CIVIL COURT of the CITY of NEW YORK
NEW YORK COUNTY
HOUSING COURT: PART D

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ROXBOROUGH APARTMENT CORP.,
Petitioner-Landlord,

L & T Index No. 5089/12

-against-

MICHAEL D. KOESSEL,
Respondent-Tenant

-and-

Decision & Order
After Hearing

RICHARD MOLERO, "JOHN DOE" and/or
"JANE DOE",
Respondents-Undertenants.

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Hon. Brenda S. Spears, J., H.C.:

In this holdover proceeding, the petitioner sought to regain possession of the subject rent-stabilized apartment on the grounds that Michael D. Koessel, the original tenant of record, did not maintain the subject premises as his primary residence. The petitioner further alleged that the respondent had sublet the apartment to Richard Mulero, incorrectly named as Richard "Molero" in the case caption; Mr. Mulero is also named as a respondent-undertenant. The respondents, Michael D. Koessel and Richard Mulero, who are represented by counsel, appeared and answered, denying the petitioner's allegations.

On January 31, 2013, the parties entered into a court-ordered stipulation with an intent to resolve this matter. This stipulation had two major components. The first major component concerned the respondents' rent regulatory status. The petitioner agreed to offer, and the respondents agreed to accept, a rent-stabilized lease in the names of Michael D. Koessel and Richard Mulero with an initial term for two years, beginning February 1, 2013 and ending January 31, 2015. The respondents would then

be offered a two-year renewal lease from February 1, 2015 through January 31, 2017 and then a one-year renewal from February 1, 2017 through January 31, 2018. The parties further agreed that the rental increases would be based on the increases established by the Rent Guidelines Board at the time of the renewals.

The stipulation also provided that the respondents acknowledged that the there was a J-51 tax abatement in effect for the subject premises and that said tax abatement would expire as of June 30, 2017. The respondents also acknowledged that upon the expiration of the J-51 tax abatement, they would no longer be rent stabilized tenants after January 31, 2018. The petitioner agreed that in the event the J-51 expires or is otherwise not applicable to the subject premises before June 30, 2017, the respondents shall still be deemed rent stabilized tenants through January 31, 2018 at rents based on the Rent Guidelines Board increases.

The stipulation's second major component addressed the need for repairs in the apartment. The parties agreed that the respondents would provide access on February 6, 2013 and February 7, 2013 to inspect and begin repairs. The work was to be completed by 30 days.

Finally, the parties agreed that the respondents tendered rent through 2012. The respondents agreed to stop payment on five checks issued in 2012 for five months and to reissue the checks by February 20, 2013.

By motion made originally returnable on June 5, 2013, the respondents moved for criminal and civil contempt pursuant to CPLR §5104 and Article 19 of the Judiciary Law, on the grounds that the petitioner had wilfully failed to comply with the terms of the January 31, 2013 stipulation. The motion also seeks legal fees and costs incurred in connection with this motion. The court granted the motion to the extent of scheduling a hearing.

This hearing took place over the course of three days, with the court hearing testimony from four witnesses. For the reasons set forth herein, and based on the testimony and the documents admitted at hearing, the respondents' motion is granted.

Three witnesses testified in support of the respondents' motion. Mr. Koessel, the tenant of record, testified that he was familiar with the stipulation's terms. As he understood that agreement, he and Ricardo Mulero would be named as tenants in a new lease at a rent of $4,100 per month. The lease would be for a two year period. At the end of that lease term, he and Mr. Mulero would be offered a two year renewal at a monthly rent calculated in accordance with rent increases authorized by the Rent Guidelines Board.

Mr. Koessel stated that they did receive a proposed lease from the petitioner, but that he believed this lease contradicted the stipulation. When it was suggested that he just make the changes, he did not agree to do so since he had bad experiences with the petitioner in the past. The witness recounted his experience with the petitioner concerning a lease renewal as an example of the problem. According Mr. Koessel, in 1997 he advised the petitioner that he and Richard Mulero had become domestic partners. He added Richardo Mulero as a tenant to the next renewal lease and Mr. Mulero signed that renewal. However, Richardo Mulero's name was crossed out in the copy of the lease they received from the petitioner.

Mr. Koessel was aware that his attorney and the petitioner's attorney had exchanged e-mails about the language in the proposed lease.

Mr. Koessel further testified that the petitioner had not made the repairs needed to the apartment. The petitioner's failure to make these repairs, and to comply with the other terms of the stipulation, has caused a substantial amount of harm and inconvenience to both him and Richard Mulero. They have had to spend a substantial amount of money on legal fees. In addition, the situation was emotionally debilitating because they were in a constant case of distress: their property had been boxed up for months.

On cross-examination, Mr. Koessel conceded that he has a summer home on Fire Island and that he has a lease to another apartment because he and Ricardo Mulero have separated. However, he and Mr. Mulero's finances remain intertwined and that he has not moved his things out of the apartment.

Richard Mulero also testified. He, like Michael Koessel, was aware of the terms of the stipulation. And, he believed that the lease the petitioner gave to them did not comply with the stipulation. With respect to the needed repairs, he knew that the petitioner was to have access on February 6 and February 7, 2013 to inspect and begin the repairs. In anticipation of the meeting, Mr. Mulero prepared a room-by-room list of the repairs needed in the apartment and spoke to the petitioner's wife about the specific time of the appointment.

On February 6, 2013, he let the petitioner into the apartment and began to walk through the apartment with him. He tried to give the petitioner a copy of the list of repairs, but the petitioner refused to accept it. During the walk-through, the petitioner took no notes. He told the witness that he would paint the apartment, except for the bathroom because any repairs needed in that room were caused by the respondent's failure to open the window. He also told the witness that he would paint the rest of the apartment but would not fix the electrical issues. Mr. Bogoni told him that the work would begin in about three weeks and would be done in 30 days; he did not explain why the work could not begin immediately. However, the petitioner told the respondent that he would not do any work until the lease was signed and the increase rent paid.

On March 6, 2013, the witness delivered the re-issued checks to the petitioner in the lobby. The petitioner started yelling at him in the public area, questioning whether these checks were "good". On March 7, 2013, the workers came to the apartment. They had just about finished working on the living room and had begun to work on other areas of the apartment, but the work was clearly not completed. The petitioner came to the apartment and started yelling at him again. He ordered the workers to leave.

After that date, the witness repeatedly asked the doorman if he knew when the workers would come back to finish the repairs. Work did not resume until March 25, 2013. Three days later, on March 28, 2013, the workers left the apartment once again at about 11 AM, telling Mr. Mulero that they had to do work in Apartment 2C in the building. In mid-May 2013, he was told that the workers would return about June 6, 2013. He was told to prepare the apartment for painting. He boxed up most of the items in the apartment; all items from the kitchen were boxed up. The petitioner never

confirmed the June 6, 2013 date and the workers never returned. Mr. Mulero's household goods remain in boxes, awaiting the resumption of the work. Because of this situation, he can not have a normal life.

Mr. Mulero identified several photographs that he had taken depicting the conditions in the apartment. These photographs clearly establish that plaster and paining is needed throughout the apartment.

On cross-examination, Mr. Mulero testified that the petitioner told him that he could have the apartment painted either white or linen. Since he wanted different color in the apartment foyer, he told the petitioner that he would buy his own paint in the color of his choice. He purchased the paint, but the petitioner refused to use it. With respect to the overall issues of repairs, Mr. Mulero acknowledged that he had made plans with the painters to complete the work. But, those plans were never confirmed. He repeatedly tried to get firm dates by leaving messages with the doorman, the usual practice for arranging repairs at the building; nothing was ever confirmed. The workers have not been back in the apartment. In total, only two rooms have been painted.

Mr. Mulero acknowledged that the lease had not been signed, even though it had been offered. He did not sign it because he thought it was not what the parties agreed to in the stipulation.

Eleanor Blau, a tenant in the subject premises, was the final witness called to testify by the respondents. Ms. Blau stated that she was a rent-controlled tenant in the subject building and recognized the petitioner's managing agent Paul Bogoni. She stated that she had been involved in a case with the petitioner and that she had withheld her rent because the petitioner had failed to paint her apartment or to make any other repairs. She alleged that when he had been directed to make repairs in her case, he came into her apartment unannounced and cursed at her.

The court has taken judicial notice of the court file in this proceeding, L & T Index No. 10776/01. The parties settled the proceeding by a two-attorney stipulation "so-ordered" by the court in June 10, 2002. Ms. Blau agreed to pay the arrears over a two-year period. It was further agreed that in the event the respondent needed repairs, she

would provide written notification to the petitioner and present it to him or his representative in person.

Paul Bogoni, the petitioner's general manager and the managing agent, was the only witness to testify for the petitioner and in opposition to the respondents' motion. He stated that the petitioner purchased the building in 1996. According to this witness, there are no Housing Court violations on the building.

With respect to the instant proceeding, Mr. Bogoni recalls coming to court in January 2013 and agreeing to the terms of the January 31, 2013 stipulation. He understood that the respondents would have a lease until 2017 and that he would make repairs. He agreed to make a date for access in about four weeks.

The witness testified that he went to see the apartment with Mr. Mulero. He stated that the kitchen had to be painted, but that the respondents had not prepared the rest of the apartment in a manner that would allow his workers to make the needed repairs. There were books all over the dining room and there were shelves along the hallway walls. When the shelves and the brackets were removed, there were holes all over the walls. The walls had to be re-plastered and re-faced. Only after that work was completed would it be possible to re-paint.

Mr. Bogoni stated that he told Mr. Mulero that the preliminary work would take place immediately. He then had to arrange to paint the living room, dining room and the foyer. He stated that dates had been made but that the respondents had asked to postpone the work three times; after the fourth cancellation, he stated that he could not do the work.

He stated that he had no further communication with the respondents after March 2013. He never agreed to re-schedule any work in June 2013 or any time after that.

Concerning the lease, Mr. Bogoni stated that he offered a lease to the respondents. They did not sign the lease and he has had no conversation with them about it.

On across-examination, the petitioner clarified his testimony concerning violations after reviewing copies of violation reports from the Department of Buildings.

He conceded that from April 19, 2013 to September 11, 2013, there had been five violations placed on the building by the Department of Buildings. [1] Mr. Bogoni also acknowledged that although he states in his June 12, 2013 affidavit that the respondents had not paid rent, he had received rent through March 2013.

With respect to the repairs, the petitioner stated that the remaining tenant (Mr. Mulero) refused to get the apartment ready for painting and that the apartment had not been ready for him to have the work done at the end of March 2013. He claims that Mr. Mulero did not have a list of the repair items prepared for him.

This witness testified that he did not know about specific repairs needed in specific rooms. During his "walk-through" of the apartment, he did not go into the bedrooms and that he did not know about any work that would be needed in the bathroom. He then conceded that he had been shown a list of the repairs, but refused to take it because "the list was for lawyers". According to Mr. Bogoni, Mr. Mulero was arrogant and dismissive during his initial visit. As a result, Mr. Bogoni claims he walked out.

Mr. Bogoni further testified that he could not begin the work on February 6, 2013, the date agreed to in the stipulation, because he already had work scheduled for four other apartments. The three painters who work at the building for him were working on other apartments.

The witness described the way in which tenants in the building arranged for needed repairs. He stated that the tenants notified the doorman about scheduling repairs. The doorman would tell him or his wife. They would schedule the work and, in

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[1]These violations included: a violation dated April 20, 2010 for operating an outdoor restaurant without the appropriate certificate of occupancy; a violation dated April 19, 2013 with respect to a horizontal crack in the building's exterior wall; a violation dated June 11, 2013 with respect to a defective elevator; a violation dated July 14, 2013 concerning the petitioner's failure to file a required technical report; and, a violation dated September 11, 2013 with respect to the petitioner's failure to certify the correction on an immediately hazardous ECB violation. [Trial Respondents' Trial Exhibits T-1 to T-10]

turn, tell the doorman of the scheduled days. The doorman would then let the tenants know the scheduled days.

According to Mr. Bogoni, Mr. Mulero had cancelled several scheduled appointments. But, he did not know which appointments had been cancelled or how he learned of the cancellations. He did not speak to Mr. Mulero directly about the situation.

Mr. Bogoni was knowledgeable about the stipulation's terms. He knew that the respondents were to be tenants under a new lease and he knew he was supposed to make repairs within 30 days after the initial February 6, 2013 access date. Moreover, he acknowledged that from February 2013 through at least June 2013 he had workers in the building, involved in other apartments.

The petitioner called no further witnesses.

The respondents cogently and credibility testified about their understanding of the proposed stipulation, their expectations with respect to receiving a new lease and the petitioner's failure to address their need for major repairs. In contrast, the petitioner's testimony was rambling ,disjointed and lacking in credibility in material areas. Yet, even if one were to give the petitioner the benefit of the doubt, one thing becomes clear: he was aware of his obligations under the terms of the January 31, 2013 stipulation, but for some reason, chose to ignore them.

An analysis of the language in the proposed stipulation rider and that agreed to in the stipulation highlight this issue. The stipulation provided that both respondents would be named as tenants of record. The proffered stipulation lists both respondents on the first page, but Mr. Mulero's name is typed next to the signature line for the "Guarantor". This may be of no real import in the future, but one has to question why, given the nature of this proceeding, the petitioner would not have crossed out that language or redacted it to avoid confusion.

But, of more importance is the language contained in the J-51 rider given to the respondents as a rider to the lease. The language in the stipulation was clear: the parties agreed that the respondents were to deemed rent-stabilized tenants until the expiration of the lease renewal set to expire as of January 2018. The stipulation provides that:

> In the event the J-51 expires or is otherwise not applicable to the subject premises prior to 6/30/17, respondents shall nonetheless be treated as though they are rent stabilized tenants with tenure in the apartment through January 31, 2018.

In contrast, the petitioner offered the respondents a lease with the following rider:

> The apartment shall remain subject to such law until the expiration of the building's tax benefits which are set to expire on or about June 30, 2017 or the expiration of the applicable provision of the rent stabilization law, whichever is earlier.

Clearly, the language in the rider given to the respondents differs from the language agreed to by the parties. The petitioner offers no explanation for his failure to abide by the terms he agreed to. And, his off-hand suggestion that the respondents should unilaterally revise the document fails to address the problem, i.e, why he chose to disavow the stipulation in the first instance, even though he testified that he was aware of the stipulations terms.

The petitioner's attitude towards his obligations to make the much needed repairs is similarly troubling. Both Mr. Koessel and Mr. Mulero testified credibly and at length about the need for numerous repairs in the subject premises. And, the photographs admitted into evidence corroborate their claim that repairs have been needed for some time. The photographs also demonstrate that, consistent with the petitioner's workers' request, the respondents prepared the apartment so that the repairs could be done. They have lived in that state for some months.

The petitioner offers not cogent explanation for his failure to make repairs. In fact, in his testimony, he was disdainful of the respondents attempts to have the work done. He refused to take a list of the repairs respondents believed were needed, he did not walk through the entire apartment, pointedly ignoring the bedrooms. His testimony with respect to when the workers were actually in the apartment was convoluted and his efforts to explain the building's method for notifying him about repairs was unclear. And, although he states that the his workers could not address the repairs needed in the subject apartment because they were working in other apartments in the building, he

offered no proof this contention. No work orders or invoices were produced and none of the workers, the doorman or his wife were called to testify.

Under these circumstances, the court grants the respondents' request that imposing a missing witness charge is appropriate. In *Seligson, Morris & Neuberger v. Fairbanks Whitney Corp.*, 11 A.D. 2d 625, 257 N.Y.S. 2d 706 (1st Dep't 1965), the court held a party's failure to produce evidence within its possession or control should be construed against its position. The court further held that the inference is so strong that a court may "give the strongest weight to the evidence already in the case in favor of the other side and which has not been, but might have been, effectively contradicted or explained by the absent witnesses". 11 A.D. 2d at 625, 257 N.Y.S. 2d at 711.See also, *Chandler v. Flynn*, 111 A.D. 2d 300, 489 N.Y.S.289 (2nd Dep't 1985), wherein the court noted that it is well-established that a negative inference may be drawn where "the witness is under the plaintiff's control and is in a position to give substantial, not merely cumulative, evidence.

This court is presented with a very different situation than that before the Court of Appeals in *DeVito v. Feliciano*, 84 A.D.3d 645, 924 N.Y.S. 2d 330 (2013), which examined the question of what is cumulative evidence. Here, there is no question of witnesses providing cumulative testimony but rather, witnesses who may be able to provide any testimony to support the petitioner's uncorroborated statements.

In the instant proceeding, the petitioner testified that he was told that Mr. Mulero had cancelled scheduled repair appointments. He stated that he was told this by his wife, or maybe by the doorman. He also stated that he could not spare the building's workers to make the repairs in the subject premises because they were working on other apartments. And, according to Mr. Bogoni, the apartment was not in a state to permit repairs. Yet, no other witnesses testified for the petitioner: he did not call his wife, the workers or the doorman. Several of the witnesses are his employees and clearly under his control. With respect to his wife, if she is an integral part of the building's management, one would expect her to testify for the petitioner. Failing to call any of these witnesses, or indeed any witnesses, leads one to conclude that their testimonies would not be helpful to the petitioner.

Moreover, the testimony presented during the hearing supports the respondents' motion for the imposition of sanctions on the petitioner and for an award of attorneys' fees. Both parties undertook certain responsibilities once the January 31, 2013 stipulation was executed. The court assumes, and parties to the stipulation have a right to assume, that the stipulation was entered in good faith. The respondents complied with their obligations, by making the requisite use and occupancy payments at the set rate even though they had not received a new lease consistent with the negotiated terms. They also provided access so that the needed repairs could be made.

On the other hand, the petitioner failed to comply: the lease given to Mr. Mulero does not reflect the agreed memorialized in the stipulation. And, he made minimal efforts to make repairs. No tenable explanation was offered for this conduct. Mr. Bogoni clearly knew what obligations he had undertaken in the stipulation. His rambling testimony presented no viable or credible basis for his failure. Apparently, he just did not want to adhere to his own commitments.

Thus, the court concludes that, based on the facts established during the hearing, the respondents can seek relief under Sections 750, 751 and 753 of the Judiciary Law. Section 750 provides in pertinent part that a court of record has the power to punish for criminal contempt "...3.willful disobedience of its lawful mandate". Section 751 provides that except in circumstances not applicable to the instant case, the punishment for contempt under Section 750 may be by fine not exceeding $1000 or by imprisonment not exceeding 30 days. And, pursuant to Section 753, a court of record has the power to punish, by fine and imprisonment, or either ... "a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in court, may be defeated, impaired, impeded, or prejudiced, in any of the following cases...".

A party can be held in criminal contempt where said party has shown willful disobedience and the intent to defy the dignity and authority of the court. *McCormick v. Axelrod*, 59 NY 2d 574 (1983); *State v. Unique Ideas, Inc.*, 44 N.Y. 2d 345, 405 N.Y.S. 2d 656, 376 N.E. 2d 1301 (1978). To be held in civil contempt, a party musty be found to have knowledge of the order in question and that and that the party's

action or inaction has prejudiced the rights of other parties. McCain v. Dinkins,84 N.Y. 2d 216 (1994). As the Court of Appeals stated in McCormick v. Axelrod, *supra*, the aim of civil contempt is the vindication of a private right of a party to litigation and "...the penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right". McCormick v. Axelrod, 59 N.Y 2d at 582-583. In contrast, the focus of a finding of criminal contempt involves the vindication of an offense against public justice and it is utilized to protect the dignity of the judicial system. In drawing a distinction between civil and criminal contempt, the Court of Appeals stated:

> Although the line between the two types of contempt may be difficult to draw in a given case, and the same act may be punishable as both a civil and a criminal contempt, the element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out.

McCormick v. Axelrod, 59 N.Y. 2d at 583. See also, Allen v. Rosenblatt, 9/2/2004 N.Y.L. J. 20, col.1 (Civ. Ct, N.Y. Co.), holding that a civil contempt in conjunction with a criminal contempt does not violate the concept of double jeopardy because a civil penalty is applied to compensate the injured party while a criminal contempt is used to protect the integrity and dignity of the judicial authority.

The facts discerned during the hearing in this matter establish that the petitioner knew what actions he had agreed to undertake in a court-ordered stipulation. He has just refused. Thus, this court holds the petitioner in civil and criminal contempt. Pursuant to §750 and §751, the petitioner is fined $1000 for criminal contempt. The petitioner is fined an additional $1000 pursuant to Judiciary Law §753.

The respondents have also sought legal fees for the cost incurred in making the instant motion, which can be recovered pursuant to Section 773 of the Judiciary Law. It is well- settled that attorneys' fees and costs are properly included in an award to the complainants as "reasonable and necessary costs and expenses" in pursuing contempt. Holskin v. 22 Prince Street Associates, 178 A.D. 2d 347, 577 N.Y.S. 2d 399 (1st Dep't 1991); 3855 Broadway Laundromat v. 600 West 161st Street Corp., 156 A.D.

2d 202, 548 N.Y.S. 2d 461 (1st Dep't 1989); *Glanzman v. Fischman*, 143 A.D. 2d 880, 533 N.Y.S. 525 (2d Dep't 1988).

Counsel for respondents has submitted invoices for attorneys' fees and costs incurred by the respondents in connection with the instant motion and hearing totaling $15, 617.79; these invoices are attached as Exhibit A to the Respondents' Post-Hearing Memorandum of Law. The court has reviewed these invoices and found the charges to reasonable in the context of this proceeding. Therefore, the respondents are awarded a money judgment in the amount of $15,617.79.

With respect to the commitments the petitioner undertook in the January 31, 2013 stipulation, within 20 days of the date hereof, the petitioner is directed to deliver a two year lease to the respondents' counsel that comports in all respects to the terms of the stipulation, except that the commencement of said lease shall be November 1, 2013. All subsequent renewals shall be based on this commencement date. The petitioner shall be liable for an additional fine of $250 per day in the event that this lease is not provided to the respondents in accordance with this ruling. The respondents may move to restore this proceeding to the court calendar for such relief.

The respondents shall return the executed lease to petitioner's counsel within 15 days of receipt and the petitioner shall provide them with a fully executed copy within 10 days thereafter. The respondents shall also provide the petitioner with a list of needed repairs. The respondents shall provide the petitioner with access within 30 days after submission of this list. The petitioner shall complete the needed repairs within 45 days of the initial access date.

In the event that the petitioner fails to make the needed repairs, the respondents shall be authorized to make the needed repairs and recoup the cost of such repairs by deducting the cost from the rent upon presentation of invoices documenting the work done and the costs incurred.

In summary, therefore, petitioner shall pay the $2,000 fines for civil and criminal contempt and the money judgment of $15, 617.79 for legal fees and costs within 30 days after receipt of a copy of this order with a Notice of Entry.

This constitutes the decision and order of this court.

Brenda S. Spears, J.

BRENDA S. SPEARS
JUDGE, HOUSING PART

Dated: New York. New York
November 3, 2014

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