

**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT L&T PART**

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TROUSDELL VILLAGE OWNERS CORP.,

Petitioner(s)

INDEX NO. LT-004527-11

against

Present:

Hon. Scott Fairgrieve

CAROL A. GAGLIARDO,

Respondent(s)

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Trial Decision

This holdover proceeding concerns a leaking of steaming hot water in a cooperative building located at 66 TE Glen Keith Road, Glen Cove, New York. The Petitioner TrousdeLL Village Owners Corp. (hereinafter TrousdeLL) owns the land and building. The Respondent Carol A. Gagliardo is the shareholder/tenant thereof. TrousdeLL has commenced this holdover proceeding to recover possession of the premises from Ms. Gagliardo for failure to maintain and make repairs to her apartment and provide requisite notice to the cooperative.

TrousdeLL is a cooperative corporation that is the fee owner and landlord of an apartment located at 66 TE Glen Keith Road, Glen Cove, New York. Ms. Gagliardo executed a proprietary lease with TrousdeLL in March 2002 whereupon she entered into possession of the above apartment as the sole shareholder/tenant. The apartment has several rooms, including a bathroom, which is furnished with a shower tub.

On the evening of August 16, 2010, Ms. Gagliardo testified that upon entering

her apartment, she observed that all its windows were closed and the apartment was full of steam. This condition caused substantial damage, including buckled floors, melted ceiling fan blades, and mold throughout the interior of the apartment. Ms. Gagliardo discovered that hot water had been gushing out of the bathtub spout and collecting in the tub. Ms. Gagliardo turned the faucet to greatly reduce the flow of water and then finally shut off the water to her bathroom by shutting off the valve. Ms. Gagliardo called a local plumber who came to her apartment on August 17, 2010. The plumber replaced the shower stem and seat, and on the same day Ms. Gagliardo called her insurance provider. On August 18, 2010, a contractor hired by Ms. Gagliardo came into the apartment to rip out the moldy carpet, remove the moldy furniture, and wipe down the moldy walls. Before the August 16 incident, Ms. Gagliardo last stayed overnight in the apartment on August 1, 2010 and stopped by briefly on August 11, 2010.

On August 20, 2010, Ms. Gagliardo sent the property manager Fairfield Properties a fax alerting them about the damage to her apartment. On November 22, 2010, the manager of the property John Shewchuk came to inspect the apartment along with the superintendent Jacob Robichaud, Ms. Gagliardo, and her friend. The inspection resulted in a letter being sent to Ms. Gagliardo on November 30, 2010, indicating that she was responsible for the damage. On January 11, 2011, Trousdell sent Ms. Gagliardo a notice of default alerting her that she was in violation of her lease for failure to repair and maintain her apartment and failing to provide access to the cooperative to do so. Ms. Gagliardo did not allow Trousdell to enter the apartment until April 11, 2011, when its insurance adjuster could also be present.

Trousdell contends that Ms. Gagliardo failed to properly maintain the seat and stem for which she was responsible. Ms. Gagliardo asserts that Trousdell had the duty under the lease to repair and maintain the seat.

The main issue in this case is whether a seat and stem are plumbing fixtures within the walls of an apartment, which would render Trousdell responsible for the repairs. This court holds they are not.

Paragraph 18(a) of the lease states in pertinent part:

The lessee... shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment and such refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges, and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures... but shall not include gas, steam, water or other pipes or conduits within the walls.

Ms. Gagliardo argues that since the seat that attaches to the stem lies within the wall, Trousdell is responsible for its maintenance. Ms. Gagliardo asserts that because the seat is attached to the stem at a point located beyond the wall, the seat must be considered "within the wall." This court, however, rejects Respondent's argument.

The court in *Machado v. Clinton Housing Development Company, Inc.*, 20 A.D.3d 307, 798 N.Y.S.2d 56 (1st Dept 2005), held that a defective hot water valve stem

was the sole responsibility of a cooperative shareholder. In *Machado* the proprietary lease provided that the maintenance and repair of fixtures, including exposed plumbing and the fixtures to which they were attached, were the sole responsibility of the shareholder. Expert testimony in *Machado* claimed that the incident occurred as the result of a valve stem becoming unseated. The court in *Machado* ruled that although the valve stem connected to a piece inside the wall, this fact did not shift responsibility for its maintenance to the co-op.

Here, as in *Machado*, the proprietary lease contains substantially the same provision regarding shareholder responsibility for repairs. The plumber observed and replaced a damaged shower stem and seat. As per the plumber's testimony, the stem is underneath the shower handle. The stem is partially inside and outside the wall and screws into the body of the faucet, which is completely inside the wall. The seat is attached at the end of the stem located within the faucet, and the seal on the faucet is created by the rubber washer on the end of the stem and the seat. In this case, a faulty shower stem and seat created a flowing water condition causing enough steam over a period of time to result in substantial damage being done to the apartment. Although the stem and seat are connected to a faucet within the walls of the apartment, Ms. Gagliardo remains liable for their repair and maintenance according to the lease.

In *Franklin Apartment Associates, Inc. v. Westbrook Tenants Corp.*, 43 A.D.3d 860, 841 N.Y.S.2d 673 (2d Dept 2007), the plaintiff shareholder/tenant brought a successful suit for summary judgment declaring that the defendant cooperative was responsible for repairs of shower bodies. The lease contained substantially the same language previously mentioned indicating that the lessee was not responsible for pipes

or conduits within the walls. In *Franklin*, the shower bodies were affixed to the building and water supply lines. Further, the shower bodies could not be accessed by the tenants without opening the walls. In holding that the cooperative was responsible, the court in *Franklin* found that the tenant was not liable for repairs that would require the tenant to open the walls.

In the case at bar, no walls or tiles were removed to make the repair. In addition, the property manager testified that where he makes such repairs in his ordinary course of business, he bills the shareholder/tenant for both pieces.

Based upon the foregoing, this court holds that the repair of the seat and stem was the sole responsibility of the shareholder/tenant Ms. Gagliardo.

Assuming *arguendo* that the repairs were the responsibility of the cooperative, this court finds that Ms. Gagliardo failed to properly notify Trousdell of any problem with the plumbing in order to allow timely repairs prior to the damage being caused. Thus, Trousdell is not liable for the repairs.

In *Giaccio v. 179 Tenants Corp.*, 45 A.D.3d 454, 845 N.Y.S.2d 328 (1st Dept 2007), a cooperative was found not liable for damage caused by a hot water pipe under a tenant's living room floor. The pipe produced enough heat over a long period of time to convert the wood sub-flooring to pyrophoric carbon, causing ignition and destroying the tenant's apartment. The court held that the cooperative had no duty to remove the floor wood "to discover what lay beneath" without actual or constructive notice of the latent defect. *Giaccio*, 45 A.D.3d at 455, 845 N.Y.S.2d at 329. See also *Papoters v. Northern Blvd. Corp.*, 11 A.D.3d 368, 783 N.Y.S.2d 555 (1st Dept 2004) (unless

restaurant created or had actual or constructive notice of wetness, condition of step being wet alone not impose liability on restaurant for plaintiff's slip and fall). In addition, the court in *Pareiman-Farber v. Shao*, 23 Misc.3d 145(A), 2009 WL 1606417 (N.Y. Sup. App. Term 2009), reversed a decision of the Civil Court upon finding that the plaintiff in its moving papers did not establish that the cooperative failed to exercise reasonable care in maintaining the plaintiff's premises.

Here, the leak had been occurring for a long enough period of time for mold to accumulate throughout the apartment. Ms. Gagliardo was last in the apartment at least five days before discovering the leak. Ms. Gagliardo did not provide any notice to the cooperative or its agents of the condition until four days after its discovery on August 20, 2010 when she sent a fax to the property manager Fairfield Properties. Ms. Gagliardo already had most of the mold condition removed by the time she sent the fax. Further, instead of contacting the on-site superintendent for the property, Ms. Gagliardo called a plumber who came in the day after she discovered the condition. The steam and mold condition inside the apartment could not provide the cooperative with actual or constructive notice of a defective seat and stem.

Based on the foregoing, the shareholder/tenant Ms. Gagliardo violated the terms of her proprietary lease by not repairing the extensive damage to her apartment. Thus, Trousdell is awarded a judgment of eviction and possession without stay as well as a money judgment for outstanding maintenance costs of \$11,041.83.

Petitioner is seeking recovery of its attorney fees incurred in this protracted litigation.

Paragraph 28 of the lease provides the contractual basis for recovering attorney

fees:

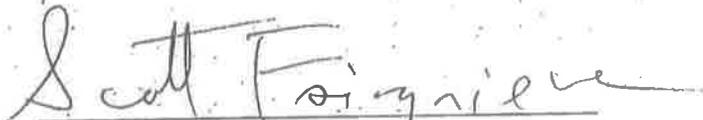
If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorney's fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent.

This court heard extensive testimony from Marc Schneider, Esq. concerning the legal fees incurred by Petitioner. Mr. Schneider was subject to extensive cross examination by Respondent's attorney Mitchell Hirsch. Additionally, Respondent testified concerning the legal fees claimed by Petitioner. The court finds that Petitioner is entitled to legal fees of \$70,022.50 plus disbursements of \$3,350.66 for a total of \$73,353.16.

Conclusion

Petitioner is awarded a judgment of possession with no stay of the warrant. Petitioner is awarded maintenance fees of \$11,041.83 and total legal fees of \$73,353.16 for a total of \$84,394.99.

So Ordered:


DISTRICT COURT JUDGE

Dated: 3-29-13

cc: Schneider Mitola, LLP
Hirsch & Hirsch, LLP