Case Sequence:

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New York State

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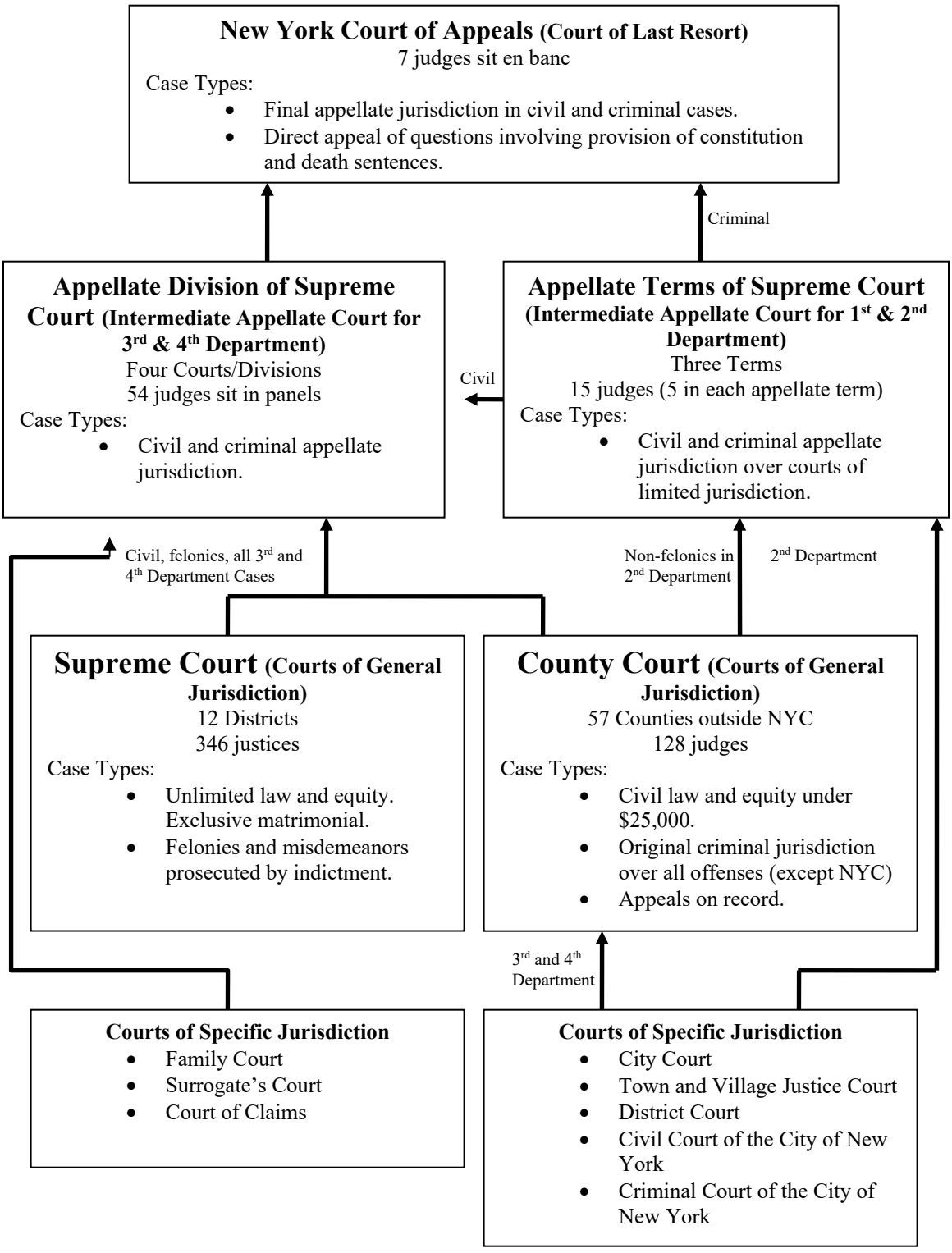
New York State Court Chart

New York State Court Chart



Widmar v. Healey, 247 N.Y. 94

Court of Appeals of New York

November 29, 1927, Argued; January 10, 1928, Decided

Judges: O'Brien, J. Cardozo, Ch. J., Pound, Crane, Andrews, Lehman and Kellogg, JJ., concur.

Opinion by: O'BRIEN

Opinion

[95] Plaintiff sued his landlord for injuries resulting from an explosion of a stove. He had leased part of defendant's premises and was in the act of taking possession when the injury occurred. His cause of action is based solely upon allegations that the stove, belonging to defendant and a fixture in the kitchen, was broken and in need of repair. His own witnesses proved the contrary. During the term of the tenant immediately preceding him, a pipe leading from the stove to the boiler had burst but a new one had been substituted. It was in excellent condition at the termination of the **[96]** lease. The outgoing tenant left the water turned on in the pipe connecting the stove and boiler but this fact was apparently unknown to plaintiff and to defendant.

Confronted by proof that the pipe had been repaired and was in good condition, plaintiff changed his theory of liability. With the complaint standing unamended, he proved that the explosion occurred not by reason of a broken and defective stove, as alleged in the complaint, but by reason of the presence of ice in the pipe. Plaintiff and his wife had inspected the premises four days previous to the accident. That day was very cold and the wife saw ice in the wash tubs and hanging from the faucets in the kitchen. Plaintiff could have seen it if he had looked. The day of the accident was equally cold and at the suggestion of defendant, plaintiff built a fire in the stove. A quarter of an hour after the fire started, an explosion occurred, the stove burst and

flying pieces of iron struck and injured plaintiff. That the accident resulted from the presence of ice in the pipe is conceded. Neither plaintiff nor defendant knew of its existence. Plaintiff made no investigation nor inquiry concerning it. He started the fire without examination. The presence of ice does not constitute a defect. It has nothing to do with the construction of the stove or pipe but is an independent condition resulting from cold weather. Plaintiff's case, therefore, was not proved.

Even if the allegations of the complaint had been supported by evidence, no cause of action would have existed. No covenant to repair is alleged.Neither does the complaint state that defendant fraudulently concealed defects. ***HN1*** In the absence of fraud or of a covenant, a lessor does not represent that the premises are tenantable and may be used for the purposes for which they are apparently intended. (*Jaffe* v. *Harteau*, 56 N. Y. 398; *Daly* v. *Wise*, 132 N. Y. 306; *Steefel* v. *Rothschild*, 179 N. Y. 273, 277; *Vousden* v. *United Cities Realty Corp.*, 194 App. Div. 26.)

[97] The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Park West Management Corp. v. Mitchell, 47 N.Y.2d 316

Court of Appeals of New York

May 2, 1979, Argued ; June 7, 1979, Decided

No Number in Original

Judges: Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur with Chief Judge Cooke.

Opinion by: COOKE

Opinion

[322] OPINION OF THE COURT

Under the traditional common-law principles governing the landlord-tenant relationship, a lease was regarded as a conveyance of an estate for a specified term and thus as a transfer of real property. Consequently, the duty the law imposed upon the lessor was satisfied when the legal right of possession was delivered to the lessee. The lessor impliedly warranted only the continued quiet enjoyment of the premises by the lessee. This covenant of quiet enjoyment was the only obligation imposed upon the landlord which was interdependent with the lessee's covenant to pay rent. As long as the **[323]** undisturbed right to possession of the premises remained in the tenant, regardless of the condition of the premises, the duty to pay rent remained unaffected.

Because the common law of leasehold interests developed in rural, agrarian England, the right to possession of the land itself was considered the essential part of the bargain; structures upon the land were deemed incidental. Thus, notwithstanding that the building may have constituted the substantial part of the tenant's consideration for entering into the lease, its destruction did not suspend his duty to pay the entire rent or afford him the right to rescind the lease (see 2 Powell, Real Property, par 233 *et seq.)*. Indeed, even if the landlord had expressly covenanted to repair structures on the demised premises, that promise was considered ancillary to the tenant's obligation to pay rent. Hence, the failure of the lessor to perform the obligations imposed by his promise to repair gave the lessee only the right to maintain an action for damages; it did not vest in him a defense to an action grounded upon nonperformance of his covenant to pay rent (1 American Law of Property [Casner ed], § 3.79).

As society slowly moved away from an agrarian economy, the needs and expectations of tenants underwent a marked change. No longer was the right of bare possession the vital part of the parties' bargain. The urban tenant seeks shelter and

the services necessarily appurtenant thereto -- heat, light, water, sanitation and maintenance. Unfortunately, the early attempts of the common law to adapt to the changes encompassed by this societal transition and to mitigate the severity of the rule holding that the tenant's covenant to pay rent was independent of all but the most basic of the landlord's obligations proved less than satisfactory.

The harshness of the common-law rule was mitigated to a degree by decisions holding that performance of a tenant's covenant to pay rent was excused when the premises were destroyed through no fault of his own (e.g., *Graves v Berdan*, 26 NY 498, 501). Subsequent judicial holdings expanded the scope of the landlord's covenant of quiet enjoyment to include a duty to refrain from any act or omission which would render the premises unusable by the tenant (e.g., *Tallman v Murphy*, 120 NY 345, 351-352). Again, however, development of this theory of constructive eviction did not meet the needs of tenants in a society rapidly undergoing urbanization and, as a practical matter, was of no aid in helping them obtain essential **[324]** services. It simply afforded the tenant the option to abandon the premises and cease paying rent if the failure of services was sufficiently severe. While the constructive eviction principle mollified the rigors of the common law to some extent, it was fraught with uncertainty, for the reasonableness of the tenant's action was subject to the vicissitudes of judicial review in an action by the landlord. If the condition of the dwelling was later determined not to have justified vacation of the premises, the tenant remained liable for unpaid rent. Further, rescission of the lease and abandonment of the premises did not spur landlords into making necessary repairs in locales in which the demand for housing greatly exceeded its supply and compelled tenants living in uninhabitable premises to undergo the expense of locating new premises and moving their belongings. Thus, since the common law imposed no implied service obligations on the landlord, maintenance and other essential services often were never performed, especially in low-income neighborhoods.

These early attempts presaged a distinct trend among courts and legislatures toward characterizing a lease of residential property as a contract containing an implied warranty of habitability interdependent with the covenant to pay rent (e.g., *Pines v Perssion*, 14 Wis 2d 590; *Brown v Southall Realty Co.*, 237 A2d 834 [DC]). A number of factors mandated departure from the antiquated common-law rules governing the modern landlord-tenant relationship. The modern-day tenant, unlike his medieval counterpart, is primarily interested in shelter and shelter-related services.He is usually not competent to perform maintenance chores, even assuming ability to gain access to the necessary equipment and to areas within the exclusive control of the landlord (see *Javins v First Nat. Realty Corp.*, 428 F2d 1071, 1077-1078, cert den 400 U.S. 925). Since a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales, with its implied warranty of fitness (Uniform Commercial Code, § 2-314) provides a ready analogy that is better suited than the outdated law of property to determine the respective obligations of landlord and tenant *(* *Green v Superior Ct.*, 10 Cal 3d 616, 626-627).

The transformation of the nature of the housing market occasioned by rapid urbanization and population growth was further impetus for the change. Well-documented shortages of low- and middle-income housing in many of our urban centers **[325]** has placed landlords in a vastly superior bargaining position, leaving tenants virtually powerless to compel the performance of essential services. Because there is but a minimal threat of vacancies, the landlord has little incentive to

voluntarily make repairs or ensure the performance of essential services (see *Boston Housing Auth. v Hemingway*, 363 Mass 184, 197-198; *Javins v First Nat. Realty Corp.*, 428 F2d 1071, 1079-1081, *supra)*. While it is true that many municipalities have enacted housing codes setting minimum safety and sanitation standards, historically those codes could be enforced only by municipal authorities *(* *Davar Holdings v Cohen*, 280 NY 828, but see L 1977, ch 849, § 13).

In short, until development of the warranty of habitability in residential leases, the contemporary tenant possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential services. Initially by judicial decision (e.g., *Tonetti v Penati*, 48 AD2d 25; *Jackson v Rivera*, 65 Misc 2d 468; *Morbeth Realty Corp. v Velez*, 73 Misc 2d 996;*Steinberg v Carreras*, 74 Misc 2d 32) and ultimately by legislative enactment in August, 1975, the obsolete doctrine of the lease as a conveyance of land was discarded. Codifying existing case law, the enactment of section 235-b of the Real Property Law (L 1975, ch 597, as amd), placed "the tenant in parity legally with the landlord" (1975 Sen J 7766-7776 [remarks of Senator Barclay]). ***HN1*** A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and , third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety. 1

[326] Petitioner is the owner of Park West Village, an apartment complex comprised of seven highrise buildings on the Upper West Side of Manhattan. For a 17-day period in May, 1976, petitioner's entire maintenance and janitorial staff did not report to work due to a strike by members of Employees' Union Local 32-B. As a result of the strike, the tenants of Park West Village suffered extensive service interruptions which prompted some of them to withhold rent for the period encompassed by the strike.

Petitioner commenced this summary nonpayment proceeding in the Civil Court of the City of New York. Respondent raised the affirmative defense that, as a result of the strike, petitioner had not provided essential services and had allowed conditions dangerous to the health of tenants to exist on the premises, constituting a breach of its implied warranty of habitability. By stipulation, the parties agreed that the decision rendered in the instant proceeding would bind some 400 tenants of Park West Village similarly situated. The parties further stipulated that in lieu of calling witnesses, they would submit written statements describing the extent and effect of the service interruptions caused by the strike. Hence, there is presented only the legal question of whether the conditions existing at Park West Village throughout the duration of the strike constituted a breach of the implied warranty of habitability.

During the strike, the entire complement of porters and handymen at the complex -- some two thirds of the entire work force -- did not report to work. All of the incinerators were wired shut, compelling tenants to dispose of refuse at the curbs in paper bags supplied by the landlord. Because employees of the New York Sanitation Department refused to cross the striking employees' picket lines, uncollected trash piled up to the height of the first floor windows. Exposure of the accumulated garbage to the elements caused it to fester and exude noxious odors, eventually necessitating the declaration of health emergency at the complex by the New York

City Department of Health. Regular exterminating service was not performed which, together with the accumulated garbage, created conditions in which rats, roaches and vermin flourished. Routine maintenance service was not performed, **[327]** common areas remained uncleaned and sporadic interruptions of other services plagued the development. Civil Court determined that the conditions at the complex constituted a breach of the implied warranty of habitability and found that the loss in rental value of the apartments sustained by the tenants justified a reduction of 10% in their June rent bill. Both the Appellate Term and the Appellate Division affirmed, the latter court granting petitioner leave to appeal to this court.

Petitioner maintains, and rightfully so, that a landlord is not a guarantor of every amenity customarily rendered in the landlord-tenant relationship. The warranty of habitability was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability. Rather section 235-b of the Real Property Law was designed to give rise to an implied promise on the part of the landlord that both the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term.

The scope of the warranty includes, of course, conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy. However, as the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well (cf. Uniform Residential Landlord and Tenant Act, § 2.104). Inasmuch as the landlord is vested with the ultimate control and responsibility for the building, it is he who has a corresponding nondelegable and nonwaivable duty to maintain it. The obligation of the tenant to pay rent is dependent upon the landlord's satisfactory maintenance of the premises in habitable condition.

Naturally, it is a patent impossibility to attempt to document every instance in which the warranty of habitability could be breached. Each case must, of course, turn on its own peculiar facts. However, the standards of habitability set forth in local housing codes will often be of help in resolution of this question. ***HN2*** Substantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition. However, a simple finding that conditions on the lease premises **[328]** are in violation of an applicable housing code does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is *de minimis* or has no impact upon habitability. Thus, once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation (see *Javins v First Nat. Realty Co.*, 428 F2d 1071, 1082, *supra; Jack Spring, Inc. v Little*, 50 Ill 2d 351, 366; *King v Moorehead*, 495 SW2d 65, 76 [Mo]; cf. *Mease v Fox*, 200 NW2d 791, 796-797 [Iowa]).

But, while certainly a factor in the measurement of the landlord's obligation, violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach. Housing codes do not provide a complete delineation of the landlord's obligation, but rather serve as a starting point in that determination by establishing minimal standards that all housing must meet (see *Boston Housing*

Auth. v Hemingway, 363 Mass 184, 200-201, n 16, *supra)*. In some localities, comprehensive housing, building or sanitation codes may not have been enacted; in others, their provisions may not address the particular condition claimed to render the premises uninhabitable. Threats to the health and safety of the tenant -- not merely violations of the codes -- determines the reach of the warranty of habitability.

A residential lease is essentially a sale of shelter and necessarily encompasses those services which render the premises suitable for the purpose for which they are leased. To be sure, ***HN3*** absent an express agreement to the contrary, a landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants. For example, no one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit. If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warrant of habitability has occurred.

[329] Under the facts presented here, respondents have proven that petitioner breached its implied warranty of habitability. As a result of the strike, essential services bearing directly on the health and safety of the tenants were curtailed, if not eliminated. Not only were there numerous violations of housing and sanitation codes (e.g., Administrative Code of City of New York, §§ D26-11.01, D26-11.03, D26-11.05, D26-13.03, D26-14.03, D26-22.03), but conditions of the premises were serious enough to necessitate the declaration of a health emergency. In light of these factors, it ill behooves petitioner to maintain that the tenants suffered only a trifling inconvenience. Rather, the failure of petitioner to provide adequate sanitation removal, janitorial and maintenance services materially impacted upon the health and safety of the tenants and permitted them an abatement in their contracted-for rent. **2**

Problematical in these cases is the method of ascertaining damages occasioned by the landlord's breach. ***HN4*** That damages are not susceptible to precise determination does not insulate the landlord from liability *(* *Green v Superior Ct.*, 10 Cal 3d 616, 638-639, *supra*; see *Matter of Rothko*, 43 NY2d 305, 322-323; *Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205, 209). Inasmuch as the duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition, the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach. The award may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition. We do not comment upon the availability of other remedies not implicated under the facts presented here.

HN5 In ascertaining damages, the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach as well as the effectiveness of steps taken by the landlord to abate those conditions. Since both sides will **[330]** ordinarily be intimately familiar with the conditions of the premises

both before and after the breach, they are competent to give their opinion as to the diminution in value occasioned by the breach *(Teerpenning v Corn Exch. Ins. Co.,* 43 NY 279, 282; Richardson, Evidence [10th ed], § 364, subd n). Indeed, the Legislature has instructed that in ascertaining the diminished market value of these dwellings, expert testimony is not required (Real Property Law, § 235-b, subd 3).

The record here amply supports the 10% reduction in rent ordered by Civil Court. Given the severity of the conditions existing on the premises during the strike and the feeble attempts by petitioner to alleviate the dangers to the health and safety of the tenants, there is no basis for disturbing the award.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Footnotes

- 1

  The statute provides:

  "1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

  "2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

  "3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony."

- 2

  It is noted that the statute we construe today speaks only of residential property used for such a purpose.

Poyck v. Bryant, 13 Misc. 3d 699

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

August 24, 2006, Decided

Judges: Shlomo S. Hagler, J.

Opinion by: Shlomo S. Hagler, J.

Opinion

[700] Shlomo S. Hagler, J.

Issue

The novel issue to be determined herein is whether secondhand smoke emanating from a neighbor gives rise to a breach of the implied warranty of habitability and a constructive eviction under the realities of modern urban dwelling. Most urban dwelling in New York City comprises "vertical living" in high-rise apartment buildings with possibly multiple neighbors in all directions. ***HN1*** With multiple neighbors living beside each other comes basic duties and responsibilities. There is a duty to protect each other's right to privacy and a responsibility not to invade a neighbor's privacy. The unwanted invasion of privacy comes in many guises such as noise, smells, odors, fumes, dust, water and even secondhand smoke.

The key to avoiding such unneighborly behavior is for the neighbor to follow the often forgotten "Golden Rule"--You shall love your fellow or neighbor as yourself. The Golden Rule is a general principle of ethics which essentially admonishes neighbors as follows: What is hateful to you, do not do to your neighbor. ***HN2*** The landlord also has an obligation to ensure that the conditions do not render the apartment "unsafe and uninhabitable" or prevents the premises from serving their intended function of residential occupation. ***HN3*** When neighbors fail to respect each other and the landlord does not act, the law imposes its will on landlords and tenants through the statutorily enacted implied warranty of habitability pursuant to Real Property Law § 235-b.

Implied Warranty of Habitability

In the landmark case of *Park W. Mgt. Corp. v Mitchell* (47 NY2d 316, 391 NE2d 1288, 418 NYS2d 310 [1979]), the Court of Appeals defined the history and parameters of Real Property Law § 235-b or the implied warranty of habitability. Real Property Law § 235-b was enacted in August 1975, to provide modern urban dwellers with much needed protections and rights to compel landlords to make necessary repairs and provide essential services. (L 1975, ch 597.) In other words, ***HN4*** Real Property Law § 235-b placed "the tenant in parity legally with the landlord." (1975 Sen J 7766-7776 [Remarks of Senator Barclay].) For more than 30 years, ***HN5*** this powerful law continues to impose a warranty of habitability in every landlord-tenant relationship where the landlord impliedly **[701]** warrants as follows: "[F]irst, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety." (*Park W. Mgt. Corp.*, 47 NY2d at 325.)

HN6 The scope and breadth of Real Property Law § 235-b is far-reaching. Landlords must warrant against "latent" and "patent" conditions throughout the entire tenancy "occasioned by ordinary deterioration, work stoppage by employees, *acts of third parties* or natural disaster" (47 NY2d at 327 [emphasis added]). ***HN7*** The standard for a breach of the implied warranty of habitability is measured "in the eyes of a reasonable person" not in a vacuum which ignores the "essence of the modern dwelling unit." (*Id.* at 328.) Real Property Law § 235-b was intended to provide an objective standard for "those essential functions which a residence is expected to provide." (*Solow v Wellner*, 86 NY2d 582, 589, 658 NE2d 1005, 635 NYS2d 132 [1995].)

Secondhand Smoke

While there appear to be no reported cases dealing with secondhand smoke ***HN8*** in the context of implied warranty of habitability, [1] secondhand smoke is just as insidious and invasive as the more common conditions such as noxious odors, [2] smoke odors, [3] chemical fumes, [4] excessive noise, [5] and water leaks and extreme dust penetration. [6] Indeed, the United States Surgeon General, the New York State Legislature and the City of New York City Council declared that there is a substantial body of scientific research that breathing secondhand smoke poses a significant health hazard. (U.S. Surgeon General's Report on **[702]** *The Health Consequences of Involuntary Smoking* [Dec. 1986]; Public Health Law § 1399-n [1]; Administrative Code of City of NY § 17-501.) Therefore, this court holds as a matter of law that ***HN9*** secondhand smoke qualifies as a condition that invokes the protections of Real Property Law § 235-b under the proper circumstances. As such, it is axiomatic that secondhand smoke can be grounds for a constructive eviction. (*See*, *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 256 NE2d 707, 308 NYS2d 649 [1970]; *cf.*, *East End Temple v Silverman*, 199 AD2d 94, 605 NYS2d 56 [1st Dept 1993] [holding that a *single* occurrence of smoke did not amount to a substantial deprivation of use and enjoyment of the residential premises].)

Of course, the court must look to the operative facts to determine whether or not the secondhand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction. This court will now turn to the facts of this case to make such a determination.

Procedural History

Plaintiff Peter Poyck (plaintiff, landlord, or Poyck) commenced this plenary action to collect rent and late charges for the months of August 2001 through December 2001, at $ 2,597 per month. (*See* exhibit E to the motion.) Defendants Stan Bryant and Michelle Bryant (defendants, tenants, or the Bryants) interposed a written answer, inter alia, denying the allegations of the complaint and asserting their third and fourth affirmative defenses and first and second counterclaims for breach of warranty of habitability and constructive eviction due to secondhand smoke. (*See* exhibit F to the motion.)

In or about June 2005, plaintiff moved for an order pursuant to CPLR 3212 granting him summary judgment striking and/or dismissing the defendants' third and fourth affirmative defenses and first and second counterclaims. The motion was adjourned to October 14, 2005. On the return date, this court denied the motion without prejudice on procedural grounds. 7

In or about March 2006, plaintiff moved for an order pursuant to CPLR 2221 (e) and 3212 renewing his prior motion for **[703]** summary judgment striking and/or dismissing defendants' third and fourth affirmative defenses and first and second counterclaims. The motion was adjourned to August 1, 2006. Defendants opposed the motion.

Background

Parties

At all times relevant hereto, plaintiff was the owner and lessor of condominium unit No. 5-D located at 22 West 15th Street, New York, New York. By virtue of a residential lease dated November 11, 2000, defendants were the tenants or lessees of the subject premises for a two-year term from January 1, 2001 through December

31, 2002, at $ 2,597 per month. (*See* exhibit A to the motion.) Defendants allegedly moved into the subject premises in 1998 and vacated at the end of August 2001.

Uncontroverted Facts

After living in the subject premises for approximately three years, in or about March 2001, new neighbors moved next door to defendants. The new neighbors constantly smoked in the common fifth-floor hallway and in apartment 5-C. The tobacco smoke or secondhand smoke penetrated into the subject premises. At that time, defendants complained to the subject building's superintendent, Frank Baldanza, about the hazardous secondhand smoke condition. The super allegedly spoke to the defendants' next-door neighbors to no avail. The incessant smoke continued unabated.

When the super's efforts failed, defendant Stanley Bryant wrote a letter dated June 29, 2001 to the super and to plaintiff Peter Poyck as well as to Poyck's attorney-in-fact, Charles Corso, seeking a solution to the hazardous smoking problem and informing them that they may consider a "healthier living situation" as follows:

"To date, their [next-door neighbors in apartment 5-C] tobacco smoke continues to permeate this end of the fifth floor hallway and my home. This is not simply a matter of unpleasant odors; it represents an ongoing health hazard for my wife who is recovering from her second cancer surgery and who is extremely allergic to tobacco smoke. Prior to the current tenant moving into 5-C, this problem did not exist on the fifth floor.

[704] "To try to remedy the situation, I have sealed my apartment entry door with weather stripping and a draft barrier. I operate two hepa air filters round the clock, incurring additional electric charges. Despite these efforts, we can still smell the smoke from 5-C in our apartment.

"If you can help in any way to remedy this problem, we would be extremely appreciative. Failing that, we must consider finding a healthier living situation." (*See* exhibit B to the motion.)

Notwithstanding the above, the landlord took no action to curtail their neighbors' smoking that was invading the Bryants' home. About 30 days later, defendants decided to vacate the subject premises due to the incessant secondhand smoke and wrote a letter to their landlord dated August 1, 2001, notifying him of their decision as follows:

"Due to my wife's continuing health concerns and our most recent and apparently ongoing 'smoking' issue with our next door neighbor (please refer to our letter to Frank Baldanza dated June 29th) we have found it necessary to look elsewhere for more appropriate living quarters. Please note that we will be vacating this apartment by the end of August, 2001." (*See* exhibit C to the motion.)

Summary Judgment

HN10 The movant has the initial burden of proving entitlement to summary judgment. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 476 NE2d 642, 487 NYS2d 316 [1985] .)

HN11 "[T]he remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 AD2d 943, 944, 259 NYS2d 1003) or where the issue is even arguable (*Barrett v Jacobs*, 255 NY 520, 522, 175 NE 275) since it serves to deprive a party of his day in court. Relief should be granted only where no genuine, triable issue of fact exists" (*Broadway--111th St. Assoc. v Morris*, 160 AD2d 182, 185, 553 NYS2d 153 [1st Dept 1990]).

Real Property Law § 235-b Inapplicable to Condominium Board of Managers

In this case, neither party asserted claims against the condominium's board of managers because ***HN12*** the implied warranty of habitability pursuant to Real Property Law § 235-b **[705]** does not apply to the relationship between the board of managers of a condominium and an individual unit owner. (*Frisch v Bellmarc Mgt.*, 190 AD2d 383, 597 NYS2d 962 [1st Dept 1993].) However, the defendants as tenants of unit 5-D may rely on Real Property Law § 235-b against the plaintiff, the only landlord in this action. (190 AD2d at 390.)

Landlord's Lack of Control of Third Parties

The gravamen of plaintiff's motion is that he cannot be held liable for the actions of third parties beyond his control such as the neighbors in unit 5-C. This argument is misplaced as the Court of Appeals, since 1979, has clearly stated that ***HN13*** the acts of third parties are within the scope of a landlord's responsibility pursuant to Real Property Law § 235-b. (*Park W. Mgt. Corp.*, 47 NY2d at 326.) The courts have continuously held that***HN14*** the implied warranty of habitability can apply to conditions beyond a landlord's control. (*Elkman v Southgate Owners Corp.*, 233 AD2d 104, 649 NYS2d 138 [1st Dept 1996] [an alleged noxious odor emanating from a retail fish store in an adjacent building neither owned nor controlled by the landlord cooperative corporation may be a breach of the implied warranty of habitability]; *Sargent Realty Corp. v Vizzini*, 101 Misc 2d 763, 421 NYS2d 963 [Civ Ct, NY County 1979] [floods caused by upstairs tenant on four occasions which landlord allowed to persist resulted in substantial abatement]; *Quasha v Third Colony Corp.*, NYLJ, Oct. 10, 1990, at 22, col 2 [Sup Ct, NY County] [noise emanating from neighbor stated a claim for breach of implied warranty of habitability]; *Solomon v Brandy*, NYLJ, Sept. 7, 1994, at 22, col 6 [Civ Ct, Bronx

County] [evicted neighboring tenant who caused nuisance resulting in lack of water supply to tenant did not constitute a good faith defense to the implied warranty of habitability].)

While the landlord contends that he had no control over the neighbors in apartment 5-C, he failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition. The landlord could have asked the board of managers of the condominium to stop the neighbors from smoking in the hallway and elevator as well as to take preventive care to properly ventilate unit 5-C so that the secondhand smoke did not seep into the Bryants' apartment. Specifically, ***HN15*** Real Property Law § 339-v (1) (i) mandates that condominium bylaws restrict the use and maintenance of both the units and common elements such as the hallways and elevators so as to "prevent unreasonable interference with the use of respective units and of the common elements by the several unit owners." The board **[706]** of managers and even the landlord could have commenced an action for damages or injunctive relief for noncompliance with the bylaws and decisions of the board of managers pursuant to the Condominium Act. (*See*, *e.g.*, *Board of Mgrs. of Vil. House v Frazier*, 81 AD2d 760, 439 NYS2d 360 [1st Dept 1981], *affd* 55 NY2d 991, 434 NE2d 257, 449 NYS2d 188 [1982].) Moreover, ***HN16*** in the case of "flagrant or repeated violation" by a unit owner, the Condominium Act also authorizes the board of managers to impose sufficient surety to ensure future compliance with their bylaws and decisions. Real Property Law § 339-j.)

Conclusion

Inasmuch as there are triable issues of fact as to whether the secondhand smoke breached the implied warranty of habitability and caused a constructive eviction, plaintiff's motion to strike and/or dismiss the defendants' third and fourth affirmative defenses and first and second counterclaims must be denied.

Footnotes

- 1 However, this court's independent research found the case of *Bender v Niebel* (11 Misc 3d 136[A], 816 NYS2d 693, 2006 NY Slip Op 50502[U] [App Term, 2d & 11th Jud Dists 2006]) wherein the Appellate Term listed the landlords' cigarette smoke as part of a litany of severe conditions that survived a dismissal motion. While *Bender* has some precedential value, it did not directly deal with the single issue of secondhand smoke emanating from neighbors as opposed to the landlords themselves.
- 2 *See Elkman v Southgate Owners Corp.*, 233 AD2d 104, 649 NYS2d 138 (1st Dept 1996).
- 3 *See Chetworth Constr. Corp. v Casati*, NYLJ, May 1, 1985, at 12, col 5 (App Term, 2d & 11th Jud Dists).
- 4 *See Goldman v Sears-Robbins/Robbins*, NYLJ, June 15, 1998, at 30, col 3 (Civ Ct, NY County, Strauss, J.).

- 5
  See *Matter of Nostrand Gardens Co-Op v Howard*, 221 AD2d 637, 634 NYS2d 505 (2d Dept 1995).
- 6
  See *Minjak Co. v Randolph*, 140 AD2d 245, 528 NYS2d 554 (1st Dept 1988).
- 7
  Plaintiff failed to allege and/or attach the following six items of information: (1) whether plaintiff is the owner of apartment 5-D located at 22 West 15th Street, New York, New York; (2) whether plaintiff is the owner and/or tenant of the neighboring apartment 5-C of the subject building; (3) who is the owner and/or tenant of apartment 5-C; (4) who is responsible for overseeing the common areas such as the hallways and/or elevators in the subject building; (5) whether there is a "house rule" or other document such as the "by-laws" which prohibits and/or restricts smoking in the subject building; and (6) whether plaintiff is the sponsor and/or owner of the subject building. (*See* exhibit G to the motion.)

Toms Point Apartments v. Goudzward, 72 Misc. 2d 629

Copy Citation

District Court of New York, Third District, Nassau County

December 5, 1972

Judges: Ralph Diamond, J.

Opinion by: DIAMOND

Opinion

[629] This is a holdover proceeding in which the landlord petitioner seeks possession of the demised premises. The tenant's defense is retaliatory eviction.

The basic facts are not in dispute. The parties entered into a lease on August 17, 1966, for a two-year period commencing September 1, 1966. The lease was renewed twice, each time for a two-year period. The last renewal expired August 31, 1972.

In October, 1971, the tenant invited a group of fellow tenants to meet in her apartment to consider the possibility of forming a tenant's organization to deal with the landlord with respect to several grievances.

In April, 1972, and again in June, 1972, the tenant was advised that her lease would not be further renewed. Despite notice, tenant failed to vacate the premises. On the 5th day of October, 1972, this proceeding was begun.

At the trial, the tenant raised the affirmative defense of "retaliatory eviction". She claimed that the landlord's refusal to renew her lease was solely in retaliation for her actions with her fellow tenants in opposing the landlord. The landlord contends that the tenant has failed to sustain the burden of proof required and, further, that the defense of retaliatory eviction does not apply in this case.

Tenant seeks to dismiss the action and have the court order the landlord to renew the lease on terms equal to those offered other tenants.

The court has before it the question whether a landlord has the right to pick his tenants and refuse to renew the tenancy of a **[630]** person he finds undesirable for any reason, or whether that right is affected by the defense of retaliatory eviction.

The defense of retaliatory eviction in New York State is a comparatively new one. Retaliatory eviction has been defined in many ways. In *Markese* v.*Cooper* (70 Misc 2d 478), the court stated that retaliatory eviction is the nomenclature that has

developed to define the action of a landlord who evicts his tenant because of the tenant's reporting of a housing code violation. The court in that case went on to say that it might have been called anything, "vengeful eviction" or, simply, "getting even". The court in *Hosey* v. *Club Van Cortlandt* (299 F. Supp. 501), described retaliatory eviction as an act by a landlord evicting a tenant when the overriding reason was to retaliate against the tenant for exercising his constitutional right.

The defense of retaliatory eviction in a holdover proceeding was not available at common law, nor do we in New York have any statutes specifically prohibiting retaliatory evicition. A few States have recently enacted such statutes. Illinois has declared it to be against public policy for a landlord to "terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any government authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation." (Ill. S.H.S. ch. 80, § 71 [1963].) Rhode Island and Michigan allow a tenant defendant, in an action based upon termination of a lease, to interpose the defense that the alleged termination was intended as a penalty for the tenant reporting a violation of any health or safety code, or any ordinance. Maryland has provided that retaliatory action will be stayed for a period of six months after a tenant has reported a major defect in the premises. California's new Civil Code section 1942.5 states that a landlord, whose dominant purpose is retaliation against a lessee for complaining to a goverment agency or for exercising other rights, "may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services, within 60 days". New Jersey provides for criminal punishment of any landlord who takes reprisals against a tenant for reporting violations of any health or building code. (See Legal Problems of Landlord and Tenant, U. C. D. L. Rev., vol. 3, 1971, pp. 17, 18.)

The cases in New York are not in complete agreement on the interpretation of retaliatory eviction. Some New York cases have recognized it as a proper defense in holdover proceedings. (*Church* v. *Allen Meadows Apts.*, 69 Misc 2d 254; *Markese* v. *Cooper, supra.*) The federal courts have also recognized the **[631]** defense. The court in *Hosey* v. *Club Van Cortlandt* (*supra*, p. 506) held that "The 14th amendment prohibits a state court from evicting a tenant when the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for an exercise of his constitutional rights". Also, see *Edwards* v. *Habib*, 397 F. 2d 687.)

The tenant in her memorandum of law places great emphasis upon *Hosey* v. *Club Van Cortlandt* in support of her argument against granting the petition. She also requests an order by the court for a mandatory renewal of the lease. The court points out the fact that the Judges' decision in the *Hosey* v. *Club Van Cortlandt* case stated (p. 505), "The right of a landlord to pick his tenants and to refuse to renew the tenancy of a person he finds undesirable for any reason is not in issue here". The court in the herein matter deems that issue to be the major issue.

HN1 The law in New York is well settled that in the absence of a covenant in the lease, or some agreement therefor, there is no way, legal or equitable, of compelling a renewal of a lease. (*Robinson* v. *Jewett*, 166 N. Y. 40.) Therefore, when the term of a lease has expired, the landlord, in the absence of a contract to renew, is at liberty to refuse to do so, and anyone with whom he sees fit to deal may become his tenant. (*Thayer* v.*Leggett*, 229 N. Y. 152; *McDonald* v. *Fiss*, 54 App. Div. 489.)

There is no dispute between the parties that absent the defense of retaliatory eviction the court must grant the landlord's petition of eviction. Testimony at the trial indicates that the tenant did hold a meeting of the tenants in her apartment and that she had testified at a hearing concerning the dismissal of the landlord's custodian. There was some testimony that the tenant had concerned herself with such matters as lack of services, rent increases and inequities in rent. The tenant testified that she complained to the Attorney-General's office regarding the failure of the landlord to pay interest on rent security deposits and that she appeared at a "hearing" of the superintendent who was fired by the landlord. The landlord during the trial neither admitted nor denied the testimony of the tenant regarding these activities.

The first question the court addresses itself to is the prayer of the tenant that the court order the landlord to grant her a new lease on the same terms and conditions as other tenants in the same building. ***HN2*** In the case of a tenant continuing in possession of leased premises after the expiration of the term of the lease, the rights of the landlord are fixed by statute in New York. The Real Property Law provides that upon a holding over by a tenant whose terms is for more than one month, the landlord may proceed **[632]** in any manner permitted by law to remove the tenant, or, if the landlord accepts rent for any period subsequent to the expiration of the term, there is created a tenancy from month to month. The holdover tenancy created at the election of a landlord is not an extension or prolongation of the original term. It is a new term for a new period, separate and distinct from that which preceded it. (*Kennedy* v. *City of New York*, 196 N. Y. 19.)

The court reject tenant's argument that if the court finds a retaliatory eviction it should grant the remedy of ordering a new lease. There seems to be no authority, public policy or any other justification for disturbing the well-settled law in New York that there is no way, legal or equitable, to compel a renewal of a lease.

In reviewing the New York, Federal, and out-of-State cases discussed above, the court finds that the basis for accepting the defense of retaliatory eviction is as follows:

HN3 A tenant has the constitutional right such as to discuss the conditions of the building he is living in with his cotenants; to encourage them to use legal means to remedy improper conditions; hold meetings; form tenants' associations; and inform public officials of their complaints. These rights would for all practical purposes be meaningless if the threat of eviction would coerce the most justifiable complaints into a submissive silence.

Failure to recognize the defense of retaliatory eviction might result in the continuation of undesirable housing conditions contrary to the strong public policy of creating and/or maintaining proper housing in New York State. Our court should not by the granting of an eviction of a complaining tenant encourage the landlord to evade his responsibility to abide by the law.

The court is in accord with the reasoning behind the acceptance of the defense of retaliatory eviction in an action by a landlord to recover possession. Once having accepted that concept, the court is faced with the problem as to what elements are necessary to create a valid retaliatory eviction defense. In reviewing the cases we find no definite guidelines to follow.

It seems to this court that ***HN4*** *all* of the following should be present for the tenant to prevail:

1. The tenant must have exercised a constitutional right in the action he undertook.

2. The grievance complained of by the tenant must be bona fide, reasonable, serious in nature, and have a foundation in fact. However, the grievance need not have been adjudicated by the agency reviewing the complaint.

3. The tenant did not create the condition upon which the complaint is based.

[633] 4. The grievance complained of must be present at the time the landlord commences his proceeding.

5. The overriding reason the landlord is seeking the eviction is to retaliate against the tenant for exercising of his constitutional rights.

Applying the facts in the present case to the above criteria, the court finds that at the time the landlord commenced this action and, at the present time, none of the original grievances existed. The tenant testified that the tenants' association never came into being; that the tenants had collected the interest due them; that the problem with the superintendent had been resolved. Moreover, the tenant failed to show any current complaint against the landlord.

In *Edwards* v. *Habib* (397 F. 2d 687, 702, *supra*), the court cautioned that even if a tenant can prove a retaliatory defense, he would not be entitled to remain in possession in perpetuity. "If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a bindingcontract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all."

The court finds that the tenant has failed to prove the elements necessary to sustain the alleged retaliatory eviction defense. Accordingly, the decision of the court is as follows:

Final judgment in favor of the landlord against the tenant. Execution of the warrant stayed to February 28, 1973.

Orange Falls, LLC v Forrest, 2016 N.Y. Misc. LEXIS 1483

City Court of New York, Glens Falls

April 21, 2016, Decided

0160-16

Judges: Hon. Gary C. Hobbs, J.

Opinion by: Gary C. Hobbs

Opinion

Gary C. Hobbs, J.

On March 8, 2016, the Petitioner filed with this Court, a Notice of Petition and Petition seeking to Recover Real Property alleging that the Respondent was a month-to-month tenant and, on January 13, 2016, the Petitioner served a 30 day notice terminating the tenancy effective as of February 29, 2016, and that the Respondent continues in possession of the premises without consent of the Petitioner. The Petitioner's Petition seeks judgment awarding possession of the premises located at Apartment No.1, located at 7 Chester Street, Glens Falls, New York, from the Respondent, together with a money judgment for the use and occupancy charges to the date of possession, together with all expenses of the action including reasonable attorneys' fees.

On March 18, 2016, the Respondent filed her Answer to the Petition. On March 29, 2016, the Respondent filed an Amended Answer to the Petition. The Respondent's Amended Answer alleged an affirmative defense of retaliatory eviction (RPL § 223-b). **[2]** Here, the Respondent alleged that, on or about December 28, 2015, the Respondent contacted the Glens Falls City Code Enforcement Office regarding an inoperable stove and, within six (6) months of that complaint, the Petitioner sought to terminate the Respondent's tenancy. The Respondent's Amended Answer also alleged two separate counter-claims. The first counter-claim sought compensatory and punitive damages for the Petitioner's alleged retaliatory eviction. The Respondent's second counter-claim sought a rent abatement for an alleged breach of warranty of habitability (RPL § 235-b).

In her counter-claim for an alleged breach of warranty of habitability, the Respondent alleged a breach based on the lack of an operable stove, an inoperable doorknob on the bathroom door, the lack of a doorknob on the closet door, second-hand cigarette smoke coming from another tenant's apartment, loose slate on the roof of the premises, loose weather stripping on the door, holes in the driveway causing a tripping hazard, a tree root near the garbage receptacle that caused a tripping hazard, and the loss or deprivation of her parking spot.

Prior to the commencement of the trial of this action, the parties stipulated **[3]** that the Petitioner's 30 day Notice to Quit was properly and timely served, and that there were no procedural defects service or filing of the Petitioner's Notice of Petition or Petition for a Holdover Eviction. The parties further agreed that, but for the Respondent's affirmative defense of retaliatory eviction, the Respondent's tenancy would have been properly terminated by the Petitioner's 30 day Notice to Quit. Based on the parties' pre-trial stipulations, this Court found that the Petitioner had demonstrated its cause of action for eviction based on the Respondent holding over beyond the termination of the term of parties' lease.

On April 15, 2016, a non-jury trial commenced on the Respondent's affirmative defense of retaliatory eviction and on the Respondent's counter-claims. The trial was concluded on April 18, 2016. During the trial, this Court was able to hear the testimony and, more importantly, to observe the demeanor and credibility of each of the witnesses.[1] This Court has also reviewed the parties' exhibits that were admitted into evidence. The credible testimony and evidence supports the following findings of fact.

Findings of Fact

The Petitioner owns and operates apartments located at located at 7 Chester Street, Glens Falls, New York (hereinafter referred to as the "subject premises"). The subject premises consists of eight separate apartments and is not owner occupied.

On January 29, 2013, the Petitioner and the Respondent **[5]** entered into a written lease agreement, under which the Respondent leased Apartment # 1 at the subject premises. The lease was for a term of six months commencing on February 1, 2013 and ending on July 31, 2013. Thereafter, the Respondent's tenancy became a month-to-month tenancy. The monthly rental is $530.00, which was due on the 1st day of each month.[2] On January 13, 2016, the Petitioner served the Respondent with a 30-Day Notice terminating the Respondent's tenancy effective February 29, 2016.[3]

As a result of being served with the 30 Day Notice to Quit, the Respondent has admittedly not paid rent for the months for February, March and April of 2016. The Respondent remains in possession of the subject property.

The Petitioner has had a number of concerning issues with the Respondent. More specifically, in April of 2014, the Petitioner's property manager, **[6]** Christine Reynolds, was called to the Respondent's apartment by the Glens Falls Police Department. Ms. Reynolds was asked to open the Respondent's apartment, because a strong odor was emanating from the Respondent's apartment, and the police were concerned that the Respondent may be injured inside the apartment. The police had attempted to obtain access to the Respondent's apartment without success. Also present was James Buxton, the Glens Falls Code Enforcement officer. According to Ms. Reynold's the smell from the Respondent's apartment was like "death." When Ms. Reynolds obtained the key, the Respondent answered the door. She refused to allow the police, Code Enforcement Officer or Ms. Reynolds to enter the property to investigate the smell. Ms. Reynolds offered to have her maintenance workers assist

the Respondent to clear the clutter from her apartment and offered use of a garage for storage. The Respondent refused this offer.

In June of 2015, the Petitioner received a signed complaint from seven of the tenants at the subject premises concerning the Respondent's apartment [Pl.Ex.11]. In their complaint, the tenants state that the Respondent is a "hoarder" and that "all windows **[7]** and walls and the emergency door are blocked to the ceiling." [Pl.Ex.11]. The tenants complaint indicated that there "is so much garbage in apartment 1, it is creating terrible odors." The tenant's complaint indicated that the building has cockroaches, which had never been a problem before the Respondent moved into her apartment. The tenants requested the Petitioner to remedy the "unsafe, unhealthy situation caused by [the Respondent]." [Pl.Ex.11].

On December 28, 2015, Laura Morgan, the Respondent's neighboring tenant, gave Ms. Reynolds a written letter complaining of the smell coming from the Respondent's property [Pl.Ex.7]. Ms. Morgan testified that it smells like garbage emanating from the Respondent's apartment. In her letter, Ms. Morgan describes the odor as being an "unbearable smell coming from her apartment." [Pl.Ex.7]. Ms. Morgan's letter indicates that her husband, Howard Morgan, has "health & breathing problems" and she is very concerned for him.4 [Pl.Ex.7]. Ms. Morgan requested the Petitioner to share her letter with the building inspector.

In the morning **[8]** of December 28, 2015, Christine Reynolds met with Chris Anderson, the Glens Falls Building Inspector to discuss the tenants' concerns about the condition of the Respondent's apartment. In response to that meeting with Ms. Reynolds, Mr. Anderson wrote to Dr. John Rugge, the City Health Officer and to Karen Judd, Esq., the City Attorney, to determine a method to obtain access to the Respondent's apartment, since the Respondent had previously denied both Ms. Reynolds and city officials access to her apartment. [Pl.Ex.7 and 9]. Mr. Anderson believed that an order may be needed to obtain access to the Respondent's apartment.

Later that same day (December 28, 2015), the Respondent contacted the City's Code Enforcement Office and filed an oral complaint and requested an inspection of her stove. The Respondent complained that her stove burners were not working. The stove burners would not light automatically with the pilot light, but the burners could be lit with a match. The Respondent testified that she had other appliances that she used to cook. Ms. Reynolds testified that, just before Christmas of 2015, the Respondent notified Ms. Reynolds, by a text message, that her stove was not operable. **[9]** 5 Mr. Anderson testified that, as a result of the Respondent's request for an inspection of her stove, he had no need to pursue an order to obtain access to her apartment.

On December 31, 2015, Mr. Anderson went to the Respondent's apartment, together with the city fire chief, to inspect her stove and to look at the general condition of the Respondent's apartment. Mr. Anderson found that the stove burners would not automatically light, but it would light with a match [Pl.Ex.6]. There was no gas leak noted. Mr. Anderson did note concerns **[10]** about the clutter in the Respondent's apartment. There were items of property piled in the kitchen which left an aisle just wide enough for one person to pass through. He observed bugs (fruit flies) flying in the kitchen [Pl.Ex.6]. Mr. Anderson noted that, unless the Respondent's apartment was cleaned and less cluttered by January 4, 2016, the Respondent would be issued

a citation for a Code violation [Pl.Ex.6]. Mr. Anderson made a follow up appointment with the Respondent to inspect the status of the clutter in her apartment on January 4, 2016.

On December 31, 2015, Mr. Anderson advised Ms. Reynolds about his observations of the stove and the general condition of the Respondent's apartment. Ms. Reynolds contacted Francis Erickson, an appliance technician, to repair the stove. An appointment was made for Mr. Erickson to repair the Respondent's stove on January 4, 2016.

On January 4, 2016, Mr. Erickson went to the Respondent's apartment to repair her stove. When he removed the top of the stove, he found that the stove was infested with cockroaches.[6] Based on his experience, Mr. Erickson testified that the infestation of the stove area indicated that the oven would also be infested with **[11]** cockroaches. Once he cleaned the top area of the stove, he found that the pilot light would stay lit, but he could not get the burners to work. Because of the infestation of the oven, Mr. Erickson advised Ms. Reynolds that the entire stove and oven should be replaced, rather than just replacing the stove burners.[7] Mr. Erickson also turned off the gas to the stove/oven.

Ms. Reynolds asked the Respondent to provide her with access to the apartment to measure the stove/oven for a replacement, and the Respondent denied her access. On January 4, 2016, Mr. Anderson had returned to reinspect the clutter in the Respondent's apartment. Ms. Reynolds asked Mr. Anderson to measure the Respondent's stove/oven. The stove/oven was a small apartment sized appliance, which needed to be special ordered. A new stove/oven was installed later in January of 2016. The city did not cite the Petitioner for any violation concerning the inoperable condition of the Respondent's stove/oven.

On January 4, 2016, Mr. Anderson noted that the clutter in the Respondent's apartment **[12]** was "a little better" and that "one area is less cluttered." [Def.Ex.F]. According to the testimony of Laura Morgan, the Respondent's neighbor, the Respondent's apartment continues to have an offensive odor, but that the odor is less noticable.

On January 13, 2016, the Petitioner served the Respondent with a 30-Day Notice terminating the Respondent's tenancy effective February 29, 2016. This Court credits the testimony of Christine Reynolds and Denis Creeden, managing member of the Petitioner, that the Respondent's tenancy was terminated because of the tenants' continuing complaints about the offensive condition of the Respondent's apartment, and because the Respondent's apartment was not fully cleaned and remained cluttered, despite Mr. Anderson's attempts to have the Respondent clean her apartment. The Petitioner was also concerned that the Respondent's stove, which was new when the Respondent rented the apartment, was found to be infested with cockroaches. The Petitioner had offered to assist the Respondent to clean and clear her apartment. The Petitioner had offered assistance of its laborers and garage space for storage. The Respondent declined the Petitioner's offer of assistance. **[13]** The Petitioner attempted to work with the city's code enforcement office to have the Respondent clean and clear her apartment, but the offensive smells continue from the Respondent's apartment.

With respect to the Respondent's counter-claim for a rent offset for a breach of warranty of habitability, the Petitioner stipulated with the Respondent's testimony that the Respondent's apartment was valued at $490.00 per month, rather than the leased amount of $530.00 per month, due to the deficiencies alleged in paragraph 21 of the Respondent's Amended Answer. The Petitioner, however, asserts that the counter-claim of a breach of warranty of habitability is not a defense to its holdover proceeding. Instead, the Petitioner asserts that the Respondent's counter- claim merely establishes the amount of rent owed by the Respondent for the use and occupancy of the apartment since the lease was terminated.

Conclusions of Law

In 1979, the New York State Legislature enacted RPL § 223—b in an attempt to protect residential tenants from evictions by landlords in retaliation against those tenants exercising, in good faith, their rights to exercise their section 235—b remedies and various other remedies. *See*:*Rasch, Landlord* ***[14]*** *and Tenant*, § 1323.5 (Supplement). Real Property Law Sec. 223(b) was designed as a vehicle to encourage tenants to report housing code violations without fear of landlord reprisal. See, 3 NY Landlord & Tenant Incl. Summary Proc. § 43:34 (Rasch 4th Ed. 1998).

Section 223-b(1)(b) states that no landlord shall serve a tenant or commence an action in retaliation for actions taken in good faith to secure or enforce rights under section 235-b or any New York State law which has as its objective the regulation of leased premises. The prohibitions against retaliatory evictions set forth in RPL § 223-b only prohibit the landlord from certain expressly enumerated conduct. A landlord is entitled to evict the respondent from the leased premises for any legal reason except for those reasons expressed in RPL § 223-b.

The statutory protections against retaliatory eviction apply to "all rental residential premises except owner-occupied dwellings with less than four units." (RPL § 223-b[6]). This section provides, among other things, that no landlord shall serve a notice to quit or commence a summary proceeding to recover possession of real property in retaliation for "[a] good faith complaint, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health **[15]** or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes . . ." (RPL § 223-b[1][a]).

If a court finds that the landlord commenced an eviction action or proceeding in retaliation for the tenant having taken any protected action, and also finds that the landlord would not otherwise have commenced such action or proceeding, then a "judgment shall be entered for the tenant." (RPL § 223-b[4]).

The burden of establishing the affirmative defense of retaliatory eviction lies with its proponent, the tenant. *See*: *339-347 E. 12th St. LLC v. Ling*, 35 Misc 3d 30, 942 N.Y.S.2d 862 (App. Term, 1st Dept., 2012). For the Respondent to prevail in her defense of retaliatory eviction, she must be established that: (1) the tenant exercised a protected right in the conduct that she undertook; (2) the grievance complained of by the tenant is bona fide, reasonable, and serious in nature, and has a foundation in fact; (3) the tenant did not create the condition upon which the

defense is based; (4) the grievance complained of was present at the time the landlord commenced the proceeding; and (5) the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for exercising his or her constitutional rights. **[16]** *Toms Point Apartments v. Goudzward*, 72 Misc 2d 629, 339 N.Y.S.2d 281 (Dist. Ct., Nassau County, 1972), *judgment aff'd on other grounds*, 79 Misc 2d 206, 360 N.Y.S.2d 366 (App. Term, Second Dept., 1973); 89 NY Jur.2d Real Property - Possessory Actions § 111.

RPL § 223-b provides a rebuttable presumption of retaliation where a landlord serves a notice to quit or commences an eviction proceeding within six months after the tenant made a good faith complaint "to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes . . ." (RPL § 223-b[5][a]).

In the present case, the Respondent has proven a *prima facie* case for retaliatory eviction under RPL § 223-b. On December 28, 2015, the Respondent filed a complaint with Mr. Anderson, the Glens Falls Code Enforcement Officer, complaining that the stove in her apartment was not operable. The Respondent's complaint was a bona fide, good faith complaint. Her stove was actually not working. In addition, there was a good faith basis to believe that the inoperable stove constituted a violation by the landlord of a health or safety law, regulation, code, or ordinance, or any law or regulation. In the present case, the Petitioner was obligated to provide the Respondent with an operable stove/oven. The Respondent's complaint alleged that she was concerned **[17]** that the stove knob could accidently be turned, resulting in a gas leak. Both Mr. Anderson and Mr. Erickson testified that a gas leak could occur, if the stove knob was accidently turned, since the pilot light was not working. In fact, Mr. Erickson testified that he shut off the gas to the Respondent's stove/oven to prevent an accidental gas leak. The fact that Mr. Anderson did not issue a citation to the Petitioner for a health or safety violation for the inoperable stove/oven does not mean that the Respondent's complaint was not based in good faith. Here, the Respondent had a reasonable complaint, based in fact, that her stove/oven was not working and that the stove/oven could constitute a health or safety hazard.

The Petitioner clearly served the Respondent with a notice to quit and commenced this eviction proceeding within six months after the Respondent made her December 28, 2015 complaint to the city's code enforcement officer. As a result, the Respondent has established the rebuttable presumption of a retaliatory eviction.

Once the tenant proves a *prima facie* defense of retaliatory eviction, the burden of proof then shifts to the landlord to come forward with evidence to rebut **[18]** the presumption by showing some independent and non-retaliatory basis for the decision to evict the tenant. *See*: *Paikoff v Harris*, 178 Misc 2d 366, 368, 679 N.Y.S.2d 251 (New York City Court 1998), *aff'd as modified*, 185 Misc 2d 372, 713 N.Y.S.2d 109 (App. Term, Second Dept. 1999); 14 Carmody-Wait 2d § 90:161.

In the present case, the Petitioner has demonstrated that it had an independent and non-retaliatory basis for the decision to evict the tenant. Beginning in April of 2014, the Petitioner received repeated complaints about the offensive condition of the Respondent's apartment. These complaints continued through December of 2015. The Petitioner's other tenants had requested, in writing, that the Petitioner compel

the Respondent to clean and clear her apartment of clutter. The Petitioner had offered the Respondent assistance to clear her apartment and had offered storage space for the Respondent's possessions. In the morning of December 28, 2015, the Petitioner's property manager, Christine Reynolds, met with Mr. Anderson to discuss involving the City Code Enforcement Office in the process of clearing the Respondent's apartment of clutter. This December 28, 2015 meeting occurred before the Respondent filed her complaint about her stove with Mr. Anderson, which the Respondent made in the afternoon of December 28, 2015. Mr. Anderson's **[19]** inspection of the kitchen area noted fruit flies flying in the kitchen on December 31, 2015 (i.e.; in the middle of the winter). The Respondent's kitchen was so cluttered that only a small path was available to walk through. Mr. Anderson found that the condition of the Respondent's apartment did constitute a code violation, even though a notice of violation was not served on the Respondent. During Mr. Erickson's inspection of the Respondent's stove/oven, which was new when the Respondent moved into the apartment, he found that her entire stove and oven was infested with cockroaches.

Prior to commencing any action to remove the Respondent from her apartment, Mr. Creeden and Ms. Reynolds waited to see if the condition of the Respondent's apartment was substantially improved with the intervention of Mr. Anderson. Mr. Anderson's subsequent inspection of the Respondent's apartment, which occurred on January 4, 2016, found that the clutter in the Respondent's apartment was merely "a little better" and that "one area is less cluttered." [Def.Ex.F]. According to Laura Morgan, the Respondent's apartment continues to smell of garbage, but the smell is somewhat less offensive.

Based on these facts, **[20]** the Petitioner has demonstrated an independent and non-retaliatory basis for the decision to evict the tenant. The Petitioner commenced these eviction proceedings based on the Respondent's failure to properly maintain her apartment in a clean and unoffensive condition. As a result, the Respondent's affirmative defense of retaliatory eviction is dismissed.

The Respondent's counter-claim for an offset in rent for a breach of warranty of habitability is granted to the extent that the Petitioner's claim for use and occupation for the Respondent's apartment is reduced from $530.00 per month, as set by the parties' lease agreement, to the amount of $490.00 per month per the Respondent's testimony of the fair and reasonable value of her apartment.

This Court, however, agrees with the Petitioner that the Respondent's counter-claim for an offset in rent for a breach of warranty of habitability is not a defense to the Petitioner's right to possession of the subject property based on this holdover proceeding. *Ctr. for Behavioral Health Services, Inc. v Bock*, 18 Misc. 3d 1111[A], 856 N.Y.S.2d 22, 2008 NY Slip Op 50007[U] (City Court, Kings County, 2008). To the extent that a tenant asserts a breach of warranty of habitability defense and counter-claim, that aspect of the Answer is properly raised only in response to the landlord's claim **[21]** for a money judgment based on the tenant's continued use and occupancy of the property after the tenancy was terminated. *King Enterprises Ltd. v. Mastro*, 2011 N.Y. Misc. LEXIS 1246, 2001 NY Slip Op 40162[U] (Civ Ct, New York County, 2001)(although a breach of habitability is not a defense to possession in a holdover action, it may be raised in a holdover proceeding to the extent that petitioner also seeks payment for the tenant's use and occupancy); *Ruradan Corp. v Natiello*, 21 Misc. 3d 1129[A], 873 N.Y.S.2d 515, 2008 NY Slip Op 52279[U] (Civ. Ct.

of the City of New York, New York County, 2008). While courts have held that breach of the warranty of habitability is not a defense in a holdover proceeding, the claim is allowed to provide a defense where, *as here*, the landlord is seeking money for use or occupancy of the premises.*See*: *King Enter. Ltd. v. Mastro*, 2001 N.Y. Misc. LEXIS 1246, 2001 NY Slip Op 40162[U] (Housing Part, Civ Ct, NY County 2001); *City of New York v. Candelario*, 156 Misc 2d 330, 332, 601 N.Y.S.2d 371 (App Term, 2d Dept., 1993), *aff'd in part and rev'd in part on other grounds*, 223 AD2d 617, 637 N.Y.S.2d 311 (2d Dept. 2006).

In the present case, during the trial, the Petitioner stipulated that the fair value for the Respondent's use and possession of the subject property was $490.00 per month, which was the amount testified to by the Respondent. Since the Respondent has not paid any amount for her use and occupancy of the apartment for the months of February, March or April of 2016, the Petitioner is entitled to recover the amount of $1470.00 for the Respondent's use and occupancy of her apartment.

Based on the foregoing, the **[22]** Petitioner is granted judgment for possession of the property known as Apartment #1, located at 7 Chester Street, Glens Falls, New York, from the Respondent. Petitioner is entitled to a warrant of eviction, which shall be issued by this Court, without further stay of execution. The Respondent's affirmative defense of retaliatory eviction is dismissed.

The fair value of the Respondent's use and possession of the subject property is determined to be $490.00 per month, and the Petitioner is granted judgment in the amount of $1470.00 for the Respondent's use and occupancy of her apartment for the months of February, March and April 2016, together with a bill of costs. Counsel for the Petitioner shall provide this Court with a money judgment, with a bill of costs, on notice to Respondent's counsel. Insofar as the Petitioner was successful in its eviction proceeding, and the Respondent was successful in her counter-claim for a breach of warranty of habitability, this Court will not grant attorneys' fees, which would merely be offsetting.

All other claims of the respective parties have been duly considered and are dismissed as being without merit.

Dated: April 21, 2016

Glens Falls, New York

Hon. **[23]** Gary C. Hobbs

Footnotes

- 1

During its case, the Petitioner called Sean Wigley, a **[4]** representative of Orkin Pest Control, to testify on April 15, 2015. Mr. Wigley was directed to return to court on April 18, 2016 for cross-examination by Respondent's counsel. Mr. Wigley failed to appear, despite repeated attempts by the Petitioner to have Mr. Wigley appear, thereby depriving the Respondent of the ability to cross-examine this witness. Respondent made a motion to strike Mr. Wigley's testimony. Petitioner was offered a new date to have Mr. Wigley appear for cross-examination, but declined that offer of an adjourned trial date and rested its

case. This Court granted the Respondent's motion and struck Mr. Wigley's testimony and Petitioner's Exhibits 2, 3, 4 and 5 which were introduced through Mr. Wigley. As a result, the Court in determining this Decision and Order has not relied on any testimony of Mr. Wigley nor on any exhibits introduced through Mr. Wigley.

- 2

The parties' lease agreement is annexed as Exhibit A to the Petitioner's Petition, and the Respondent admitted to terms of the lease agreement in paragraph 1 of her Amended Answer.

- 3

Respondent admitted to the service of the 30 Day Notice and the termination of her tenancy effective February 29, 2016 in paragraph 1 of her Amended Answer.

- 4

Howard Morgan also signed the June 2015 tenant's complaint about the condition of the Respondent's apartment [Pl.Ex.11].

- 5

The Respondent testified that she orally told Christine Reynolds, the property manager, about the inoperable stove in November of 2015. Ms. Reynolds testified that she was notified of the problem with the stove, for the first time, in a text from the Respondent, which she received just before Christmas of 2015. This Court credits the testimony of Ms. Reynolds. The Respondent's testimony was often inconsistent and not credible. For example, the Respondent initially testified that Ms. Reynolds never responded to her request to fix the stove. The Respondent then changed her testimony asserting that Ms. Reynolds told her that the stove was not going to be fixed.

- 6

The cockroaches in the burner area were dead.

- 7

The stove and oven was brand new when the Respondent moved into the apartment in February of 2013.