

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART O

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RACHEL BOYKO,

Petitioner,

Index Nos. L&T 315428/22 &  
6335/22

-against-

**DECISION/ORDER UPON  
MOTION TO DISMISS AT  
TRIAL**

JSHI HOLDINGS LLC, JENNY SHI,

Respondents,

Premises:  
34-33 30th Street, Apt. 1F  
Astoria, NY 11106

DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

Respondent.

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Present:

Hon. CLINTON J. GUTHRIE  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondents' motion to dismiss upon the conclusion of petitioner's prima facie case at trial:

<b>Papers</b>	<b>Numbered</b>
Respondents' Memorandum of Law & Exhibits Annexed.....	<u>1 (NYSCEF # 91 &amp; 92)</u>
Petitioner's Memorandum of Law in Opposition.....	<u>2 (NYSCEF #93)</u>
Reply Affirmation.....	<u>3 (NYSCEF #94)</u>

Upon the foregoing cited papers, the decision and order on respondents' motion is as follows.

PROCEDURAL HISTORY

These consolidated HP actions seeking an order to correct (Index No. 6335/22) and for both an order to correct and a finding of harassment (Index No. 315428/22) proceeded to trial on

February 9, 2023.<sup>1</sup> All parties were represented by counsel. The trial continued on March 8, 2023 and May 1, 2023. On May 1, 2023, upon the close of petitioner's prima facie case, counsel for respondent made an oral motion to dismiss, in effect pursuant to CPLR § 4404(a). The court permitted simultaneous briefing on the motion. Following an extension and additional briefing upon the court's order, the final brief was filed on June 2, 2023 and decision was reserved.

### DISCUSSION

Respondents argue that petitioner did not meet her prima facie burden at trial. Petitioner Rachel Boyko was the sole prima facie witness. She testified that she moved into the subject premises in December 2017. She described her apartment, which has one bedroom. She also described the heating apparatuses in the apartment, including a radiator and heating pipes.

She next testified about an incident in March 2022, when an individual named Terry Shi knocked on her door and identified himself as the new landlord. She stated that he had a lease renewal and that she had a conversation with him about the rent amount. She testified that after the conversation with Terri Shi, hot water was "scarce" in her apartment. She also described having to use space heaters, as she had to with her old landlord. Upon refreshing her recollection with a book where she kept notes, Ms. Boyko testified about hot water outages on September 24, 2022 and October 14, 2022. She explained that her son, who is in high school, could not shower when the hot water went out. She also testified about heat and hot water outages on October 19, 2022, November 23, 2022, December 12, 2022, and December 19, 2022. She testified that she had to use space heaters when the heat went out and that her electric bills went up as a result. She also testified that she would boil water when the hot water went out, which also increased her electric

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<sup>1</sup> This court consolidated the actions by Decision/Order dated January 20, 2023.

bills.

When asked what she did about the lack of heat and hot water, Ms. Boyko testified that she made complaints through her attorney and took her landlord to court. She then testified about a gap in her living room floor, which was the subject of a Department of Housing Preservation and Development (DHPD) violation [Number 15581340]. She testified about a photograph (petitioner's Exhibit 1) documenting the condition, which was admitted into evidence. Next, Ms. Boyko was asked about a violation [Number 15581343], which concerned acoustic ceiling tiles. She testified that tiles cover a little over half the ceiling. She testified that her landlord put up plastic covering to not damage the room, but that no ceiling tiles were taken down. Before Ms. Boyko's direct examination concluded, the court admitted a DHPD Departmental Memorandum of "heat days" in December 2022, along with the U.S. Department of Commerce certified meteorological records, specifically Local Climatological Data based on hourly observations in December 2022 in New York, New York (collectively as petitioner's Exhibit 3).

On cross-examination, Ms. Boyko was asked what the temperature in her apartment was on December 12, 2022. She replied that it was "freezing" but that she did not have any temperature readings. She was asked if she had heat before 2:00 AM on December 12, 2022; she replied that she did not know because she woke up at 2:00 AM. She was asked if she had heat around 5:30 AM. She replied that it was typically around 7:00 AM when she had heat. When asked for the reason as to the discrepancy between her testimony and what was alleged in the petition in Index No. HP 6355/22 as to the hours of the heat outage on December 12, 2022, she replied that she did not know. When asked if she called 311 on December 12, 2022, she replied that she "either" called Terry [Shi] or 311 but that she "probably" called 311. In response to a question as to whether she

notified respondents on December 12, 2022, Ms. Boyko stated that she sent a text to Terry; when asked if she sent notice by mail, she replied that she did not have an address for respondents.

Ms. Boyko was next asked about December 19, 2022. She was asked if the heat was on prior to 1:00 AM. She replied that "it was warm." She was asked if the heat was back on after 3:00 AM. She replied that she was not sure, and that it was "usually cold" at 1-to-2-to-3 AM. Subsequently, Ms. Boyko was asked to refresh her recollection with her book where she kept notes; for December 12, 2022, she replied that she noted that she had no heat from 2:00 AM to 6:00 AM. As for December 19, 2022, Ms. Boyko replied that she noted that she had no heat all night. When asked why her petition (for Index No. HP 6355/22) stated that she had no heat from 1:00 AM to 3:00 AM, Ms. Boyko replied that she did not know how to explain the inconsistency. Next, Ms. Boyko was asked if she knew the temperature on October 14, 2022, October 19, 2022, November 23, 2022, December 12, 2022, and December 19, 2022. She replied that she did not know as to all dates. She also replied that she did not have temperature readings for any of the dates. When asked if she had water temperature readings from September 24, 2022 and October 24, 2022, she replied that she did not. She did confirm that she had a notebook dedicated to heat and hot water issues and that she purchased the notebook in March 2022. She also stated that she made contemporaneous entries in the notebook.

Subsequently, Ms. Boyko was asked about DHPD complaints (contained in a Complaint History, which was admitted as respondents' Exhibit A). With regard to a hot water complaint on May 5, 2022, Ms. Boyko testified that she called 311 and her landlord. She was asked why May 5, 2022 did not appear in her heat/hot water notebook. She testified that she was not sure why there was no entry for May 5, 2022, but denied that the notebook was purchased right before trial. When

asked if there were other dates with no heat or hot water that were not included in the notebook, Ms. Boyko replied, "probably." In reference to a DHPD hot water complaint on September 24, 2022, Ms. Boyko testified that she called 311 then. In responding to questions about an inspection and violations related to the boiler on October 15, 2022, Ms. Boyko stated that she was not aware of them.

When Ms. Boyko was asked if her apartment, 1F, was the only one with DHPD complaints listed in the Complaint History in evidence, she replied that it was. Ms. Boyko next testified that her landlord, Terry, came to her apartment in March 2022 about signing a lease renewal. When asked if she had communications with Terry before March 2022, she replied that she had text messages with him. Ms. Boyko also confirmed that she had provided access to respondent to make repairs on multiple dates in December 2022 and January 2023. When asked if any violations on the DHPD report were not repaired, Ms. Boyko replied that the repairs for the acoustic ceiling tiles (No. 15581343) and wood floor (No. 15581340) violations were not completed. In response to a question as to whether Terry made a request for access on January 20, 2023, she replied that she did not know and could not recall.

On redirect, Ms. Boyko was asked about her conversation with Terry in March 2022. She responded that she told him about mold in her bathroom, missing tiles in the bathroom, loose electronic wire in the bathroom, wire in the living room, and flooring in the kitchen and hallway. She also stated that she told him about having no hot water and he told her that she should not have painted over her radiator. She was asked again when she moved in and she replied that it was in 2017. She confirmed that she had painted her radiators.

Ms. Boyko was then asked a series of questions about her recollection of heat outages

starting in October 2022. Explaining the differences between her testimony and what was alleged in the petition in Index No. HP 6335/22, she testified that she did not have her notebook when she filed the petition and was writing the times of outages to the best of her recollection. When asked specifically about October 19, 2022, she testified that there was no heat all night and that there was a mist blowing out of her radiator; she testified that there was mist again on October 20, 2022. She testified that she could see her breath on November 23, 2022, December 12, 2022, and December 19, 2022.

Ms. Boyko was next asked if she had complained to her landlord before bringing the HP cases. She replied that she had told Terry and texted him as well. She understood Terry to be her landlord. She stated that she had not had any dealings with the representative from respondents appearing in court.

When asked about the petition, Ms. Boyko confirmed that she signed and dated it, but that the remainder of the handwriting was not hers. She was asked why she did not commence the case until December 2022; she replied that she did not need heat until December. She conceded that two DHPD violations (15581340 and 155841343), for the acoustic ceiling tiles and wood flooring, were repaired. She conceded the same about Violation #15581338, for an electric outlet in the kitchen.

Ms. Boyko was asked about an affidavit of hers that was filed in the case (NYSCEF Doc. 19). She confirmed what she had stated there about Terry not being the superintendent of the building and reiterated that she believed that he was the landlord.

Petitioner's prima facie case concluded upon the conclusion of Ms. Boyko's testimony.

#### DISCUSSION/CONCLUSION

Pursuant to CPLR § 4401, "[a]ny party may move for judgment with respect to a cause of

action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.”

Respondents argue that petitioner did not meet her prima facie burden for claims for an order to correct or harassment under the Housing Maintenance Code. Petitioner opposes in all respects. The court notes that Ms. Boyko conceded that the last DHPD violations of record at issue were repaired by the conclusion of the prima facie case. Therefore, the court must determine whether petitioner made out a prima facie entitlement to a violation for heat and/or hot water (the allegations raised in Index No. 6335/22) at trial. While DHPD enforces the Housing Maintenance Code (HMC) and places appropriate violations, this court also has the authority to issue a violation if the evidence warrants it (*see Grant v. NYCHA*, 59 Misc 3d 136[A], 2018 NY Slip Op 50514[U], \*1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018] [“The Civil Court has the power in an HP proceeding to issue orders directing the removal of housing violations or *directing the imposition of such violations.*”] [Emphasis added]; *see also Coleson v. Sarker*, 73 Misc 3d 1010, 1012 [Civ Ct, Bronx County 2021]; *Mite v. Pipedreams Realty*, 190 Misc 2d 543, 544 [Civ Ct, Bronx County 2002]).

With regard to heat and hot water, the HMC specifies the required minimum levels for both. NYC Admin. Code § 27-2031 requires “every bath, shower, washbasin and sink in any dwelling unit in a multiple dwelling . . . [to be] supplied at all times between the hours of six a.m. and midnight with hot water at a constant minimum temperature of one hundred twenty degrees Fahrenheit[.]” While Ms. Boyko testified about hot water outages, she presented no actual evidence to demonstrate that the hot water temperature in her apartment fell below 120 degrees

during the relevant hours specified in the statute. While the court can consider testimony in determining whether to impose a violation (*see Mite*, 190 Misc 2d at 544), Ms. Boyko's testimony alone did not meet petitioner's evidentiary burden on the existence of a violation for lack of hot water under the HMC.

Under NYC Admin. Code § 27-2029, from October 1st through May 31st, centrally-supplied heat must be maintained in every portion of a dwelling at a minimum of sixty-eight (68) degrees Fahrenheit when the temperature outside falls below fifty-five (55) degrees between six a.m. and ten p.m., and it must be maintained at a minimum of sixty-two (62) degrees Fahrenheit between ten p.m. and six a.m. While petitioner submitted meteorological records establishing when the temperature was below 55 degrees between six a.m. and ten p.m. during the months of October through December 2022, Ms. Boyko's testimony only referenced outages, mostly in the middle of the night, and lacked specificity as to the actual temperature inside her apartment. No other evidence was introduced to demonstrate the internal temperature. Accordingly, petitioner similarly failed to establish, *prima facie*, the existence of a heat violation under the HMC.

As for petitioner's harassment claims under the HMC, the amended petition pleads a claim only pursuant to the "catch-all" subsection of the harassment definition section of the HMC. This subsection references "acts or omissions" of "such significance to substantially interfere with or disturb the comfort, repose, peace or quiet of" a lawful occupant (NYC Admin. Code § 27-2004(a)(48)(ii)(g)). To the extent that the alleged conditions in the apartment, specifically lack of hot water, formed a basis for the harassment claim in the petition, as this court held above, no violation was established for lack of hot water. A claim for harassment based on conditions and/or essential services requires the existence of a predicate violation (*see Berg v. Chelsea Hotel Owner*,



LLC, 203 AD3d 484, 485 [1st Dept 2022]). Thus, no claim for harassment was proven related to the alleged conditions.

As for the allegations in the amended petition about the purported landlord, Terry Shi, such as threats and failure to renew the lease, Ms. Boyko's testimony was not sufficient to make out a claim that any of Terry Shi's actions rose to the level of "such significance to substantially interfere with or disturb" Ms. Boyko's comfort, repose, peace, or quiet (NYC Admin. Code § 27-2004(a)(48)(ii)(g)). Moreover, petitioner did not establish through competent evidence that Terry Shi was an agent of either named respondent (*see Maurillo v. Park Slope U-Haul*, 194 AD3d 142, 146 [2d Dept 1993] [An "agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority."]).

Thus, petitioner failed to sustain her burden on her claims of harassment under the HMC (*see* NYC Admin. Code §§ 27-2005(d) and 27-2004(a)(48)). For the foregoing reasons, respondent's motion to dismiss at the close of petitioner's prima facie case at trial is granted. The petitions in the consolidated proceedings, Index Nos. HP 6335/22 and HP 315428/22, are dismissed and the clerk shall issue a judgment dismissing the petitions after trial.

This Decision/Order will be filed to NYSCEF. A copy will also be emailed to the attorneys for DHPD. The parties are directed to pick up their exhibits from Part O, Room 202, within 35 days or they may be destroyed at the Court's discretion in compliance with DRP-185.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York  
August 15, 2024

  
HON. CLINTON J. GUTHRIE  
J.H.C.

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CO ORDERED - HON. CLINTON J. GUTHRIE