Dep't of Housing Preservation & Development v. Forest

OATH Index No. 1320/20 (Nov. 9, 2022), *adopted*, Comm'r Dec. (Nov. 16, 2022), **appended**

Petitioner presented proof that building owner failed to fix leaks and cracks in the walls of a building which was eventually evacuated by the Fire Department. ALJ found these actions constituted harassment. Denial of certificate of no harassment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
-against-
STEVEN FOREST
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

The Department of Housing Preservation and Development (the "Department" or "petitioner") referred this matter pursuant to section 27-2093.1 of the New York City Administrative Code. Respondent Steven Forest, an asset manager and leasing agent with Walter & Samuels, Inc. ("Walter & Samuels") who acts on behalf of 96 & Second LLC, the owner of the building at 300 East 96th Street, New York, New York (the "Building"), applied for a certificate of no harassment ("CONH") for the Building. Petitioner seeks a finding that harassment occurred and denial of respondent's application for a CONH pursuant to section 27-2004 of the Administrative Code.

During an eight-day trial, petitioner called seven witnesses and offered documentary evidence. Respondent called five witnesses, testified on his own behalf, and offered documentary evidence. The record closed after submission of closing briefs.

For the reasons below, I find that petitioner proved that respondent harassed lawful occupants of the Building. Thus, the application for a CONH should be denied.

ANALYSIS

Local Law 1 of 2018, the CONH Pilot Program, directs petitioner to identify distressed buildings where harassment may have occurred that are located within identified community districts and to create a Pilot Program List (the "List") that includes buildings based on a Building Qualification Index ("BQI"). Admin. Code § 27-2093.1 (Lexis 2022).

Petitioner's rules specify criteria for calculating BQI, including the number of open and closed hazardous and immediately hazardous violations of the Housing Maintenance Code ("HMC") and the amount of emergency repair charges at the Building, per "adjusted dwelling unit," within five years before July 24, 2018. 28 RCNY § 53-03(1), (2). Also considered is the number of times a building changes ownership, if any, within the same five-year time frame. 28 RCNY § 53-03(3). A building could also be added to the List based on other criteria, such as if the building is subject to a full vacate order, which is what occurred here. *See, e.g.,* 28 RCNY § 53-02(2)(b).

Owners of buildings on the Pilot Program List who wish to obtain a permit from the Department of Buildings ("DOB") to perform renovations must first obtain a CONH from petitioner or a waiver of such a certificate. Admin. Code §§ 27-2093.1(c)(1); 28-505.4 (Lexis 2022). After a CONH application is filed, petitioner investigates to determine whether harassment occurred in the building during the preceding five years. Admin. Code § 27-2093.1(d). If petitioner determines that no harassment occurred, it will issue a CONH. Admin. Code § 27-2093.1(d)(5)(A). If petitioner finds reasonable cause that harassment occurred, it will refer the matter to this tribunal for a trial. Admin. Code § 27-2093.1(d)(5)(C); 28 RCNY § 53-07(1).

On November 9, 2017, the DOB issued a peremptory vacate order for the Building ("Vacate Order") (Pet. Ex. 11). The Vacate Order indicated that the Building had developed severe interior and exterior cracks which rendered it unsafe (Pet. Ex. 11). The tenants were immediately vacated by the Fire Department of the City of New York ("FDNY").

On July 15, 2019, respondent applied for a CONH (Pet. Ex. 3). On December 18, 2019, the Department issued an initial determination that there was reasonable cause to believe that harassment of lawful occupants occurred at the Building during the inquiry period, and the matter was referred to this tribunal (ALJ Ex. 1).[1]

[1] The "inquiry period" commences five years before submission of the CONH application and ends on the date that the Department issues its final determination. 28 RCNY § 53-01.

In an amended petition dated October 26, 2020, the Department alleged that respondent committed harassment during the inquiry period, from July 15, 2014, to the time of trial, by: (1) failing to fix conditions leading to leaks and water accumulation in the Building's entrance lobby and stairways; (2) failing to repair cracks in the walls in public areas; (3) failing to repair cracks in the walls inside lawful occupants' units; (4) failing to fix the Building's front door; (5) failing to fix conditions leading to leaks inside lawful occupants' units; (6) failing to promptly fix a broken mailbox unit; (7) failing to repair conditions which lead to the Vacate Order; and (8) substantially interfering with and disturbing the comfort, repose, peace and quiet of lawful occupants, causing or intending to cause such lawful occupants to vacate or surrender their occupancy rights (ALJ Ex. 1).

Respondent disputed the allegations of harassment, contending that it made timely efforts to maintain the Building as required and that it did not commit actions or omissions that constitute harassment.

Petitioner's Evidence

To prove that harassment occurred, petitioner presented the testimony of four tenants: Michelle Leonard, Omri Shellef, Reva Sookraj, and Aleksandra Palak.

Michelle Leonard

Ms. Leonard testified she lived in unit 4B of the Building from May 2014 until November 9, 2017, that her rent was $1,850 a month, and that her unit was not rent stabilized (Tr. 16, 60). Throughout her tenancy, she observed several problems in the Building's common areas as well as within her unit.

Ms. Leonard described a major leak in the lobby which persisted from May 2017 until early September 2017 (Tr. 16-17). She stated that the leak was "very heavy" and that a clear plastic tarp was placed on the ceiling of the lobby to "cover it" (Tr. 47). The tarp, however, would fill with water and the leak would continue (Tr. 47). She stated that if it was raining outside, "it would run nonstop, and the lobby would be completely covered in water" (Tr. 47). Ms. Leonard took videos of the leak on May 13, 2017 and June 19, 2017 (Tr. 19; Pet. Exs. 14, 15). These videos show water streaming down from a large piece of plastic material taped to the ceiling and puddling on the tile floor below (Pet. Exs. 14, 15). Ms. Leonard complained to management about the leaks (Tr. 21-22).

On August 31, 2015, Ms. Leonard received a notice from the United States Postal Service ("USPS") indicating that the Building's mailboxes could not be locked (Tr. 26-29; Pet. Exs. 16, 17). As a result, she would need to pick her mail up at the post office (Tr. 29). On September 8, 2015, she sent an e-mail with an image of the USPS notice to Norman Silver, a member of building management (Tr. 26; Pet. Ex. 16). On April 27, 2016, she received a second notice from USPS indicating that deliveries would be discontinued until further notice due to the condition of the mailboxes (Pet. Ex. 17). On June 15, 2017, Ms. Leonard sent an e-mail to Mr. Silver requesting a "break" on her rent and attaching a photograph of the second USPS notice (Pet. Ex. 18). Because of her work schedule, she had difficulty picking up her mail (Tr. 29). She testified that she was aware that construction in an adjacent building had caused the problem with the Building's mailboxes (Tr. 55-56).

On June 15, 2017, Ms. Leonard sent another e-mail to Mr. Silver stating that the "building is becoming incredibly dilapidated" and inquiring when repairs would take place (Pet. Ex. 18). On November 9, 2017, she sent an e-mail to Linda Grabow, an attorney for the landlord, after she witnessed an individual installing shoring inside the lobby (Tr. 36; Pet. Ex. 20). In the e-mail she asked for an explanation regarding the construction in the hallway. Later that day, she sent a follow-up e-mail to Ms. Grabow stating "Let me out of my lease. The building is collapsing." (Pet. Ex. 21). Ms. Leonard attached photographs showing floor-to-ceiling cracks with shoring installed, apparently to support the Building (Tr. 49-50; Pet. Ex. 21). Ms. Leonard called 311 to report the conditions and was instructed to call 911 (Tr. 39-40). After she called 911, the FDNY arrived within minutes (Tr. 40). She stated that the "City said that it wasn't safe to stay there and so they evacuated all of us" (Tr. 16).

After being evacuated, Ms. Leonard retrieved some of her belongings with the assistance of the FDNY (Tr. 40). Since being evacuated, she has been able to return to her apartment only once and she estimates roughly $20,000 to $30,000 in belongings remain in the apartment (Tr. 40-43).

Ms. Leonard also identified certain issues specific to her unit including problems with the toilet seat, the window guard to the fire escape, and paint in the bathroom which was peeling and showing moisture marks (Tr. 17). She e-mailed Ms. Grabow regarding the peeling paint in her bathroom (Tr. 30; Pet. Ex. 19). Her e-mail contained images that show bubbling paint adjacent to her showerhead and a large water stain in the corner of the room, but management failed to address the issue (Tr. 30; Pet. Ex. 19).

Ms. Leonard spoke with Peter Gray, a tenant advocate, in connection with his investigation regarding the Building and his report largely corroborates her testimony. She also told Mr. Gray that management would negotiate moveouts with tenants who would lodge complaints rather than address the issues (Pet. Ex. 6, Memorandum Regarding Conversation with M. Leonard).

Omri Shellef

A second tenant, Omri Shellef, lived in unit 6B of the Building from January of 2017 until he was evacuated by the FDNY, and his unit was not rent stabilized (Tr. 74-75, 108). His starting rent was $2,225 per month which was later increased to $2,450 per month (Tr. 75).

Mr. Shellef stated that during his entire tenancy there was a leak in the Building's lobby (Tr. 77). He explained that when it would rain, "it would rain inside the building" resulting in wet, dangerous floors (Tr. 77). Prior to moving in, he had been assured by management that the leak would be fixed "very, very soon" (Tr. 81). He continued complaining to management regarding the leaks when he would drop off his rent checks (Tr. 79).

Mr. Shellef indicated that by the spring of 2017 he had not received mail for months because the Building's mailboxes had been damaged and would not fully close (Tr. 81). He complained to management about this issue, but did not receive mail until he moved to a new address (Tr. 82). As a result, he missed a bill payment (Tr. 83).

On November 9, 2017, the FDNY woke Mr. Shellef and told him to evacuate the Building (Tr. 83-85). He was allowed two minutes to gather his essential belongings (Tr. 83-85). He was later granted two brief opportunities to retrieve items from his apartment but many of his belongings remain in the unit (Tr. 86-89). Mr. Shellef claimed that he has been unable to pursue litigation in connection with a prior business deal because relevant documents remain in the apartment (Tr. 88). However, he filed a lawsuit related to this business deal seven months after the evacuation (Tr. 100; Resp. Ex. B). Mr. Shellef testified that he lost a job, has been depressed, and has had problems sleeping as a result of the evacuation from the Building (Tr. 90).

Mr. Shellef filed a claim with the Division of Housing and Community Renewal ("DHCR") for rent reduction. DHCR adjusted his rent to $1.00 per month so that he may keep his rights to the unit (Tr. 90, 129). He also filed a claim against the landlord for damages suffered from leaving his possessions behind (Tr. 118). Additionally, he filed a third claim against the Metropolitan Transportation Authority ("MTA") and the Building's management. That claim alleges that

subway construction nearby may be partially responsible for the damage to the Building (Tr. 120-22).

Reva Sookraj

A third tenant, Reva Sookraj, lived in unit 2A of the Building from September 2017 until November 2017, paid $1,900 per month in rent, and her apartment was not rent-stabilized (Tr. 134, 149).

On the day Ms. Sookraj moved into her apartment, the door to her unit broke, locking her inside (Tr. 135). When she reported the situation to the Building's superintendent via text message, he instructed her to use a credit card or screwdriver to open the door (Tr. 137; Pet. Exs. 24, 25). She replied: "This is very illegal. If there was a fire I would die. I have to report this" (Pet. Ex. 25). Ms. Sookraj was unable to unlock the door and pleaded with the superintendent to come free her from the apartment (Tr. 137; Pet. Exs. 24, 25). The superintendent responded, "I can do it tomorrow 7:00 am" (Pet. Ex. 25). Ms. Sookraj called the FDNY who ultimately broke down her door (Tr. 138). When she e-mailed management regarding this incident, they initially suggested that she may need to pay for the damage (Tr. 138).

Additionally, Ms. Sookraj notified management and the superintendent that the front door to the Building was broken (Tr. 139-40). For more than a week, both the front door and the door to her apartment were broken, leaving her unit accessible "to anyone" (Tr. 139). She also told management that her bathroom ceiling had a leak which was causing the drywall and plaster to fall off, but management did not reply to her complaint (Tr. 140-41).

The FDNY evacuated Ms. Sookraj from the Building on November 9, 2017 (Tr. 141-42). While she was able to retrieve some essential items, much of her property remains in her unit (Tr. 143). She was later informed by building management that the evacuation was the result of structural damage to the Building (Tr. 144). Ms. Sookraj filed an insurance claim for her property that remains in the Building and is a party to a lawsuit against management and the owners of the Building (Tr. 152, 155). She also initiated a DHCR proceeding, which set her rent at $1.00 per month (Tr. 149-50).

Aleksandra Palak

A fourth tenant, Aleksandra Palak, lived in unit 4A of the Building from November 15, 2013 until she was evacuated on November 9, 2017 (Tr. 168). She testified that there was a major leak in the Building's lobby area with some "baby leaks" in the staircase area (Tr. 170). She

witnessed the leaks "as many times as there was rain" (Tr. 170). She stated that "safety was always a concern" because the floor tile would become "very, very slippery" (Tr. 171). She notified the superintendent about the leaks in person, but management did not fix the leaks. Instead, a tarp was place in the ceiling of the lobby (Tr. 172).

Ms. Palak noticed cracks in the walls of the Building when she began her tenancy (Tr. 173). Light from the outdoors was visible through the cracks in the staircase wall (Tr. 173). She also noticed a larger crack between her apartment and apartment 4B, which ran across the whole wall (Tr. 174). However, she never complained to management regarding these cracks because she assumed that "nobody would let her live" in a building that was not safe (Tr. 177).

Ms. Palak testified that, because of construction in an adjacent building, her mailbox was filled with chunks of concrete (Tr. 179, 200). USPS subsequently left a notice stating that mail would no longer be delivered until the mailboxes were fixed, and the mailboxes remained broken for a few weeks (Tr. 179-80). Ms. Palak complained to the superintendent verbally and sent an e-mail to Mr. Silver on June 20, 2017, in which she complained that the mail situation was "unacceptable" (Tr. 180-81; Pet. Ex. 23). Later that day, Mr. Silver forwarded the message to Ms. Grabow and wrote "This tenant appears to be talking with 4B, Michelle Leonard" (Pet. Ex. 23). Mr. Silver directed Ms. Palak to communicate with Ms. Grabow regarding a potential rent adjustment (Tr. 183).

Ms. Palak stated that the Building entrance had two doors, the first of which did not have a lock and would remain partially open (Tr. 184). While the second door required a key, the lock was broken, so anyone could walk in (Tr. 184). She described this as an ongoing condition which lasted for about a year or two, during which she complained to management multiple times (Tr. 185).

Ms. Palak's HVAC unit broke during the winter of 2016 (Tr. 186). Although management sent someone to fix the unit, it broke repeatedly after being repaired (Tr. 186). She used extra blankets to sleep during cold weather, and used cold towels during the summer months (Tr. 187). She complained to the superintendent numerous times and e-mailed Mr. Silver on May 1, 2017, that the HVAC unit had "broken multiple times" in the last year (Tr. 187; Pet. Ex. 22). After six months of the HVAC unit repeatedly malfunctioning, the unit was replaced (Tr. 189). When the broken unit was removed, a large hole was left in the wall, which was covered with cardboard for eight days until the new unit was installed (Tr. 189).

After the evacuation on November 9, 2017, Ms. Palak was permitted to return to her unit twice to remove personal items, but was able to return only once due to her work schedule (Tr. 191). She estimated that about $3,500 worth of belongings remain in the apartment (Tr. 191-92). Ultimately, she received a settlement of $2,500 to compensate her for the belongings that remain in the apartment (Tr. 193).

Ms. Palak spoke with Mr. Gray in connection with his investigation regarding the Building, and his report largely corroborates her testimony (Pet. Ex. 6, Memorandum Regarding Conversation with A. Palak).

In addition to the testimony of the four tenants, petitioner presented the testimonies of Guy Donaldson, a Department investigator, and Peter Gray, a tenant advocate.

Investigator Donaldson

Investigator Donaldson conducted an investigation into the Building. As part of the investigation, he visited the premises and reviewed violations found in DOB and HPD databases (Tr. 221).

Investigator Donaldson identified a Department "Open Violation Summary Report," dated November 4, 2020, which indicates the Building has two open violations for water leaks (Tr. 223-24; Pet. Ex. 7). The violations, issued on June 28, 2017, report water leaks on the first, second, and third floors (Pet. Ex. 7). The Open Violation Summary Report also notes a third violation, dated June 20, 2017, for a broken mailbox for apartment 4B (Tr. 224; Pet. Ex. 7).

Investigator Donaldson also identified a DOB summons for "failure to maintain building in a code compliant manner" dated November 10, 2017, the day after the order to vacate was issued (Tr. 230; Pet. Ex. 12). The summons describes cracks throughout the masonry and indicates that due "to lack of maintenance/or repair to this pre-existing condition and the possibility of failure" the Building is unsafe (Pet. Ex. 12). A separate DOB summons from November 9, 2017, indicates that "exposure #3 wall has vertical crack from 1st story up to 6th story" that is "approximately 2 inches wide" (Pet. Ex. 12). Multiple DOB summonses were issued for failure to comply with the Commissioner's Orders contained in the original summonses (Pet. Ex. 12).

Certified 311 records in connection with unit 4B and dated June 17, 2017, describe the ceiling as "collapsing or falling" (Pet. Ex. 9). These records also identify heavy leaks from the ceiling and a broken or missing mailbox (Pet. Ex. 9). Records in connection with unit 2A and dated September 4, 2017, describe a problem with the door lock and lines of travel (Pet. Ex. 9).

Similar door issues were reported to 311 again on September 15, 2017 (Pet. Ex. 9). Complaints regarding the heat and hot water in unit 2B and 6E were reported on January 18, 2016, and February 15, 2016, respectively (Pet. Ex. 9). These records also reveal other complaints regarding the Building, including problems with the plumbing, heating, hot water, plaster, and windows (Pet. Ex. 9).

On September 25, 2019, Investigator Donaldson inspected the outside of the Building and observed scaffolding, a posted vacate order, and cracks on the exterior wall (Tr. 238, 247). He did not go inside the Building (Tr. 247-48). Photographs taken by Investigator Donaldson show large cracks along the walls with shoring in place (Tr. 238; Pet. Ex. 32).

Tenant Advocate Peter Gray

Mr. Gray is a tenant advocate with Lenox Hill Neighborhood House, where he assists tenants with housing issues (Tr. 262). The Department subcontracts Lenox Hill Neighborhood House to work on the CONH Pilot Program (Tr. 263). Mr. Gray's role is to conduct on-site investigations and gauge the status of a building (Tr. 263-64).

On October 1, 2019, Mr. Gray met with respondent at the Building (Tr. 264). As indicated in his investigative report (the "Investigative Report"), submitted to the Department detailing his tour of the Building, Mr. Gray walked through floors 3, 5, 6, and the roof, and also observed various apartments (Pet. Ex. 5). He observed scaffolding outside the Building and described the Building as "rundown" (Tr. 264). The Building smelled due to lack of airflow, the elevator was broken, and there was shoring on each floor he entered (Tr. 265). Inside the apartments, Mr. Gray saw that a "lot of things had been left" behind and that "[t]oiletries remained in some of the bathrooms" (Tr. 265). Mr. Gray took pictures during his visit to the property (Tr. 266; Pet. Ex. 39). These photographs show extensive shoring along the hallways (Pet. Ex. 39). Mr. Gray noted in the Investigative Report that the Building had been vacant for two years, that there was no work in progress, and that the "entire building is in disrepair, very dirty" with "[s]horing visible on all floors" (Pet. Ex. 5).

The Investigative Report also includes several memoranda detailing conversations Mr. Gray had with at least four additional Building tenants beyond the four who testified at trial. These tenants reported building conditions similar to those testified to by Ms. Leonard, Mr. Shellef, Ms. Sookraj, and Ms. Palak (Pet. Ex. 5).

Specifically, the memoranda indicate that numerous former tenants experienced what Mr. Gray characterizes as "living conditions that did not comply with the Warranty of Habitability" (Pet. Exs. 5, 6). These conditions included: cracks on the walls, some of which were so large tenants could see outside from inside their apartments; leaks inside their apartments and throughout the Building; feeling the Building shake; and problems receiving mail due to damaged mailboxes (Pet. Exs. 5, 6). These tenants also reported many of the same difficulties dealing with management, whom they described as "shady," "rude," and "unhelpful" (Pet. Exs. 5, 6).

Architect Notaro

Lastly, petitioner elicited testimony from Michael Notaro, an architect familiar with the Building. Mr. Notaro, president of MVN Architect LLC, testified that he has worked as an architect for almost 40 years (Tr. 694). He oversaw an inspection of the exterior of a building located at 1850 Second Avenue, which is adjacent to the Building. As part of his inspection, he was required to prepare reports and to communicate with the Department (Tr. 759). Sometime in the middle of 2017, he learned that the bottom portion of 1850 Second Avenue was enclosed by a wall shared with the Building (Tr. 759, 772). A survey of the property confirmed that this was a party wall shared by the two buildings (Tr. 759-60).

Mr. Notaro explained that the Building relies on the shared wall for "enclosure and bearing" while 1850 Second Avenue utilizes the shared wall only for enclosure (Tr. 698, 701). A partial vacate order was issued in 2017 for 1850 Second Avenue because of unstable masonry on the party wall (Tr. 707). The partial vacate order impacted the first-floor retail tenant at 1850 Second Avenue (Tr. 707; Pet. Ex. 43). Mr. Notaro stated that the unstable masonry could potentially fall and injure staff who maintained equipment on the roof of 1850 Second Avenue as well as people occupying the first-floor retail space (Tr. 708-09). He suggested that the unsafe conditions could adversely affect occupants in the first seven stories of 1850 Second Avenue (Tr. 710).

Mr. Notaro was present at 1850 Second Avenue on many occasions and observed the party wall progressively deteriorate over the course of years (Tr. 722). He stated that the deterioration accelerated after 2010 (Tr. 731). He submitted a report regarding the condition of the party wall to the City in 2017, but did not discuss the wall with anyone from the Building management until after the November 9, 2017 vacate order was issued (Tr. 732-34). However, he stated that Nancy

Wan, a representative of 1850 Second Avenue Services Company, reported by e-mail the condition of the wall to Building management prior to the evacuation order (Tr. 769-70).

On November 9, 2017, DOB issued a complaint to 1850 Second Avenue Services Company regarding 1850 Second Avenue (Tr. 710; Pet. Ex. 44). The complaint indicates that the Building has not been maintained in a code compliant manner "due to [the] compromise[d] condition of 300 E 96th Street" (Pet. Ex. 44). Mr. Notaro attended an on-site meeting with DOB officials (Tr. 711). He also engaged in various discussions with individuals from Walter & Samuels regarding repairs to the party wall (Tr. 712). Amidst conversations with James Scheld of Shapiro Associates, Mr. Notaro reviewed and gave feedback regarding design proposals to repair the party wall (Tr. 713). He indicated that his role was to review the designs and communicate with management for 1850 Second Avenue about the process (Tr. 714-15).

In March 2018, DOB officials met with representatives from both buildings (Tr. 715-16). DOB requested that 1850 Second Avenue Services Company file plans for a fire separation partition between the two buildings prior to the commencement of work on the party wall (Tr. 717). The purpose of the fire separation partition was to maintain a legal fire separation at the property line (Tr. 719). These plans were submitted in the weeks following the meeting (Tr. 717). The fire separation partition was to be constructed by 1850 Second Avenue Services Company (Tr. 717). Representatives of the Building were to be responsible for undertaking the repair of the enclosure and structure (Tr. 717).

The application for the fire separation partition was approved on June 4, 2018 (Pet. Ex. 45). Constructing the fire separation partition from the 1850 Second Avenue side presented difficulties because this space was occupied by the New York Foundation for Senior Citizens which houses elderly and frail individuals (Tr. 719). Mr. Notaro indicated that constructing the fire separation partition using access through the Building became a topic of discussion for the next few years (Tr. 719).

The parties continued to engage in discussions regarding repair of the party wall (Tr. 721). Mr. Notaro reviewed subsequent iterations of the repair proposals including a review of the shoring design involved in the repair of the Building (Tr. 721, 739). Towards the end of 2019, James Scheld submitted a new approach to the party wall repair (Tr. 739). This new plan involved an "encasement scenario" which involved construction of a reinforced concrete masonry unit which would attach to the frame of 1850 Second Avenue (Tr. 739-40). 1850 Second Avenue Services

Company agreed to proceed with the encasement scenario, which eliminated the need for the fire separation partition (Tr. 741).

Mr. Notaro indicated that James Scheld later communicated to him that there were additional problems involving the foundation of the Building (Tr. 741). The foundation had been built on wood piles which had deteriorated, requiring the use of underpinning to facilitate the replacement of the rotted wood with reinforced concrete (Tr. 741-42). Building management was also considering demolishing the Building (Tr. 743). Mr. Notaro noted that in the event of a demolishment, the encasement scenario should remain in place to form the fire separation partition and create a stabilizing element for the party wall (Tr. 743).

At a February 2020 meeting, representatives of the Building indicated that repairs to the party wall were not dependent on demolition (Tr. 745). The parties also discussed certain changes to the enclosure of the one-story extension of 1850 Second Avenue (Tr. 746). According to Mr. Notaro, the plan was satisfactory to 1850 Second Avenue Services Company and they were optimistic about moving forward (Tr. 747). The fire separation partition was to be progressively installed from the Building side while portions of the party wall were repaired (Tr. 793). However, no work was ultimately done in connection with this plan (Tr. 748).

Respondent's Evidence

Respondent presented testimony from the superintendent of the building, Vate Pepushaj, and the Building's managing agent, Norman Silver. Together they handled the day-to-day operations of the Building while acting as the point of first contact between tenants and management. Respondent, an asset manager and leasing agent with Walter & Samuels and a part owner of the entity that owns the Building, also testified.

Building Superintendent Pepushaj

Mr. Pepushaj owns a company named I&V Reliable Corporation, under which he worked as a contractor and superintendent for the Building (Tr. 388-89). His company would invoice Walter & Samuels for his work in both roles (Tr. 389). As superintendent, Mr. Pepushaj maintained the Building by removing garbage, cleaning, shoveling snow, and handling complaints from tenants (Tr. 389). He was present in the Building every morning, Monday through Saturday, and would sometimes return in the afternoon to complete additional tasks such as trash removal (Tr. 391, 450, 452). Tenants would contact him with requests by text message, phone, and

sometimes e-mail (Tr. 448). He testified that he would complete small repairs immediately but required management approval for larger repairs (Tr. 391, 450).

Mr. Pepushaj testified that he observed leaks in the Building lobby which caused the floor to become wet and slippery during heavy rain (Tr. 392, 461-62). To deal with the leaks, he would use a bucket to collect the water and he would mop the floor (Tr. 394, 462). A tarp was used while the leak was investigated (Tr. 462). He stated that the Building's roof was replaced by different contractors in the summers of 2014, 2015, and 2016 (Tr. 396-97, 463). In the summer of 2017, the lobby ceiling was opened to attempt to trace the source of the water leaks (Tr. 431). Plastic was used to cover the ceiling (Tr. 432). Mr. Pepushaj invoiced Walter & Samuels for work in connection with the leaks on October 13, 2014, September 12, 2015, July 24, 2016, and October 8, 2017 (Tr. 429; Resp. Ex. W-1).

The Building has two front entrance doors (Tr. 399). Mr. Pepushaj indicated that the first entrance door, opening onto the sidewalk, was always left open to provide access to the intercom which is located between the first door and the second, inner door (Tr. 399). In August of 2015, the lock to the second inner door had to be replaced because the magnetic strip in the mechanism failed, preventing it from locking (Tr. 401-02; Resp. Ex. W-1). The handle for the second door would sometimes become loose and Mr. Pepushaj would have to tighten it (Tr. 402-03). Both doors had previously been replaced in 2014 (Tr. 399-400, 464-65).

In the summer of 2016, after management received complaints from Ms. Palak that her HVAC unit was not working, an air-conditioning company made multiple attempts to repair the unit (Tr. 414-15, 465). Mr. Silver later approved the replacement of the entire unit (Tr. 415). After the old unit was removed, the air-conditioning company covered the hole in the wall with cardboard until the new unit could be installed (Tr. 416). Mr. Pepushaj claimed that the unit was only broken for about a week (Tr. 465). He did not recall receiving complaints from Ms. Palak during the winter (Tr. 466). Mr. Pepushaj was aware that Ms. Palak would be leaving her unit at the end of her lease, and he observed that, following the Vacate Order, her apartment was empty except for a single cardboard box (Tr. 417-18).

Prior to Ms. Sookraj moving into her apartment, Mr. Pepushaj painted and prepared the unit for her arrival (Tr. 427-28; Resp. Ex. W). Upon recalling the events in which Ms. Sookraj became locked inside her apartment, Mr. Pepushaj stated he did not consider the situation to be an emergency (Tr. 467). He stated that Ms. Sookraj began texting him at 9:45 p.m., and that he responded that he would come to her unit in the morning (Tr. 406). He instructed her by text

message to use a screwdriver or credit card to open the door (Tr. 406; Pet. Exs. 24, 25). He indicated that she was "afraid to do that" and "afraid of staying" in the apartment (Tr. 406). The following day, after the door had been forcibly opened by the FDNY, he had the door replaced and a locksmith installed a new lock (Tr. 407; Resp. Ex. W-1). Ms. Sookraj also complained to Mr. Pepushaj about a leak in her bathroom, but he was unable to identify any leaks and suggested that the water damage was the result of a lack of ventilation (Tr. 412-13).

Mr. Pepushaj plastered cracks in the hallways and inside apartments but indicated that he did not observe cracks in the lobby (Tr. 404-05, 453). He would repair cracks using tape and plaster (Tr. 404). Neither the tenants nor the authorities were alerted to these cracks (Tr. 461). In early November 2017, Mr. Pepushaj saw the large crack which was photographed by Ms. Leonard (Tr. 454, Pet. Ex. 21). He also saw cracks on the third, fifth, and sixth floors (Tr. 475). He notified management, who directed Colgate Restoration to install a small amount of shoring on the sixth floor (Tr. 459-60, 478). When asked why he had not observed the cracks from the outside of the Building, Mr. Pepushaj indicated that the Building does not have a yard from which these cracks could be seen (Tr. 424).

During the week before the Vacate Order, Mr. Pepushaj noticed that tape on the walls had begun to curl, which he believed meant "something is moving" (Tr. 421). Mr. Pepushaj reported this development to management (Tr. 421). An engineer and construction company were hired to remove sheet rock to allow for inspection of the walls (Tr. 422).

Managing Agent Silver

Mr. Silver has been employed as a managing agent by Walter & Samuels for almost 40 years (Tr. 481-82, 515). He manages approximately 12 buildings, including the Building, by supervising day-to-day operations, overseeing the superintendents, responding to tenant complaints, collecting rent, and processing paperwork in connection with the property (Tr. 482, 515). He is in daily contact with the superintendent for the Building (Tr. 515). Mr. Silver indicated that the current owners of the Building acquired title in July of 2013 (Tr. 482). He explained that management did not typically confer with the owners regarding conditions at the Building (Tr. 519).

Mr. Silver has authority to approve routine maintenance work, but prior approval is needed for repairs that exceed a certain price point (Tr. 521). Any violations issued to the Building would be addressed with the superintendent (Tr. 499).

Between July 2013 and when the Building was evacuated, Mr. Silver received phone calls and e-mails from tenants regarding issues with the Building (Tr. 483). Sometimes tenants would reach out directly to Mr. Silver but other times they would contact the superintendent (Tr. 483). Mr. Silver testified that he would call a contractor if needed or would notify the superintendent to conduct certain repairs (Tr. 483).

Mr. Silver indicated that the general plan for the Building was to keep tenants in their apartments with lease renewals, or if they chose not to renew, to find new tenants as quickly as possible (Tr. 483). When an apartment was rented to a new tenant, Mr. Silver would inspect the unit (Tr. 504). Otherwise, he would not inspect an apartment unless he was called by a tenant (Tr. 504). Mr. Silver was present at the Building typically once a week but sometimes every other week (Tr. 483). He would meet with the superintendent to evaluate any conditions that needed repair (Tr. 484).

At some point, the Building superintendent told Mr. Silver that construction at a nearby building had caused damage to the mailboxes in the lobby (Tr. 484). He inspected the damage on the same day that it was reported (Tr. 484). He notified the developer of the adjacent property via e-mail and followed-up with one or two phone calls (Tr. 485; Resp. Ex. DD). The developer sent someone to photograph the damage and take measurements for replacement boxes (Tr. 485-86). Mr. Silver testified that he had constant communication with the developer who provided updates about the timeline for replacing the mailboxes, which needed to be custom manufactured (Tr. 486; Resp. Ex. DD). During the construction on the adjacent property, Mr. Silver observed that the Building would shake (Tr. 498).

A printout of the e-mails between Mr. Silver and the contractor contains a hand-written notation which reads “No mailboxes from: 6/3/17-7/7/17” (Resp. Ex. DD).

Mr. Silver described the lobby and entrance of the Building as a “setback” that was built after the property had originally been developed (Tr. 493). The lobby area is only one story tall (Tr. 493). He acknowledged that when there was heavy rain, the lobby would leak (Tr. 492-93). He indicated that this had been occurring since management took over the Building (Tr. 493). Mr. Silver was alerted to the leaks by tenants and the superintendent (Tr. 493). He described the leaks as serious and “more than a trickle” (Tr. 516). Typically, the superintendent would attempt to find the source of the leak and repair it (Tr. 493). When this was not possible, an outside contractor was called (Tr. 493). Mr. Silver estimated that he observed the leaks four to six times between 2013 and 2017 (Tr. 494).

To contain the leaks, the Building superintendent installed a tarp beneath the leaks, although Mr. Silver could not recall when this occurred (Tr. 495). The tarp remained in place for about six weeks (Tr. 525). Mr. Silver typically called a contractor within a few days of learning of the leaks (Tr. 496). He estimated that repairs were attempted four times (Tr. 495). After the repairs, the leaks would stop for a period of months and then reoccur in a different part of the roof (Tr. 496). Because the lobby was an add-on to the building and management did not possess any plans for the structure, no one was able to determine the source of the leaks (Tr. 527).

According to Mr. Silver, the original contractor used for the repairs was Mesta Renovation Inc. (Tr. 509). That company was subsequently taken over and began doing business under the name Kanaris Contracting Corporation (Tr. 509). Mr. Silver identified several invoices from these two entities (Tr. 510; Resp. Ex. FF). He authorized payment for these invoices and confirmed that the work had been done in each case (Tr. 510).

Mr. Silver testified that Colgate Restoration had also been hired to perform waterproofing and other repairs (Tr. 505). He identified two invoices in connection with this work, which were signed by Mr. Silver and another member of management (Tr. 506; Resp. Ex. EE). Prior to approving payment, Mr. Silver would confirm that the work had been done by speaking with the superintendent and, if necessary, visiting the Building to inspect the work (Tr. 507). The first invoice was for a repair to the main roof (Tr. 508; Resp. Ex. EE). The second invoice was for emergency repairs to the lobby roof and stairs (Tr. 508; Resp. Ex. EE). Mr. Silver indicated that the second job involved waterproofing and stucco replacement (Tr. 508).

Mr. Silver recalled that the door to the entrance of the Building had to be replaced although he could not remember when this occurred (Tr. 525, 527). He stated that management "certainly wouldn't leave the door wide open" (Tr. 527). He estimated that it took two or three weeks to get a replacement (Tr. 525). He did not recall how many complaints he received regarding the door; he suggested "it might have been just a handful" (Tr. 526).

During routine walkthroughs of the Building, the superintendent would sometimes point out cracks to Mr. Silver (Tr. 496). Some of these cracks were in the stairwell but were strictly cosmetic (Tr. 496-97). Similar cracks were also present in the public hallway (Tr. 497). These cracks were typically six inches long and half an inch or less wide (Tr. 497). Mr. Silver suggested that these cracks were also cosmetic (Tr. 497). At the time, these cracks did not concern Mr. Silver as he felt that they were typical for an older building (Tr. 498).

Mr. Silver was unclear about the timing of events leading up to the Vacate Order. Towards the end of October 2017, he had not observed any condition in the Building that would be of concern (Tr. 501). Around this time, he performed his routine inspections with the superintendent during which they walked through the Building from top to bottom (Tr. 501). He did not observe any cracks in the sheetrock although he did receive a complaint from a tenant regarding sheetrock (Tr. 502). Upon inspection of the tenant's unit, he observed a separation of the sheetrock in the unit (Tr. 502). He subsequently notified senior management about this condition (Tr. 502).

Mr. Silver testified that sometime during the 30-day period prior to the Vacate Order, the superintendent pointed out to him a structural crack on the south wall (Tr. 504). This crack was not visible from the street (Tr. 504). Sometime before the Vacate Order, Mr. Silver went to an adjacent building to view the crack (Tr. 505). Around this time, he also observed large cracks in the sheetrock of the upper floor hallways (Tr. 500). He notified senior management about these conditions (Tr. 500-01). Senior management brought in an engineer who recommended the immediate installation of shoring (Tr. 501). Mr. Silver did not notify the tenants or any authorities about these events (Tr. 524).

Mr. Silver testified that to his knowledge, ownership or management never attempted to interrupt services or create conditions that would cause tenants to vacate the Building (Tr. 514). Prior to the Vacate Order, Mr. Silver was not aware of any tenants who had left the Building because of interruptions in service or lack of repairs (Tr. 514).

Respondent's testimony

Respondent testified that he is an asset manager and leasing agent with Walter & Samuels and has worked in this role for over 20 years (Tr. 607). Respondent was responsible for making sure that apartments within the Building were occupied (Tr. 608). He also worked with the Building manager, Mr. Silver, and the superintendent, Mr. Pepushaj, to manage the day-to-day operations of the Building (Tr. 608).

The owners, 96 & Second LLC, acquired title to the Building in 2013 (Tr. 608). Respondent has a three percent ownership interest in the company (Tr. 627). The business plan was to maintain the Building fully occupied and in good condition (Tr. 608). When a lease approached expiration, management would contact the tenant to determine if they were interested in renewing the lease (Tr. 610). Incremental increases in rent were sought where the market allowed; otherwise renewals were offered at the existing rent (Tr. 611). Respondent's

understanding was that all the units in the Building were free market apartments (Tr. 611). He testified that he never checked whether the rent being charged was below the standard for rent stabilization guidelines (Tr. 635).

When a tenant moved out, the superintendent and managing agent would inspect the unit and discuss any necessary upgrades with respondent (Tr. 611-12). Keeping tenants in their apartment was a priority because when a tenant left management would often need to spend funds on improvements (Tr. 612). Management would also have to bear the cost of lost rent if a replacement tenant was not immediately found (Tr. 612-13). Respondent suggested that the rent rolls illustrate this plan by showing consistent levels of rent (Tr. 615-16; Resp. Ex. Y).

Respondent is listed as the applicant for the CONH (Tr. 678). After filing for the CONH, the Department informed respondent that Lenox Hill Neighborhood House would be conducting an inspection of the Building (Tr. 638). Respondent met with Mr. Gray at the Building although he was unfamiliar with Mr. Gray's role and did not know that the Department could refer the investigation to a community organization (Tr. 639).

With regard to the maintenance of the Building, respondent claimed that Mr. Silver monitored day-to-day operations (Tr. 648). In certain circumstances, issues would then be reported to respondent (Tr. 648). Respondent acknowledged that he knew that construction was taking place near the Building (Tr. 643).

Respondent testified that he never saw the crack in the south wall of the Building until a few days before the Vacate Order (Tr. 653). He stated that the Vacate Order was issued because "there was some physical condition that rendered the building unsafe for the tenants" (Tr. 656). Respondent was aware that there were plans to remedy the crack but was not aware of the details. His involvement with the Building was limited after the Vacate Order went into effect (Tr. 659-60). He was not involved in discussions regarding the party wall and was not aware of the specifics of the DOB violations and orders issued (Tr. 661-62, 672-73). Further, he did not recall that a criminal summons had been issued to the Building (Tr. 662). He was also unaware of whether Walter & Samuels or agents of the owner were monitoring the Building (Tr. 664).

Respondent was aware that all tenants were forced to vacate the Building, leaving behind much of their belongings (Tr. 668). He could not explain why it took more than 18 months from the Vacate Order to file the COHN application (Tr. 679-80).

Mr. Almiroudis

Adamantios Almiroudis, who holds a degree in engineering, is a general contractor and has been a principal at Kanaris Contracting Corporation for five years (Tr. 568-69). Prior to this position, he worked at Mesta Renovation. Under both these companies, Mr. Almiroudis has performed work for the Building (Tr. 568, 570).

In the summer of 2014, Mr. Almiroudis was retained to perform waterproofing work for the Building and identify the source of water leaks (Tr. 570). When he inspected the roof, Mr. Almiroudis saw that several areas were torn and damaged (Tr. 574). He described the situation as an "ongoing operation" and that there was "a lot of vibration in the area, so there was continuous work performed on the façade or on the roof to help mitigate the problem" (Tr. 576). He indicated that there were potential penetration points, such as "pitch pockets," which required special waterproofing (Tr. 574). Probes were cut into the ceiling to look for the source of the leaks (Tr. 575). Approximately 50 square feet of roof had to be removed and waterproofed (Tr. 576). After completing the work, Mr. Almiroudis believed that the issues had been resolved (Tr. 575, 578).

In November of 2016, Mr. Almiroudis returned to the Building to deal with another leak in the lobby (Tr. 578). He performed an inspection that included the chimney stack that went to the roof (Tr. 578). Water was entering from the chimney stack through another stack connected to the mailroom (Tr. 579). His inspection revealed a crack in the acrylic stucco, approximately ten feet from the roof, which required repair (Tr. 579). Mr. Almiroudis indicated that the Building was under "high vibrations" because of nearby construction (Tr. 580).

Steve Marku

Steve Marku, the owner of a construction business called Colgate Restoration, testified that he dispatched a crew to patch minor leaks in the main roof of the Building in September of 2017 (Tr. 535-37). He was called again in early October of 2017 to address leaks in the façade of the Building (Tr. 537-38). His team used hanging scaffolds to patch the cracks, and subsequently applied an elastomeric coating, which prevents water from re-entering the façade (Tr. 538-39). They also performed emergency repairs on the first-floor roof, lobby, and stairs, and repaired minor cracks on the front of the Building (Tr. 540, 542).

Mr. Marku testified that in November of 2017, drywall was removed after a crack was discovered inside the hallway (Tr. 543). Mr. Marku observed the crack and recommended that an engineer immediately survey the area (Tr. 544). The engineer suggested the installation of shoring

and that drywall on other floors be removed to gain an understanding of the integrity of the rest of the Building (Tr. 545). Mr. Marku stated that as additional drywall was removed, it became clear that there were "much bigger issues at the building than anyone ever thought" (Tr. 545). Roughly ten days prior to the Vacate Order, shoring was installed in the Building (Tr. 556). On the recommendation of DOB and the engineer, a sidewalk shed was also installed (Tr. 546).

Howard I. Shapiro & Associates ("Shapiro Associates") was hired to handle the engineering side of the process (Tr. 547). Shapiro Associates requested that additional, more robust shoring be put in place to prevent the wall from collapsing (Tr. 547). Monitoring devices were installed on the front wall along with tarps to prevent additional water from entering the Building (Tr. 548). Conversations began between Shapiro Associates, Colgate Restoration, and Building management regarding a complete rebuild of the wall (Tr. 549). These conversations continued for five or six months (Tr. 549).

Subsequently repair plans for the wall were submitted to and approved by DOB (Tr. 549). The plans required that the entire wall be demolished to the foundation and a new wall built in its place (Tr. 550). Re-building the wall also required partial demolition of a wall shared with the adjacent building (Tr. 555-56). Mr. Marku indicated that an agreement could not be reached with the owners of the adjacent property (Tr. 550-51). He also determined that the wall could not be re-built (Tr. 551).

James Scheld

James Scheld is the structural engineer who was brought in to evaluate the structural integrity of the Building. He has been a structural engineer with Shapiro Associates for 17 years (Tr. 311). He was qualified as an expert for the portion of his testimony that pertained to engineering (Tr. 314).

Mr. Scheld was hired by Walter & Samuels to assess the condition of the Building in 2017, shortly after the Vacate Order was issued (Tr. 315). Mr. Scheld was provided with a survey prepared by an inspection service called MT Group which indicated that the Building was in good condition with only minor deficiencies (Tr. 348-49; Resp. Ex. V). The survey contains a photo of certain cracks in the stucco, plaster, and masonry. Mr. Scheld indicated that these cracks did not impact the structural stability of the Building (Tr. 350-51; Resp. Ex. V). Based on the survey, Mr. Scheld did not see any cause for concern with regard to the Building in November of 2015 (Tr. 349-50).

On November 10, 2017, Mr. Scheld evaluated the crack in the Building's south wall which he described as a "full-height crack from the roof to the ground floor" that was "1-5/8 inch at the roof line and tapered to zero at the ground floor" (Tr. 315). Because the floors were in danger of collapsing, he ordered ten-feet of shoring be installed on either side of the crack from the roof to the cellar (Tr. 315). To inspect for additional cracks, Mr. Scheld instructed the contractor to remove the drywall covering the south wall (Tr. 317). Once the drywall had been removed, more cracks were discovered towards the western end of the Building (Tr. 318). The bricks within the wall had also shattered, causing the wall to buckle (Tr. 318).

Mr. Scheld submitted a letter to the Department on August 7, 2019, with affixed photos taken at the end of 2017 (Tr. 319-21; Resp. Ex. S). One of the photographs submitted shows the crack in the Building which resulted in the Vacate Order (Tr. 323; Resp. Ex. S, Fig. 2). Mr. Scheld stated that to see this crack, one would need to stand in the back of 1850 Second Avenue on the roof of the extension (Tr. 323-24). The crack was not visible from any other outdoor vantage point (Tr. 323). According to Mr. Scheld, the crack only became visible inside the Building once the drywall had been removed (Tr. 369-70).

The third photo provides a close-up, showing the extent of the crack in greater detail (Tr. 325; Resp. Ex. S, Fig. 3). The fourth photo, taken from the sixth floor, provides a close-up of the crack at its widest point (Tr. 325; Resp. Ex. S, Fig. 4). The fifth photo shows an opening in the wall exposing the concrete masonry behind it (Tr. 325; Resp. Ex. S, Fig. 5). By testing the wall in various locations, Mr. Scheld was able to verify that the wall was originally 12 inches wide because the original width remained intact in certain locations along the wall (Tr. 326). The sixth photo reveals collapsed brick that had fallen out of the wall (Tr. 327; Resp. Ex. S, Fig. 6).

After the shoring was installed, the plan was to perform a partial demolition of the party wall which would then be re-built to the correct thickness (Tr. 330-31). However, Walter & Samuels hired a geotechnical engineer who concluded that timber piles beneath the Building were rotting, compromising the foundation, and causing the Building to tilt (Tr. 334). Mr. Scheld attributed the large crack running the height of the Building to this tilting and suggested that the crack may have also caused the stair tower and elevator shaft to pull away from the main structure (Tr. 334). In connection with nearby construction at 302 East 96th Street, drilling was being performed which may have disturbed the foundation (Tr. 335). He also suggested that construction on the 96th Street subway in 2010 may have also been a contributing factor, as evidenced by

monitors which were installed by the MTA on existing cracks within the Building (Tr. 337-38; Resp. Ex. S, Fig. 9).

In August of 2018, after the investigation of the foundation, it was determined that it was best to demolish the Building in its entirety (Tr. 340, 378). Fixing the foundation problems would have required jacking up the full weight of the Building and installing new piles underneath the foundation (Tr. 342-43). Mr. Scheld testified that remedying the DOB violations was "not possible" and "doesn't make sense" (Tr. 343). In his career, he had never seen a building of this age undergo such work (Tr. 344). Further supporting demolition, initial plans for rebuilding the party wall required a "two-hour fire rated wall" be built to protect the adjacent senior citizen tenants in 1850 Second Avenue (Tr. 340-41). Mr. Scheld indicated that management from 1850 Second Avenue was opposed to construction that would impact these senior citizen tenants (Tr. 341).

Two plans were developed (Tr. 344). The first involved keeping the compromised party wall and building a new eight-inch concrete masonry wall in front of it (Tr. 344). An application for the partial demolition of the party wall was filed with DOB in early 2018 (Tr. 331-33, 378; Resp. Ex. PW-1). The second plan was to demolish the Building (Tr. 344). An application to demolish the entire building was filed with DOB in June of 2019 (Tr. 344-45, 378; Resp. Ex. PW-1). Mr. Scheld indicated that this plan has been submitted three times but could not move forward without the certificate of no harassment (Tr. 346).

In anticipation of a meeting with representatives of 1850 Second Avenue, a drawing putting forth the demolition plan was prepared (Tr. 351-54; Resp. Ex. R). The plan involved a repair scheme through which, following the demolition of the Building, the party wall would be repaired, and an eight-inch wall would be built to lock it in place (Tr. 354-55). This plan was received positively by the representatives of 1850 Second Avenue Services Company (Tr. 355).

Mr. Scheld reviewed the violation received by the Building on November 13, 2017, indicating that each one of the remedies had been implemented (Tr. 362-36; Pet. Ex. 35). In addressing the violation received on November 14, 2017, Mr. Scheld indicated that it was impossible to comply because the remedies required access to 1850 Second Avenue (Tr. 365-66; Pet. Ex. 36). In connection with the criminal summons for failure to complete job application number 14073938, Mr. Scheld stated that "the due diligence of investigating the foundation" and having to "coordinate with the adjoining property owner" made completing the job "impossible"

(Tr. 366-67). On cross-examination, Mr. Scheld acknowledged that the work had not been completed by January 20, 2018 as required by DOB violation (Tr. 374-75).

Harassment

The issue before this tribunal is whether respondent engaged in harassment against the tenants.[2] The City's Housing Maintenance Code definition of "harassment" by or on behalf of a building owner includes any one of the following acts:

> (b) repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit;
>
> (b-1) an interruption or discontinuance of an essential service that (i) affects such dwelling unit and (ii) occurs in a building where repeated interruptions or discontinuances of essential services have occurred;

Admin. Code § 27-2004(a)(48), (b), (b-1); *see also* Admin. Code § 27-2093.1(a) ("harassment" under the Pilot Program has the meaning set forth in subdivision 48 of section 27-2004 of the Administrative Code). The statute includes a rebuttable presumption that acts of harassment were committed on the owner's behalf with the intent to cause the lawful tenant to vacate a multiple dwelling unit. Admin. Code § 27-2004(a)(48)(ii); *see Dep't of Housing Preservation & Development v. Edelstein*, OATH Index No. 490/12 at 2 (Dec. 7, 2012) (owner may rebut presumption of intent by a preponderance of credible evidence); *Dep't of Housing Preservation & Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 at 12 (Dec. 29, 2006). The specific allegations are addressed below.

Leaks and Water Accumulation in the Building's Lobby and in Units

Petitioner proved that respondent failed to correct conditions in the Building in a timely or diligent manner, which resulted in the consistent leaking of water in the Building lobby area. Ms.

[2] The parties, respondent in particular, also sought to elicit testimony from the witnesses regarding the appropriate steps that should be taken in connection with the Building moving forward, including respondent's preferred option of demolishing the Building. This question is not before this tribunal and is best left to the agencies and stakeholders with expertise in the field. But without question, public safety should be the central criteria for determining any future steps for the Building.

Leonard, Mr. Shellef, and Ms. Palak all credibly and consistently testified that when it rained, a significant amount of water would collect in the Building lobby area.

Ms. Palak, who lived in the Building from 2013 to 2017, credibly testified that there was a major leak in the Building's lobby area, and smaller leaks in the staircase area. She witnessed the leaks "as many times as there was rain" and noted that the floor would become slippery. To address the leak, the superintendent placed a tarp on the ceiling of the lobby (Tr. 172). Another tenant, Ms. Leonard, also saw a "major" leak in the lobby during the time she lived in the Building, from May 2017 until early September 2017 (Tr. 16-17). She stated that the leak was "very heavy" and that if it was raining outside, "it would run nonstop, and the lobby would be completely covered in water" (Tr. 47). Her testimony was corroborated by video evidence, which shows water streaming down from a large piece of plastic material taped to the ceiling and puddling on the tile floor below (Pet. Exs. 14, 15). A third tenant, Mr. Shellef, added that when it would rain, "it would rain inside the building" resulting in wet, dangerous floors (Tr. 77).

Respondent did not contest the leaks occurred in the lobby area when it rained. Indeed, Mr. Silver, the managing agent, conceded that when it rained heavily, the lobby would leak (Tr. 492-93). He further testified that the leaks had been occurring since management took over the Building, which presumably meant since 2013, when the owners acquired the Building. Yet in 2017, the leaks continued.

Respondent argued that Building management contracted several contractors to make repairs multiple times and stop the leaks (Tr. 537-40, 570-80). Respondent also sought to mitigate the leaks with a tarp (Tr. 47, 172, 495, 462). However, none of these actions solved the problem, and the leaks returned although sometimes in a different portion of the lobby (Tr. 496).

The weight of the evidence establishes that respondent's hodge-podge and myopic approach to address the leaks allowed for repeated interruptions of essential services and substantially impaired the habitability of the Building. Put another way, while respondent knew or should have known about the major and consistent leaks in the lobby that went on for years, the growing cracks in the wall that required shoring, the nearby construction project affecting the Building, and the frequent shaking of the Building, it seems to have never occurred to respondent or the owners that these were signs of a greater structural problem that required more than just roof repairs.

Indeed, it was Ms. Leonard, a tenant, who on November 9, 2017, saw shoring being placed in the lobby area and wrote an e-mail to management pleading, "Let me out of my lease. The

building is collapsing" (Pet. Ex. 21). Her alarm caused her to call 911, which resulted in the evacuation of the building by FDNY. Yet Mr. Pepushaj and Mr. Silver, the building superintendent and managing agent, seem to believe the Building was in good condition up until the time of the evacuation. Instead, the evidence is clear that the leaks were a serious, reoccurring problem impacting all tenants in the Building.

Part of the objective of the harassment statute is to keep tenants in their homes. *Allen v. 219 24th St. LLC*, 2020 N.Y. Misc. LEXIS 1753 at *69 (N.Y. Civ. Ct. May 6, 2020). Respondent's contention that they wanted to keep tenants in the Building as part of their business plan is insufficient to overcome the evidence of deferred or insufficient maintenance which had the effect of causing tenants to move out of their units.

In sum, the evidence showed that respondent committed acts of harassment by failing to fix conditions leading to leaks and water accumulation in the Building's entrance lobby and stairways. Respondent failed to rebut the inference that this harassment was committed with the intent to cause lawful occupants to vacate their units or surrender their rights. *See Dep't of Housing Preservation & Development v. Goldsmith,* OATH Index No. 2118/12 at 30 (Aug. 27, 2013) (failure to correct recurring leaks and defective floors, doors, and windows, deemed harassment); *Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07 at 15, 21 (May 16, 2007) (persistently ignoring deplorable conditions, including leaks, constitutes harassment).

Additionally, petitioner proved that respondent failed to fix conditions leading to leaks inside lawful occupants' units. Ms. Sookraj testified that a leak in her bathroom ceiling caused drywall and plaster to fall off (Tr. 139-40). The reports prepared by Lenox Hill Neighborhood House also note similar leaks within the bathrooms of certain units (Pet. Exs. 5, 6). Yet there is no evidence that respondent or the owners addressed or fixed these issues.

Wall Cracks

Petitioner alleges that respondent failed to repair cracks in the walls in public areas within the Building (ALJ Ex. 1). The evidence proves the presence of various cracks throughout the Building. Some of these cracks appear to have been small and potentially "cosmetic" rather than structural (Tr. 173-77, 350-51, 404-05, 453, 496-97, 542; Pet. Exs. 5, 6; Resp. Ex. V). Other cracks were larger and may have impacted the overall integrity of the Building (Tr. 49-50, 238, 454, 500-04; Pet. Exs. 12, 21, 32). The testimony of the superintendent, Mr. Pepushaj, suggests that he made attempts to remedy cracks using tape and plaster (Tr. 404-06). Mr. Silver confirmed that

Mr. Pepushaj would show him these cracks during their walkthroughs of the Building (Tr. 496-98).

Respondent purports to have been unaware of the structural problems with the Building prior to the period immediately before the Vacate Order (Tr. 501-04, 653-60, 841). The timing of the complaints from Ms. Leonard corroborates that the more extreme cracks may not have been immediately visible (Tr. 36-40; Pet. Exs. 20, 21). The testimony of Mr. Scheld also supports respondent's position that the structural cracks were not discovered until the removal of certain pieces of drywall on November 10, 2017 (Tr. 315-18). However, other testimony establishes that while respondent made cosmetic fixes to the cracks in public areas, he failed to adequately address the visible cracks and ignored numerous warning signs of actual structural problems.

Ms. Palak credibly testified that she had noticed cracks in the walls since 2013, and that light from the outdoors was visible in the staircase (Tr. 173-74). The reports prepared by Lenox Hill Neighborhood House corroborate the existence of these major cracks and indicate that management took the position that these were cosmetic issues and failed to investigate further (Tr. 275-76; Pet. Exs. 5, 6). It strains credulity that cracks which allow daylight into a building should be characterized as "cosmetic." Further, the failure to thoroughly inspect the Building despite the consistent leaks and cracks shows a lack of diligence, which allowed unsafe conditions to persist despite numerous complaints from tenants. Indeed, once Mr. Scheld was hired to conduct such an inspection, it seems he had no great difficulty gaining access to the adjacent building to see the crack that led to the Vacate Order.

Petitioner also alleged that respondent failed to repair cracks in the walls inside lawful occupants' units (ALJ Ex. 1). The reports prepared by Lenox Hill Neighborhood House credibly indicate that several tenants had extensive cracks in their units which were never repaired despite complaints to management (Pet. Exs. 5, 6). Respondent failed to provide any evidence to rebut these claims. Accordingly, the evidence established that respondent committed acts of harassment by failing to adequately address and inspect the Building for cracks, despite sufficient warning signs that the Building was unsound, which eventually led to the evacuation of tenants from the Building, and for which they have yet to return.

Issues with Front Door

Petitioner alleged that respondent failed to fix the Building's front door (ALJ Ex. 1). Petitioner's witnesses testified that at certain times the locks to the doors at the front of the Building

were broken in such a way that left the Building completely open (Tr. 139-40, 184). Records from 311 also indicate problems with the front door (Pet. Ex. 9).

Mr. Pepushaj testified that the first door to the Building is always left open in order to provide access to the intercom which is located between the two front doors (Tr. 399). Mr. Pepushaj testified to making timely repairs to the second door when necessary (Tr. 399-403). Mr. Silver testified that at a certain point, one of the doors needed to be replaced (Tr. 525). He estimated that it may have taken up to three weeks to get a replacement (Tr. 525).

In addition to these problems with the front door, Ms. Sookraj testified that when she first moved into her apartment, the door to her unit broke, locking her inside her apartment (Tr. 135). Mr. Pepushaj failed to provide her with effective assistance (Tr. 137, 506; Pet. Exs. 24, 25). She was forced to call the FDNY, which had to break down her door (Tr. 137-38, 407). Ms. Sookraj indicates that for more than a week, while the front door was broken, her unit door also remained broken (Tr. 139). Mr. Pepushaj disputed this, stating that the lock was fixed the next day even as he acknowledged that the door ultimately had to be replaced (Tr. 407-08).

While discrete maintenance issues may not rise to the level of harassment, the persistent problems with the front door where it would remain unlocked, and the weeklong period during which Ms. Sookraj's unit door remained broken, constitutes a denial of an essential service, and therefore harassment.

Broken Mailboxes

Petitioner alleges that respondent failed to fix the broken mailboxes (ALJ Ex. 1). Ms. Leonard testified that on August 31, 2015, she received a notice from USPS which indicated that, because the mailboxes could not be locked, mail would need to be picked up at the post office (Tr. 26-29; Pet. Exs. 16, 17). Mr. Shellef, Ms. Palak, and other tenants also identified this problem, as do records from 311 (Tr. 81, 179-80; Pet. Exs. 5, 6, 9).

Mr. Silver testified that construction at a nearby building caused damage to the mailboxes which prevented USPS from delivering mail (Tr. 484-86). He worked closely with the developer of the adjacent property to replace the mailboxes (Tr. 485-86; Resp. Ex. DD). The evidence suggests that the mailboxes remained damaged for about a month, from early June 2017 until early July 2017 (Resp. Ex. DD). According to Mr. Silver, the mailboxes needed to be custom manufactured (Tr. 486). The evidence establishes that Mr. Silver made appropriate efforts to

remedy the issues with the mailboxes and that the failure to fix the broken mailboxes did not constitute harassment.

Conditions Which Led to the Vacate Order

Petitioner alleges that respondent failed to repair conditions which led to the issuance of the Vacate Order (ALJ Ex. 1). Respondent claims to have been unaware of these conditions (the structural issues with the Building manifested by major leaks when it rained and significant cracks in the Building) prior to the Vacate Order and asserts that they were beyond his control (Tr. 501-04, 653-60, 841, 853). These issues have already been discussed above. Petitioner proved that during the inquiry period, respondent failed to fix a number of conditions within the Building, which led to the Vacate Order. Respondent failed to rebut the statutory presumption that these acts or omissions constitute acts of harassment that were intended to cause lawful occupants to vacate their units or waive their occupancy rights.

Substantial Interference with and Disturbing the Comfort, Repose, Peace and Quiet of Lawful Occupants

Petitioner alleged that respondent substantially interfered with and disturbed the comfort, repose, peace and quiet of lawful occupants, causing or intending to cause such lawful occupants to vacate or surrender their occupancy rights (ALJ Ex. 1). Tenants within the Building have dealt with reoccurring leaks in the lobby and cracks in the walls. Management has remedied certain minor issues raised by tenants, but has persistently failed to remedy large-scale problems in the Building. Therefore, petitioner has shown that respondent substantially interfered with and disturbed the comfort, repose, peace and quiet of lawful occupants.

In sum, petitioner proved that during the inquiry period, respondent interrupted or discontinued essential services. Respondent failed to rebut the statutory presumption that these acts or omissions constitute acts of harassment that were intended to cause lawful occupants to vacate their units or waive their occupancy rights.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent committed harassment during the inquiry period by failing to fix conditions leading to leaks and water accumulation in the Building's lobby and stairway, failing to repair the front door, failing to repair cracks in the

walls in public areas and inside occupants' units, and disturbing the comfort, repose, peace, and quiet of lawful occupants.

2. Because respondent harassed lawful occupants, his application for a certificate of no harassment should be denied.

RECOMMENDATION

I recommend that respondent's application for a certificate of no harassment be denied.

Noel R. Garcia
Administrative Law Judge

November 9, 2022

SUBMITTED TO:

ADOLFO CARRIÓN JR.
Commissioner

APPEARANCES:

DENISE OLIVEIRA, ESQ.
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ROSE & ROSE
Attorneys for Respondent
BY: PAUL COPPE, ESQ.

CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

FINAL DETERMINATION UPON APPLICATION FOR A CERTIFICATION OF NO HARASSMENT PURSUANT TO SECTION 27-2093.1 OF THE NEW YORK CITY ADMINISTRATIVE CODE

Application No.:	73/19
Applicant(s):	Steve Forest
Premises:	1854 2nd Avenue New York, New York 10128
Inquiry Period:	July 15, 2014 to the present.
Action:	Denied, after hearing, pursuant to Section 27-2093.1(d)(5)(C) of the New York City Administrative Code.
Duration:	No application for a Certification will be accepted for five years from the date of this determination.
Date of Issuance:	November 16, 2022

[redacted]
Martha Ann Weithman, Assistant Commissioner - HLD
Department of Housing Preservation & Development

ACKNOWLEDGEMENT

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

On the 16th day of November, in the year 2022, before me the undersigned, Martha Ann Weithman, personally appeared, personally known to me or proven to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed this instrument.

[redacted]
NOTARY PUBLIC

RONIT JOSEPH
Notary Public, State of New York
No. 02JO6371480
Qualified in Richmond County
Commission Expires Feb. 26, 2026