] to vacate such unit or to surrender or 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 [lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy.

Section 27-2093(b) creates the presumption that any statutory act defined in section 27-2093(a) was committed "on or behalf of the owner of such multiple dwelling," and, further, was committed with the intent to cause a lawful tenant to vacate the unit. An owner may rebut the presumption of intent by a preponderance of the credible evidence. *Dep't of Housing Preservation & Development v. Edelstein*, OATH Index No. 490/12 at 2 (Dec. 7, 2012); *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 and Development v. McClarty*, OATH Index No. 1602/00 at 3 (Dec. 7, 2000). An owner may also rebut the presumption that a statutory act was committed on or behalf of himself or herself by a preponderance of the credible evidence. "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." Black's Law Dictionary at 1304 (9th ed. 2004).

As discussed below, here petitioner met its burden of establishing a *prima facie* case of harassment through evidence of housing code violations and failure to maintain essential services. Respondent rebutted this presumption, however, through evidence of Ms. Palomino's refusal to provide access and cooperate with attempts to correct violations. Further, Ms. Palomino's testimony regarding Jarrel Lewis was insufficiently reliable to satisfy petitioner's burden to establish harassment by a preponderance of the credible evidence.

I

The building at issue is a four-story brownstone (Pet. Exs. 5, 9). The certificate of occupancy is for a class B multiple dwelling with four floors and a basement (Pet. Ex. 2). The building likely dates to the late 1890s (Tr. 368). Respondent bought the building in 1998 (Pet. Ex. 1). Investigator Wycoff visited the building on March 20, 2014, as part of the investigation into whether the Department should grant a CONH. He observed that the top floor was gutted and partitions removed, leaving ten SRO units on the remaining three floors and an apartment on the ground floor (Pet. Ex. 9). Further, he noted that three other tenants used to live in the building, although the duration of their occupancy was unknown (Pet. Ex. 9). Petitioner did not present evidence regarding the circumstances of their departure.

Ms. Palomino, who lives in unit four on the first floor, is the sole remaining SRO tenant in the building. There is also one market-rate tenant, Mr. Harnly, who lives in the ground floor apartment. Jarrel Lewis used to live in the building as well (Tr. 430). Respondent indicated in his application for a CONH that he would like to convert the empty spaces in the building into apartments, with the occupied units remaining with upgrades to electrical and plumbing systems. He stated that the building previously had a CONH but it expired (Pet. Ex. 5).

The Department relied heavily upon the testimony of Ms. Palomino, as well as documentary proof of the violations and of housing court cases filed involving respondent.

Ms. Palomino testified that she has lived in the building since 1969 (Tr. 109). About 14 years ago, when respondent bought the property, he started "tearing everything down" (Tr. 133). She complained to him about conditions in the apartment and he said that he "was not going to fix things, and he wanted [her] to leave" (Tr. 132). Respondent even offered her money to leave (Tr. 133). Ms. Palomino's rent, as reported in respondent's application for a CONH, is $356.66 a month (Pet. Ex. 5 at 9).

According to Ms. Palomino, between 2010 and 2013, she complained to respondent about conditions in the unit (Tr. 135). Among other things, the apartment needed painting and repairs to the floors, the radiator was broken and needed a cover, and there were roaches and mice (Tr. 29-30, 47). Respondent said that the work would be done, but he was always unclear as to when (Tr. 89, 137). She felt that he did not want to fix things because he wanted the building just for himself and his son (Tr. 136).

Although it was unclear when, Ms. Palomino testified that at some point she fell in the apartment because the floor or the carpet was damaged. She went to the hospital, having bruised her chest and jaw and chipped her tooth (Tr. 57, 70, 77, 90). Another time, the ceiling in her bedroom fell on her bed (Tr. 71, 149, 264, 266). Ms. Palomino took photographs of various conditions in the apartment. Most of these photographs were taken in 2011, but some were taken later (Tr. 45). The photographs show: a radiator with peeling paint (Pet. Ex. 6a), a bare bulb in the bathroom with exposed wiring (Pet. Ex. 6b), a damaged wooden floor in need of repair (Pet. Exs. 6c, 6d), a ceiling with two holes in it (Pet. Ex. 6e); peeling paint near a pipe which she attributed to water damage (Pet. Ex. 6i; Tr. 80); a discolored wall next to the stove (Pet. Ex. 6k; Tr. 80); and pest control strips which she testified that she had placed in her unit and the hallway bathroom because of a rodent problem (Pet. Exs. 6l-6q; Tr. 59).

Ms. Palomino testified that she went to court five times regarding housing maintenance issues. According to her, respondent did not appear and she was advised not to pay rent until the repairs were made. About a year and a half later, respondent sued her for unpaid rent (Tr. 90). She agreed to pay the back rent and he agreed to make repairs (Tr. 90). Ms. Palomino acknowledged that respondent made the required repairs in 2012 (Tr. 143).

Ms. Palomino asserted that she allowed respondent access to her apartment, because she thought he was going to fix things, but he never did, other than the repairs she acknowledged were made (Tr. 138). She admitted, however, that on one instance in 2014, she refused to open the door to the hallway bathroom, so that respondent could make repairs. The bathroom was exclusive to her and she had the only key. Respondent had a worker with him but she denied access because respondent had sent a letter asking for access a week later (Tr. 243, 244, 248). She told respondent that the repair date was set for the following week, "so you're not going to open the door" (Tr. 243). Respondent then "went and damaged the door" by trying to open it with a knife or screwdriver (Tr. 243, 246). After that she changed the lock to the door (Tr. 245).

Ms. Palomino acknowledged that in 2014 the New York State Department of Housing and Community Renewal ("DHCR") sent a letter to her stating that she had not permitted inspectors or workers to enter her unit (Tr. 125). She testified that she would permit inspectors or exterminators to enter her apartment whenever they showed identification (Tr. 125). However, because she lives alone, and "things are very bad here," when somebody knocks on her door, she becomes "scared" that she will be robbed or killed (Tr. 125, 126).

Regarding heat, Ms. Palomino acknowledged that respondent sent a company to her unit "to fix the heating," but "all the company did was take the cover off the [radiator] valve" (Tr. 248). She testified that she has two heaters which she keeps in her living room and uses for heat when the radiators do not work (Tr. 249, 250). Several times she went to a friend's house when she did not have heat or hot water, although she always returned home to sleep (Tr. 278-79). Further, Ms. Palomino recalled that when respondent began making repairs in 2012, he installed a carbon monoxide detector, but when a housing inspector examined it in 2014 he told her it did not work (Tr. 251). She denied ever removing the carbon monoxide detector from her unit (Tr. 252).

Regarding respondent's son, Jarrel Lewis, Ms. Palomino recalled that he moved into the building in 2011 or 2012 and lived on the second floor (Tr. 210, 215, 216). Since that time, he would sweep and help fix the building (Tr. 216, 258). Ms. Palomino testified that on Palm Sunday in 2014, at about 7:00 a.m., she was closing the door to go to church when respondent and Jarrel "came out from the second floor" and Jarrel poured a combination of baby oil mixed with urine on her head (Tr. 105, 242-243). As the building does not have a second-story porch (*see* Pet. Ex. 6g), it appears that she was referencing respondent and Jarrel coming down the interior steps and Jarrel throwing the liquid. It is unclear whether the "door" to which she referred was the door to her apartment or the front door to the building.

In any event, Ms. Palomino testified that the liquid fell all over her body; the urine had a "very foul odor" (Tr. 106). Jarrel then "went upward" and undid his zipper showing her his genitals (Tr. 106). She called the police, as well as her daughter. Both arrived at the building. The police advised her that she should go to criminal court (Tr. 106). A criminal court complaint for harassment was generated against respondent, the narrative portion of which stated that the landlord threw baby oil on her to try to harass her on April 13, 2014 (Tr. 239, 240; Resp. Ex. E).[1] An order of protection was issued on September 30, 2014 against Jarrel Lewis, expiring on February 27, 2015 (Pet. Ex. 4). A new order of protection was issued on January 8, 2015, continuing through May 29, 2015 (Pet. Ex. 7; Tr. 122). Ms. Palomino testified that she requested an extension of the order of protection because Jarrel has a lot of friends, and she feels scared

[1] Respondent marked the criminal court complaint for identification and questioned Ms. Palomino about it. It appears that he inadvertently neglected to move it into evidence. There being no objection to the authenticity of the document, and so the record is complete, I am marking the complaint as ALJ Ex. 2.

(Tr. 115). Under the order of protection, Jarrel is prohibited from going near her residence, but she has seen him entering the house with his friends (Tr. 114).

More generally, Ms. Palomino testified that respondent and his son consistently harassed her because they want her to leave the building (Tr. 109). Jarrel told her and others that he was the landlord's son and asked why she did not move out of the building if she did not like to live there (Tr. 108). She was afraid of both of them (Tr. 219). She testified, "What he did to me that was to kill me with the oil, you know?" (Tr. 109). Referring to a video of an interaction between Jarrel and herself while he was sweeping the hallway in front of her unit (Resp. Ex. D2), she indicated that he would "mak[e] a show" of cleaning outside her unit every day, with the intention of "bothering [her]" (Tr. 221). She went on to say that, "when he would go into the room he would pull down his zipper . . . and he would do like this" [exposing himself] (Tr. 221). Ms. Palomino did not clarify what room she meant, although the video showed Jarrel taking cleaning supplies from a room in the hallway (Resp. Ex. D1).

Further, Ms. Palomino testified that "every day" that Jarrel was living in the building, he would open the front door to the building. Sometimes he would leave it open and sit in the staircase with his friends. Other times he would go in and out. She felt harassed because she lives on the first floor and the bathroom is on the first floor outside her unit, and would ask Jarrel to close the building's front door (Tr. 269, 277, 278). Ms. Palomino did not indicate whether Jarrel complied.

In August 2014, several months after the incident with the baby oil and urine, Ms. Palomino filed a complaint with DHCR alleging harassment by respondent and his son (Tr. 224). The application, which she signed on August 20, 2014, does not mention the incident with Jarrel. Rather, it seeks a "rent reduction based upon decreased services," and states that the owner was feeding rats in the bathroom (Resp. Ex. A). At trial, however, Ms. Palomino denied that respondent was feeding rats. She testified that someone at Legal Aid had written the application for her, because she does not speak or write English. She denied ever reading the document or telling the person at Legal Aid that the owner was feeding rats (Tr. 166, 168, 170). DHCR determined that no further enforcement action was warranted, on two grounds: that "the matter has been resolved," and that "the remaining complaints or unresolved issues do not constitute violations of the harassment sections of the rent regulatory laws" (Resp. Ex. C).

Investigator Wycoff interviewed Ms. Palomino at the building, as well as in his office, on four separate occasions between January and March 2014 (Tr. 309). His report (Pet. Ex. 9) contains a summary of her allegations, including the following. Respondent kicked out a lot of the prior tenants and has done illegal work in the building at night, the fumes from which have made her sick and caused her to go to the hospital. Until forced to do so in court, respondent did not make repairs. She has had intermittent heat and hot water for the past ten years, although after she filed a 311 complaint about heat in 2013, the building has had too much heat. She has also had problems with roaches and rodents, and her stove works intermittently as well. She fell in her unit in January 2014 and sustained bruises and a chipped tooth. Her ceiling also collapsed, causing bruising. On January 21, 2014, respondent turned off the public hall lights and she fell in the hallway, which caused her to chip her tooth and to experience headaches. Con Ed shut off the gas to the building for two days due to non-payment of bills. Further, respondent curses at her and is intimidating because he is a big man. He called 911 in December 2013 and reported that she was "crazy." She thought that he wanted to hit her because she would not open her apartment door when he came by recently. Respondent's son smokes marijuana in the building, and both respondent and his son watch her when she leaves the building. Further, the tenant downstairs keeps his fan on all night to annoy her, and has parties every weekend, with marijuana and women. Ms. Palomino showed Investigator Wycoff women's lingerie that she reported as belonging to one of the party-goers (Pet. Ex. 9 at 11-12).

In his report, Investigator Wycoff corroborated Ms. Palamino's testimony as to some, but not all, conditions in her apartment. He noted in his report that she showed him the hole in the ceiling in the kitchen, where she said mice enter the unit. She showed him how she tapes a rug to the bottom of the door to prevent what she said was the smell of marijuana entering her unit. She also turned the stove on and off, showing that the pilot light came on only sometimes (Pet. Ex. 9 at 7). However, Investigator Wycoff also indicated in his report that the heat and hot water was working and that the building was clean and seemed to be maintained (Pet. Ex 9 at 3, 4, 11, 12).

Investigator Wycoff took photographs of the unit during his site visit to the building on March 20, 2014, some of which corroborated portions of Ms. Palomino's testimony as to conditions inside the apartment. One of the photographs showed an opening in the ceiling for a pipe; the opening was not flush with the pipe, leaving a space which Ms. Palomino alleged

provided a means of access for mice and roaches (Pet. Ex. 8l; Pet. Ex. 9 at 7). Two photographs showed an area of whitish discoloration on a wall, which Ms. Palomino believed to have been caused by a water leak (Pet. Exs. 8p, 8q). Investigator Wycoff agreed that this showed a concealed water leak (Tr. 323, 324). Other photographs were more equivocal. For example, one photograph depicted the stove, with discolorations near the burners and on the wall behind the stove (Pet. Ex. 8n); however, Investigator Wycoff could not say whether the discolorations on the stove or wall were attributable to dirt or were burn marks (Tr. 322). Another photograph showed her door with tape all over it, which is consistent with Ms. Palomino's testimony that she taped the door to keep out the smell of marijuana (Tr. 323; Pet. Ex. 8s), but falls short of establishing the identity of the person or persons smoking the marijuana, or the frequency with which marijuana was smoked.

Petitioner also relied upon the litigation history for the building. The evidence showed there were at least four cases filed: two heat cases filed by HPD in 2011 and 2012, a "comprehensive" violation case also filed by HPD, and the holdover/non-payment action filed by respondent in May 2012. The heat cases were filed on January 12, 2012 and March 20, 2013, relating to violations issued on December 16, 2011, January 4, 2012, and December 11, 2012, for temperature readings inside Ms. Palomino's apartment at 54 degrees and 58 degrees, failing to provide ready access to the boiler room, and failing to post notices stating the name and location of the person with a key to the building heating systems (Pet. Exs. 13, 15).

The Department commenced a comprehensive proceeding in housing court against respondent on July 20, 2012, for failing to correct housing maintenance violations listed on the Department's violation summary report. The case was settled by consent order, dated September 17, 2012, in which respondent agreed to correct all violations by September 17, 2012 and pay appropriate civil penalties (Pet. Ex. 14).

Respondent commenced a holdover/non-payment proceeding against Ms. Palomino on May 8, 2012, seeking almost $9,000 in unpaid rent. On July 11, 2012, as part of the settlement of that proceeding, respondent and Ms. Palomino entered into a so-ordered stipulation, requiring Ms. Palomino to permit access and respondent to do certain work, including repairing damaged floors, windows, kitchen cabinets, ceilings and walls (which had holes in them), repairing the damaged bathtub, painting the radiator and installing a radiator cap, replacing the radiator in the

hallway, fixing or replacing the stove, painting, exterminating mice and roaches, and replacing electrical outlets (Pet. Ex. 3).

Both parties relied upon the violation history for the building, petitioner to show the number of open violations and respondent to assert that he had closed most of the violations pertaining to Ms. Palomino's unit or the hallway outside her door. The open violation report, which is current as of December 4, 2014, shows 48 open violations (Pet. Ex. 12); these include violations that were opened during the window period beginning on December 23, 2010, as well as violations that were opened previously but not yet closed. Of the 48 violations, slightly over half, or 25 violations, relate specifically to apartment four, which is Ms. Palomino's unit. Several other violations pertain to the locked cellar door to the heating system. The violations relating to Ms. Palomino's unit are for: missing carbon monoxide and smoke detectors; inadequate heat; mice; roaches; failure to provide ready access to the heating system; extremely hot water in excess of the allowable limit; a broken doorbell; a problem with the front door to her unit; a broken flushing apparatus in the toilet; leaky and defective bathtub faucets; and an unlawful cooking space in the apartment, requiring legalization if feasible. All but one of the violations relating to the cellar door or to Ms. Palomino's unit were issued in 2014; one heat violation was issued in 2012. Fifteen of the violations were issued from October through December 2014; they were characterized as pending because they had a certification due date of December 11, 2014, which was subsequent to the date that the report was printed. Seven violations were marked as overdue, relating to the carbon monoxide and smoke detector, as well as insufficient heat. Five violations were marked as "not complied," indicating that a false certificate of correction had been submitted; these related to the smoke and carbon monoxide detector, mice, roaches, and the flushing apparatus in the toilet.

The closed violation inspection report, current as of March 21, 2014 (Pet. Ex. 11), reflects violations relating to Ms. Palomino's unit and the hallway and bathroom outside her unit, that were closed during the window period. Petitioner noted that 33 violations were closed on September 13, 2012 (Pet. Post-Trial Br. at 6). Many of these violations were overdue, having been issued in 2009 or 2010 (Pet Ex. 11). Among other things, the closed violations involve the need to paint and plaster in the unit, exterminate mice and roaches, repair leaky bathtub faucets, provide adequate hallway lighting, fix broken flooring, provide a smoke detector and carbon monoxide device, and fix the pilot light on Ms. Palomino's stove and a shut-off valve on her

refrigerator (Pet. Ex. 11). The September 13, 2012 date corresponds to respondent's agreements in the comprehensive and holdover proceedings to make necessary repairs and correct violations. Of the seven class "B" violations that were specifically listed in the petition in the Department's comprehensive proceeding (Pet. Ex. 14 at 5), respondent cured six of them, the one exception being the violation for failing to legalize the cooking space in Ms. Palomino's unit (Pet. Ex. 12 at 6).

Respondent denied ever harassing Ms. Palomino (Tr. 429), although he did not address the purported incident with the baby oil or baby oil and urine. He asserted that he made repairs when Ms. Palomino permitted him access, but contended that often, she would not permit access to him or his workers. He testified that Ms. Palomino never told him of problems in her apartment either verbally or in writing. He only became aware of problems in her apartment when he got violations from HPD. He tried to fix the problems, but "[s]he would never give me access, nor would she respond to me knocking on her apartment door" (Tr. 429). Respondent offered documentary evidence which supported this contention, at least to some degree, as did the testimony of Mr. Harnly, the other building tenant.

Respondent's documentation does not cover the entire window period, but it dates back to 2011. Respondent testified that he sent a letter to HPD, dated November 1, 2011 (Resp. Ex. N), requesting mediation between himself and Ms. Palomino, because he had tried to "handle her complaints with little success" (Resp. Ex. N). In the letter he indicated that she was the only tenant to complain of heat and hot water, even though everyone was on the same line and thermostat; that he has told her that she needs to have her items moved away from the wall so he can paint but she has refused to do so; that he installed a smoke or carbon monoxide detector in Ms. Palomino's apartment and was "shocked" when he received a violation for not having one in place and believes that Ms. Palomino removed it after the battery life expired because it makes "an annoying noise" until the battery is replaced (Resp. Ex. N).

In the same document respondent addressed his violation for failure to exterminate. He wrote that he had an exterminator examine Ms. Palomino's apartment, who indicated that, prior to extermination, Ms. Palomino would have to move her possessions away from the wall and empty the cabinet. Upon being so advised, Ms. Palomino contacted the Spanish Speaking Elderly Council, a representative of which told respondent in 2010 that Ms. Palomino would retain her own exterminator. "Fast forward to 2011, the City was contacted and now I have a

violation regarding not exterminating." (Resp. Ex. N). Respondent also wrote that when Ms. Palomino saw an exterminator in the building in 2011, she asked that her apartment be attended to, and he arranged for that. He indicated that the other tenant in the building has a roach problem, stemming from Ms. Palomino's apartment, and that he has asked for her permission to enter her apartment to spray the walls and inside the apartment, but she has refused to cooperate (Resp. Ex. N).

Respondent testified that no one from HPD ever replied to his letter (Tr. 466). Accordingly, he went by subway to various HPD sites to talk to someone about how to get access to Ms. Palomino's apartment so he could fix things. He went to HPD's office "downtown," as well as HPD's East New York office. He waited and spoke to an inspector for about half an hour and was told to keep a paper trail (Tr. 467). At some point, he spoke to Ms. Palomino's daughter in the hallway of the building and asked for her phone number so he could communicate directly with her, but she refused to provide it (Tr. 468).

Respondent submitted invoices from the extermination company from 2012 forward, which bear out his contention that he paid for monthly extermination services for roaches and rodents at Ms. Palomino's and Mr. Harnly's units, and show that on at least two occasions, on January 26, 2013 and May 25, 2013, Ms. Palomino did not permit the exterminator to enter her apartment (Resp. Exs. L1, L3).[2]

Respondent also submitted invoices from 2012 from a heating service company. The first invoice, dated February 15, 2012, after the heat violations, indicated that B and D, the company, had difficulties repairing Ms. Palomino's radiator. The description of services and work rendered provides:

> Tenant Marlene Palomino in apartment 4 gave us trouble accessing her apartment. She has been calling 911 complaining of no heat. Luis finally spoke to her and she let him in. He found the radiator valve off. He turned on and riser and radiators became hot. While we were waiting for radiators to get hot we checked the boiler. We went back upstairs and tenant shut valve off again while we were downstairs. We turned it on again and removed handle as per landlords [sic] request. All radiators were hot when we left. I informed customer he needs a boiler tune-up. He will call us next season.

[2] The invoice for January 26, 2013 indicates that the "tenant upstairs did not let tech inside" (Resp. Ex. L1). The invoice for May 25, 2013 indicates that the technician treated one apartment, and that "2nd Apartment Denied Service" (Resp. Ex. L3).

(Resp. Ex. K1). The other invoice that was submitted, dated December 17, 2012, also related to respondent's apartment and it indicated that two technicians responded to a complaint that the radiator in the bedroom was not getting hot, but when they inspected the radiator, they saw that the air valve was "upside down" and "painted over." They changed the air valve and the radiator began to get hot (Resp. Ex. K2).

Additionally submitted were invoices from a plumbing and heating company, dated 2014, indicating that the shower head and the shower body spindles and handles in the first floor bathroom were replaced (Resp. Exs. M2, M3).

Other documentation which respondent submitted included four letters, dated February 11, 2014 (written to Ms. Palomino), February 26, 2014 and March 23, 2014 (written to HPD), and March 19, 2014 (written to DHCR) (Resp. Exs. G, H, J, I, respectively). In the letter to Ms. Palomino, respondent indicated that she had made "several complaints" to HPD about pests and problems with her bathroom, that he had knocked on her door several times to address the complaints, and that she had not answered even though she was in the apartment. He indicated that Ms. Palomino had let the exterminator into her unit on February 1, and that there would be monthly extermination appointments, about which she would be given at least a week's notice. In addition, respondent provided his telephone number in the letter, which he indicated he had previously conveyed, and wrote, "[e]ven if I do not receive a call from you, I will keep knocking on your door." Finally, respondent wrote, "[p]lease also note that the carbon monoxide detector that I installed in your apartment needs to be taken out of the draw [sic] you have it in and put back on the wall" (Resp. Ex. G).

In the two letters to HPD, respondent indicated that both a working carbon monoxide detector and a working smoke alarm were in Ms. Palomino's unit in the summer of 2013, and that he should not be held liable for the violations if Ms. Palomino removed the devices. He indicated that he had written to Ms. Palomino requesting access to the unit, but that Ms. Palomino had neither contacted him nor provided access. He indicated that he would not forcibly enter her space, for fear of being accused of breaking and entering, but that he would replace both alarms if she permitted him access. He acknowledged entering Ms. Palomino's bathroom without permission, because she did not permit him access and he wanted to fix violations that HPD had cited him for as a result of her complaints (Pet. Exs. H, J). In order to

gain access, he "had to jimmy the lock on the bathroom door to get in," after which he fixed the toilet and unclogged the bathtub. He indicated that the bathtub faucet was not leaking or defective as indicated by a violation (Resp. Ex. H). Further, respondent stated that he provides regular extermination services, but that Ms. Palomino routinely refuses access. He stated that February 1, 2014 was the first time an exterminator had been able to access the unit (Resp. Exs. H, J). He stated that he has "no reason" to harass Ms. Palomino, because she would still have her apartment after renovations (Resp. Ex. J).

Respondent made similar statements in the March 19, 2014 letter to DHCR. In addition, he contended that Ms. Palomino's complaints about not getting cold water or electricity were "false," since electricity and cold water are building-wide services and the other tenant in the building had not complained (Resp. Ex. I).

Mr. Harnly corroborated respondent's contention that he provided building-wide services. He testified that he has lived in the building since September 2013 and has found respondent to be "friendly" and "responsive" to any requests for repairs (Tr. 484). Respondent fixed some windows at the front of the apartment, did work in the hallways, provided regular exterminations, and resolved an issue with water leaking into his unit from Ms. Palomino's apartment (Tr. 484). He said that the "upkeep was good" and sometimes there is "a roach or two" but "no pests" (Tr. 490). He has never felt intimidated or harassed (Tr. 485). He has had no problem with heat. "If anything, the heat is . . . substantial and I . . . temper it" (Tr. 490). Mr. Harnly pays $2,700 a month in rent for his apartment (Pet. Ex. 5).

Moreover, Mr. Harnly testified that he never witnessed respondent harassing Ms. Palomino. On several occasions, however, he witnessed Ms. Palomino refuse to provide respondent access to her unit or the hallway bathroom to make repairs. At one point he and respondent were trying to gain access to her bathroom in order to address the leak that was coming into his unit. "And so it mainly consisted of us knocking on the door and, and trying to get her [to] cooperate in letting us address the issue" (Tr. 488). Another time, when he and respondent knocked on the door, they could hear noise suggesting that she was in the apartment but she did not answer and so they gave up. A third time, Ms. Palomino's door was open and after some persuasion she let them open the bathroom door so they could inspect the bathroom (Tr. 489).

Mr. Harnly testified that sometimes he speaks with Ms. Palomino. At one point she believed that respondent or his son was drilling in the basement in the middle of the night. He realized that she was referring to the fan that he runs in his bathroom (Tr. 486). Ms. Palomino did not like that he ran the fan and called the police twice when he operated the fan while taking a shower (Tr. 490).

Respondent also relied upon two videos that were filmed within the interior of the building, including the video showing Jarrel cleaning the hallway outside of her unit (Resp. Ex. D2). This video runs almost 22 minutes, and according to respondent, was shot on his son's cell phone on November 11, 2013, apparently by someone other than his son (Tr. 398, 399). The video shows that Ms. Palomino has the door to her unit open and she is often talking and sometimes singing on the phone. In about the middle of the video, Ms. Palomino becomes very agitated when Jarrel begins to clean an area of the hallway close to her door, and tells him not to clean there. They argue, with Jarrel insisting that she has made a mess and that he has the right to clean there, and Ms. Palomino insisting that he refrain from cleaning close to her unit. At one point Ms. Palominio pushes Jarrel away. He tells her not to touch him. She makes a phone call, and leaves and re-enters the building. Jarrel continues to clean areas that he has already cleaned, including the area near Ms. Palomino's door that they have argued about. At about seventeen or eighteen minutes into the video, Ms. Palomino begins to stomp loudly on the floor, Jarrel asks her not to, citing the tenant who lives under her, and Ms. Palomino screams, "Go to hell" several times and pulls the fire alarm (Resp. Ex. D2).

Ms. Palomino testified that during this video she was trying to show Jarrel that she was not afraid of him, because "he was always intimidating me and . . . I was afraid" (Tr. 220).

The other video introduced by respondent is only fifteen seconds long, also filmed from outside Ms. Palomino's apartment, and shows Ms. Palomino inside her apartment, with the door open, sharpening knives and then singing and shaking her rear end, while bent over with her back to the camera (Resp. Ex. D1).

II

The issue to be resolved is whether, on this factual record, petitioner established that respondent engaged in acts of harassment against Ms. Palomino.

There are two basic types of allegations in the petition: allegations regarding housing maintenance violations and allegations regarding respondent's son. Petitioner may establish a *prima facie* case of harassment based upon housing code violations and failure to make repairs and correct other housing conditions. *See Dep't of Housing Preservation & Development v. McFaddin,* OATH Index No. 2327/13 at 13 (Nov. 8, 2013) ("persistent failure to promptly attend to problems . . . was an interruption in essential services that interfered with [the tenant's] comfort, repose, or quiet, and was intended to cause [the tenant] to vacate"); *Dep't of Housing Preservation & Development v. Goldsmith*, OATH Index No. 2118/12 at 30 (Aug. 27, 2013) (failure to repair recurring leaks and correct other housing conditions basis for finding of harassment); *Dep't of Housing Preservation & Development v. Tauber,* OATH Index No. 675/07 at 15 (May 16, 2007) ("on the basis of the violation history alone, petitioner has established that respondent has interrupted or discontinued 'essential services' . . . by failing to promptly make repairs throughout the common areas and private rooms of the building"); *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").

Here, there is ample evidence by which petitioner established a *prima facie* case of harassment due to failure to maintain essential services and correct violations. This includes evidence of the open housing code violations pertaining, among other things, to inadequate heat, mice, roaches, problems with the doorbell, front door, toilet, and bathtubs, and a missing carbon monoxide and smoke detector. Additionally, although 33 violations were closed on September 13, 2012 during the window period, relating to these items as well as to inadequacies with flooring, painting, and plastering, the fact that they remained open for years is sufficient to establish a *prima facie* case of harassment. *See Tauber*, OATH 675/07 at 8 (noting long delay in closing violations). Beyond the violations, many of the photographs which Ms. Palomino and Investigator Wycoff took of conditions in Ms. Palomino's unit demonstrate the failure to maintain essential services, as did Investigator Wycoff's observations that there was a hole in the ceiling in the kitchen and that the pilot light in the stove worked intermittently.

However, respondent provided sufficient evidence to rebut the presumption that he interrupted or discontinued essential services with the intent to cause Ms. Palomino to vacate her unit. Respondent produced letters which he testified that he wrote to Ms. Palomino, HPD, and

DHCR in 2014, indicating that Ms. Palomino did not permit access to her unit and hallway bathroom for repairs, and that she otherwise impeded respondent's efforts to fix conditions in her unit. Clearly, respondent wrote these letters after he filed his application for a CONH, which created an incentive for him to assert that the fault lay in Ms. Palomino's denial of access.

Yet, considering the record as a whole, I found respondent's testimony and statements to be credible. Apart from the 2014 documents, respondent produced the November 11, 2011 letter, asking for mediation with Ms. Palomino, citing her refusal to move possessions away from the walls so the exterminator could spray, and indicating that she appeared to have removed the smoke and carbon monoxide detectors previously installed in her apartment. The letter contained respondent's home address, and the date, and the salutation, "Dear Sir or Madam," but was not specifically addressed to HPD or any other entity or individual. However, respondent's testimony that he sent the letter to HPD was extremely plausible, given the level of detail in the letter and his reference to violations issued by HPD.

Respondent's testimony that he went to various HPD offices seeking help after he did not get a response to his letter was also plausible, particularly considering how he described the procedures at the HPD office: " . . . you sign in, you wait in this little hallway, then the officer will come and get you, you go to their office, you sit down before the inspector at the desk that's handling walk-in complaints, and we probably had a half hour conversation but the only thing that happened there as well, as well as it happened downtown, I was told keep a paper trail" (Tr. 467) .

Respondent's testimony and statements about difficulty in gaining access to Ms. Palomino's unit were corroborated by invoices from outside service companies, by Mr. Harnly, and, to a limited extent, by Ms. Palomino herself.

The invoices from outside extermination and heating contractors are compelling as they are from individuals who do not have a stake in this litigation and have no apparent reason to lie. The heating company's invoice, dated after the first heat violation, serves to rebut any inference of harassment stemming from that violation, as it indicates that the radiator valve inside Ms. Palomino's unit had been turned off, and that after the workers turned it back on, restoring the heat, Ms. Palomino shut it off.

Additionally, I credited Mr. Harnly's testimony that on several occasions, including when respondent wanted to fix a leak from the first floor bathroom into Mr. Harnly's unit, he

witnessed Ms. Palomino refuse respondent access. This testimony was credible given the corroborating documentary evidence of problems with the toilet and bathtub, and Mr. Harnly's obvious interest in having any leak fixed.

The credibility of both Mr. Harnly and respondent was enhanced by Ms. Palomino's admission that she did not permit respondent entry into the bathroom to make repairs and that she is often afraid when people knock on her door. Ms. Palomino's asserted reason for refusing access -- that respondent and his worker were a week early -- does not explain why she would not let respondent fix problems which she had complained about. It was to her advantage to get repairs done earlier. If anything, it seemed that Ms. Palomino seized upon the moment as a chance to be obstructive and to engage in confrontation with respondent.

Additionally, although Ms. Palomino asserted that she lets inspectors or exterminators enter her apartment when they show identification, she also testified that because things are "very bad" in the building, she is scared whenever anybody knocks on the door. This lent credence to the statements by the outside exterminator and heating contractor about trouble gaining access.

Petitioner has argued the violation history is problematic, because although it showed that respondent closed 33 violations on September 13, 2012, this was only as a result of litigation filed by HPD and by Ms. Palomino withholding rent. The nexus between the closed violation date and the repair dates in the litigation cannot be overlooked, nor can respondent's delay in closing many of the violations or the current existence of open violations. Further, I am aware that Ms. Palomino's rent is paltry compared to Mr. Harnly's and that respondent could make a lot more money on the unit if Ms. Palomino vacated.

None of this, however, alters the proof that Ms. Palomino has persistently failed to provide access or cooperate with attempts to fix problems in her unit or the hallway bathroom (such as turning off the radiator valve in her apartment after workers had turned it on, or not moving her possessions away from the wall to permit extermination). It is significant that she was mandated by the so-ordered stipulation in the holdover action to provide access. Ms. Palomino's testimony that she always permitted access, so long as workers showed identification (apart from the instance where respondent wanted to make repairs a week early) was not credible given this conflicting evidence.

Ms. Palomino's testimony should also be viewed with caution because the record shows that at times she tended to embellish her complaints about respondent. Ms. Palomino filed a DHCR complaint in which she accused respondent of feeding rats, which she disavowed at trial. Her attempt to shift blame to the person at Legal Aid who helped her file the complaint was not persuasive. It does not follow that this individual simply made this up. It is more likely that Ms. Palomino embellished her remarks when speaking to Legal Aid, which Legal Aid then incorporated into the complaint filed with DHCR. If so, it is problematic that a false allegation was asserted in a complaint to a state enforcement agency. Additionally, as more fully discussed below, Ms. Palomino's testimony that she was afraid of Jarrel Lewis seemed to be contradicted by the video of their interaction (Resp. Ex. D2).

Thus, without minimizing the violation history, or the open violations, I conclude that respondent has rebutted the presumption of intentional harassment stemming from housing maintenance violations and problems.

The remaining issue has to do with the alleged harassment by Jarrel. This includes the allegation involving Jarrel throwing baby oil and urine, as well as Ms. Palomino's allegations that Jarrel intimidated her by pretending to clean and exposing himself, sitting on the interior steps of the building with his friends, or leaving the front door to the building open.

The allegation involving the baby oil and urine throwing is particularly serious and would, if proven, constitute grounds for denying the CONH. Respondent has contended that he is not liable for any actions of Jarrel because there is no proof of a principal-agency relationship (Resp. Post-Tr. Br. at 2-3). I disagree. Ms. Palomino acknowledged that Jarrel never collected rent or made repairs in Ms. Palomino's unit and did not appear to manage the building (Tr. 183, 144). However, she also testified that Jarrel would clean the building on a daily basis, which is consistent with the video showing Jarrel sweeping and mopping for a good portion of the 22 minutes filmed (Resp. Ex. D2). It is reasonable, therefore, to infer that Jarrel performed work in the building at the behest of respondent, even if, as respondent testified, the work was unpaid (Tr. 430). Accordingly, under the anti-harassment statute, acts of harassment, if proven to have been perpetrated by Jarrel, are attributable to respondent. *See Goldsmith,* OATH 2118/12 at 17 (Aug. 27, 2013) (veiled threats made by owner's agents and/or relatives sufficient to constitute harassment).

On this record, however, I find that petitioner has not proven harassment. Petitioner's proof of alleged harassment regarding Jarrel was limited to the testimony of Ms. Palomino. I did not find her testimony sufficiently reliable to satisfy petitioner's burden of proving by a preponderance of the credible evidence that Jarrel harassed her.

The video of the interaction between Jarrel and Ms. Palomino suggests that Ms. Palomino's testimony that she was afraid of Jarrel should not be credited. It appeared from the video that Jarrel was intent on provoking Ms. Palomino into an angry outburst, by repeatedly cleaning areas of the hallway near her unit that he had already cleaned. Jarrel's desire to document Ms. Palomino's reaction was made clear when, at one point in the video, he faced the camera and indicated, "This is all for protection. This is nothing new . . . This has been happening for years." On the other hand, Ms. Palomino clearly took the bait. The video shows that she was the aggressor during the incident, pushing Jarrel out of the way, sounding the fire alarm, banging her feet, and screaming and cursing loudly. Despite her testimony otherwise, Ms. Palomino did not appear to be a person who was afraid. Someone who was afraid would likely not keep their door open, nor stride in and out of her apartment, nor push Jarrel and tell him to "go to hell."

I found, therefore, that Ms. Palomino embellished her testimony by saying that she was afraid of Jarrel, similar to how she embellished her complaint to DHCR by accusing respondent of feeding rats. Pulling the fire alarm to the building, when there was no fire (Resp. Ex. D2) further supports the conclusion that Ms. Palomino has a tendency to embellish or exaggerate.

Given these embellishments, Ms. Palomino's uncorroborated complaints about Jarrel must be viewed with caution, particularly the more serious complaints about Jarrel exposing himself or throwing baby oil or urine. Regarding the urine and oil throwing allegation, it is notable that the police complaint report of the incident stated that the landlord threw baby oil, and made reference neither to Jarrel nor to urine. It is possible, given their acrimonious relationship, that Jarrel threw some liquid of some type at Ms. Palomino. It is unfortunate that Ms. Palomino's daughter was not called to testify about what happened, and that respondent was not asked and did not testify about the alleged incident. But on the record before me, Ms. Palomino's testimony regarding Jarrel is too problematic to form the sole basis for a finding of harassment against respondent.

Moreover, it is not clear that Ms. Palomino's more minor complaints about Jarrel, such as Jarrel opening and closing the door to the building, or sitting on the steps of the building, would, if credited, constitute harassment. *See Dep't of Housing Preservation & Development v. Pascal,* OATH Index No. 626/06 at 5 (Apr. 5, 2006) (evidence too vague to prove harassment). Ms. Palomino's testimony that Jarrel repeatedly asked why she did not move out of the building, if she did not like living there, is also insufficient to establish harassment. Even if this testimony were credited, this statement, by itself, fails to rise to the level of a verbal abuse of a threat, which would constitute harassment. *Cf. Dep't of Housing Preservation & Development v. Edelstein,* OATH Index No. 490/12 at 13 (Dec. 7, 2012) (harassment found where building manager angrily threatened to evict tenant).

In short, it was petitioner's burden to prove that a lawful tenant of the building was harassed during the inquiry period. The evidence presented failed to satisfy that burden.

FINDINGS AND CONCLUSIONS

Because petitioner did not establish harassment of a lawful tenant under the Administrative Code, respondent's application for a certificate of no harassment should be granted.

RECOMMENDATION

I recommend that the application for a certificate of no harassment be granted.

Faye Lewis

Faye Lewis
Administrative Law Judge

July 9, 2015

SUBMITTED TO:

VICKI BEEN
Commissioner

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