

**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART S**

x L&T No. 55820/19

The Estate of Lillian Goldman and
the Lillian Goldman Family, LLC
Petitioner-Landlord,

-against -

**POST-TRIAL
DECISION/ORDER**

Melissa Mates

Respondent-Tenant,
John Doe and/or Jane Doe
Respondent-Undertenants.

x

Hon. MICHELLE D. SCHREIBER

In this nonpayment summary proceeding the petition is dated March 4, 2019. It states the monthly rent for the subject rent stabilized apartment is \$1,763.38 and seeks a judgment of possession in the amount of \$2,901.23. The respondent retained counsel and filed a written answer raising ten affirmative defenses, including lack of jurisdiction, incorrect amount of rent, tender and refusal¹, improper rent demand, and breach of the warranty of habitability due to “environmental hazards and infestation(s).” The answer also contains four counterclaims seeking an abatement based upon the breach of warranty, and “forcing Respondent to temporarily vacate to accommodate Petitioner’s attempts at remediation of mold and beetles,” an order to complete repairs, and attorney’s fees. The case was adjourned a few times pursuant to two attorney stipulations requiring repairs and with petitioner agreeing to “take under advisement the provision of a copy of the mold remediation report and all testing.” The case was sent to Part X on August 1, 2019 and then to Part S for trial. It was adjourned for a pretrial conference on

¹ This affirmative defense was withdrawn at trial; as was the personal jurisdiction defense.

September 12, 2019, and then for trial to October 28, 2019; the trial commenced that day, was continued on January 13, 2020, and concluded with no further testimony on January 17, 2020. Post trial memoranda of law were to be submitted initially on February 28, 2020; the submission date was adjourned and then the matter marked off calendar due to the COVID 19 pandemic. The parties thereafter agreed to engage in settlement discussions; when no settlement was reached memoranda of law were submitted on June 23, 2020. Based upon the credible documentary and testimonial evidence at trial the Court makes the following findings of fact and conclusions of law.

The parties stipulated to the following documents to be admitted into evidence: a certified copy of the deed, Multiple Dwelling Registration, and DHCR registration statement; the last lease renewal; and a rent ledger. The deed, dated December 21, 1995, shows The Lillian Goldman Family, L.L.C. has an “undivided 85% interest, as Tenant-in-Common” of the subject building. The MDR lists “Est. Of L. Goldman & Lillian Goldman Family L.L.C.” as the corporate owner and Michael Gaffney as the managing agent. The DHCR statement shows the property is registered and the subject premises is rent stabilized; the last lease renewal commenced on June 1, 2018 and expired on May 31, 2020 with a monthly rent of \$1,763.38. The lease renewal is dated February 5, 2018 and was signed by the respondent on March 23, 2018; it is also signed by an owner. The rent ledger is dated October 25, 2019 and shows arrears of \$17,008.27. The petitioner rested without calling any witnesses having established its *prima facie* case through documentary evidence.

The respondent’s case began with a stipulation by counsel for the admission into evidence of respondent’s original lease dated May 31, 2000; a certified copy of a DHPD open violation

summary report (certified on August 1, 2019) showing one class “B” violation in the subject premises, to wit, “to trace and repair the source and abate the nuisance consisting of mold at south wall (18 sq ft) in the 1st room...;” a certified DHPD closed violation summary report (certified on August 1, 2019) showing seventeen class “B” and nine class “A” violations issued between August 2016 and December 2018 in the subject premises for *inter alia* leaks, mold, defective flooring and outlets, plaster and paint, and that were closed as the landlord complied or was deemed to have complied; emails between respondent and management from September through November 2018 regarding repairs and scheduling showing lengthy delays from the time the respondent requested work to the time management responded and scheduled the work; emails from January through May 2019 regarding repairs and scheduling similarly showing delays by management in response to emails from the respondent; a mold testing and inspection report dated November 5, 2016 from Olmsted Environmental Services, Inc. (hereinafter “Olmsted); and a mold inspection and testing report dated October 5, 2018 from Olmsted.

The first Olmsted report, based upon a physical inspection, analysis of tape lift samples, and lab reports, summarizes the results as follows:

1. Moisture readings in the apartment revealed most areas to be dry. The bathroom ceiling was damp measuring 25% with a moisture meter. This is an indication of an active leak.
2. Table 1 summarizes the results of tape lift samples analyzed by Ed Olmsted. Mold growth was found on the following surfaces:
 - a. Under the wood parquet floor on the cork and underside of the wood flooring;
 - b. Base of the walls behind the molding and / or cove base;
 - c. On the fan coil unit.
3. The wood flooring shows signs of water damage and is warped and some tiles are loose. One tile was lifted from place and inspection of the underside revealed visible damage a [sic] mold

- growth. A tape lift from the underside of the wood, number 96F-1, was analyzed by Olmsted and Prestige and had heavy amounts of spores, hyphae and conidiophores, indicating mold growth. There were also mites, insects and their fecal matter in the sample.
4. The base of the living room wall on the shared wall with the neighbor had visible water damage. A tape lift from behind the wood molding, number 96F-5, was analyzed by Olmsted and Prestige and had light growth of *Aspergillus*.
 5. The base of the kitchen wall by the door has water damage behind the vinyl cove base. A tape lift sample from the wall behind the cove base, number 96F-7, was analyzed by Olmsted and Prestige and had heavy growth of *Aspergillus*.
 6. The wall is water damaged below the kitchen window with peeling paint and crumbling plaster. A tape lift from the damaged paint was analyzed by Olmsted and Prestige and was found to have light growth of *Aspergillus*.
 7. The fan coil unit has mold growth on the grill. This is a source of mold spores in air.

The report makes specific recommendations in accordance with numerous governmental guidelines with a scope of work to repair the leak through the bathroom ceiling; remove the wood parquet flooring and cork beneath; remove the wood base molding, clean the area and replace with new molding; remove the vinyl cove base from the kitchen wall and clean behind it; scrape loose paint and plaster from below the kitchen window; and clean and service the fan coil unit. The report directs that “the mold removal work should be done by a professional mold remediation contractor and workers with hazardous materials training.” This report was given to management no later than April 2, 2017.

The second Olmsted report, based upon a visual inspection, analysis of tape lift samples and lab reports, summarizes the results as follows:

1. The wood floor is water stained and warped. The floor is in the worst condition around the fan coil unit but staining and warping is evident across a significant fraction of the studio. There is measurable dampness in the warped floor 10 to 15 feet across the

room from the fan coil unit.

2. Moisture readings in the apartment revealed the living room wood floor is wet. There is still dampness in the bathroom ceiling. The results are indicated in the attached figure and are summarized below:

- a. Wall to the left of the fan coil unit 90%
- b. Warped floor in front of the fan coil unit 42%
- c. Floor one foot in front of the fan coil unit 25%
- d. Floor 10 feet from the fan coil unit 37%
- e. Bathroom ceiling 35%

3. Table 1 summarizes the results of tape lift samples analyzed by Ed Olmsted. Mold growth was found on the following surfaces:

- a. Under the wood parquet floor where warped;
- b. On the top surface of the parquet floor in the living room where visible staining is evident;
- c. Base of the walls behind the molding and / or cove base around the fan coil unit, in the closet by the entry to the apartment and in the kitchen;
- d. On the fan coil unit and inside the fan coil unit on the insulation.

4. A tape lift from the underside of the wood, number 96F-2, was analyzed by Olmsted and Prestige and heavy amounts of spores, hyphae and conidiophores of *Aspergillus* and *Penicillium*, indicating mold growth. There were also mites, insects and their fecal matter in the sample. These are late colonizers of damp materials indicating the mold growth has been present for an extended period.

5. A tape lift from under the flooring at the closet in the foyer area of the apartment. The sample, number 96F-7, had spores, hyphae and conidiophores of *Aspergillus* and *Penicillium*, indicating mold growth.

6. The base of the kitchen wall by the door has water damage behind the vinyl cove base. A tape lift sample from the wall behind the cove base, number 96F-10, was analyzed by Olmsted and Prestige and had growth of *Aspergillus* and *Paecilomyces* indicating growth.

7. The wall is water damaged below the kitchen window with peeling paint and crumbling plaster. During the previous survey a tape lift from behind the damaged paint was analyzed by Olmsted and Prestige and was found to have light growth of *Aspergillus*.

8. The fan coil unit has mold growth on the grill, inside the unit on the insulation and on the cover. This is a source of mold spores in air. A tape lift from the insulation inside the unit, number 96F-5,

was analyzed by Prestige and Olmsted and had spores, conidiophores and hyphae of *Penicillium*, indicating mold growth.

The report states that “the wood flooring in this apartment has extensive water damage caused by the leaking fan coil unit and this has resulted in heavy mold growth. The base of the walls and wood molding also have mold growth in the living room and kitchen. There is light mold growth in the plaster below the window in the kitchen. The condition of the apartment is a health hazard.” It makes specific recommendations in accordance with numerous governmental guidelines with a scope of work to repair the leak through the bathroom ceiling; remove wood parquet flooring and cork beneath it throughout the apartment and closets and check for asbestos; remove wood base molding, clean the wall behind it and replace with new molding; remove water damaged and moldy plaster around the fan coil unit on the base of the wall; check pipe inside to make sure there is no condensation and the insulation is not failing; remove and clean the vinyl cove base from the kitchen wall; scrape loose plaster and paint from below kitchen window; replace fan coil unit; and clean the back of the leather couch.

The respondent testified that she has lived in the subject premises, a rent stabilized studio apartment since June 2000. She testified to years of complaints to management and management’s failure to do the necessary work. Specifically, she testified that the class “B” mold violation on the DHPD open violation report, placed on October 7, 2018, was still not corrected as of October 28, 2019. As to the closed DHPD violations, she testified that some of the repairs were for conditions existing as far back as 2009 - 2012. A copy of an email sent to management on August 19, 2013 regarding repair issues dating back to August 2012, including mold and leaks, was admitted into evidence. The respondent admitted that work was done in

March 2019 although she credibly testified that at the time of trial there was still an issue with some peeling plaster and paint; photographs of the conditions were admitted into evidence.

The respondent testified to conditions in her kitchen over the years from 2012 through 2019 including power surges resulting in spoilage of food, the stove needing replacement four times, the leaks in the faucet and under the sink, and the defective laminate leaving no place for preparation of food. Her testimony as to notice to the landlord on multiple occasions, and her resulting frustration with management's refusal or inability to correct the conditions, was entirely credible.

The respondent testified regarding violations in her bathroom (as reflected on the DHPD closed violation report). She testified that she notified the landlord in writing and orally as to some conditions in 2009 and as to others in 2012. She admitted the landlord did some spackling and painting but the condition reoccurred. She stated that the tub stopper did not work from the time she moved in until 2016; similarly, the sink drain needed repairs from the time she moved in until it was repaired in 2016. She testified and presented photographs of the mold in the bathroom which was not repaired until March 2019 preventing her from proper use of the bathtub and sink; the condition negatively affected her health due to her allergy to mold.

The respondent testified regarding violations in the main room. She stated that there was a flood in 2012 resulting in rotting, peeling, and splintering of the floor tiles (the letter from respondent to management dated August 19, 2013 referencing the water damage to the floors in 2012 was admitted into evidence); the repairs were not completed until March 2019. She similarly testified that necessary repairs to the electrical outlets, radiator leak, smoke detector, and peeling plaster and paint (all of which were DHPD violations) were not corrected until

March 2019. The same was true for conditions in the area around the closet; photographs of the conditions were admitted into evidence. In addition, a copy of a letter from the respondent to management dated August 9, 2016 was admitted into evidence. It states the respondent's willingness to provide access or leave keys for the super to access her apartment to make repairs including plastering and painting, faucets and drains, and checking floors. Contrary to petitioner's claims, there is no evidence that respondent refused access. A series of emails in early 2017 similarly show the respondent agreeing to provide reasonable access albeit not on holidays. Attached to the email dated April 2, 2017 is a copy of the 2016 Olmsted report²; respondent reasonably states that petitioners' offer to schedule a "three year paint job" was not appropriate given the need for additional repairs. The respondent testified that she knew management was aware of the mold since they contacted her to say there was mold in 2016; the Court notes that a violation for mold was placed on August 22, 2016.

The respondent testified regarding a problem with carpet beetles in early to mid October 2018. She saw small black bugs, captured some and gave the sample to the super. The exterminator was given a sample and larva; he identified the bugs as carpet beetles. The respondent provided access to the exterminator on November 9 and 28, and December 13, 2018. Because of the ongoing issue with the bugs and need for several treatments the respondent moved out of the subject premises. The respondent stated access was provided for other repairs in September 2018 and in early 2019. She testified that the ongoing issues in her apartment prevented her from having her parents visit, caused her stress, and resulted in lost income due to

² The respondent credibly testified that she was delayed in sending the report to management due to health issues and work.

missing work and expenditures for repairs.

The respondent called Edward Olmsted as a witness. He was qualified as an expert in environmental health, industrial hygiene, and mold assessment. Mr. Olmsted inspected the subject premises in October 2016, September 2018, and January 2020; reports from the first two inspections were, as noted above, admitted into evidence. He explained the methodology used to test for moisture and stated he found dampness in the bathroom ceiling and floor. He stated there was visible mold on the air conditioning unit and kitchen walls. Based upon the testing he found mold growth structures and concluded it was from the air conditioning unit which was producing water. He recommended removal of the unit and damaged flooring. Mr. Olmsted testified that based upon his inspection in 2018, his belief that the air conditioning unit was leaking under the floor was confirmed. He stated that moisture readings should be below 10% but the readings he took in the subject premises indicate moisture levels of 20-40% meaning there is water and there was mold germination. The respondent rested at the conclusion of Mr. Olmsted's testimony.

The petitioner called Juan Betancur as its first rebuttal witness. He works for Metro Pest Control as a service specialist. He testified that Metro treated the respondent's apartment for carpet beetles commencing on November 6, 2018 and concluding on December 12, 2018. He admitted that the respondent prepared the subject premises as required and paid Metro \$468.16 for materials for bagging her belongings. The petitioner was charged \$680.47 for Metro's services; a bill marked paid was admitted into evidence.

The petitioner called Michael Gaffney, the registered managing agent, as its next rebuttal witness. He admitted that he became the managing agent in 2017, and, therefore had no personal knowledge of the DHPD violations in 2016. He admitted further, upon being shown a certified

copy of the violations, that there were violations placed in 2016 including one for mold. He claimed that he looked to see if there were any violations when he became the managing agent, and sought access to the subject premises to do repairs; he had no written proof. Rather, a letter dated December 10, 2018 stating he was unable to confirm access dates for mold remediation was admitted into evidence; correspondence from respondent's counsel disputing the claim of no access was also admitted. At one point, Mr. Gaffney stated respondent provided access in mid-February 2018, but then he changed his testimony to say he meant 2019 "I think." He admitted that a fan coil unit was ordered but mold remediation was not actually done until 2019, and admitted further that the respondent provided access on numerous dates. Documents supporting petitioner's request for a dismissal of DHPD violations were admitted into evidence showing work commenced February 25, 2019 and was completed March 6, 2019. The total cost for mold remediation, furnishing and installing a new air conditioning unit, painting, new floors, and new kitchen counter and cabinets was \$26,197.17; invoices and copies of checks for work from various companies were admitted into evidence. Mr. Gaffney asserted that he "put his job on the line" to get the violations and additional repairs done; he claimed the petitioner had "an agenda" to do repairs. The petitioner did not establish either of these claims and Mr. Gaffney was not a credible witness. In addition to inconsistencies in his testimony, his demeanor on the stand was disturbing as it was punctuated by moments of belligerence, obstinance, and agitation; at times he could not sit still, and began sweating.

"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.... The obligation of the tenant to pay rent is dependent upon the landlord's satisfactory maintenance of the premises in habitable condition." *Park West Mgmt. Corp. v Mitchell*, 47 N.Y.2d 316, 327 (1979). Here, the landlord failed to satisfactorily maintain the premises.

After due consideration of the evidence in the record it is the finding of this Court that respondent established her defense and counterclaim of breach of the warranty of habitability based upon petitioner's failure "to trace and repair the source and abate the nuisance consisting of mold," exterminate the beetles, repair the wood flooring, and plaster and paint. In addition, the petitioner failed to timely correct numerous class "B" DHPD violations placed in August 2016 including repairing the broken mechanical stopper in the washbasin and bathtub, and the loose electrical outlet. The respondent established that petitioner had actual notice of many of the conditions as a result of correspondence from the respondent, as well as DHPD violations placed in August 2016, and the Olmsted report which petitioner was aware of as of April 2017. The respondent further established that the conditions impacted her ability to use and enjoy the premises, as well as her health. The respondent is entitled to a 30% abatement of rent, a total of \$16,181.58, for the period from September 2016 through March 2019 to be offset against the rent arrears; in addition, respondent is entitled to be reimbursed for the payment to Metro in the amount of \$468.16. The Court notes the arrears through October 2019 totaled \$17,008.27, leaving a balance due to the petitioner through October 2019 of \$358.53 which respondent is directed to tender within ten days of the date of this decision.

The respondent is entitled to attorney's fees pursuant to Real Property Law § 234 and

based upon paragraph 20(B) of her lease. The petitioner in this matter failed to correct DHPD violations in the respondent's apartment in a timely manner. In addition, the petitioner failed to effectuate necessary repairs notwithstanding having actual notice of the conditions. The respondent was awarded a substantial abatement for a period of two and a half years based upon the breach of the warranty of habitability. Based upon the nature of the litigation and the results achieved by the respondent this Court finds the respondent is the prevailing party. *See e.g., Bunny Realty v Miller, 180 A.D.2d 460 (1st Dep't. 1992); 1374 York Assoc. v Pardisi, 4/8/98 NYLJ 28:3, 26 HCR 205B (AT 1st Dep't.); Hampshire Owners Corp. v Sullivan 2009 NY Misc. LEXIS 2571 (Civ. Ct. Qns. Cty.)*. This matter may be restored for a hearing on the amount of the fees if the parties are unable to reach an agreement and when the Court is available for nonessential matters to be heard given the limitations based upon the COVID 19 pandemic.

The parties are directed to contact the Court within ten days with respect to the exhibits given the limited Court access at this time.

This is the decision and order of the Court, copies of which are being mailed to the attorneys as indicated below.

Dated: New York, NY
July 27, 2020



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