CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART B
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RICHARD ALLEN, et al.,

Petitioners,

Index No. HP 57401/2019

- against -

DECISION/ORDER

219 24th STREET LLC, et al.,

Respondents.
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Present: Hon. Jack Stoller
Judge, Housing Court

Richard M. Allen, Ramon Casares, Dru Fitzpatrick, Kenneth J. Robertson, Kenneth A. Vaher, and Mark N. Lulgjuri, the petitioners in this proceeding ("Petitioners"), commenced this Housing Part proceeding ("HP proceeding") against 219 24th Street LLC, Amazon Realty Group LLC, Clara Sokol, and Abraham Lokshin, respondents in this proceeding ("Respondents"), the Department of Housing Preservation and Development of the City of New York ("HPD"), and the New York City Department of Buildings ("DOB"), seeking an order directing Respondents to correct conditions that caused a vacate order to be placed on 219 West 24th Street ("219"), 221 West 24th Street ("221"), and 223 West 24th Street ("223"), New York, New York (collectively, "the subject premises") and seeking relief on a cause of action sounding in harassment pursuant to N.Y.C. Admin. Code §27-2005(d). DOB interposed a cross-claim against Respondents seeking an order directing Respondents to correct violations of the Building Code that DOB placed on the subject premises. Respondents interposed an answer raising a number of defenses. The Court held a trial of this matter on December 2, 2019, December 4,

2019, December 9, 2019, January 27, 2020, and February 11, 2020, and adjourned the matter for post-trial submissions to April 20, 2020.

Prima facie case on the HP cause of action

The parties stipulated that all of the petitioners except for Mark N. Lulgjuri ("the Super") are proper petitioners and that Respondents are proper respondents. Petitioners' and the Super's unrebutted testimony established that the Super lived in the subject premises as a super. Lawful occupancy of the subject premises establishes standing to commence an HP proceeding or a harassment proceeding. N.Y.C. Admin. Code §27-2115(h)(1), N.Y.C. Admin. Code §27-2120(b). Accordingly, the Super is a proper petitioner and the Court dismisses the fourth affirmative defense of Respondents' answer, that the Super is not a proper petitioner.

A deed in evidence dated January 19, 2012 shows that Respondents had purchased the subject premises at that time. The Real Property Tax Transfer report shows that Respondents paid $4,500,000 for the subject premises.

DOB placed a vacate order dated July 2, 2019 ("the Vacate Order") on the subject premises. The grounds stated for the Vacate Order include water damage in various locations, a leaning stair, floors sagging excessively, water-damaged joists, deteriorated stucco on a masonry wall, a deteriorated and sagging roof, a partially-collapsed first floor which caused an interior wall to the cellar to buckle, a bulging wall, and a bowing wall.

Petitioners introduced into evidence the following violations of the New York City Housing Maintenance Code placed on the subject premises by HPD on July 25, 2018, February 16, 2019, and June 20, 2019: "C" violations for doors that do not close by themselves in

individual apartments and mice in individual apartments;[1] "B" violations for broken floor tiles, missing smoke detectors, leaky faucets, roaches, bedbugs, sloping wood floors in Apartment 8 at 219, leak damage in ceilings and walls, broken or defective wood floors in individual apartments, a broken wood step in the public hall stairs, loose hand rails, defective wood floors, a defective light fixtures, mice, and roaches in the common areas, inadequate water in the common bathrooms, and broken or defective fire retardant material and leak damage at the ceilings in public hallways of the cellar and the first, second, third, and fourth floors; and an "A" violation for painting the same ceilings and walls.

The deputy director of the forensic and hearing unit of DOB ("the DOB director") testified he responds to referrals from other units or requests from DOB regarding compromised buildings if an inspector sees a building that is compromised that might require an engineer; that an engineer looks for occupancy issues that might impact public safety; that he knows the subject premises; that an emergency work order dated February 2, 2018 noted a front wall of the subject premises in a state of disrepair and a deteriorated cornice; that another order dated February 5, 2018 noted that the subject premises was in disrepair, with water entering through the roof, requiring Respondents to engage an engineer to evaluate the entire subject premises; that he went to the subject premises on July 2, 2019 to evaluate occupancy and egress; that he placed the Vacate Order as a result of that inspection; that the front facade was bulging between 221 and 223 from the roof to the first floor; that the front facade had a diagonal crack in the walls from the roof to the first floor; that he did not see evidence of pointing or maintenance of the front or

[1] A class "A" violation is "non-hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(1); class "B" violation is "hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(2); and a class "C" violation is "immediately hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(3). Notre Dame Leasing LLC v. Rosario, 2 N.Y.3d 459, 463 n.1 (2004).

rear facades; that the rear facades of 219 and 223 had diagonal cracks; that a reconstruction of the front facade is required; that there was no proper drainage, to wit, a missing leader;[2] that a stair was leaning; that roof joists and floors were sagging; that some floor joists that belonged to the first floor framing were rotten and unsupported in the bearing walls; and that plaster inside the subject premises was cracked.

The DOB director testified on Respondents' cross-examination that the facade was stabilized in August 2019; that diagonal cracking he saw in this case warranted repair; that, in February of 2019, he observed a partial collapse of the rear wall; that he thinks that the entire facade needs to be replaced; that factors that lead to a vacate order can be cumulative; that the condition of the facade alone, the condition of the stairs alone, and the sagging floors alone would have been sufficient to warrant a vacate order; that he issued the Vacate Order not knowing the condition of the joists, but he saw that floors were sagging, which is a structural issue; that he could not see a lot of conditions because they are behind finishing; and that the subject premises is 150 years old, which he knows from historic tax maps.

The DOB director testified on redirect examination that DOB did not impose a specific remedy and that the violations do not require the complete replacement of front façade. In response to a question of the Court, the DOB director testified that he has seen a situation before where an issue comes up in remedying a Vacate Order that is different from the original problem. On Respondents' re-cross examination, the DOB director testified that he has never seen a situation where a problem that caused a Vacate Order did not have to be fixed.

[2] A leader, in this context, is a pipe that drains water down from a roof.

As the parties are the proper parties, as the HPD violations are prima facie proof of the underlying conditions, MDL §328(3), as the Vacate Order and the DOB violations are uncontested, and as the Housing Court has the subject matter jurisdiction to entertain an order to correct conditions that caused a vacate order, Vargas v. 112 Suffolk St. Apt. Corp., 66 Misc.3d 1214(A)(Civ. Ct. N.Y. Co. 2020), *citing* Rivellini v. Rolf, 43 Misc.3d 1202(A)(Civ. Ct. N.Y. Co. 2014), Various Tenants of 515 E. 12th St. v. 515 E. 12th St., Inc., 128 Misc.2d 235, 238 (Civ. Ct. N.Y. Co. 1985), Matter of Miller v. Notre Dame Hotel, N.Y.L.J., December 17, 1980 at 11:3 (Civ. Ct. N.Y. Co.), Petitioners and DOB have proven their prima facie case against Respondents with regard to an order to correct violations and conditions.

Petitioners' evidence regarding claims of harassment, the timing of conditions, and notice

One of the Petitioners, Kenneth Vaher ("the Apartment 8 Tenant"), testified that he lived at apartment 8 in 219 since around 1999 or 2000; that around the time that Respondents bought the subject premises, his entire building was one-third occupied; that the previous owner had neglected the subject premises, which was already slanting and leaning; that there was mold, a tub needed repair, there was rot in the sink, there was a collapse in his room in the wall by the sink, there were floods that caused floors to rot, heat was rarely on, pipes would freeze, a pipe exploded once, the facade of the subject premises was buckling, a trellis at the facade broke away from it, wood behind plaster looked like it was deteriorating, which he saw because plaster broke away, the wood was dark, mildewy, wet, and spongy, his lock was not secure, a water pipe did not connect to sink, floors were sloping, and there was a gigantic crack in the wall of the common bathroom; that he complained to HPD and to a member of the LLC that is one of Respondents ("Respondent"), who cursed at him and told him not to complain to HPD, but to speak to him first; that sometimes when he called nothing would happen and sometimes

Respondents would do something cosmetic; and that he and the Super would repair items in the subject premises in part by doing work on a roof.

Petitioner introduced into evidence photographs of a linoleum floor from 2018 with cracks in it, revealing a rotted-looking subfloor; a trellis outside the subject premises from 2018 which depicts bricks that are deteriorated; a lock from 2018 made of metal that looks corroded; and walls from 2018 that are cracking, flaking, spalling, and buckling and separated from the frame of the subject premises.

The Apartment 8 Tenant testified on DOB's cross-examination that when it rained, a big puddle would end up on the roof and water would go down the side of the subject premises instead of through a downspout; that he and the Super tried to fix that; that the water damaged the facade of the subject premises and bulging ensued; that the skylight would leak; and that he complained to Respondents, who claimed that it was fixed.

The Apartment 8 Tenant testified on Respondents' cross-examination that the subject premises was old and in bad shape when Respondents bought it; that the previous owner was negligent and left a lot of filth in the subject premises as well as sagging floors; that Respondents had employees working in the subject premises; that the Super was an employee; that the Super's job was to clean front of the subject premises; that the Super would help him with the window and fix the roof; that the Super lived in the subject premises; that HPD did not issue all violations when he complained; that there was a fire before Respondents bought the subject premises; that he asked Respondent to stop making him buyout offers in 2012; that he was interested in a buyout at "the end" because he was worried about the subject premises collapsing; that Respondent asked him what he wanted and the Apartment 8 Tenant said that he wanted

comparable housing; that he never wanted to leave; and that Respondent harassed him constantly, saying that "it" was "going to get shut down anyway."

On the Apartment 8 Tenant's cross-examination, Respondents introduced into evidence records from HPD showing that HPD had dismissed a number of violations, including a violation in 2016 for a defective ceiling and wood floors in the common area, violations in 2017 for the entrance door, bathroom floors, roof leaks in the ceiling in a common area, and heat, and a violation in 2019 for defective plaster in the walls and a defective wood floor, and that Respondents had certified others, in particular, violations in 2012 for a bulging ceiling and pipe connections, a violation in 2013 for a defective wood floor, a violation in 2014 for a smoke detector, violations in 2015 for a window, hot water, cold water, a light fixture, bedbugs, water leaks on the walls and ceiling of a bathroom, a floor joist, and defective plastered surfaces.

The Apartment 8 Tenant testified on redirect examination that he asked for a buyout because he felt so beaten down; that violations that he complained about from 2016 to 2018 were the same conditions as violations from 2012; and that Respondent said that the subject premises was going to be "shut down" and that Respondents were "working on it."

Kenneth Robertson, another petitioner ("the Apartment 6 Tenant"), testified that he lived at apartment 6 at 221 for twenty-one years before the issuance of the Vacate Order; that, in 2011, the subject premises was only half-full; that Respondents did not rent apartments when the tenants there died or moved out; that there were floods in the subject premises every time it rained or snowed; that he saw ceilings collapse at the end of a hallway; that he observed soggy wood in the third and fourth floors; that Respondents did not do anything to abate flooding, like patch the ceiling; that he went with the Super to the roof with buckets of tar and rolls of paper to try to patch where water was entering from roof; that he rarely complained to Respondents; that

he once saw Respondents' workers putting plaster on cracks in walls; that about three or four months before the Vacate Order issued, Respondent repeatedly asked him what he wanted; and that Respondent said that if he did not do something, that the City would "come in and do the job for [them]."

The Apartment 6 Tenant testified on Respondents' cross-examination that he never called HPD; that he knows the Super and witnessed the Super making repairs; that he never asked the Super to make repairs; that he did not complain about the ceiling collapsing in his apartment; and that when Respondent asked him what he wanted, he assumed that Respondent was asking him about a buyout.

Dru Fitzpatrick, another petitioner ("the 223 Tenant"), testified that he used to live at 223 for 18 years to the date of the Vacate Order; that the condition of 223 in 2011 was livable; that the livable condition changed in 2011, although before Respondents bought the subject premises; that plaster collapsed, a tub did not work, and a step had to be covered; that he observed cascading water in the subject premises when it rained, which eventually caused ceilings to collapse; that the ceiling structure would yellow and paint would bubble and crack over time; that he saw wet wood and crumbling plaster in the second floor, where most water damage would occur; that a giant roll of roofing tile showed up; that he took it upon himself to fix the roof in the fall of 2018; that, in 2011, 223 was 65% occupied; that, in 2012, the occupancy rate at 223 dropped to 30%; that he was the only occupant left in 223 as of 2019; that he complained to the Super, who he was friends with; that the Super would tell him to fix items himself; and that he did not complain more because he wanted to keep on good terms with Respondents.

The 223 Tenant testified on DOB's cross-examination that he repaired the roof with roofing paper and tar; that he patched up spots where the leak was coming from; and that he also used a rubber floor mat to try to stop leaks because he did not have enough material otherwise. The 223 Tenant testified on Respondents' cross-examination that roof repairs occurred in about the fall or summer of 2018; that water came down in long drips; that he never complained to Respondents, although he complained to the Super; that he did not remember dates; and that he did not complain to HPD or to Respondents.

The Super testified he used to live at room 1 in 221 and that Respondent hired him.

DOB introduced into evidence the following DOB orders concerning violations of the Building Code at the subject premises: an order dated September 19, 2013 finding a collapsed ceiling, stairs and a hallway out of plumb, and an exposed joist with no fire rated protection; an order dated March12, 2015 for defective masonry and a front facade that was also spalling, bulging, and cracked; an order dated November 15, 2017 that noted vertical cracks on the facade and bowing exterior walls and parapet walls; an order dated October 29, 2015 imposing a fine for cracks in interior plaster walls, stairwells and landings, uneven floors, cracks and bulging in the front facade; an order dated June 14, 2018 for sloping ceilings and floors and numerous cracks on walls and ceilings; an order dated July 26, 2018 for cracks and spalling in walls, a ceiling, and a staircase; an order dated February 7, 2019 finding compromised structural integrity and falling stucco; and another order dated February 7, 2019 for multiple cracks throughout, walls that are leaning and bulging out, and signs of water penetration.

Respondents' first, second, third, and fifth defenses

Respondents' first affirmative defense is that the Court lacks the subject matter jurisdiction to adjudicate this matter. However, New York City Civil Court Act confers upon the Court the jurisdiction to render determinations relating to maintenance of housing standards, which encompasses orders to correct conditions that cause vacate orders. Vargas, supra, 66 Misc.3d at 1214(A), Rivellini, supra, 43 Misc.3d at 1202(A), Various Tenants of 515 E. 12th St., supra, 128 Misc.2d at 238. "To suggest that this Court is powerless to order a landlord to make repairs once a vacate order has been issued would make a mockery of the mission of the housing part to maintain housing standards." Carrasquillo v. 197 Columbia Realty Corp., N.Y.L.J., Dec. 2, 1992, at 25:2 (Civ. Ct. Kings Co.). Accordingly, the Court dismisses Respondents' first affirmative defense.

Respondents' second affirmative defense raises laches, waiver, and estoppel, defenses which Respondents would state if Petitioners and/or DOB prejudiced Respondents by delaying in enforcing housing standards, essentially consented to the state of the subject premises, or made representations to Respondents that caused Respondents to refrain from maintaining the subject premises.

A private party may not waive a right that affects the public interest or contravenes statutory policy. Caravaggio v. Ret. Bd. of Teachers' Ret. Sys., 36 N.Y.2d 348, 354 (1975), Berkovich v. Mostovaya, 22 Misc.3d 91, 94 (App. Term 2nd Dept. 2009). Nor can the doctrines of estoppel, ratification, or laches thwart public policy. In re Wille, 61 Misc.2d 992, 1015 (S. Ct. N.Y. Co.), *aff'd*, 31 A.D.2d 721 (1st Dept. 1968), aff'd, 25 N.Y.2d 619 (1969), *cert. denied sub nom*. Intra Bank, S. A. v. Wille, 399 U.S. 910 (1970). Put another way, an individual cannot acquiesce in or ratify a public wrong. Schneider v. Greater M. & S. Circuit, Inc., 144 Misc. 534,

541 (S. Ct. N.Y. Co. 1932). With regard to DOB and HPD, estoppel is not available as a remedy to prevent a governmental agency from discharging its statutory duties. W. Midtown Mgmt. Grp., Inc. v. State of N.Y., Dep't of Health, Office of the Medicaid Inspector Gen., 31 N.Y.3d 533, 541-42 (2018).

Numerous examples illustrate the principle that the kinds of equitable defenses Respondents raise do not apply regarding a matter of public policy. A tenant may not invoke a waiver defense against a landlord when the tenant's default is serious enough to implicate public policy, Charles Altenkirch & Son Inc. v. CDK Restaurant Inc., N.Y.L.J. June 26, 1986 at 17:5 (App. Term 9th and 10th Dists.), or when such a default adversely affects others, such as in the case of an illegal trade, business, or manufacture, Sam & Joseph Sasson LLC v. Guy, 2018 N.Y.L.J. LEXIS 4293, *38 (Civ. Ct. N.Y. Co.), *citing* Bel Air Leasing L.P. v. Kuperblum, 15 Misc.3d 986, 991 (Civ. Ct. Kings Co. 2007), Hudsonview Co. v. Jenkins, 169 Misc.2d 389, 393 (Civ. Ct. N.Y. Co. 1996) or when a tenant engages in illegal construction. 508 Columbus v. Beasley, 2010 N.Y. Misc. LEXIS 7067, at *12 (Civ. Ct. N.Y. Co. 2010). Defenses of waiver, estoppel, and laches cannot abrogate the public policy requiring rent-regulated tenants to maintain their apartments as their primary residences. Lenox Hill Hosp. v. Spitz, 1 Misc.3d 134(A)(App. Term 1st Dept. 2004), Kev Realty Co. v. Goldfarb, N.Y.L.J., November 18, 1993, at 29:6 (App. Term 1st Dept.), *citing* Rose Assocs. v. Weisenthal, N.Y.L.J., May 16, 1988, at 14:1 (App. Term 1st Dept.). Laches does not apply to the enforcement of zoning or environmental restrictions as a matter of public policy. Chevere v. City of N.Y., 31 Misc.3d 337, 350 (S. Ct. Richmond Co. 2010).

Public policy in New York requires the maintenance of housing standards. See, e.g., MDL §2 (the establishment and maintenance of proper housing standards requiring sufficient

light, air, sanitation and protection from fire hazards are essential to the public welfare). Cf. D'Agostino v. Forty-Three E. Equities Corp., 16 Misc.3d 59, 60 (App. Term 1st Dept. 2007) (the broad public purpose in maintaining housing standards is so interlaced with strong public policy considerations that private parties may not contract to resolve disputes about housing standards by arbitration). Public policy places the responsibility for maintenance of housing standards on owners. MDL §78(1). Just as public policy precludes the application of equitable defenses to causes of action such as nonprimary residence, eviction on the ground of illegal trade or illegal construction, and zoning, defenses such as laches, estoppel, and waiver do not apply to a cause of action for enforcement of housing standards. Cf. D'Agostino v. Forty-Three E. Equities Corp., 12 Misc.3d 486, 489-90 (Civ. Ct. N.Y. Co. 2006), *aff'd on other grounds*, 16 Misc.3d 59 (App. Term 1st Dept. 2007), Castillo v. Banner Grp. LLC, 63 Misc.3d 1235(A)(Civ. Ct. N.Y. Co. 2019)(the few defenses to an order to correct include lack of standing or jurisdiction, completed repairs, that conditions are not code violations, that notice of violation is facially insufficient, that the respondent is no longer the owner, and economic infeasibility). As a matter of law, then, defenses of laches, estoppel, and waiver do not apply to an order to correct in an HP proceeding and the Court dismisses Respondents' second affirmative defense.

Respondents' third affirmative defense is that the petition fails to state a cause of action. As noted above, Petitioners proved their causes of action with regard to the HP proceeding. Accordingly, the Court dismisses Respondents' third affirmative defense.

Respondents' fifth affirmative defense invokes a lack of access, which is not a defense to an order to correct as a matter of law. D'Agostino, supra, 12 Misc.3d at 489-90, Castillo, supra, 63 Misc.3d at 1235(A). The Court dismisses so much of Respondents' fifth affirmative defense as seeks relief on this ground.

Evidence of DOB and Respondents regarding other defenses and harassment

Respondents introduced into evidence an appraisal of the subject premises ("the Appraisal"). The Appraisal evaluated the subject premises based on its "as is" value. The Appraisal states that the subject premises is in poor condition reflecting deferred maintenance; that the highest and best use of the subject premises is a continuity of its prior use as a Single-Room Occupancy ("SRO") building; that, applying an income approach, if the subject premises was repaired so as to be habitable as an SRO building again and fully leased to rent-stabilized tenants at legal regulated rents, the value per residential unit would be $52,083; and that, if site of the subject premises was vacant, the land value would be greater. As the subject premises has 48 units, at $52,083 per unit, the total value of the subject premises would be $2,499,984, which the Appraisal rounded up to $2.5 million.

Respondents introduced into evidence a report written by an engineer that Respondents retained ("Respondents' expert's report"). Respondents' expert's report states that the subject premises is in an overall state of disrepair, requiring substantial remedial work to building systems; that walls were delaminated and bulging; that brownstone brick masonry was spalling; that the north walls of 221 and 223 should be completely demolished and reconstructed to address the distress deterioration; that the masonry roof membranes exhibited severe displacement, being weathered and cracked; that Respondents' expert recommended restoring the brick masonry, replacing the roof, reconstructing a cornice, replacing windows, sealing penetrations through partitions and ceilings; that the subject premises does not have a certificate of occupancy ("C of O"); that some extant aspects of the subject premises are grandfathered, but not all; that a code upgrade would be required; that stairs would have to be reconfigured as they are currently a trip hazard; that Respondents would have to build a second means of egress,

which would result in a loss of one room per floor unless they used a non-combustible construction type; that Respondents would have to build a ramp or a lift; that Respondents would have to upgrade the sprinkler system; and that the total repair cost ranges between $6,027,452 and $7,894,187.

DOB introduced into evidence its engineering report ("DOB's expert's report"). DOB's expert's report stated that the walls of the subject premises are cracked and bulging; that the floors and stairs sag; that floor joists are rotted; that interior plaster skylight frames are in poor condition and rusting; that masonry of the chimney is in poor condition; that there is no roof drainage, such that standing water collects on the roof; that the use of tar on the roof is a problem; that deferred maintenance is apparent; that the damage observed is consistent with long-term neglect, particularly with regard to leaks; that leaks and resultant water damage from the roof, skylights, and windows were visible and would have been known; that there was no sign of foundation movement; that there was no construction adjacent to the subject premises since 1938; that there was no sign of overstress from use; that 700 square feet of masonry must be rebuilt; that facades should be tied with steel rods to floor joists; that cracks can then be pointed; that no work is required for sagging floors, which are common; that 20% of the joists must be replaced; that plaster should be replaced with gypsum board; that the skylights and window should be replaced; that such work could keep the interior layout as it is, with no changes to rooms, hallways, or stairs; that the work will not change the size, use, occupancy, room count, configuration, or egress of the subject premises, so no C of O would be required; that the work could be in accordance with building codes that applied before 1968; and that the cost would be about $600,000.

Respondents introduced into evidence an application dated July 6, 2018 ("the PW1 Application") that Respondents filed to repair the subject premises, which called for structural building repair and restoration, including replacement of floor joists, affected plumbing and sprinkler components, damaged exterior masonry wall sections, and all affected wall ceiling and floor surfaces. Respondent introduced into evidence a list dated December 11, 2018 of objections that DOB registered to Respondents' plans ("DOB's Objections").

Respondents' property manager ("the Property Manager") testified that she has managed the subject premises for at least five years; that her responsibilities include resolving tenant complaints and making sure that violations are corrected; that tenants have contacted her about complaints; that she never purposely left a violation uncorrected; that the subject premises was not in great shape; that issues of a building of this age come up that you have to address; that she received complaints from the Apartment 8 Tenant directly, which she addressed; that Respondent addressed some issues; that she tasks the Super with small minor repairs within his capacity; that the Apartment 8 Tenant is the only party who contacted her; that other tenants who had since moved out called her with complaints; that she remembers a violation in 2013 about something related to water; that Respondents cleared that violation with patching of a roof; that she is unaware of leaks; and that she has been to the subject premises on meetings with tenants in winter and spring. Respondents introduced into evidence notices dated April 30, 2018 that Respondents provided to tenants about buyout offers.

The Property Manager testified on Petitioners' cross-examination that she manages thirteen buildings and she is a condominium manager, for a total of eighteen properties; that she is familiar with the Rent Stabilization Law; that she does not engage with potential tenants; that Respondents have a broker who sends her paperwork; that she does not list apartments; that

Respondents inform a broker when an apartment becomes vacant; that she does not know if the subject premises was inspected before Respondents purchased it; that she gets notice of HPD and DOB violations; that she certified violations; that she is aware of open violations; that the Super is not a licensed contractor or engineer; that she went to the subject premises maybe twenty times from 2012 to 2019; and that she is aware of a Certificate of No Harassment ("CONH") application.[3]

The Property Manager testified on DOB's cross-examination that she did not remember a conversation among Respondents, who are her family members, about why the subject premises was purchased, although she testified, "it's real estate in Manhattan"; that she does not remember a conversation about the high number of vacancies; that Respondents had a discussion about possibly emptying the subject premises; that Respondents would see if a tenant wanted a legal buyout offer; that the reason to buy a tenant out was to give them options about what to do, or just to have an empty building; that, of the 48 units in the subject premises, about 25 were occupied in 2012; that Respondents never rented a vacant unit in the subject premises; that she does not know why; that no one told her to rent other units; that the number of tenants in the subject premises went down from 2012 to 2019; that between 10 and 12 tenants received buyouts, some of which were initiated by tenants; that Respondent, who is her father, or another of the named Respondents, who is her uncle, dealt with buyouts, which were between $7,500 and $50,000; that, in 2019, the average monthly rent in the subject premises was $400, which was insufficient to operate the subject premises; that she did not know if Respondents visited the

[3] Some approvals of permit applications require a certificate from HPD pursuant to N.Y.C. Admin. Code §27-2093.1, a CONH, that an owner has not harassed any tenant of the subject building in the prior 60 months.

subject premises before purchasing it; that she was never on the roof of the subject premises; that the only time she heard of a leak was in 2013; that she did not know if the leak was related to a roof or something else; that no tenant told her that water dripped from the roof or the skylights; that she was not aware that tenants patched the roof; and that the subject premises lost money every month from 2012 onward.

The Property Manager testified on HPD's cross-examination that she visited the subject premises in 2018; that she did not see any leaks or holes in the ceiling at the time; that she did not know if the condition of the subject premises she observed at that time required repair because she is not a contractor; that she was surprised when she saw violations from 2018; that Respondents never deferred maintenance for lack of money; and that she never oversaw repairs to the facade of the subject premises.

The Property Manager testified on redirect examination that Respondents hired an engineer when they got a violation in 2018.

The Court granted Respondents' application to qualify Respondents' engineer as an expert witness. Respondents' engineer testified that he is a licensed professional engineer; that he specializes in structural mechanical engineering for residential properties in New York; that he has performed multiple inspections of the subject premises; that Respondents retained him in the spring of 2018; that the scope of his retention was to inspect and prepare plans for repair work; that the subject premises has significant structural issues; that the floor framing throughout is severely deteriorated and deflected; that floor framing entails work on plumbing, sprinkler systems, mechanical and electric systems, and the structural perimeter; that he filed the PW1 Application in July of 2018 with DOB to effectuate repairs for an "Alt-2" repair, meaning an alteration that does not require a C of O; that the PW1 Application provided for floor

replacement, interior wall reconstruction, plumbing work, mechanical work, and sprinkler work; that DOB did not approve application (referencing DOB's Objections); that he resolved a number of objections; that a resolution of objections took a number of months because he was only able to get short appointments with DOB examiners at times that are far apart from one another; and that one objection said that a CONH is needed, which he does not deal with.

Respondents' engineer testified on Petitioners' cross-examination that there was such intense damage to flooring that many systems would need to be replaced; that such damage would have taken a years of deterioration and neglect to develop; that plans he had submitted to DOB had an estimate of $891,000, a rough estimate, with no contractor pricing or bids; that it would be possible to legally reinstall the stairway with winders in the subject premises; that he thought that egress could be legally maintained; and that there would be no way to install a straight staircase in the subject premises without losing SRO units.

Respondents' engineer testified on DOB's cross-examination that he relied on an iteration of the Building Code pre-dating 1968 in formulating his plans; that he saw one of the front facades in 2016; that he saw deficiencies in front facade; that he indicated to Respondents and what he thought the issues were, to wit, brick movement in the front; that he did not file plans to address brick movement; that he prepared plans for stabilization of the subject premises, requiring extensive interior shoring and bracing of the front wall; that he observed the front facades in May of 2018; that he did not remember how it compared with 2016; that the cause of the facade problem is that the front wall lacks structural tie backs from the original installation and mortar has severely deteriorated over 100 years; that, when asked about evidence of pointing or other exterior work, he observed what might have been minor repairs; that, in 2018, the extent of damage to the facade was not visible; that such damage was caused by binding material

between the bricks; that, in May of 2018, he observed that an undesirable deflection in the roof frame that caused water to remain on the roof rather than quickly drain off; that water is supposed to drain off of the roof through a hole called a scupper into a leader; that he did not remember if he checked to see if the leaders were working; and that he did not meet with a DOB examiner after December 11, 2018 because he was waiting for a CONH.

Respondents introduced into evidence a report dated March 20, 2018 that Respondents' engineer wrote, which stated that the subject premises maintained significant structural deficiencies: a severe deflection of floor framing and deterioration of joists, excessive wood rot at joists, requiring total replacement of floor joists, a large section of masonry wall was found to have moved laterally, further movement of which could lead to a catastrophic collapse, and bulging and cracking in masonry. Respondents' engineer testified on redirect examination that the DOB plan examiner had told him that his estimate of $891,000 was too low; and that the examiner verbally told him that a realistic cost estimate would be $2,675,100.

Respondent's engineer testified on DOB's recross examination that repeated water exposure caused wood rot; that there may be a missing leader, but that would not affect draining, as a leader just directs drain-off; that water goes down the facade if there is no leader; that water running down facades may or may not be damaging, but it does not help; that, if the subject premises is not watertight, water will continue to come into it; that a freeze/thaw cycle in winter can worsen water intrusion, as water uniquely expands when it freezes so it can cause damage if water freezes when in place, and can damage brick masonry, although he did not know if that occurred with regard to the subject premises; that a photograph of missing windows in the subject premises could mean that water could enter the subject premises; that the consequence

depends on what surfaces it impacts; and that he would recommend making the roof and scuppers impenetrable and that windows be closed.

The Court granted Respondents' application to qualify Respondents' expert as an expert witness. Respondents' expert testified that his firm provides professional engineering services in various capacities, including envelope consulting; that he has a BS and MS in civil engineering; that he does forensic work, entailing an examination of a condition to advance an analysis to determine causes of issues and appropriate remedial actions; that Respondents retained his firm; that he inspected the subject premises on November 15, 2019; that there are shared party walls between 219 and 221, and also between 221 and 223; that they have unreinforced (meaning without steel) brick masonry walls; that there is a brownstone veneer; that the front and rear walls have window and door openings and window sills; that the subject premises has wood frame construction and wood floor joists; that there is a combination of finishes, including plaster with wood lathe and more modern gypsum wall board; that the subject premises is a very common construction type for the age of the subject premises, which is pre-1940s, and maybe as early as the mid-1800s; that the subject premises has a shallow foundation, just below the cellar, with stone masonry that transitions to brick as you come up; that the joists go from wall to wall without interior supports; that the front and rear facades are in a severe state of deterioration and in a state of collapse; that the entire brick facade is pulling away 6 to 8 inches; that brownstone is displaced as well; that there is a lot of cracking of masonry on the front of windowsills; that the cornice is in disrepair and in a state of collapse; that the rear wall is bowing, bulging, cracking, and pulling away from the rest of the subject premises; that there is significant evidence of water damage throughout the subject premises, including the ceiling, plaster, and wood lathe areas at the rear of the first floor of 219; that framing has collapsed; that the roof and the joists

throughout have deteriorated; that long-term water damage caused rot and decay of the floor joists; that the front and rear wall issues are not moisture related, but a by-product of how walls were constructed, with facades built across party walls, which requires that they be tied to party walls; that the masonry between the front facade and party walls were tied together, but in bunches, resulting in a very weak bond between those two walls, causing separations over time, displacement that is not related to water; that he recommends that front and rear facades be completely removed and rebuilt; that wood framing be removed and replaced; that he did not come up with an estimate because that opens up the issue of the stairs and affects the number of joists to be replaced; that the masonry in 219 needs repair; that the cornice needs to be rebuilt; that there are newer buildings on both sides of the subject premises, construction of which could have put the subject premises at risk; that he is worried about differential settlement in a brick masonry building which is brittle and weak in tension; that the amount of damage depends on how the masonry is tied; that the joists were either overloaded or a defect caused it to split; that he noticed some fire damage which could effect the load-carrying capacity of joists depending on the extent of charring; that the fracturing he observed is not from water damage at a few joists, but could be caused by how they were originally constructed; that some joists were fractured near mid-span due to a defect, like a knot in the underside of wood; that his assessment is mostly visual; that it's not uncommon that removal of finishes reveals more problems; and that window headers have to be repaired because the sills are cracked.

Respondents' expert testified on Petitioners' cross-examination that the subject premises could have been built as early as 1840; that not all buildings in Manhattan in style are in this state of disrepair; that the damage to the subject premises is particular to its circumstances; that a majority of damage is moisture-related, although not the facades; that long-term exposure to

moisture in the joists is not something that happened overnight; and that he thinks that more repairs are necessary than DOB's expert.

Respondents' expert testified on DOB's cross-examination that he saw the subject premises in an 1854 map of Manhattan; that he did not observe any adjacent property construction, although he knows that buildings were constructed after the subject premises; that it is possible that neighboring buildings could have damaged the subject premises, but he did not know anything specific that happened there; that water collects on the roof, exits through a scupper, and is directed by a leader to a drainage system; that one leader is in disrepair; that the worst of the damage is at party wall between 221 and 223; that there is no relation between a lack of a leader and the damage, nor a correlation between water exposure and six to eight inches of displacement; that the bulging he observed plays back into how buildings were originally constructed, although it is not a robust connection; that facades have been known to separate, although he had not seen similar visible separation to that extent in other buildings; that long term wear and tear and deterioration causes separation; that vertical displacement and shifting of the front facade had to have been going on at least since February of 2018; that there is no evidence of repair to the front facade as of February of 2018; that the roof is beyond its useful life of 20 years; that water exposure deteriorates building materials, especially with wood framing, as wood rots, and fungi grow and eat wood; that he observed long-term water exposure in the subject premises; that water can also cause some issues with masonry as well, as masonry is porous and thus absorbs water, especially in colder climates, which can lead to spalling and cracking; that water has not been kept out of the subject premises; that there is extensive water damage throughout the subject premises; that he did not observe any active leaks; that there was evidence of leakage in the subject premises, especially in bathroom areas near plumbing; that, in

general, there was a lack of maintenance; that, if the roof was repaired at the end of its useful life, it would have prolonged the life of the subject premises in general; that if he had seen evidence of leaking earlier in time, he would have recommended that it be addressed; that by the time you see standing water, leakage has been going on a while; that he did not recommend specific measures for leakage abatement, as he has a scope of recommended repairs in report and as damage has been done at this point; that he did not see any effort made to tie back the facade to party walls when it pulled away; that tie-backs at 219 would help; that the front facade at 221 and 223 is too far out to do anything with tie-backs; that there has been some maintenance over the years to the rear facades, to wit, some stucco was placed over bricks and some cracks were filled with mortar; that he does not know how long the damage has taken, but it had been going for quite a while, likely years; that the pattern of damage in the floor joists, some by water exposure, took a long time, although it may have been in phases, depending on leak events that may have occurred; that repairing the plumbing and the roof would have abated damage; that he did not observe foundation settlement; that all windows are wood framed and in various levels of decay; and that peeled paint and deteriorated wood demonstrate no recent signs of maintenance at least within the last five years.

Respondents' expert testified on redirect examination that the age of a building comes into play most to see how well it has been maintained and that materials in older buildings age and degrade, such that older buildings require more maintenance.

The Court granted Respondents' application to qualify a construction consultant ("the Construction Consultant") as an expert witness. The Construction Consultant testified that he specializes in coming up with cost estimates for construction projects, particularly those dealing with water damage; that he uses a proprietary pricing database called "RS Means" to reap

construction data; that he has been to the subject premises and worked with Respondents' expert; that engineers gave them a set of plans that were marked up with scope of repairs; that he differentiated between general costs for all three buildings that comprise the subject premises and costs specific to each of the three buildings to avoid artificially inflating the estimate; that he used a a low amount and a high amount; that the DOB's expert's estimate of $600,000 contemplates a completely different scope of work; that his scope of work is essentially a full gut renovation, entailing work on party walls, joists, mechanical work, electrical work, and plumbing; and that DOB's expert's report does not include line items for asbestos and lead abatement, electrical work, plumbing work, fire protection, and permit fees, which he included.

The Construction Consultant testified on Petitioner's cross-examination that he does not determine what repairs are necessary; and that Respondents' expert's scope of work was effectively a gut renovation, calling for demolition of most partition walls.

The Court granted DOB's application to qualify DOB's expert as an expert. DOB's expert testified that Sanborn maps showed the existence of the subject premises in 1854, with a public school to the west and row of buildings to the east; that the walls were built as party walls as opposed to independent walls; that the building to the east of the subject premises was replaced in 1911; that the kind of wood used to build rowhouses in the 1850s was old growth timber, which is denser and stronger than modern farmed timber; that wood to wood connections will be made with mortise and tenon rather than using metal connectors; that this wood ages differently as the wood shrinks, which loosens the connections a great deal; that wood can rattle around and cause some visible movement but has no meaning regarding structural capacity; that a review of maps shows that the condition to the east of the subject premises has not changed in over 100 years; that a public school to the west of the subject premises was replaced in late

1930s or 1940s by a much larger high school; that there has not been construction immediately adjacent to the subject premises, which can cause foundation movement or damage to the upper floors, since 1940 or so; that waterproofing on the roof was in extremely poor condition; that there was standing water on the roof; that he saw vegetation on the roof, which indicates that there are lots of puddles when it rains; that the roof has a lot of patching, some of which appears to be rubber floor mats rather than roofing materials; that rubber is unlikely to keep the roof watertight; that flashing he observed on the roof has failed; that parts of the tarpaper on the roof are older than the useful life of tarpaper of twenty to thirty years, evidenced by aging from ultraviolet from sunlight; that the roof is noticeably sloped to the front for drainage; that standing water on the roof indicates that drainage isn't working properly; that a leader does not connect with the scupper at the parapet; that checking a scupper and a leader is part of a normal maintenance plan for a building; that longer that water ponds on a roof, the more likely the water will find a gap in the waterproofing membrane; that a skylight made of sheet metal, tin, and maybe iron in the subject premises is in extremely poor condition; that the skylight is rusting; that the tops have been waterproofed with tarpaper in poor condition; that monitor windows at vertical sides of the skylight are open and admitting water; that the roof should be removed down to the wood deck and a new membrane should be put in place with proper flashing at the perimeter and at skylights and chimneys; that the most common remedy is tapered insulation, similar to styrofoam, which would cost $20,000; that the subject premises has been supporting ordinary loads for 170 years, indicating that the original design is sound; that deterioration comes from damage, which can come from movement in floors or walls, particularly active movement; that a ceiling is damaged from a leak but there is no significant structural movement; that a bulge has collapsed a hole in the plaster; that drips coming down from the leak are visible; that there is

some patching in the wall, but the subject premises is still reasonably plumb and flat, suggesting no structural problem in these areas; that he felt wood joists bounce as he walked through the subject premises, which was not out of the ordinary; that he noticed sagging in floors, but every single wood joist using natural lumber sags, and sags more with age, such that the sags he observed in the subject premises is typical for a mid-1800s rowhouse; that, in general, he did not see a structural issue in the subject premises; that replacement of only some of the framing is needed; that there is no sign of movement of foundations in the rear cellar; that there are no other symptoms in the plaster that he would associate with joists being damaged; that 10% of the joists are in need of repair; that he made a cost estimate for 20% of the joists just in case the joists immediately adjacent to plumbing were damaged, which is often the case; that he observed plaster on the walls damaged to varying degrees; that such damage is a nonstructural safety hazard; that there is a bulge in the facade between 221 and 223; and that there is evidence of a long term leak at the location of leaders, maybe coming from a front parapet or a damaged scupper.

DOB introduced into evidence a Google image of the facades of the subject premises from May of 2009. DOB's expert testified that the paint in that photo is in good condition; that the paint from 2009 is intact at the junction of 219 and 221, compelling the conclusion that the bulge between 221 and 223 is not ordinary, but the result of a leak; that the bulging faces inward; that the veneer brick is separated from backup brick, such that you can see daylight between the veneer brick and the backup brick; that the bricks are not tied together well, just at windowsills and window heads; that the bulging is a potentially dangerous structural problem; that water penetration broke the mortar bond between the veneer and the backup; that a little bit of outward movement of the veneer creates a gap that accelerates over time as water collects there, through

freeze-and-thaw action; that the wall is five or ten years from collapse by the time it is visible, which can be triggered by a passing storm; that buildings of this era were built using lime mortar which is soluble in water, so a bulging of this age is more vulnerable to a lack of maintenance than a modern building; that, other than shoring, he saw no evidence of maintenance; that the area of the bulge extends into spandrel panels; and that the rear facade had a similar bulge, again around juncture between 221 and 223.

DOB's expert testified that a basic maintenance program that would maintain the structural integrity of the subject premises requires roof replacement every twenty to thirty years, pointing on the same schedule, opening plaster to identify sources of plumbing leaks, and replacement of plaster with gypsum board and that he recommended that the roof be completely removed, that fabric flashing be installed, that the limited number of joists that are damaged be replaced, that the facade be rebuilt where it is bulging, including pinning and stabilizing the veneer where it has moved, that facades be fastened to internal floor joists, that the facade be rebuilt by removing existing brick and replacing it with new brick, and that a similar scope apply to 700 square feet of the rear facade.

DOB's expert testified that in general he agrees with the physical descriptions from Respondents' expert's report; that he disagreed with Respondents' expert's recommendations that the bulging of the walls warrants their complete demolition and reconstruction, given that specific locations had problems; that even though page 5 of Respondents' experts' report states that joists are fractured, uneven, and deteriorated, a "fractured" joist has been overloaded and has failed and stressed, and only one joist has a longitudinal crack and a small minority are fractured and sagged; and that he observed light fire damage, such that the surface of a joist was charred,

but from a structural perspective, a small amount of wood was lost, which doesn't require a replacement of the joist.

In evaluating Respondents' expert's report, DOB's expert testified that Respondents estimate that the job will take eighteen months, and he thinks that it will take four months, although he used six months for his estimate; that Respondents' line item for demolition of the entire interior is not necessary, not only because that framing should remain except for selected joists but also because Respondents' experts' report does not call for removal of all framing; that he would remove the finishes only, except for damaged joists; that Respondents include a line item for removal of a slab on grade even though the DOB violations do not require that work; that Respondents include a line item for repair of side walls even though Respondents' expert's report does not identify work to be done at the side walls; that Respondents include line items for removal of all floor joists even though only 20% have to be removed and that Respondents' expert's report does not support removal of all floor joists, but only first floor rear joists; that Respondents have a line item for replacement of the entire roof when Respondents' expert's report does not call for that; that he assumes replacement of 20% of the roof is needed; that Respondents include a line item for a new concrete stoop, although that is not required to correct DOB violations; that he reduced Respondents' estimate for repairs on the exterior wall by a factor of twelve, even though the scope of work is more or less correct because it includes decorative work, like a brownstone veneer which is not structural or required; that Respondents' line item for rebuilding the parapet is not needed; that Respondents' expert's report does not require the amount of work on the rear facade wall that the cost estimate calls for; that Respondents' line item for rebuilding masonry in the chimneys was not required; that Respondents' line item for an exterior door replacement is not a part of scope; and that, without

general conditions, he estimates that the work needed would total $600,000; that he expects $250,000 to $300,000 more, which would total $850,000 to $900,000.

DOB's expert testified on cross-examination that, structurally, the subject premises is not in extremely poor condition, aside from facades and the floor issues in the rear of the first floor; that the subject premises is not beyond repair; that he has experience with buildings in the same condition as the subject premises; that he inspected portions of the subject premises foundation that were visible; that he saw no sign of foundation movement that would be destructive; that there are minor signs of water damage; that differential settlement would be destructive, which would manifest as diagonal cracks in masonry walls which he did not see; that he only sees a problem like that when a building is on poor soil, or when adjacent construction moves soil or causes de-watering, which he does not see here, even though there was adjacent construction a long time ago; that that construction was not a new building that required excavation; that it is extremely unlikely that construction on existing buildings could impact the structural soundness of the subject premises; that he never saw alterations to the buildings adjacent to the subject premises that could cause foundational problems, as those buildings pre-date engineering; that a building constructed with masonry walls and wood joists, like the subject premises, can theoretically last indefinitely; that, if construction was defective in the first instance, problems would have shown up a long time ago; that original plaster he observed in the subject premises meant that there had not been a structural renovation of the subject premises; that a structure does not suddenly get defective without an outside source like water intrusion or someone excavating next door; that the construction adjacent to the subject premises occurred 80 years ago; that loads on floor joists today are not higher than in 1850 in residences; that the pattern of damage to the coating on the brick is consistent with long term water exposure; that bulging is

the result of weathering; that he did not know if bulging was caused by something exclusively post-dating 2009; that the current use of the subject premises as an SRO does not overload the joists; that the effect of a fire on the integrity of a joist depends on the extent that the joist is burned, as when wood burns it chars and insulates it at first; that wood joists are subject to destruction from microorganisms and insect infestation; that rot spreads quickly if conditions are present; that the floor would get noticeably spongy if that was going on; that, when wood is cut in a sawmill it still has water in it; that wood dries out in service over ten or fifteen years and shrinks in that time; that he did not know about a buckled wall in a cellar; that he agrees that there was severe water damage and deteriorating stucco and a deteriorating roofing membrane; that his observations about floors in the subject premises are at odds with the Vacate Order; that he did not see a buckled wall in 221 referenced in the Vacate Order; that Respondents' expert's reference to deterioration of wood-to-wood connections is not accurate; that Respondents' expert mischaracterized plaster failures as structural problems; that very little shoring is required; that, since work would be done from top of building down, windows would have to be removed; and that he did not include current shoring in his cost analysis.

Discussion: Structural infeasibility and impossibility of performance

Respondents' answer raises defenses of "impossibility of performance" and "structural infeasibility." Respondents' own witnesses, however, offered evidence to the effect that it is theoretically possible for Respondents to engage in the work necessary to lift the Vacate Order, so long as Respondents paid the appropriate amount to do so. Accordingly, the Court dismisses the defenses of "impossibility of performance" from Respondents' fifth affirmative defense and "structural infeasibility," raised in Respondents' eighth affirmative defense.

Discussion: economic infeasibility

An owner states an economic infeasibility defense if it can prove that the cost to repair a building exceeds its value after the repair, Hous. & Dev. Admin. v. Johan Realty Co., 93 Misc.2d 698, 703 (App. Term 1st Dept. 1978), Farrell v. E.G.A. Assocs., Inc., 9 Misc.3d 1118(A)(Civ. Ct. N.Y. Co. 2005), 153-155 Essex St. Tenants Ass'n v. Kahan, 4 Misc.3d 1008(A)(Civ. Ct. NY Co. 2004),[4] which Respondents bear the burden of proving by a preponderance of evidence. Buchanan v. Toa Construction Corp., N.Y.L.J., May 31, 1989, at 29:1 (App. Term 1st Dept.), *leave to appeal denied*, N.Y.L.J., November 24, 1989 (1st Dept.), Lamberty v. Peter Papamichael & Pandyland, 2013 N.Y.L.J. LEXIS 7380 n.1 (S. Ct. Kings Co.).

The Housing Maintenance Code does not provide a defense of economic infeasibility. Rather, the defense has arisen from case law as an exercise of equitable discretion. 153-155 Essex St. Tenants Ass'n, supra, 4 Misc.3d at 1008(A). Accordingly, an economic infeasibility defense is not a license to permit owners to let their properties decay beyond the point of reasonable rehabilitation and thus obtain an unwarranted windfall. Eyedent v. Vickers Mgmt., 150 A.D.2d 202, 205 (1st Dept. 1989), 153-155 Essex St. Tenants Ass'n, supra, 4 Misc.3d at 1008(A). See Also Lamberty, supra, 2013 N.Y.L.J. LEXIS at 7380, *citing* HPD v. St. Thomas Equities Corp., 128 Misc.2d 645 (App. Term 2nd & 11th Dept. 1985)(the so-called economic viability of a building may not be used as a device, nor raised as a standard by which a landlord is permitted to escape its non-waivable duty to maintain a property); Farrell,

[4] Respondents, as well as various authorities cited here, also cite in support of this proposition Bernard v. Scharf, 246 A.D.2d 171 (1st Dept. 1998). However, the Court of Appeals reversed and remitted the matter for dismissal on the grounds of mootness, Bernard v. Scharf, 93 N.Y.2d 842 (1999), which has the effect of depriving the decision of precedential value. Hearst Corp. v. Clyne, 50 N.Y.2d 707, 718 (1980).

supra, 9 Misc.3d at 1118(A)(an owner's unclean hands precludes an economic infeasibility defense). An application of this proposition to Respondents starts with their purchase of the subject premises. The only witness with knowledge of Respondents' business was unable to testify whether Respondents even inspected the subject premises in 2012 prior to purchasing it for $4.5 million. As Respondents own more than five properties, they can be deemed "experienced real estate operators", Eyedent, supra, 150 A.D.2d at 204-05, for which a failure to inspect a building that is more than 100 years old evinces an indifference to its condition consistent with its later deplorable state. Id.

Even if Respondents did not inspect the subject premises before purchasing it, the Property Manager visited the subject premises on numerous occasions over the years, and agreed that the subject premises was in bad shape. Respondents' expert himself testified to visible conditions like cracking masonry and a facade that was bowing and bulging. If the visibility of the subject premises' maintenance needs was not enough, DOB gave Respondents notice of the state of the subject premises, including violations from 2013 for a collapsed ceiling in the common area, violations from 2015 for cracks in interior plaster walls, defective masonry, and a spalling, bulging, and cracked front facade, and violations from 2017 for vertical cracks on the facade and bowing exterior walls and parapet walls. Compounding this notice, Respondents' engineer testified that he informed Respondents of brick movement in 2016.

Despite the subject premises' obvious need for maintenance, the DOB director testified on DOB's prima facie case that the state of the subject premises did not display any evidence of pointing or maintenance of the exterior. Respondents' expert testified that there was no evidence of maintenance of the facades as of February of 2018. The Property Manager herself testified that she never oversaw work on the facade. Respondents' expert testified that the roof was

beyond its useful life of twenty years. A photograph in evidence showed vegetation growing on the roof, which demonstrated that water had been ponding on the roof for a protracted period of time, according to DOB's expert's testimony. Petitioners testified that the maintenance of the roof fell to them rather than, say, a roofer retained by Respondents. Respondents' expert testified that the peeled paint and deteriorated wood he observed demonstrated no signs of maintenance within at least the last five years before his testimony.[5] Respondents did not rebut any of this evidence, nor prove that they engaged in minimal efforts to mitigate water penetration of the subject premises, like maintaining an operative connection between the scupper and the leader.

Why would Respondents pay $4.5 million in 2012 for a property appraised at $2.5 million seven years later and so dramatically fail to maintain it? Respondents conspicuously refrained from renting units when they became vacant to the point where only 6 of the 48 units were occupied. Respondents attempted to buy out anyone left in the subject premises. When asked why Respondents bought the subject premises in the first place, the Property Manager testified, "it's real estate in Manhattan." Respondents clearly wanted the subject premises vacant so they could demolish it and develop the property to be something more lucrative than a rent-stabilized SRO. Given the nature of this matter, the Court need not judge such a business plan except to the extent that *deferring maintenance of the subject premises advanced Respondents' end*. Notably, Respondents did not rebut the testimony of the Apartment 8 Tenant that Respondent said that he should take a buyout because the subject premises was going to be shut

[5] Respondents' expert testified on December 9, 2019.

down anyway or the Apartment 6 Tenant that Respondent said that the City was going to "do [Respondents'] job" for them, presumably meaning something like the Vacate Order.

The record shows the results. Photographs in evidence depict the distressed state of the subject premises. Respondents' expert testified that the facades are in a "severe" state of deterioration and collapse, and that rot and decay in the floor joists resulted from long-term water damage. The Appraisal — procured by Respondents — states that the subject premises is in a poor condition reflecting "deferred maintenance," which is consistent with DOB's expert's statement that the deferred maintenance is "apparent." DOB's expert's report adds that the damage observed demonstrates "long-term neglect," particularly with regard to water damage, which is also consistent with Respondents' engineer's testimony that the state of the subject premises would have taken years of deterioration and neglect to develop.

Respondents argue that they in fact did repair work in the subject premises, evidenced by HPD's dismissal of housing maintenance code violations. However, Respondents' corrections of HPD violations — i.e., some of the problems — do not excuse Respondents' failure to correct other, ultimately more serious problems, particularly regarding the building envelope.

Respondents also argue that their retention of an engineer demonstrated a sufficient attempt to repair the subject premises, and moreover that DOB thwarted Respondents' engineer, both by delaying the approval of the PW1 application and by erroneously requiring a CONH. Respondents retained Respondents' engineer in response to DOB's order of February 5, 2018. Respondents' engineer submitted the PW1 application on July 6, 2018, five months later. DOB examiners then raised objections, which Respondents' engineer testified that he addressed, a process that took until December of 2018, another passage of five months ("the latter five months").

Respondents' focus on the latter five months is crucial toward their argument, but the latter five months strikes the Court as less decisive given the five months Respondents themselves took from DOB's order in February of 2018 until the submission of the PW1 application. Furthermore, the significance of the latter five months declines in the context of six-and-a-half years from January of 2012 through the July of 2018 when Respondents made no effort to seal the roof and the facade.

The PW1 application foundered on DOB's demand for a CONH, a demand that Respondents now argue was incorrect, citing 28 R.C.N.Y. §10-02. The regulation, however, affords some potential support for DOB's position. The regulation requires a CONH where mandated pursuant to N.Y.C. Admin. Code §28-107.1 *et seq*. N.Y.C. Admin. Code §28-107.1 requires a CONH for, *inter alia*, an "alteration" of an SRO building, an "alteration" being "any … renovation to a building…." N.Y.C. Admin. Code §28-101.5. Moreover, 28 R.C.N.Y. §10-02(b)(2) states that, with regard to SRO buildings, even if an application does not invoke a type of plan requiring a CONH, a CONH may still be required pursuant to N.Y.C. Admin. Code § 28-107.1 *et seq*.

Be that as it may, Respondents' argument that 28 R.C.N.Y. §10-02 did not require a CONH for the PW1 application had merit, as 28 R.C.N.Y. §10-02(b)(1) specifies five kinds of plans that trigger the CONH requirement, none of which appear to implicate the PW1 application. As meritorious as Respondents' argument may have been, and even though Respondents' engineer successfully addressed DOB's other objections to the PW1 application, no evidence in the record shows that Respondents made their argument to DOB in between Respondents' engineer's meeting with a DOB plan examiner on December 11, 2018 and the issuance of the Vacate Order on July 2, 2019. The potential competing interpretations of statutes

and regulations between DOB and Respondents does not excuse the absence of Respondents' effort for more than seven months to address the CONH issue, much less Respondents' prior years of deferring maintenance.

Respondents assert that the subject premises was already in poor condition when they obtained title in 2012. However, Respondents' subsequent neglect of the subject premises from 2012 through 2019 diminishes any exculpatory value of the subject premises' condition when they bought it. Moreover, the evidence does not necessarily support Respondents' assertion, as the photo image of the subject premises in 2009 does not show the kind of damage to the facades as they exhibited ten years later.

Even assuming *arguendo* that the subject premises was in poor shape in 2012, a landlord cannot escape responsibility for a building's precarious condition when the landlord acquired the building, when the need to make repairs could have been anticipated before the purchase. 128 Hester LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 146 A.D.3d 706, 707 (1st Dept. 2017), *citing* Eyedent, supra, 150 A.D.2d at 205, Lamberty, supra, 2013 N.Y.L.J. LEXIS at 7380. To this point, Respondents did not rebut the testimony of the Apartment 8 tenant that, at the time Respondents bought the subject premises, the facade was buckling and the common bathroom wall sustained a "gigantic" crack, conditions which a minimal amount of diligence would have revealed. The condition of the subject premises at the time Respondents purchased it therefore does not support their economic infeasibility defense.

Even assuming that Respondents let the subject premises "decay beyond the point of reasonable rehabilitation," Eyedent, supra,150 A.D.2d at 205, Respondents argue that any such neglect did not cause the condition necessitating the Vacate Order, so much as construction adjacent to the subject premises and its age and purportedly defective design. If the record

supported Respondents' argument, an economic infeasibility defense would not amount to a "windfall" precluding an economic infeasibility defense. Id.

Respondents' expert testified that it is possible that construction at the neighboring buildings could have damaged the subject premises, but he did not know anything specific that happened there. DOB's expert's report stated that the available records did not show any construction adjacent to the subject premises since 1938. The preponderance of the evidence on this record therefore does not show that construction adjacent to the subject premises caused any of the conditions necessitating the Vacate Order.

Respondents' expert challenged the proposition that water damage caused problems in the subject premises. Specifically, he testified that the lack of a leader did not cause damage and that water exposure did not cause the displacement observed in the subject premises. Rather, Respondents' expert testified that the bulging he observed "plays back" into the original construction of the subject premises. Respondents' expert and Respondents' engineer testified that the front wall lacks structural tie backs from their original installation, causing the facade problem as the mortar has severely deteriorated over 100 years.

DOB's expert's testimony conflicted with that of Respondents' expert and Respondents' engineer. DOB's expert testified that if the construction of the subject premises was defective in the first instance, problems would have shown up a long time ago. DOB's expert testified that the pattern of damage to the coating on the brick is consistent with long term water exposure.

Reconciling the testimony of Respondents' and DOB's expert witnesses requires a deeper scrutiny of their testimony. Respondents' expert testified that the original construction of the subject premises did not bear a "robust connection" to the bulging in the facades and that he had not seen similar visible separations in other buildings. Respondents' expert also testified that

fracturing in wood joists "could" be caused by flaws in their original construction, but also that rot and decay in the floor joists resulted from long-term water damage, as water exposure causes fungi growth, which eats away at wood. Respondents' expert testified that water can also cause some issues with masonry as well, especially in colder climates, as masonry is porous and thus absorbs water, which can lead to a cycle of water freezing in the winter and thawing in the summer, eventually stressing the masonry to the point that spalling and cracking ensues. Respondents' expert's testimony as such is consistent with DOB's expert's testimony that water penetration broke the mortar bond between the veneer and the backup of the facade, citing the same cycle involving water freezing and thawing over the years. Respondent's expert also testified that if the roof was repaired at the end of its useful life, it would have prolonged the life of the subject premises.

DOB's expert testified that the wood-to-wood connections loosen over time and cause visible movement, which could conceivably jibe with Respondents' expert's testimony that characteristics of the original design of the subject premises were the cause of defects in the facade. DOB's expert also testified, however, that such movement has no meaning regarding structural capacity.

The age of the subject premises poses a challenge to Respondents' narrative of the purportedly defective design of the subject premises. The preponderance of the evidence shows that the subject premises dates back to at least 1854. Respondents essentially posit that in the 165 years from 1854 to 2019, the subject premises' fatally defective design coincidentally manifested at the same point in time as one following years of neglect that caused ongoing water penetration. Perhaps expert evidence less contested, qualified, and unambiguous as that adduced

herein could persuasively prove such a proposition, but the evidence on the record herein does not do so.

The record therefore supports the finding that an economic infeasibility defense would constitute an "unwarranted windfall" for Respondents. See Dep't of Hous. Pres. & Dev. v. Mill River Realty, 169 A.D.2d 665, 669 (1st Dept. 1991), appeal dismissed, 82 N.Y.2d 794, 798 (1993)(any alleged economic hardship the owner may suffer in making the repairs to the building is self-inflicted in light of its delay in making the repairs despite repeated notice of the need for such repairs as evidenced by the outstanding violations issued against the building, court orders issued over a ten-year period of time, and a visible structural crack). Accordingly, the Court dismisses Respondents' economic infeasibility defense, the ninth affirmative defense in Respondents' answer.

Discussion: regulatory takings

The Fifth Amendment of the U.S. Constitution proscribes a taking of private property for public use without just compensation ("the Takings Clause"), a clause that applies to the states through the Fourteenth Amendment. Kelo v. New London, 125 S. Ct. 2655, 2658 n. 1 (2005). The Constitution of New York State imposes an identical restriction. New York State Constitution Article I, §7(a). Respondents raise a defense that an order of this Court to correct conditions that led to the Vacate Order would amount to a taking. While Respondents do not allege that an order to correct would physically take or occupy the subject premises, they assert that an order to correct would amount to a regulatory taking. A regulatory taking is an unfair imposition of a burden on a property owner that the public as a whole should bear, denying an owner an economically viable use of a property by making it impossible or commercially impracticable for it to profitably engage in business or to fail to substantially advance a

legitimate state interest. Cycle Stone, Inc. v. N.Y.C. Dept. of Consumer Affairs, 2019 N.Y. Slip Op. 31537(U), ¶ 6 (S. Ct. N.Y. Co.). A regulatory taking defense occasions an "essentially ad hoc, factual inquir[y]…" Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 375 (2nd Cir. 2006), Dawson v. Higgins, 197 A.D.2d 127, 137 (1st Dept. 1994).

A regulatory taking challenge normally applies to a statute or regulation, rather than a Court's application of a statute or regulation to a particular litigant. Save Pine Bush v. Common Council, 188 A.D.2d 969, 971-72 (3rd Dept. 1992).[6] The distinction is significant because Respondents do not challenge statutes imposing non-waivable[7] duties upon them to maintain their residential properties so as to be safe, healthy, and habitable. See, e.g., RPL §235-b, MDL §78, and N.Y.C. Admin. Code §27-2005. Respondents' forbearance in this regard accords with a government's power to regulate harmful uses of property without compensation, Lucas v. S.C. Coastal Council, 112 S. Ct. 2886, 2897 (1992), so as to promote health, safety, and the general welfare. Penn Cent. Transp. Co. v. New York City, 98 S. Ct. 2646, 2659 (1978).

A regulatory takings claim can involve an analysis of, *inter alia*, the effect of a government action on distinct investment-backed expectations. Sherman v. Town of Chester, 752 F.3d 554, 565 (2nd Cir. 2014), Buffalo Teachers Fed'n, supra, 464 F.3d at 375, James Square Assocs. LP v. Mullen, 21 N.Y.3d 233, 247 (2013), Smith, supra, 4 N.Y.3d at 9. The State law in force informs these investment-backed expectations. Ark. Game & Fish Comm'n v.

[6] Be that as it may, Courts have cited the Takings Clause in support of an economic infeasibility defense. See, e.g., 289 Grand St. v. Wong's Grand Realty Corp., 2012 N.Y.L.J. LEXIS 5578 (Civ. Ct. N.Y. Co.). Bernard, supra, 246 A.D.2d at 171, also makes this connection, although, as previously noted in footnote 4, the Court of Appeals' dismissal of the appeal of that decision on grounds of mootness deprives that decision of precedential value.

[7] See HPD, supra, 128 Misc.2d at 650, *citing* Park W. Mgt. Corp. v. Mitchell, 47 N.Y.2d 316, 327 (1979).

United States, 133 S.Ct. 511, 522 (2012). The various statutes and regulations Respondents do not challenge mean that reasonable investment-backed expectations in multiple dwellings in New York City take into account obligations concerning ongoing maintenance. An already extensively-regulated sector of commercial life diminishes the force of an argument that an additional government action frustrates an investment-backed expectation. Dawson, supra, 197 A.D.2d at 137.

The Court has made a finding, supra, that Respondents have been failing to comply with their statutory responsibilities to properly maintain the subject premises from their purchase of the subject premises in 2012. The Court cannot disentangle Respondents' regulatory takings defense from Respondents' prior failure to maintain the subject premises. A party asserting a takings claim bears the burden of proving its case, in New York beyond a reasonable doubt, De St. Aubin v. Flacke, 68 N.Y.2d 66, 76 (1986), Matter of New Creek Bluebelt, Phase 4., 122 A.D.3d 859, 861 (2nd Dept. 2014), Matter of C/S 12th Ave. LLC v. City of N.Y., 32 A.D.3d 1, 9 (1st Dept. 2006), Dawson, supra, 197 A.D.2d at 136, and in federal Court by a preponderance of the evidence. W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp.2d 140, 149 (E.D.N.Y. 2002). Respondents have not proven, by either standard, that timely maintenance of the subject premises from back in 2012 — e.g., by pointing or properly maintaining the roof, scupper, and leader — would have cost more than the value of the subject premises.[8]

[8] Instructively DOB's expert's estimate of the roof repair at the present day — presumably more than it would have been in past years — is $18,298, obviously orders of magnitude lower than the value of the subject premises. While Respondents' expert's report itemizes the cost of roof repairs in a more compartmentalized way, that total cost of roof repair is of a similar scale relative to the value of the subject premises.

Respondents' noncompliance with a statute they do not challenge therefore places them in a different stead than successful regulatory takings claimants, who have typically have been inoffensively going about their business at the time that a statute imposed a burden on them. See, e.g., E. Enters. v. Apfel, 118 S. Ct. 2131, 2150-53 (1998)(an entity that had ceased coal mining operations decades before an imposition of a cost upon them stated a regulatory takings cause of action), Lucas, supra, 112 S. Ct. at 2889 (a property owner who did not have to obtain a permit to develop single-family residences at the time he acquired a lot, as owners of adjacent lots had done, stated a regulatory takings cause of action when a newly-enacted state statute restricted him from doing so). Respondents' posture as such affects the application of the various regulatory takings tests to their defense.

One test to determine whether a governmental action effectuates a taking entails a comparison between the value taken from the property and the value that remains in the property. Murr v. Wisconsin, 137 S. Ct. 1933, 1943-44 (2017). Any order to correct issued by this Court would not "take" value from the subject premises in any amount comparable to the value that Respondents' own neglect has already taken from the subject premises. Another test analyzes whether a regulation deprives landowners of "all economically viable use" of their property. Smith v. Town of Mendon, 4 N.Y.3d 1, 9 (2004). Again, no order to correct of this Court deprives the subject premises of any economically value use on a scale comparable with Respondents' own neglect.

An evaluation of a regulatory takings claims "involves an examination of the 'justice and fairness'" of the governmental action. E. Enters., supra, 118 S. Ct. at 2146. As the Court will not countenance a landlord's emptying of a building by neglect, Lacks v. City of N.Y., 156 Misc. 2d 749, 754 (S. Ct. N.Y. Co. 1992), *citing* HPD v. 69 W. 38th St., N.Y.L.J., Aug. 5, 1987, at

11:1 (App. Term 1st Dept.), HPD, supra, 128 Misc.2d at 645, nor will allow wrongdoers to profit from their own unlawful conduct, Id. at 651, justice and fairness will not permit Respondents to neglect the subject premises to the point of decrepitude and then use the Takings Clause as a shield against the consequences of their neglect, particularly to the detriment of rent-regulated tenants' interest in the maintenance of their homes and to the detriment of the municipal agencies' charge to enforce standards of habitability in housing. Accordingly, the Court dismisses Respondents' regulatory takings defense, the tenth affirmative defense in Respondents' answer.

Order To Correct

As Petitioners and DOB have proven their prima facie case with regard to the Vacate Order, and as the Court has dismissed all of Respondents' applicable defenses with regard to the Vacate Order, the Court shall direct Respondents to correct the conditions necessary to get the Vacate Order lifted. What remains of Respondents' fifth affirmative is the extent that it states that any order to correct should provide time frames commencing with the date of an order to correct, not a date on a notice of violation and that fines are excessive. Any order to correct will provide a time frame running from the date of this order, so while Respondents' fifth affirmative defense does not preclude an order to correct, it prevails in that regard. The Court is not at this point imposing any fines regarding the Vacate Order, so the Court dismisses this part of the eleventh affirmative defense with regard to the Vacate Order as unripe, without prejudice to renewal upon any application to impose fines.

Respondents seek a dismissal of so much of the petition as seeks repair of conditions that DOB's expert testified do not need to be repaired. The Court intends to direct Respondents to take actions necessary to lift the Vacate Order, but the Court does not prescribe

means. Respondents may choose to take a more costly route, for example, by replacing the cornice rather than by repairing it, or by using hardwood floors instead of vinyl tiles, but so long as Respondents get the Vacate Order lifted, that level of detail is not the Court's concern.

Be that as it may, given that the point of the petition and DOB's cross-claim was to stabilize the subject premises and return Petitioners to their homes as soon as possible, lifting the Vacate Order by the means set forth in DOB's expert's report would certainly effectuate that objective faster and cheaper. To the extent that Respondents are concerned that DOB, HPD, or Petitioners may cause delays or increased costs by insisting upon a course of remedial work more time-consuming or expensive than what they, particularly DOB, litigated in favor of, the best the Court can say is that it maintains a broad jurisdiction over the enforcement of housing standards and over municipal agencies toward that end, New York City Civil Court Act §110, and this order is without prejudice to any claim sounding in judicial estoppel or law of the case in future motion practice if Respondents adopt DOB's recommendations and then DOB holds up a permit over an issue that DOB's expert and/or DOB's expert report said Respondents could dispense with.

In the interests of lifting the Vacate Order as soon as possible, though, in an exercise of its authority pursuant to New York City Civil Court Act §110, the Court dismisses any potential cause of action any party has to insist upon an issuance of a CONH for Respondents to obtain a permit. Whatever salutary objectives of the CONH program, delay of a permit over that issue would perversely harm Petitioners' compelling interests in returning to their homes as soon as possible. The Court shall address any cause of action for harassment by this decision.

Harassment

The Housing Maintenance Code defines "harassment" in a general way as, *inter alia*, any omission that substantially interferes with the comfort of any tenant. N.Y.C. Admin. Code §27-2004(a)(48). The Housing Maintenance Code also defines harassment more specifically as, *inter alia*, a repeated failure to correct violations of the housing maintenance code or construction codes, N.Y.C. Admin. Code §27-2004(a)(48)(b-2), and conduct related to offers to buy tenants out. N.Y.C. Admin. Code §§27-2004(a)(48)(f-1), 27-2004(a)(48)(f-2), and 27-2004(a)(48)(f-3).

Given the evidence that Respondents did indeed provide residents of the subject premises with disclosures relating to buyouts and the evidence that some residents themselves initiated buyout conversations, the proof that Respondents failed to comply with N.Y.C. Admin. Code §§27-2004(a)(48)(f-1), 27-2004(a)(48)(f-2), and 27-2004(a)(48)(f-3) is too ambiguous by itself to warrant a finding of harassment on that basis alone. That evidence, however, leaves no ambiguity of Respondents' goal of emptying out the subject premises. The Court has already found, supra, that in advancement of that end, Respondents purposely deferred maintenance of the subject premises, an "omission" that obviously interfered with Petitioners' comfort. An objective of the harassment statute is to keep tenants in their homes. See Prometheus Realty Corp. v. City of N.Y., 80 A.D.3d 206, 213 (1st Dept. 2010)(finding the legislature's interest in preventing landlords from "forcing tenants out" to be rationally related to the remedies memorialized in N.Y.C. Admin. Code §27-2005(d)); Aguaiza v. Vantage Props., LLC, 69 A.D.3d 422, 423 (1st Dept. 2010)(the legislature enacted a harassment statute to address, in part, "a perceived effort by landlords to empty rent-regulated apartments…."). Omitting maintenance to empty out a building therefore constitutes exactly the kind of conduct the Legislature sought

to curb by its enactment of N.Y.C. Admin. Code §27-2005(d). Petitioners have therefore proven that they are entitled to the relief sought in their petition on their cause of action for harassment.

Tenants who prove harassment may obtain placement of housing maintenance code violations, an injunction restraining a landlord from engaging in such conduct, and civil penalties payable to the New York City Commissioner of Finance, N.Y.C. Admin. Code §27-2115(m)(2), all of which are appropriate in this matter. Tenants who prove harassment may also obtain compensatory damages, punitive damages, and attorneys' fees, N.Y.C. Admin. Code 27-2115(o), which Petitioners seek herein.

As compensatory damages, the petition seeks to have Respondents "pay for temporary housing for Petitioners during the pendency of this proceeding" and to "reimburse Petitioners for all expenses incurred as a result of their neglect of the [subject premises]." Petitioners' memorandum of law argues for an award of compensatory damages in the form of relocation expenses and/or relocation to similar and acceptable housing in the same neighborhood as the subject premises. While a tenant can obtain relocation costs as relief in an HP proceeding, Revilla v. 620 W. 182nd St. Heights Assocs. LLC, 47 Misc.3d 1211(A)(Civ. Ct. N.Y. Co. 2015), Gonzalez v. Kwik Realty LLC, 42 Misc.3d 433 (Civ. Ct. N.Y. Co. 2013), the record does not contain proof as to the damages that Petitioners incurred from relocating. Compensatory damages cannot be contingent or speculative, but ascertainable to a degree of reasonable certainty. E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 448-49 (2018). Directing Respondents to pay to relocate Petitioners without specifying an amount sets up a potential fact dispute over an appropriate amount to pay and would effectively bifurcate the trial. While the

Court may bifurcate trials, CPLR §603,[9] the Court may not do so unilaterally. Schaeffer v. Lipton, 217 A.D.2d 845, 846 (3rd Dept. 1995). In the absence of such proof, the Court can award Petitioners compensatory damages of $1,000.00. N.Y.C. Admin. Code §27-2115(o).

Petitioners also seek punitive damages. Punitive damages both punish and set an example to others, Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 193-94 (2008), and in the housing context in particular can deter conduct which undermines housing maintenance standards. Gruber v. Craig, 208 A.D.2d 900, 901 (2nd Dept. 1994), Minjak Co. v. Randolph, 140 A.D.2d 245, 249 (1st Dept. 1988).

At the risk of being repetitive, Respondents deferred maintenance at the subject premises in order to clear the subject premises to the extent that Petitioners lost their homes. If punitive damages would not apply to Respondents under these circumstances, deferral of maintenance could potentially be a rational course of conduct for a property owner. Accordingly, punitive damages are appropriate in this instance.

While no rigid formula fixes punitive damages, they should bear some reasonable relation to the harm done and the flagrancy of the conduct causing it. Bi-Economy Mkt., Inc., supra, 10 N.Y.3d at 193-94. Given the scale of numbers the experts discussed in this matter — a range of repairs from $900,000 to $7 million — punitive damages at $20,000 each for each of the six Petitioners is neither excessive but, at a total of $120,000, substantial enough to deter similarly-situated property owners. Adding the $1,000 for compensatory damages would be a total award for each Petitioner of $21,000.

[9] A Court Rule encourages judges in Civil Court to bifurcate the issues of liability and damages in trials of personal injury actions, 22 N.Y.C.R.R. §208.35(a), and rules of the Civil Court shall apply to the Housing Part whenever practicable. 22 N.Y.C.R.R. §208.43(b).

The Court further will enter into an injunction against Respondents directing that Respondents from engaging in any proscribed conduct stated in N.Y.C. Admin. Code §§27-2005(d) and 27-2004(a)(48). The Court will direct HPD to place a "C" violation on the subject premises for harassment. Furthermore, N.Y.C. Admin. Code §27-2115(m)(2) mandates an award of civil penalties. The Court will award HPD civil penalties in the amount of $2,000.00 against Respondents for each Petitioner, as provided by N.Y.C. Admin. Code §27-2115(m)(2),

The Court also grants Petitioners' motion for attorneys' fees to the extent of finding that, pursuant to N.Y.C. Admin. Code §27-2115(o), Petitioners are entitled to a judgment against Respondents for attorneys' fees, to be determined at a hearing.

Accordingly, it is

ORDERED that Petitioners and DOB have proven their prima facie cases on their causes of action for an order to correct, and it is further

ORDERED that the Court dismisses all of Respondents' defenses with prejudice, except for so much of the fifth affirmative defense as seeks to have deadlines for correction run from the date of the order, and except that the dismissal of the eleventh affirmative defense is without prejudice to renewal in the event that any party moves for the awards of civil penalties or fines, and it is further

ORDERED that Respondents shall, in compliance with any applicable rules, regulations, and orders concerning social distancing, engage in such corrective work as may be necessary to effectuate a lifting of the Vacate Order at the later of either six months from the date of this order or six months from the earliest date that such corrective work is lawful according to applicable rules, regulations, and orders concerning social distancing, without prejudice to an order to extend such a deadline, which may be sought by motion and which the Court, in its discretion, may grant on a showing of good cause, and it is further

ORDERED that the Court directs DOB to dispense with any requirement for a Certificate of No Harassment upon Respondents' application for any permit for any corrective work referenced herein, and it is further

ORDERED that the Court holds in abeyance and stays Respondents' obligation to correct extant HPD and DOB violations aside from those required to effectuate a lifting of the Vacate Order pending Respondents' timely compliance with this order and/or with subsequent orders of the Court, without prejudice to Petitioners', DOB's, and HPD's remedies upon the lifting of the Vacate Order if extant violations remain after the Vacate Order is lifted; and it is further

ORDERED that Respondents are enjoined from engaging in any harassment conduct prohibited by N.Y.C. Admin. Code §27-2005(d) and defined in N.Y.C. Admin. Code §27-2004(a)(48), and it is further

ORDERED that HPD shall place a "C" violation on the subject premises for harassment; and it is further

ORDERED that HPD has a final judgment in the amount of $12,000.00, which may be enforced as a lien against Block 774, Lot 24, in the borough of Manhattan; and it is further

ORDERED that the Court awards Kenneth A. Vaher, the Apartment 8 tenant, a judgment against Respondents, jointly and severally, in the amount of $21,000.00; and it is further

ORDERED that the Court awards Kenneth J. Robertson, the Apartment 6 tenant, a judgment against Respondents, jointly and severally, in the amount of $21,000.00; and it is further

ORDERED that the Court awards Dru Fitzpatrick, the 223 tenant, a judgment against Respondents, jointly and severally, in the amount of $21,000.00; and it is further

ORDERED that the Court awards Mark Lulgjuri, the Super, a judgment against Respondents, jointly and severally, in the amount of $21,000.00; and it is further

ORDERED that the Court awards Richard M. Allen a judgment against Respondents, jointly and severally, in the amount of $21,000.00; and it is further

ORDERED that the Court awards Ramon Casares a judgment against Respondents, jointly and severally, in the amount of $21,000.00; and it is further

ORDERED that Petitioner's prayer for attorneys' fees is granted to the extent of calendaring the matter for a hearing to be held on a date that the parties and the Court (part B of Civil Court of the City of New York, New York County) shall mutually arrange.

The parties are directed to pick up their exhibits within thirty days of the opening of the Courthouse to the public or they will either be sent to the parties or destroyed at the Court's

discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York
May 6, 2020

APPROVED
JSTOLLER , 5/6/2020, 10:19:01 am

HON. JACK STOLLER
J.H.C.