

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

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208-214 E. 25th ST. LLC,

Petitioner/Landlord,

Index No. 87263/2013

- against -

DECISION/ORDER

MATTHEW BRODY,

Respondents/Tenants.

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Present: Hon. Jack Stoller
Judge, Housing Court

208-214 E. 25th St. LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Matthew Brody, the respondent in this proceeding ("Respondent") seeking possession of 208 East 25th Street, Apt. 53, New York, New York ("the subject premises") on the ground of nonpayment of rent. Respondent interposed an answer raising, *inter alia*, a defense of breach of the warranty of habitability. The Court held a trial of this matter.

At trial, Petitioner proved that it is the proper party to bring this case, that it has complied with the registration requirements of MDL §325, that it has had a landlord/tenant relationship with Respondent, and that it demanded the rent pursuant to RPAPL §711(2).

Petitioner introduced into evidence a rent ledger showing that Respondent did not owe any rent at the end of July of 2013. Petitioner introduced into evidence a lease extension agreement, which shows that, as of August of 2013, the monthly rent for the subject premises was \$2,950.00. Petitioner's senior property manager testified on Petitioner's case that Petitioner had rented the subject premises to a different tenant as of April of 2014, as Respondent had surrendered possession of the subject premises by that time. Respondent's aggregate rent

liability from the eight months from August 2013 through March of 2014 at a rate of \$2,950.00 a month was \$23,600.00. Petitioner's rent ledger credited one payment during this time period of \$2,950.00.¹ Crediting this payment against Respondent's aggregate rent liability leaves a balance of \$20,650.00. Accordingly, the Court finds that Petitioner proved its *prima facie* case at trial and the burden shifts to Respondent to prove his defenses.

Respondent testified on his own behalf that he moved into the subject premises in October of 2012 and that he moved out in early February of 2014. Respondent testified that for over a year starting in February of 2013, the skylight and ceiling were leaking a great deal and that all of the plaster had been falling out. Respondent testified that he notified the super by text and property management by phone on or about February 25, 2013 or February 28, 2013, that they caused minor repairs to be made, that the problem persisted, and that they stopped responding to his repair requests which he continued to make. Respondent testified that the work was never done.

Respondent introduced into evidence multiple photographs of the cracking condition around the skylight, water on the floor coming from the skylight, and the progression of the deterioration, shown by a water stain on a wall that spread out across the ceiling.

Respondent testified that he was constantly cleaning up paint chips and water; that he would be walking out of the subject premises to go to work and that he would slip; that the condition cut him off from the living room, which is about fifty percent of the subject premises.

Respondent also testified that the subject premises was treated for bedbugs, but the

¹ The breakdown credits this payment in December of 2013, which is consistent with a stipulation the parties entered into in this case on December 17, 2013 providing that Respondent was to pay one month's rent without prejudice to the either party's claims or defenses.

treatment was not done thoroughly and bedbug infestation continued to be a problem.

Respondent testified that he could not use his living room because this condition, which began on July 17, 2013, effectively deprived him the use of his couch, and caused all of his belongings to be bagged up. Respondent testified that he notified Petitioner on July 17, 2013; that someone from Petitioner's office visually inspected the subject premises two days after that when the bedbugs were visible on the floor; and that Petitioner's representatives said that they would schedule a treatment and informed him to prepare the subject premises for that treatment.

Respondent testified that everything was bagged and put in the middle of the room, causing him to have nowhere to live for about a week. Respondent testified that he went on vacation for two days with his family and that when he returned, although there had been a second and a third treatment, he was still finding live bedbugs.

Respondent introduced into evidence photographs of bedbugs in the subject premises that he found from October 2013 and November 2013, and photographs of all of his personal property and clothes sealed in plastic bags.

Respondent testified that the bedbugs created a stressful situation in the subject premises and that he could not use the "vast majority" of the subject premises, such that he often stayed in hotel rooms. Beside that outlay, Respondent testified that he spent a lot of time and money cleaning the subject premises, rubbing alcohol spray, using a steam cleaner, taking his clothes to the dry cleaner, a total expenditure that Respondent estimated was ten thousand dollars.

Respondent also introduced into evidence an online real estate listing that showed that the subject premises was relet as of March 3, 2014.

On cross-examination, Respondent testified that he emailed, texted, and phoned

Petitioner, to five different property managers. On cross-examination, Respondent testified that he was not at the subject premises for the bedbug treatment because his understanding was that he was not supposed to be there, and that an entity named "JB Pest Control" was the exterminator that was used. Respondent testified on cross-examination that the exterminator did not give him a packet of information or instructions about how to deal with bedbug infestation, although the exterminator gave him a page on how to prepare the subject premises for treatment. Respondent testified on cross-examination that the exterminator treated the subject premises twice in July of 2013 and once in August of 2013, and that bedbugs were still there after the treatment in August of 2013.

On redirect examination, Respondent introduced into evidence the emails that he referred to on cross-examination.

On Petitioner's rebuttal case, Petitioner called as a witness an exterminator for the company Respondent referred to in cross-examination ("the Exterminator"). The Exterminator testified that he was at the subject premises on a monthly basis in 2013, that he treated the subject premises for bedbugs, and that there were no bedbugs after the treatment.

On cross-examination, the Exterminator testified that the three treatments he gave to the subject premises were part of the same outbreak, that he had not treated the subject premises before that, and that Petitioner did not call him aft these three treatments. The Exterminator testified on cross-examination that he treated the subject premises thoroughly and dusted outlets there.

As Respondent interposed an affirmative defense only, the Court only considers the breach of the warranty of habitability as a setoff against the rent arrears for the months in which

the arrears accrued, not in the months when rent was paid. Pallotta v. Perry, N.Y.L.J. May 24, 2002 at 23:3 (App. Term 9th & 10th Dists.).² Although Respondent provided some evidence that Petitioner leased the subject premises as of March of 2014, this evidence was from a website whose reliability was not established in a manner sufficient to rebut Petitioner's evidence that Petitioner did not relet the subject premises until April of 2014. Respondent's vacatur from the subject premises does not otherwise release Respondent from the obligations to pay rent. Compare Douglas Manor House, Inc. v. Wohlfeld, 66 Misc.2d 265 (App. Term 1st Dept. 1970) (awarding a landlord a judgment for rent for the months of the lease that post-dated a tenant's vacatur of the premises). Accordingly, the baseline time period upon which to evaluate Respondent's claim for a rent abatement encompasses the eight months between August 2013 through March of 2014.

The preponderance of the evidence at trial shows that the conditions Respondent complained of persisted at the subject premises, that Respondent gave timely notice to Petitioner, and that the conditions had an adverse impact on the habitability of the subject premises. Indeed, Petitioner's rebuttal case corroborated that there was a bedbug infestation at the subject premises at least at some point in time, although there was a dispute between the parties as to the status of the infestation after the three treatments.

In resolving this dispute, the Court credits Respondent's evidence, in particular the photographs of bedbugs post-dating the treatments. The Court also credits Respondent's photographic evidence of the leak damage in the subject premises.

² For these purposes, Respondent is still potentially entitled to an abatement for December of 2013, as the payment of the rent that month was pursuant to a stipulation between the parties that the payment was, *inter alia*, without prejudice to Respondent's defenses.

The measure of damages for breach of the warranty of habitability is the difference between the rent reserved under the lease and the value of the premises during the period of the breach. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 329, *cert. denied*, 444 U.S. 992 (1979), Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 105 (1st Dept. 1996). Bedbug infestation can constitute a breach of the implied warranty of habitability. Gawad v. Aviad, 37 Misc.3d 126A (App. Term 2nd Dept. 2012). Valoma v. G-Way Management, LLC, 29 Misc.3d 1222A (Civ. Ct. N.Y. Co. 2010).

By August of 2013, the conditions Respondent complained of were already affecting the subject premises, and continued to do so through March of 2014. It is reasonable to expect that a habitable function of an apartment is to maintain furniture and clothing there and use the entire premises, which Respondent proved was not possible. Accordingly, the Court finds that the habitability of the subject premises was diminished by sixty percent throughout the months of August of 2013 through March of 2014. Sixty percent of \$23,600.00 is \$14,160.00 and the Court awards Respondent a rent abatement in this amount. Crediting the rent abatement against the arrears of \$20,650.00 leaves a balance of \$6,490.00.³

As Respondent vacated possession of the subject premises during the pendency of this proceeding, possession is no longer an issue. Accordingly, the Court awards Petitioner a money judgment only against Respondent in the amount of \$6,490.00.

The parties are directed to pick up their exhibits withing 30 days or they will either be

³ The amount against which the Court credits the abatement is lower than the baseline amount upon which the Court determines the abatement because of the payment of one months' rent without prejudice to Respondent's defenses in December of 2013 pursuant to the parties' stipulation.

sent to the parties or destroyed at the court's discretion and in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 8, 2014



HON. JACK STOLLER
J.H.C.