Dep't of Housing Preservation & Development v. Scharf

OATH Index No. 2062/07 (Mar. 31, 2008)

Petitioner failed to demonstrate that owners engaged in harassment of lawful SRO tenants within the meaning of section 27-2093 of the Administrative Code. Thus, respondent's application for a certificate of no harassment should be granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
- against -
ALEXANDER SCHARF
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the Department of Housing Preservation and Development ("HPD"), commenced this proceeding pursuant to section 27-2093 of the Administrative Code. Respondent, Alexander Scharf, is the owner of a building at 306 West 94th Street, New York County. Petitioner alleges that respondent and/or the previous owners committed acts of harassment against the building's single room occupancy ("SRO") tenants and asserted that respondent's application for a certificate of no harassment ("CONH") should be denied.

A hearing was held on November 7, 8, December 11, 2007, and January 16, 2008. The parties relied upon testimony and documentary evidence. Post-hearing briefs were filed on February 13, 2008. After review of the record, I find that HPD failed to demonstrate that tenants were harassed within the meaning of section 27-2093 of the Administrative Code. Therefore, I recommend that respondent's application for a CONH be granted.

BACKGROUND

306 West 94th Street is a seven-story building classified as an "Old Law Tenement" (Pet. Ex. 12).[1] The certificate of occupancy provides for 114 SRO units and 2 apartments on the first floor (Pet. Ex. 11). According to HPD's "Report of Investigation Regarding Application for Certificate of No Harassment," the building currently has 120 SRO units. Floors two through seven each have 18 rooms and three community bathrooms, two of which have showers. The first floor has a lobby, 12 rooms, and two bathrooms with toilets and showers. There are eight SRO units occupied on the second, third, fourth and seventh floors (Resp. Ex. D). Respondent does not dispute that he is operating a portion of the premises as a transient hotel.

In 2000 Matt Markowitz, an architect, was hired by the then-owner, Devon Residence Hotel LLC, to draw plans to replace damaged joists which are the wood beams that support the floors of the building (Tr. 290). According to Mr. Markowitz, the joists had been damaged by water leaks in the bathrooms and were in serious disrepair: floors were cracked, ceilings were falling down, and conditions were generally unsafe (Tr. 309). Indeed, in the late 1990's the Department of Buildings ("DOB") issued violations for the damaged joists (Tr. 289, 319-20; Pet. Ex. 5; Resp. Exs. K, O). According to Mr. Markowitz, if the damaged joists were not replaced, there was the potential for a catastrophic collapse (Tr. 290). As part of his DOB application for a work permit, Mr. Markowitz obtained an opinion letter from HPD dated February 24, 2000, stating that the work did not require a CONH "[i]f the plans submitted . . . do not call for the addition or removal of kitchen or bathroom facilities, or for the reconfiguration of dwelling units" (Tr. 291-92; Resp. Ex. I). A permit was issued and work commenced (Tr. 293-94). Approximately four months later there was a "complaint of violation" (Tr. 295). On July 24, 2000, DOB revoked its decision to allow the work to continue without a CONH and issued a stop work order (Tr. 295, 313; Resp. Ex. L).

On September 10, 2002, 306 West 94 Street LLC purchased the building from Devon Residence Hotel LLC.[2] Nicholas Gavalas was one of the owners (Tr. 164; Pet. Ex. 12). Because the joists had still not been replaced, the new owners hired expediters, Berger & Associates, to have the stop worker order lifted (Tr. 295, 313). In July 2003 DOB rescinded the order (Tr. 297,

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[1] An old law tenement was originally erected as a multiple dwelling in accordance with the laws in effect prior to April 12, 1901. *See* Article 1 of the Multiple Dwelling Law § 4 (11).

[2] Pursuant to OATH Rule 1-48, and with the consent of the parties, this tribunal took official notice of this transfer date which is a matter of public record.

314; Resp. Ex. M) and a revised application and joist replacement plan prepared by Mr. Markowitz were approved by DOB on October 20, 2003 (Pet. Exs. 5, 6). Replacing joists is essentially a gut renovation of the affected areas: the plumbing and electrical fixtures as well as the floors, ceilings, and walls are removed, the old joists are inspected and the rotten ones replaced, and new plumbing, walls, floors, ceiling, and fixtures are installed (Tr. 164, 215-216, 300). The revised plans show the areas affected by the joist work (Pet. Ex. 6).

Prior to construction beginning, management advised the tenants about the renovations and offered them the option of moving to 308 West 94th Street while the work was completed (Tr. 165-67, 216-17). 308 West 94th Street, a similar building next door, was owned by the same owners and had just been renovated following a similar joist replacement project (Tr. 165, 259, 306-07; Pet. Ex. 6). Most of the tenants moved out of the building but seven or eight units remained occupied during the construction (Tr. 216).

Mr. Gavalas was the general contractor (Tr. 304). Construction began in March 2004 and continued until July 2005 (Tr. 164, 238, 306). Approximately 90 to 95 beams or 75 percent of the joists were replaced (Tr. 164, 238, 305-06). When the work was completed, all the floors had new bathrooms and plumbing, there was new electrical and cable wiring throughout the building, rooms had been renovated and there were new windows and doors, and all of the hallways had new paint, plaster, and rugs (Tr. 171, 175-76, 218, 228, 232-33).

On December 21, 2005, Mr. Gavalas filed an application for a CONH to construct a penthouse on top of the building (Pet. Ex. 12). On January 12, 2007, petitioner made a finding that there was reason to believe that harassment of SRO tenants had occurred since December 21, 2002. The case was docketed at OATH as *HPD v. Gavalas*, OATH Index No. 1311/07. At a conference Mr. Scharf advised that he had purchased the building from Mr. Gavalas on February 14, 2007. The case was taken off-calendar. On April 25, 2007, respondent filed an application for a CONH to "add 3 piece bathroom to the vacant units" (Pet. Ex. 11). On May 3, 2007, petitioner issued an "amended petition" naming Mr. Scharf as the respondent and denied the application based on its prior conclusion that the tenants had been harassed (ALJ Ex. 1).

ANALYSIS

Petitioner seeks a finding denying respondent's request for a CONH on the grounds that harassment occurred during the inquiry period beginning December 21, 2002. Petitioner charges the respondent and/or the previous owners with:

> Repeatedly intimidating individual tenants;
> Failing to provide heat and hot water;
> Failing to make repairs to the elevator;
> Failing to make repairs to ceilings and walls;
> Failing to abate the nuisance of vermin and rodent infestation;
> Authorized illegal alteration and demolition of SRO units;
> Allowing construction debris to obstruct access to stairwells and to accumulate in hallways;
> Allowing construction dust to accumulate throughout the subject premises;
> Failing to abate the nuisance of noise from construction workers;
> Generally interrupting, discontinuing and decreasing essential services.

(ALJ Ex. 1). Petitioner did not allege that use of the premises as a hotel constitutes harassment.

Under section 27-2093(a) of the Administrative Code, harassment is defined as:

> (2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of a [lawful occupant] in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause [a lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy . . . .

Section 27-2093(b) creates a rebuttable presumption that, if an act of harassment is proven, "such acts or omissions were committed with the intent to cause a [lawful occupant] to vacate such unit or to surrender or waive a right" to lawful occupancy. *Dep't of Housing Preservation & Development v. Fenelon*, OATH Index No. 1525/04, at 3 (Oct. 6, 2004), *aff'd*, Index. No 5111/05 (Sup. Ct. Kings Co. July 12, 2005). Moreover, any acts of harassment during the inquiry period are attributed to the current owner, even if those acts were committed by prior owners, without regard to the current owner's fault. *Dep't of Housing Preservation & Development v. Bryant*, OATH Index No. 149/07, at 4 (Jan. 5, 2007), *aff'd*, Sup. Ct. N.Y. Co. Index No. 102249/07 (Oct. 10, 2007).

While it is acknowledged that during the inquiry period there were interruptions in essential services and that the construction caused inconvenience for some of the residents, the

record is replete with evidence that the prior owners were trying to resolve the many problems in a building long neglected through a renovation that was safe and code compliant. Given that the joist work was necessary, it was done pursuant to a permit, and tenants were given the option to move temporarily next door, I am persuaded by the record that respondent has established that the interruption of essential services and the construction were not intended to cause lawful tenants to vacate their units or waive their occupancy rights. Therefore, to the extent petitioner has made a *prima facie* case, respondent has rebutted the presumption of intentional harassment set forth in the Administrative Code. *See generally Dep't of Housing Preservation & Development v. Wulliger,* OATH Index No. 782/06 (May 5, 2006) (statutory presumption of intentional harassment rebutted); *Dep't of Housing Preservation & Development v. Rice*, OATH 1838/04 (Mar. 23, 2005) (same); *Dep't of Housing Preservation & Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000) (same).

Petitioner's Evidence

Petitioner presented the testimony of Lavinia Lynes, an HPD clerical associate, Compton Cuffy, an HPD housing inspector, Miuka Delacruz, a DOB inspector, Terry Poe, a former tenant organizer with the Westside SRO Law Project ("Westside SRO"), and three tenants in the building: Hilda Soto, Edwin Soto, and Adan Galvez. Overall, I found the tenants and Mr. Poe to be unreliable and incredible and the agency witnesses to be uninformative about the relevant facts and unknowledgeable about the documents they introduced.

Ms. Lynes testified that she has worked for HPD for 21 years and that she calls landlords and tenants when complaints are referred to HPD by the city's 311 operators. She first contacts the landlords to ascertain whether they will make the necessary repairs and contacts the tenant later to determine whether the landlord corrected the condition. If the tenant alleges that the condition still exists, an inspector from HPD's Code Enforcement Unit is sent to the premises (Tr. 7-8). If a 311 complaint is deemed "dire," she contacts the landlord and tenant and faxes the complaint to Code Enforcement immediately (Tr. 11). Ms. Lynes submitted into evidence the 311 history, a 148-page document, showing building complaints received by 311 between January 26, 2003 and June 29, 2007 (Pet. Ex. 1). On cross-examination, Ms. Lynes acknowledged that 311 and not HPD creates the history and that when HPD contacts the landlord, it has no proof that the condition exists, other than the tenant's complaint (Tr. 11-12).

Ms. Lynes did not know the meaning of notations "close" and "active" on the 311 history (Tr. 12), or what the categories "active, inactive, pending, all" referred to (Tr. 15). She also admitted that there was nothing to indicate whether an owner was called, what follow-up action HPD took, or the current status of the complaint (Tr. 12-14).

HPD Inspector Cuffy testified that he responded to complaints from building tenants on February 1, and March 11, 2005, and issued a violation for hot water temperature of 160 degrees for the seventh floor community bathroom and one for a temperature of 156 degrees in the second floor bathroom, class C violations (Tr. 20-21) which are the most serious (Tr. 17). When he visited in March he also issued violations for conditions in unit 205 for an infestation of roaches, walls and ceilings which needed plastering, and a hole in the fireplace (Tr. 22-23; Pet. Ex. 4). Inspector Cuffy introduced an HPD violation summary report of closed violations going back to 1989 (Pet. Ex. 3) and an open violation summary report as of October 25, 2007 (Pet. Ex. 4). He admitted that he was not familiar with the printouts (Tr. 25) and did not know HPD procedures concerning the violations other than his job of issuing them (Tr. 23-27).

Inspector Delacruz testified that she is a DOB supervising inspector. At the hearing, she introduced and reviewed the previous owners' application to replace the wood joists and architectural plans including the tenant safety plan (Tr. 34-41; Pet. Exs. 5, 6). Even though she was trained as a plan examiner (Tr. 35), she seemed to have trouble reading the plans and could not find, even with assistance, the note stating that the joists to be replaced were dry and cracked (Tr. 49). Inspector Delacruz also introduced a printout of 14 DOB violations issued during the inquiry period (Pet. Ex. 7). She testified that she inspected the building on June 27, 2006, and issued a violation for use of the building as a hotel contrary to the building's certificate of occupancy (Tr. 45-48). Inspector Delacruz stated that if DOB had received complaints for excessive dust and debris or any other violation of the tenant safety plan, an inspector would have been sent out and would have written a violation if warranted (Tr. 50).

Mrs. Soto testified that she has lived in the building for 23 years and that she occupies unit 715 with her husband. In 2005, the elevator did not work for eight months. Her ill health made it difficult to go up and down the stairs, especially when carrying laundry and groceries (Tr. 55-56). After the construction began there were "several" discussions about moving out and these discussions made her "depressed." Mrs. Soto thought that the owners offered them about $50,000 to move (Tr. 56-57). The staircase was constantly full of construction debris such as

wood, metal, and stone as well as workmen carrying construction materials. Between 2005 and 2007, all the bathrooms on the seventh floor were closed and she had to use one on the sixth floor. During the construction there was no heat and "the hot water burned her" (Tr. 57-59). She alleged that workers made a hole in the wall of her closet causing dust to enter her room and no one responded to any of her complaints (Tr. 61). Construction started at 7:00 a.m. and continued until 2:00 or 3:00 a.m. (Tr. 64). Mrs. Soto also complained that the new carpeting in the hallway has a "weird, bad smell" (Tr. 67).

Mr. Soto testified that starting in December 2004 and the following nine months the elevator was out of service. Mr. Soto stated that the construction was "very dramatic" and there was a lot of dust. The staircase was unlit and full of dangerous debris (Tr. 70-72). Workmen were carrying tools and materials on the stairs and were knocking down rooms, the floors, and the walls and putting them back new. The men worked from 8:00 a.m. until 11:00 p.m. Moreover, the workers took no measures to counteract the dust (Tr. 74-75). During demolition of the neighboring room, the workers made a hole in their closet which ruined their clothes (Tr. 77). Although he complained to Mr. Gavalas, nothing was done (Tr. 71, 74-75, 77). With regard to his community bathroom, the workers knocked it down without notice and he had to use a bathroom 50 feet away for nine months (Tr. 78). Sometimes the water in the bathroom was too hot and he once called an inspector who verified this (Tr. 81). He also stated that the old bathroom was bigger and more comfortable than the one they have now (Tr. 82). He also made complaints about the lack of heat (Tr. 82). Mr. Soto corroborated his wife's testimony that there were "several" offers from management to move but he also claimed that a building employee "would practically come over every day and offer us money" (Tr. 75-76). Respondent also offered him money not to testify at the hearing (Tr. 81). Mr. Soto also stated that he was not offered an opportunity to relocate to the building next door (Tr. 88).

Mr. Galvez testified that he resides in unit 205 with his wife. Without notice the owners began construction and it was very dirty. The elevator was out of service for more than six months and there was plywood across the elevator doors (Tr. 89-91). Someone from management wrote threatening messages on the second and third floor plywood which remained for more than five months (Tr. 108-09, 111). The construction work went on until 2:00 a.m. Barriers were placed between the construction and inhabited areas but they were inadequate to protect against the dust (Tr. 91-92). During the construction, the hallways were crammed with

containers filled with debris leaving little room to walk (Tr. 96). In addition, there were live wires exposed for more than five months which shocked him once (Tr. 97, 118-20). Mr. Galvez testified that he was asked to move next door but he refused (Tr. 110). He also alleged that sometime in 2002 Arsenio, a building employee, twice asked him about his immigration papers and said that he might have a problem once the renovation began (Tr. 94, 118).

Mr. Galvez also testified that before November 2004, one of the showers on the second floor was clogged and that the other two bathrooms had extremely hot water. The hot water situation lasted about six months and he had to use a bucket to wash. For a period of about 14 months he also had to use a tool to open and close the water faucets. He complained to Mr. Gavalas who said he would "open the water" but he never did. Mr. Galvez called 311 about the hot water (Tr. 92-93). He also complained more than seven times to Arsenio about the conditions in his room and the hallway but Arsenio was non-responsive. In his room there was a lot of dust and the plaster and the window frame was so deteriorated that mice and rats entered his room (Tr. 94-95). Mr. Galvez complained to Mr. Gavalas but nothing happened, so he bought traps and caught mice regularly. Mr. Galvez stated there has been no exterminator service since 1994 (Tr. 103-05). Since 2006 there has been an exterminator and he currently has bedbugs. When the exterminator came, he broke the bed. Mr. Galvez did not complain to anyone about his broken bed (Tr. 106).

Mr. Galvez presented photographs showing electrical cables on the second floor, dead mice on glue traps, a hole in the second floor hallway wall, wooden barriers with sheets hanging from the ceiling, tourists entering the building, and plywood in front of the elevator doors. The photos of the elevator show writing which is not completely legible but seems to refer to tenants moving out of the building and management charging higher rents after new bathrooms are installed (Pet. Ex. 9H-J).

On March 4, 2005, Westside SRO brought a Housing Court action on behalf of Mr. Soto and Mr. Galvez seeking to have the owners correct various violations including scalding hot water, broken plaster and peeling paint, leaking radiators, holes in ceilings, floors, and walls, vermin infestation, excessive dust from construction, the out-of-service elevator, and exposed cables along some walls (Pet. Ex. 8). That same day, Westside SRO filed requests to have HPD inspect the complaining tenants' units as well as the building (Resp. Exs. E, F). The action was subsequently settled through the execution of two stipulations. Although there were no HPD

inspection reports presented (Tr. 211), the stipulation dated April 1, 2005, states that following an inspection on March 11, 2005, the following conditions were *not* found by HPD: emergency exit blocked on the second floor; stairwells filled with construction materials; hallway on second floor divided into narrow space with not enough space to pass safely; in unit 205, insufficient electrical outlets, paint/plaster removed from the floor, bottom of door to room eaten by mice, mice in room, window separating from wall, and no heating coming from steam pipe; and in unit 715, a hole in floor near radiator. In the stipulation, Mr. Galvez agreed to temporarily relocate to a different room so that repairs could be made. The owners agreed to maintain the room size, install cable, assist Mr. Galvez with moving, and fix eleven HPD violations including broken base boards on the second floor, a missing radiator in 205; roaches in 205 and 715; broken surfaces in 205 and 715; and scalding hot water in the second floor bathroom (Resp. Ex. G). In the stipulation dated August 5, 2005, the owners agreed to maintain the elevator unless work was being performed (Resp. Ex. F).

Mr. Galvez testified that he moved to a different room on the same floor for eight weeks. When he moved back management was very friendly, helped him move, and asked him where he wanted everything. The room was brand new but smaller (Tr. 114-117).

Mr. Poe testified that the building had been on Westside SRO's "radar screen" since at least the mid-1990's (Tr. 127). In 2004, he responded to complaints from tenants regarding major demolition in the building. When he visited he toured the public areas. Based on his observations, Mr. Poe believed that the work being performed was in violation of the permits obtained. Mr. Poe presented photographs showing "the total gut demolition of floors five and six in the south wing" (Tr. 126-28). The photographs show the demolition of various SRO units including the removal of rotten joists (Pet. Ex. 10).

During respondent's case, petitioner, over respondent's objection, introduced affidavits from Eliuth Garcia and Rolando Ramirez, tenants in units 308 and 408 who did not appear at the hearing (Tr. 279). The affidavits were prepared and translated by Westside SRO and were provided to HPD Inspector Wycoff by Mr. Poe, who advised the inspector that "the owner did illegal work on the building and forced tenants out" (Resp. Ex. D). In the affidavits, the declarants described the relocation efforts made by the prior owners during the construction. In addition, they complained about conditions in the units and the owners' failure to respond to their complaints as well as the effects that the construction had on them (Pets. Exs. 13, 14).

Respondent's Rebuttal

Respondent presented the testimony of former owner Gavalas, Nikitas Theologitis, a former building manager, architect Markowitz, Stuart Berger and Michael Jaffa, expediters, and three tenants: Ms. Letty Arias, Mr. Felix Guzman, and Mr. Marlon Moctezuma. In addition, respondent subpoenaed Antony Wycoff, HPD's harassment inspector for the building, who was not called by petitioner (Resp. Ex. C). Overall, I found that the prior owner and manager provided a consistent and clear picture of the building renovations which was corroborated by tenants, industry professionals, HPD's harassment inspector, and documentary evidence.

Mr. Gavalas testified that he and Mr. Theologitis were the only people involved in asking tenants to relocate. Most people agreed to move to 308 West 94th Street into newly renovated units. Tenants had the option of moving back to their units after the construction but no one did. He denied that he told tenants that they had to leave (Tr. 165-66). Mr. Gavalas also denied offering the Sotos money to move. Instead, he offered them two rooms next door because their room was large but they refused to move (Tr. 167).

Mr. Gavalas testified that the demolition of the bathrooms, floors, walls, and ceilings and the replacement of joists, plumbing, electrical, and physical structures was done in sections (Tr. 164). The workers started on the seventh floor and worked down (Tr. 176). Plywood doors and sheets were placed to close off areas where men were working and the doors locked to prevent tenant accidents in the work area (Tr. 169). Also, two workers were hired to clean dust and remove debris (Tr. 169, 180, 185-86). The regular work hours were 8:00 a.m. to 5:00 p.m. but sometimes workers would stay until 6:30 or 7:00 p.m. to perform emergency and light repairs as well as clean-up. There was no construction work after 5:00 p.m. (Tr. 177, 184).

According to Mr. Gavalas, they installed new cable and electric wiring in the building. The wires were off the floor and high up on the walls. Power was not on until the wiring was completed (Tr. 170). The owners also got a permit to fix the elevator and it was taken out of service for about five months. The elevator, located within the well of the staircase, was very old and would not always stop evenly at each floor. Plywood was placed on each floor in front of the elevator to prevent people from being injured if the door opened. Notice that the elevator was out of service was sent to tenants and posted on the elevator. He denied that he or any of his employees wrote threatening messages on the elevator and testified that as soon as he saw the

statements depicted in Petitioner's Exhibit 9, he had the plywood replaced (Tr. 171-72, 179-80). Also, tenants who lived on the upper floors were offered rooms on lower floors or next door while the elevator was out of service. The superintendent in the building offered to help people carry their food or laundry upstairs (Tr. 180).

Mr. Gavalas also stated that even though the city came regularly to inspect the construction, the inspectors never found anything wrong. He got one complaint from Mr. Soto about something on the floor and they cleaned it right away (Tr. 173-74). During construction, the owners provided continuous exterminator service and had a sign-up sheet at the front desk. Mr. Gavalas acknowledged that there were a lot of roaches coming out of the old wood being demolished and that he was issued violations (Tr. 174, 178). He stated that they had an emergency exterminator on call (Tr. 178).

Mr. Gavalas said that Mr. Galvez was represented by Westside SRO and that he moved to another room on the same floor so that the room could be renovated. The joists in his ceiling had to be replaced and this required demolition of the entire room. The room was restored to its original size and Mr. Poe or Liz Fernandez from Westside SRO inspected the room, measured it, and was happy with the results (Tr. 167-68). Mr. Gavalas acknowledged that the Sotos complained to him about their unit but asserted that they refused him access to correct the conditions. Once he sent Mr. Soto a registered letter announcing a plan to replace his front door, but Mr. Soto refused to cooperate. Unit 715 is one of only two units that have old doors because all the other tenants allowed him to replace the doors (Tr. 175).

On the floors with tenants, the crews would work on one bathroom at a time so that there was always one available. As the bathrooms were renovated, they were reopened for tenants' use (Tr. 170-71, 175-76). All the demolished SRO units were restored to the same floor plan that existed prior to construction and no units were eliminated (Tr. 177). Tenant complaints could be made to the front desk. When he learned about the scalding hot water on the seventh floor, he checked it but found no problem. When the second complaint was made and the inspector asked him to reduce the temperature of the water, he changed the faucets (Tr. 182-83).

Respondent presented proof that on January 7, 2003, Mr. Soto filed a complaint with the New York State Division of Housing and Community Renewal ("DHCR") alleging harassment by way of a decrease in unspecified services and rent overcharges (Resp. Ex. A). The complaint

was dismissed on June 6, 2003, because Mr. Soto failed to refute the owners' submission that the service complaints had been resolved (Resp. Ex. B).

Mr. Theologitis testified that he was the building manager from January 2004 until February 2007, and was responsible for doing repairs (Tr. 214). He explained to the tenants that the building had to be renovated. Some people asked for buyouts but most tenants moved next door (Tr. 216, 241). Tenants had the option of moving back to their units after construction was completed and no one was told they had to leave (Tr. 216-17).

If tenants had serious complaints they would come to him, but they would report minor ones to the front desk (Tr. 231). When he first started at the building, it was a "disaster" and had many open violations. The biggest problems were the beams and community bathrooms which needed to be replaced (Tr. 238). They divided the work into sections. On floors with tenants, they would renovate one bathroom at a time so that there was always one open. Bathrooms on floors without tenants were all taken out of service at the same time (Tr. 215-18). After the bathrooms were renovated, everything in them was brand new (Tr. 228). Mr. Theologitis changed all the doors except for units 707, 715, and 307, because the tenants did not want new doors. Westside SRO told him not to pressure Mr. Soto about the door (Tr. 237).

Mr. Theologitis also testified that all the wiring in the building was replaced starting in 2004. Using Mr. Galvez's pictures he explained that the wires and new cable were located about nine feet off the floor running towards the ceiling. The wires were later enclosed in a box and had no electricity until the job was completed and the power turned on by Con Edison. There was no interruption of electricity during the conversion (Tr. 222-21, 243-44, 260).

Mr. Theologitis described the precautions taken during the construction. For the tenant who remained in unit 718, they shored up the room from the sixth floor so he would not be disturbed (Tr. 217). Using Mr. Galvez's picture, Mr. Theologitis further explained that he placed plywood and hung sheets from the ceiling to act as a barrier between the work and residential areas. The barrier was erected to prevent construction dust from bothering residents (Tr. 221, 241) and was placed so that they would always have an egress (Tr. 222-27). Mr. Theologitis testified that the fifth and sixth floors were empty and inaccessible to tenants. When Mr. Poe came to see the construction, Mr. Theologitis would walk him through the building (Tr. 235).

The elevator was taken out of service at the end of 2004 or beginning of 2005 for four or five months. They had to repair the old motor because the elevator would not stop evenly with

the floors. Because the elevator was so old, the owners had trouble locating the right parts. In order to avoid an accident, plywood was placed over the elevator doors (Tr. 228-29, 244-45). When he saw the writing on the plywood, he immediately replaced the plywood. Mr. Theologitis did not know who wrote the messages (Tr. 229). After the Housing Court stipulation, the owners restored elevator service (Tr. 245).

Mr. Theologitis asserted that Mr. Galvez would always complain to Westside SRO but would never come to him. After Westside SRO came to him about Mr. Galvez's room and he moved out, everything was replaced: new floor, walls, electric, appliances, and kitchen cabinets. Before Mr. Galvez moved back an inspection was held with Westside SRO. It was measured and found to be the same size as before (Tr. 231-32, 253). Mr. Galvez was one of several tenants who had children living in the SRO. Even though children were not allowed, the owners took no action because "we try to make happy everybody [sic]" (Tr. 266).

According to Mr. Theologitis, construction debris was removed through chutes that were attached to the window and emptied out in the courtyard below. The debris was transferred to a container (Tr. 233, 261). As workers demolished the interior they would throw the debris down the chute (Tr. 236, 254-55). Two people were hired to remove the debris (Tr. 254, 267). Construction was done between 8:30 a.m. and 5:00 p.m. On the weekend the workers cleaned (Tr. 262, 267). During the construction, inspectors from various agencies would come almost daily. One day in October 2005, 40 inspectors came from the Mayor's Office, DOB, HPD, the Police Department, the Fire Department, "SPD," and the Red Cross (Tr. 236). Mr. Theologitis received a violation for debris in the yard and for storing an air conditioner in the lobby. He cleaned up the garbage and paid a fine (Tr. 244-45, 249).

Mr. Theologitis testified that when 306 West 94 Street LLC purchased the building there were no apartments on the first floor (Tr. 269). In September 2005 and July 2007, DOB issued violations for illegal construction on the first floor because there were supposed to be two apartments (Tr. 250-51, 268; Pet. Ex. 7). He stated that other violations were written as illegal construction even though no construction was actually being performed (Tr. 269). He also indicated that violations such as replacement of the door to unit 314, which appear open on the open Violation Summary Report, were corrected during the renovation (Tr. 263). He also accompanied the inspectors who came in February and March 2005 to check the water temperature in the seventh and second floor bathrooms. When the inspector advised him in

March that the water was too hot, he changed the faucets and called the plumber to adjust the thermostat on the boiler (Tr. 257-58).

Mr. Moctezuma testified that he has lived in the building for 20 years in unit 415. Mr. Gavalas asked him whether he wanted to move next door during the construction. He said no. Mr. Gavalas asked him only once and he was never contacted again about moving (Tr. 270-71). During the construction he always had access to a bathroom on the fourth floor (Tr. 270-71, 277). The elevator was taken out of service but notice from the front desk was provided and posted on the elevator (Tr. 272-73). When he had a complaint, he would notify the front desk and it would be handled in a reasonable period of time (Tr. 273-74). Management would usually notify him if the water or elevator was going to be out. Normally the water would be restored within two hours. Mr. Moctezuma was home during the day and saw men working "normal work hours," from 8:30-9:00 a.m. to 5:30-6:00 p.m. There was no construction debris on the stairs, and the areas where men were working were blocked off from the rest of the building. Mr. Moctezuma had no problems with his room during the construction (Tr. 274-76).

Mr. Guzman testified that prior to construction, management asked him if he wanted to move next door and that he did so because he did not want "to stay there by [him]self with the boom, bam, bing, boom." He was not pressured to move and was given the option to return to his room but chose to stay where he was (Tr. 153-57). Ms. Arias testified that she approached Mr. Gavalas about moving to a better room because she was living on the second floor. Mr. Gavalas gave her a room next door on the third floor with more light. She stated that she was never pressured to move out (Tr. 147-50). According to Ms. Arias and Mr. Guzman, notice was given whenever the elevator or boiler was fixed (Tr. 149, 157).

Respondent also called Inspector Wycoff, who prepared the report in response to Mr. Gavalas's application for a CONH (Resp. Ex. D). He visited the building once in 2006 (Tr. 198) and observed transient guests and that some of the SRO rooms had old doors (Tr. 202-03). He also observed that all the SRO units were intact, that there were no apartments on the first floor, and there were more SRO units than listed in the certificate of occupancy (Tr. 204-06). He also noted that the building was clean and in very good condition (Resp. Ex. D).

Mr. Markowitz was the architect of record for the construction project (Tr. 304). He stated that tenants in units adjacent to the work needed to be relocated temporarily in order to

perform the renovation (Tr. 300). Because tenants were living in the building, the architectural drawings included "Tenant Safety Notes," which required that:

1. Construction will be confined to the areas shown on drawings, and will not create dust, dirt, or other such inconveniences to the other tenants in the building.
2. Construction operations shall not block hallways or other means of egress for occupants or tenants of the building.
3. Construction operations will not involve interruption of heating, water, or electrical services to other tenants of the building.
4. Construction operation shall be confined to normal working hours, 8A.M. to 5P.M. Mondays through Fridays, except legal holidays.
5. There shall be no one occupying the spaces where construction is shown on the drawings.

(Pet. Ex. 6).

Mr. Markowitz testified that it was customary for DOB to visit the building to investigate complaints and to see if work was being performed according to the plans (Tr. 301). He visited the building every one or two months and saw that the work was in accordance with the plans he filed (Tr. 303-04). Mr. Markowitz noted that because the joists span from wall to wall, the bathrooms including some adjacent rooms, where most of the damage was located, had to be removed. As the joists were exposed, a determination could be made whether additional rooms needed to be demolished in order to replace the joists (Tr. 307-11).

Expediter Berger explained how he had the stop work order lifted (Tr. 314). He also explained the process whereby corrected DOB violations are closed. An affidavit is submitted to DOB to certify the correction of the condition. After review and a showing of compliance, the violation is dismissed (Tr. 315). On January 15, 2008, Mr. Berger reviewed the DOB building profile and saw that there had been 60 complaints made against the building by tenants, including after-hours work, an out-of-service elevator, and light shining from the parking lot. No violations were issued for construction debris or dust, the blocking of an egress, working after hours, or the elimination of SRO units. Of the 60 complaints made, only four remained open or unresolved as of January 16, 2008 (Tr. 317-31). According to Mr. Berger, even though the stop work order from 2000 was still listed on the profile, all the related violations had been dismissed (Tr. 316-18, 337-40). The two violations identified in the 2003 work permit (Pet. Ex. 5) had been corrected as of December 2007 (Tr. 319-20; Resp. Ex. O). According to Mr. Berger, many of the violations in petitioner's Exhibit 7 concerned violations of the certificate of occupancy and

illegal construction which could not be corrected without a CONH (Tr. 327-30). With regard to the violation for subdividing the apartments into additional SRO units, there is no indication when the demolition was done (Tr. 330).

Respondent presented an incomplete DOB complaint disposition overview which shows that 29 complaints were made to DOB during the inquiry period. The complaints were for illegal construction and conversion, debris falling from the roof, an inoperative elevator, excessive dust and debris, blocked egress, after hours work, and unsafe demolition. Following inspections, these complaints were dismissed (Pet. Ex. P).

Expediter Jaffa testified that he was hired in November 2007 to remove as many violations as was possible (Tr. 344). At the time there were approximately 45 open HPD violations and as of January 16, 2008, there were only 4 open violations (Tr. 345; Resp. Ex. Q).

Requests to Relocate Tenants

Petitioner alleges that respondent intimidated SRO tenants in that they were repeatedly asked to give up occupancy of their units. Prior to and during the construction, management advised tenants that they could relocate next door either permanently or temporarily while the work was completed. There is no dispute that the offered housing was comparable. In addition, some tenants received buyouts and moved away.

Unsolicited and unwanted buyout offers, or other invitations to relocate, can constitute harassment. *See Vaughan v. Michetti*, 176 A.D.2d 144, 574 N.Y.S.2d 30 (1st Dep't 1991) (repeated buyout offers, coupled with deplorable living conditions, sufficient to constitute harassment); *Dep't of Housing Preservation & Development v. Nyameke*, OATH Index No. 1796/04, at 7-8 (May 2, 2005) (repeated inquiries about relocation combined with terrible living conditions amounted to harassment). It does not follow, however, that relocation of a tenant always equals harassment. *Dep't of Housing Preservation & Development v. Pascal*, OATH Index No. 626/06, at 5 (Apr. 5, 2006).

The question then is whether the nature of the relocation offers violates section 27-2093 (a) of the Administrative Code, either because the offers involved the use of force, or threatened use of force, prohibited in section 27-2093(a)(1), or because they involved language or conduct so threatening as to fall within the general language of section 27-2093(a)(4): "any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling

unit . . . ." *See Dep't of Housing Preservation & Development v. Haddad*, OATH Index No. 1312/07, at 21 (Aug. 9, 2007); *see also Rice*, OATH 1838/04, at 24 (if credited, allegations that owners told tenant "we are going to get you . . . if we have to burn you out" would have constituted harassment); *Dep't of Housing Preservation & Development v. Greaux*, OATH Index No. 1457/02, at 19-20 (Aug. 30, 2002) (harassment sustained where, among a number of wrongful acts, ALJ found "most significant" the owner's "veiled, but clearly implied, threat that harm might befall [the tenant] if he did not leave," as well as the suggestion that the tenant might find his belongings on the street, and her reference to the tenant's inability to afford court proceeding); *cf. Dep't of Housing Preservation & Development v. Tauber*, OATH Index No. 675/07, at 22 (May 16, 2007) (owner's one-time buy-out offer made after beginning of building repairs was insufficient to trigger presumption of harassment); *Haddad*, OATH 1312/07, at 21-29 (efforts to buy out tenants did not rise to the level of harassment); *Dep't of Housing Preservation & Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06, at 25-26 (Dec. 29, 2006) (non-threatening efforts to have tenant relocate temporarily during demolition and reconstruction of building did not constitute harassment).

Thus, the issue is whether the relocation offers were threatening in nature. Where the facts are disputed, resolution depends on an assessment of the witnesses' relative credibility. In making credibility determinations, this tribunal has often considered "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98, at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here, petitioner failed to present persuasive evidence that the owners' offers to relocate tenants involved harassment within the meaning of section 27-2093(a) of the Administrative Code.

I found the testimony of the Sotos and Mr. Galvez to be incredible because they often contradicted each other as well as the other tenants. Moreover, their testimony was replete with embellishments and was alarmist in nature. This tribunal has been reluctant to sustain charges of harassment where the tenant testimony is unreliable and unsupported by corroborating evidence. *See generally Haddad*, OATH 1312/07; *Dep't of Housing Preservation & Development v. Porres*, OATH Index No. 627/06 (June 16, 2006). On the other hand, I found Mr. Gavalas and Mr. Theologitis to be credible witnesses who provided common sense testimony that they

offered tenants temporary, comparable accommodations during the construction. Since neither witness has a current relationship with the building or interest in whether respondent receives the CONH (Tr. 187, 214), I find that they had no apparent motive to fabricate their testimony. Most importantly, their testimony was corroborated by tenant witnesses: two who relocated next door and one who stayed during the construction.

Mr. Soto's claims that he was never asked to move next door and that he received buyout offers almost daily was incredible. Given that management gave other tenants the option to move next door and that it would have been easier to have the building vacant during construction, I find it likely that Mr. Soto was also given this option and that he refused to move. Moreover, it seems unlikely that management would repeatedly offer Mr. Soto money to leave while allowing Mr. Moctezuma to remain undisturbed. Mr. Soto was clearly prone to exaggeration and/or fabrication. For example he said that he called 311 "hundreds of thousands of times" (Tr. 72), when in fact between January 2004 and October 2006 he made approximately nine complaints, none of which concerned unwanted buyout offers (Pet. Ex. 1). Moreover, Mr. Soto was admittedly very vocal about his complaints concerning the construction (Tr. 71) to the point where he took the owners to Housing Court (Pet. Ex. 8). It is more likely that each time he complained about living in a construction zone, he was reminded that he could move next door.

I also found Mr. Galvez's claim that a building employee named Arsenio told Mr. Galvez that he could have immigration problems if he did not move to be without merit. Although Mr. Galvez testified that he was not scared because his papers were in order (Tr. 94), if true, this conduct could constitute harassment. In addition to Mr. Galvez's credibility problems, there was no reliable evidence that these threats were made during the inquiry period which began on December 21, 2002. Mr. Galvez provided vague testimony as to when this conversation occurred (Tr. 94) and when pressed he stated that it was sometime in 2002 (Tr. 118). Mr. Theologitis testified that Arsenio, an employee of the previous owner, left in 2002, or a few months after they bought the building in September 2002 (Tr. 230). There is no evidence to suggest that 306 West 94 Street LLC began its relocation efforts immediately after this purchase, which was long before the stop work order was lifted in July 2003 and the new plans approved in October 2003. I credit the testimony of Mr. Gavalas and Mr. Theologitis that they were the only people who approached tenants about relocation and find it unlikely that Arsenio was threatening tenants on their behalf. Therefore, I am unable to conclude that Arsenio's threats even if true,

were made to Mr. Galvez between December 21, and 31, 2002, the only days in 2002 which are covered by the inquiry period. *Dep't of Housing Preservation & Development v. Bonaparte*, OATH Index No. 930/05, at 15 (July 13, 2005) (letters written outside of inquiry period not evidence of harassment); *Pascal*, OATH 626/06, at 3 (building code violations issued before inquiry period not relevant). It should be noted that according to Mr. Theologitis, Mr. Galvez had a child living in his SRO unit in violation of the certificate of occupancy. Even though they may legally have done so, the prior owners did not take steps to have the child removed. Therefore, it seems unlikely that an owner would engage in illegal harassment to force Mr. Galvez out while foregoing legal means to have him evicted.

In further support of the petition, petitioner submitted tenant affidavits from Ms. Garcia and Mr. Ramirez. In her affidavit, Ms. Garcia stated that in July 2004 she was asked to move and that the landlord said he would help her find an apartment for $1,200, which was more than she could afford. Rafael, a worker in the building, told her six times that she should move and would follow her and pressure her to leave. Also, after she moved to another room while her room was being repaired, the landlord (who was unnamed) kept telling her to move next door and kept giving her higher offers to move out completely (Pet. Ex. 13). In his affidavit Mr. Ramirez stated he was asked to move at least four times. In 2005 he was asked to move next door but the room was very small. Rafael told him that they would waive rent arrears but he refused. Two months later Mr. Ramirez was shown another room which was too small and Rafael threatened to have him evicted. Rafael approached him again and told him that they were going to tear down walls and that he would be bothered by the construction. On two occasions Rafael offered him money to move (Pet. Ex. 14).

The affidavits of Ms. Garcia and Mr. Ramirez are hearsay. While hearsay is admissible, it must be "carefully scrutinized as to its reliability and sufficiency to meet petitioner's burden of proof." *Health & Hospitals Corp. (Lincoln Medical & Mental Health Center) v. Huling*, OATH Index No. 1359/05, at 5 (July 22, 2005); *See also Dep't of Correction v. Tatum*, OATH Index No. 2062/04 (July 19, 2005), *modified on penalty*, Comm'r Dec. (Aug. 28, 2005) (declining to sustain charge based solely on hearsay evidence, in light of contrary trial testimony). "Clearly, the more central the hearsay is to an agency's case, the more serious the question of basic fairness and the more critical the question of reliability may become." *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980), *cert. den*., 452 U.S. 906, 101 S. Ct. 3033 (1981); see *also Transit*

Auth. v. Maloney, OATH Index No. 500/91, at 24 (Apr. 19, 1991), *aff'd sub. nom. Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 (1st Dep't 1994) ("where the statements of the hearsay declarants are central to an agency's case and there is question about the declarants' credibility, this tribunal has been loath to place much stock in those statements because they have not withstood the test of cross-examination"). Moreover, this tribunal has considered whether the agency has a reasonable explanation for its failure to call the hearsay declarant. *Dep't of Juvenile Justice v. Clements*, OATH Index No. 1198/06 (Apr. 24, 2006) *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-44-SA (Apr.5, 2007); *cf. Taxi & Limousine Comm'n v. Boodhram*, OATH Index No. 879/91, at 6-7 (May 28, 1991) (not unfair to rely on hearsay where petitioner did not cause witness to be unavailable).

Here, the affidavits are central to the Department's case because they provide allegations concerning the relocation efforts and conditions in the building which, if true, could constitute harassment. Petitioner failed to explain why these tenants had not been called as witnesses except to say that Mr. Garcia could not take time from work (Tr. 279-80). There is no evidence that HPD made any attempt to subpoena these tenants and nothing suggests that petitioner's reliance on the hearsay was occasioned by necessity. *Police Dep't v. Ayala,* OATH 401/88, at 6 (Aug. 11, 1989) (where Department demonstrated that it made attempts to serve witness with a subpoena but that she had moved and could no longer be located, reliance on hearsay was occasioned by necessity). Except for the hearsay statements that the relocation efforts were made by a building employee named Rafael, there was no other evidence explaining who Rafael was. In light of contrary trial testimony from reliable witnesses who testified that tenants were asked by Mr. Gavalas and Mr. Theologitis to move temporarily next door during the construction and because the declarants' credibility was not tested by cross-examination, I conclude that the affidavits have little probative value. Even if credited, these affidavits do not set forth facts which would support a finding that the relocation efforts were threatening in nature or were made with the intent to have the declarants permanently waive their right to occupy their units.

Petitioner also claims that, based on the decreased number of SRO tenants in the building, harassment can be inferred. Petitioner argues that the prior owners used the joist replacement work as an opportunity to move as many tenants out as possible so that the premises could be used as a transient hotel. While, I have no doubt that a building owner would rather collect market hotel rates rather than stabilized rents, petitioner's argument is unavailing.

Petitioner's assertion that according to Mr. Gavalas there were originally 105 SRO tenants when he purchased the building (Pet. Mem. at 31) is not supported by the record. Petitioner never established the date of purchase and incorrectly stated during Mr. Gavalas's cross-examination that it was June 2003 or 2004 (Tr. 181, 187). Mr. Gavalas's testimony concerning the number of tenants at the time of purchase (September 10, 2002) was confusing and it seemed that he was talking about the total number of SRO units in 306 and 308 West 94th Street (Tr. 181-89). HPD Inspector Wycoff identified 48 occupants living in the building during all or part of the inquiry period which started in December 21, 2002 (Resp. Ex. D). Mr. Gavalas also testified that around the time of the construction (March 2004) there were 40 to 45 people living in the building and that many of them were moving next door (Tr. 186-89). Mr. Theologitis put the number between 20 and 35 (Tr. 216). Contrary to petitioner's claims (Tr. 356), Mr. Gavalas's confusion did not make him an incredible witness.

It is clear that a number of tenants moved out of the building during the inquiry period due to the disruptive nature of the joist replacement project. However, this is insufficient to establish harassment, especially since there was convincing evidence that tenants were offered the option to temporarily move to comparable accommodations next door. In addition to Ms. Arias, Mr. Guzman, and the tenant from unit 605 (Tr. 166), Inspector Wycoff identified tenants from units 514, 210, 618, 609, 612, 309, and 733 who moved to 308 West 94th Street. Inspector Wycoff also spoke with Elizabeth Cummings in unit 412 who said that she moved next door in January 2005 because the owners were renovating the building and that she had no problems or harassment while she lived there (Resp. Ex. D). Moreover, Mr. Gavalas testified credibly that he offered to help tenants find alternative housing (Tr. 166). This testimony was corroborated by Ms. Garcia's statement that the landlord offered to help her find an apartment (Pet. Ex. 13), and Inspector Wycoff's report that Mike Murray, a tenant who lived in the building for 30 years, had never been harassed and had moved to a senior citizen home in June 2005 with the help of the owners who provided him with a buyout, transportation, and help with the move (Resp. Ex. D).

Most importantly, petitioner's argument ignores that the joist replacement work was necessary to preserve the structural integrity of the building and was done pursuant to a permit. I credit the unrebutted testimony of Mr. Markowitz that the failure to replace the floor joists would likely have had catastrophic results and that the tenants in units adjacent to the work needed to be relocated temporarily in order to perform the renovation. The fact that most of the original

tenants moved in order to avoid living through a long gut renovation of the building and chose not to return is not evidence of harassment.

Petitioner has not demonstrated that tenants were threatened verbally or physically to relocate. Rather, respondent has demonstrated that the prior owners made non-threatening efforts to have tenants relocate temporarily during necessary reconstruction of the building and that they did not continue ask those tenants who remained in the building to leave. *See Tauber*, OATH 675/07; *331 West 22nd Street LLC*, OATH 912/06.

Loss of Essential Services and Construction Consequences

Petitioner alleged that the owners failed to provide essential services such heat, hot water, working bathrooms, and a working elevator, that they failed to make necessary repairs to tenant units, and that they had numerous open violations on the building. Petitioner also alleged that the owners allowed dust and construction debris to accumulate throughout the premises, failed to abate noise from construction and the nuisance of vermin, and performed illegal alterations.

In addition to the violation history, the majority of the evidence concerning these claims came from Mr. and Mrs. Soto and Mr. Galvez. In their affidavits, Mr. Ramirez and Ms. Garcia made similar complaints concerning the owners' failure to correct conditions in their units, dust, debris, and noise from the construction, lack of elevator service, problems with vermin, and issues concerning water in the bathrooms. It seemed that, on one hand these tenants were complaining about the conditions in the building but, on the other hand they were resisting the owners' efforts to correct these problems. Curiously, Mr. Galvez's wife spoke with Inspector Wycoff in 2006 and "denied any lost [sic] of essential services while in the building" and could not specify any incidents that may have involved harassment. Inspector Wycoff also spoke with Bernard Pignatelly, Ms. Cumming, and Mr. Murray, long term tenants in the building who reported no problems (Tr. 205; Resp. Ex. D). Respondent also presented Mr. Moctezuma, Ms. Arias, and Mr. Guzman who made no complaints concerning the conditions in the building.

HPD Violations: Failure to Repair, Scalding Hot Water, and Vermin

Petitioner submitted copies of the open and closed HPD violation summary reports dated October 25, 2007, showing the violations issued during the inquiry period starting on December 21, 2002 (Pet. Exs. 3, 4). Except for testimony from Mr. Soto, Mr. Galvez, and Inspector Cuffy

concerning the violations issued in February and March 2005 for scalding hot water and the conditions in Mr. Galvez's unit, and general statements from tenants concerning vermin and building conditions, petitioner did not provide any other testimony relating to specific violations. Moreover, the inspector who introduced the histories into evidence was unfamiliar with the printouts and was unable to provide any testimony concerning their relevance.

Petitioner argued that the existence of the violations and the fact that many of them remained open beyond the time permitted by the Administrative Code demonstrate harassment. This tribunal has recognized that open violations are *prima facie* evidence of harassment. *Tauber*, OATH 675/07 at 15; *see also Wulliger,* OATH 782/06, at 12 (finding "sufficient documentary proof as an initial matter to support the Department's allegations based on a codified presumption of intentional harassment"). Here, there is no dispute that violations were issued during the inquiry period, that some of the violations were still open at the time of the hearing, and that others were "late certified" or "overdue." Therefore, I find that a *prima facie* case of harassment has been made based on the violation history. Thus, the issue is whether respondent has rebutted the presumption of intentional harassment of the tenants. *Id.* Petitioner did not argue why respondent's rebuttal was insufficient to overcome the presumption of harassment. After reviewing the violation history and considering the context in which the violations arose and how they were cured, I find that respondent has rebutted the presumption that the owners intended to force tenants to relinquish their rights.

According to the open and closed HPD violation summary reports, there were approximately 34 class A violations, 78 class B violations, and 26 class C violations issued during the inquiry period. The class C violations included six violations for defective paint and plaster, four for various fire escape issues, three for mold and mildew in the bathrooms, three for defective entrance doors, two for scalding hot water, two for leaks in a tenant unit and a kitchenette, two for defective sprinkler heads, two for defective wash basins in tenant units and/or kitchenettes, one for lead paint, and one for a defective window. Many of the A and B violations are not the kind that would give rise to a finding of harassment. For example, 11 violations related to the improper use of a unit by a tenant for housing underage children, improper cooking, and construction of a loft bed. Another seven concerned the use of the wrong color paint. Also, there were miscellaneous violations for random complaints such as a broken counter top of a gas range, a broken floor near a radiator, defective light fixtures, and extension

cords and refuse in the hallway. Although not cited by petitioner, there were approximately 14 class B violations for vermin. On February 28, and March 10, 18, 21, 2003, there were 11 violations issued for roaches and one for mice in various parts of the building. On December 11, 2003, a violation was issued for roaches in unit 605. On March 14 and 15, 2005, three violations were issued for roaches in the Soto and Galvez units. In addition, there were numerous violations regarding defective plaster and conditions in the bathrooms.

There is no dispute that there were serious violations that arose and existed during the inquiry period. Mr. Gavalas admitted that when the building was purchased by 306 West 94 Street LLC in 2002 it was in severe structural disrepair, most likely caused by years of neglect by the former owners. There also was a stop work order in effect which had halted the prior work to fix DOB violations for damaged floor joists caused by leaking fixtures in the bathrooms. Petitioner's argument that Devon Residence Hotel LLC's failure to take action to make the necessary repairs after the stop work order was issued in 2000 and that it allowed the building to deteriorate further constitutes harassment is without merit (Tr. 355-56). These acts cannot be attributed to 306 West 94 Street LLC or the current owner since they occurred outside the inquiry period.

After purchasing the building, 306 West 94 Street LLC hired professionals to lift the stop work order and to create new plans for the replacement of the floor joists. After the plans were approved, the owners asked tenants to move out of the building temporarily so that the renovation could proceed without bothering them and the workers would be unhindered by their presence. The owners worked around those tenants who chose to remain in the building even though some of them occupied units with damaged floor joists.[3] Work on the joist replacement program commenced within 18 months of the purchase of the building and was completed approximately 16 months later. Given the obstacles the prior owners had to overcome to get the stop worker order lifted and to obtain the permits to perform the job, the need to give tenants the

[3] The record demonstrates that at least two occupied units needed joists work: Mr. Galvez's unit and unit 718 where the floor was shored up from below with a steel beam so that the work could be performed without disturbing the tenant (Tr. 217). Pursuant to the Rent Stabilization Code, a landlord can evict a permanent hotel tenant prior to undertaking renovations when the planned renovation is for the room occupied by the tenant or "the building in which it is located" and the tenant has refused the landlord's written notice to move temporarily to a substantially similar room in the building at the same rent. 9 NYCRR § 2524.3. Even though the DOB plans and application do not mention demolition of SRO units, an argument could be made that demolition and renovation of these units was necessary to complete the joist replacement program and that the offered housing next door was comparable. The fact that the prior owners did not pursue an eviction action after the tenants initially refused to move is further evidence that the owners were not trying to force tenants to waive their rights to occupy their units.

option and the time to move into a newly renovated building next door, and the scope of the work performed, this timeframe was not unduly long. Moreover, the owners' method of renovating the building from the top down and removing the rotten joists and bathrooms one at a time on those floors with tenants was reasonable. Although given the opportunity, petitioner did not call any witnesses in rebuttal to demonstrate that these renovations plans were flawed (Tr. 349).

Of the 138 violations issued during the inquiry period, approximately 109 were issued prior to the construction beginning in March 2004. Despite this seemingly high number of violations, the tenant testimony concerning the conditions in the building focused mainly on the construction period. Notably, there were no significant complaints from the tenant witnesses regarding building conditions prior to the construction. Ms. Arias testified that before she moved "[e]verything worked" and that she did not have problems with the elevator, the hot water, or the conditions of the hallways (Tr. 149-51). Mr. Soto testified that despite some complaints about dirt and vermin, prior to the demolition he and his wife "lived in peace and everything was okay" (Tr. 84) and that "the big complaint were [sic] when the building started to be broken down" (Tr. 83).

Also, the record supports a finding that the owners were not ignoring these pre-construction violations and tenant complaints with an eye towards resolving them later through the renovations. I credit the testimony of Mr. Gavalas and Mr. Theologitis that they were making routine repairs in the building. This was corroborated by Mr. Moctezuma who stated that when he had a complaint, he would notify the front desk and it would be handled in a "normal time or right away depending on what it was" (Tr. 273-74). Moreover, the closed violation summary report indicated that approximately 48 violations issued after the start of the inquiry period were inspected and closed by HPD before the construction began.[4] About eight of these violations concerned repairs in Mr. Moctezuma's unit which appear to have been corrected to his satisfaction (Pet. Ex. 3).

With regard to petitioner's claims that the owners failed to repair walls and ceilings in a timely manner, I find that respondent has rebutted the presumption of intentional harassment. Many of the relevant B and C violations emanated from the rotten joist condition. Violations for

[4] According to the report, 13 class A violations, 32 class B violations, and 3 class C violations were issued after December 21, 2002, and closed as of March 4, 2004 (Pet. Ex. 3).

mold and mildew, and severely damaged walls, floors, and ceilings in the bathrooms and surrounding SRO units could not be cured without removing the water soaked, damaged joists and replacing the floors, ceilings, walls, and plumbing. As rotten joists were replaced, new bathrooms were installed which had new floors, ceilings, walls, and plumbing fixtures. Moreover, SRO units which had been demolished were rebuilt new and vacant and accessible SRO units were renovated. By the end of the work there also was new electrical wiring, new windows and doors, and all of the hallways had new paint, plaster, and rugs.

At least seven violations were for repairs in the rooms occupied by Mr. Galvez, the Sotos, and Mr. Ramirez. With regard to conditions in Mr. Galvez's unit, there was no evidence that his unanswered complaints to Arsenio, who left in 2002, were made during the inquiry period. Mr. Gavalas admitted that the conditions in unit 205 were "very bad" (Tr. 168). I credit Mr. Theologitis's testimony that Mr. Galvez would always complain to Westside SRO but never approached him, even though he was the building manager. Indeed, Westside SRO took the owners to Housing Court regarding the conditions in Mr. Galvez's room while renovations were ongoing. It does not follow that Mr. Gavalas, who was trying to replace rotten joists and had offered to relocate Mr. Galvez temporarily, would not fix his room had the opportunity arisen. In court, Mr. Galvez agreed to move to unit 209 and Mr. Gavalas agreed to renovate the room and make it the same size. Because the joists were so rotten, the entire room was demolished and replaced new. I credit the testimony of Mr. Theologitis as corroborated by Mr. Gavalas that prior to Mr. Galvez moving back, the room was measured and inspected by Westside SRO and that everyone was satisfied. As Mr. Galvez acknowledged, he did not complain to his attorneys or the Housing Court that his room was smaller (Tr. 116). Therefore, Mr. Galvez's claim that his room was smaller after the renovation is hard to believe.

Petitioner has also not established harassment of Mr. and Mrs. Soto. The Sotos testified that, during the construction, workers made a hole in their wall which caused dust to enter their room and that Mr. Gavalas refused to fix it. In addition, petitioner presented the Housing Court complaint in which Mr. Soto complained about the window, peeling paint, and an infestation of vermin. I credit the testimony of Mr. Gavalas that Mr. Soto complained to him about his unit but refused workers access to correct it. Mr. Gavalas's and Mr. Theologitis's testimony that Mr. Soto refused to have his front door replaced was supported by Inspector Wycoff who observed several old doors in the building. Given that Mr. Soto refused to have his door replaced and

went so far as to have Westside SRO tell the owners to not bother Mr. Soto about the door, it seems likely that he also refused to allow them access to the unit to replace anything else. In any event, the owners agreed to make repairs pursuant to the Housing Court stipulation and there is no evidence that it was not done to the Sotos satisfaction.

Both Mr. Garcia and Mr. Ramirez complained about conditions in their units and acknowledged that they eventually moved temporarily so that their rooms could be repaired. There is no evidence that the renovations were unsatisfactory (Pet. Ex. 13, 14).

I also find that the violations for scalding hot water on the seventh floor on February 2, 2005, and on the second floor on March 11, 2005, are insufficient to sustain a finding of harassment. I credit Mr. Gavalas that, when he went to check the violation on the seventh floor, he did not find a problem (Tr. 182), which is in accord with Mr. Soto that the condition occurred "sometimes" (Tr. 81). Mr. Soto also testified that the seventh floor hot water condition was corrected within ten hours of the inspection (Tr. 81). I further credit Mr. Theologitis, as corroborated by Mr. Gavalas, that when the inspector told him in March to reduce the water temperature, he replaced the faucets and called the plumber who changed the thermostat on the boiler (Tr. 257-58, 182-83). Mr. Galvez provided confusing testimony about when the second floor condition was remedied (Tr. 93). It should be noted that in the April 1, 2005, Housing Court stipulation, the owners agreed to correct the scalding hot water condition in the second floor bathroom (Resp. Ex. G). There was no evidence that the owners breached this agreement or that there were any more violations or complaints about scalding hot water. According to the closed violation report, the owners filed a certification of correction for the February violation on March 5, 2003, and the March violation on May 25, 2005. In light of Mr. Soto's testimony that the hot water condition was sporadic and the absence of evidence to establish when it first began, Mr. Galvez's claim that there was scalding hot water for six months was not reliable. Also, Mr. Galvez's assertion that he had to wash from a bucket seems unlikely because there were operable bathrooms elsewhere in the building. Similarly, Mr. Galvez's claim that Mr. Gavalas never responded to complaints about broken faucets is contradicted by the record which demonstrates that the owners installed new fixtures in all the bathrooms. Nor was there anything in the Ramirez affidavit that there were times when there was no hot water and other times when it was too hot which would support a finding of harassment. While it appears that the scalding hot water condition existed at various locations in the building sporadically for over one month, I

find that under the circumstances the owners resolved the problem within a reasonable period time. *See Dep't of Housing Preservation & Development v. Weall*, OATH Index No. 457/05 (Feb. 28, 2005) (where repairs made timely and services restored, allegations of harassment cannot be sustained).

Despite the open and late certified violations, I credit the testimony of Mr. Gavalas, Mr. Theologitis, and Expediter Berger that a number of the violations and poor building conditions were corrected by the construction. The violation history indicates that the building did not receive any more violations after July 21, 2005, which is around the time the construction ended (Pet. Exs. 3, 4). Mr. Poe testified that the last time he visited the building in December 2005 he observed "nearly completed renovated units" (Tr. 141). When Inspector Wycoff visited the following year he observed the building "to be in very good condition" and that the "heat and hot water was [sic] working properly" (Resp. Ex. D). While it is unclear when particular violations were actually cured, approximately 31 class A, 64 class B, and 24 class C violations issued during the inquiry period were closed by HPD at various dates prior to October 25, 2007 (Pet. Ex. 4). Respondent also presented evidence that as of January 16, 2008, all the remaining violations had been closed except for three B violations issued in 1989 and 2005 and one C violation issued in 2005. The B violations are for improper use of the cellar as an apartment, roaches in the second floor bathroom, and unlawful cooking in the unit occupied by Mr. Ramirez (Resp. Ex. Q). According to Expediter Jaffa, the C violation for lead paint in Mr. Ramirez's unit had been corrected and inspected but had not yet been removed by HPD's Lead Paint Unit, as evidenced by the "Defect Letter" code on the summary (Tr. 345-47).

With regard to the violations concerning vermin it appears that there was a problem with roaches towards the end of February and early March 2003 which resulted in the bulk of the vermin violations issued. The closed violation report indicates that the owners responded to the complaints and the violations were cured and closed by HPD shortly after they were issued. I found Mr. Galvez's uncorroborated claim that there was no exterminator service between 1994 and 2006 incredible. Instead, I credit Mr. Gavalas's testimony that they had a sign-up sheet for tenants to request an exterminator. The two March 18, 2003, complaints were made by Mr. Moctezuma for mice and roaches in his unit. According to the closed violation summary report, a certification of correction was received by HPD on April 22, 2003, and these violations were dismissed on July 23, 2003. There is no indication that Mr. Moctezuma was dissatisfied with the

owners' response to this problem. I also credit the testimony of Mr. Gavalas that the construction literally drove roaches out of the wood work. I have no doubt that the Sotos, Ms. Garcia, Mr. Ramirez, and Mr. Galvez experienced a large influx of mice and roaches seeking cover, especially prior to the renovation of their rooms and the elimination of the holes where vermin could easily enter. I cannot conclude, however, that this expected consequence of the construction constituted harassment, especially since there was credible testimony from Mr. Gavalas that there was an emergency exterminator on-call.

Looking at the totality of the record, I find that respondent rebutted the presumption of harassment based on the HPD violation history. *See Wulliger,* OATH 782/06 (respondent rebutted presumption of harassment where there was an extensive violation history including two vacate orders); *Rice,* OATH 1838/04 (respondent rebutted presumption of harassment where there was an extensive violation history); *Cf. Tauber*, OATH 675/07 (extensive violation history supported by tenant testimony, and evidence that respondent was not acting reasonably to make necessary repairs in a timely manner sufficient to sustain a finding of harassment).

Heat and Hot Water Complaints

It is undisputed that no heat violations were issued during the inquiry period. In support of the charge that tenants were denied heat and hot water, petitioner presented a 311 history showing approximately 24 heat and/or hot water complaints between January 2003 and October 2006 (Pet. Ex. 1). This tribunal has found that 311 complaints standing alone are insufficient to establish harassment. *Dep't of Housing Preservation & Development v. Schwartz*, OATH Index No. 788/06, at 3-4 (Apr. 7, 2006), *aff'd*, Deputy Comm'r Decision (July 18, 2006) (311 records only show that a telephone complaint was made, but offer no description of the nature of the complaint or establish that tenants had no heat, or that the landlord was on notice that complaints had been made); *Pascal*, OATH 626/06, at 3 (eleven heat complaints made during inquiry period which did not result in the issuance of a violation insufficient to demonstrate harassment).

Here, the 311 history was introduced by someone who did not investigate the complaints and did not know how to read the document. There was no testimony from a reliable source concerning the severity or duration of the heat conditions. Also, there was nothing about the

chronology of the complaints from which to infer that heating problems were so prolonged that the owners were trying to harass tenants into leaving the building.[5]

Mr. Gavalas testified credibly that they had an excellent boiler and that when someone made a heat complaint, the building would call a service company to check the problem (Tr. 182-83). This testimony was corroborated by Ms. Arias who stated that she never had problems with the hot water. Instead, I found the Soto's claims about heat and hot water vague and contradictory. Mr. Soto said the heat was out before the construction (Tr. 82) and Mrs. Soto claimed that it was out "all the time" during the construction between 2005 and 2007 (Tr. 58). She also stated that it was not a two-year period and that she was not sure because she is ill (Tr. 62). Her claim of no heat was also contradicted by her statement that "they used to put it back every now and then" (Tr. 58) and that they provide heat "whenever they feel like it" (Tr. 62).

Petitioner's reliance on Mr. Guzman's testimony that the heat would be off for two or three days at a time (Pet. Mem. at 16) is misplaced. It was unclear what time frame Mr. Guzman was referring to and he moved out prior to the construction. Above all, Mr. Guzman was hard of hearing (Tr. 158) and initially testified that the heat would be out between two and four hours (Tr. 161). On redirect he stated that the heat was out "about two or three days, not years" (Tr. 162), which could refer to the number of occasions of no heat. Since Mr. Guzman did not appear to have any heat complaints and stated that he was advised when the boiler was going to be out (Tr. 157), I conclude that he was more likely testifying about short disruptions since he noted that service was always restored (Tr. 163).

Dust, Debris, Construction Noise, and Other Construction Consequences

Mr. Soto's claim that the tenants had "no dust protection" (Tr. 75) and Mr. Galvez's claim that there was "no cover" to protect from the dust (Tr. 92) are without merit. There was ample evidence in the record, including photographs taken by Mr. Galvez (Pet. Ex. 9G), that the owners put up plywood barriers and hung sheets from the ceiling to keep the work zones and the dust separate from the inhabited areas of the building. Moreover, Mrs. Soto and Mr. Galvez corroborated the testimony of Mr. Gavalas and Mr. Theologitis that two men had been hired to clean the dust and remove the debris (Tr. 64, 91). The fact that despite precautions dust still

[5] Heat complaints were filed on January 26 and December 5, 2003, January 1, 10, 19 and December 22, 2004, January 22, 27, March 2, 9, 30, December 1, 2, 4, 8, 10, and 16, 2005, and October 26, 2006 (Pet. Ex. 1).

existed is insufficient to sustain a finding of harassment. While the owners could have perhaps hung more or better sheets to keep the dust contained or had more than two men dedicated to cleaning, dust is a natural and inevitable consequence of demolition and construction, especially with a project of this magnitude.

Similarly, the tenants' claims that the staircase was constantly full of construction debris and that the egresses were blocked are without merit. I credit the testimony Mr. Theologitis as corroborated by Mr. Gavalas that they never placed a barrier in a way that would block an egress and that they had chutes attached to the windows to throw down the debris as it accumulated. Mrs. Soto confirmed that they had "some sort of window" that they would use to "bring the debris down" (Tr. 64). As a practical matter, it seems unlikely that workers would haul heavy construction debris down the stairs when they could throw it down the chute. Mr. Gavalas's candid admission that there were times when the hallways were blocked by materials and that they would have to ask tenants to wait while it was cleared away (Tr. 185) lent credibility to respondent's position that the owners did not allow debris to accumulate unnecessarily. Mr. Moctezuma's testimony that he did not observe debris on the staircases lent further support to this conclusion. I also credit Mr. Gavalas and Mr. Theologitis, as corroborated by Mr. Moctezuma that the work areas were inaccessible to the tenants. Nothing else in the record, including the tenant affidavits and Mr. Poe's photographs of debris on the sixth floor which was vacant and closed off to tenants, substantiates these claims.

The best evidence in support of the owners' handling of dust and debris were the multiple inspections conducted by DOB and HPD which found the conditions to be code compliant. For example, on March 11, 2005, HPD sent an inspector who found no evidence that an emergency exit was blocked, that stairwells were filled with construction materials, or that the hallway on second floor had insufficient space to pass safely (Resp. Ex. G). In addition, DOB inspectors visited the building on March 9 and 30, 2005, and did not observe unsafe conditions from dust and debris or a blocked egress (Resp. Ex. P). Respondent provided unrebutted testimony that, except for an accumulation of debris in the side yard, at no time did the owners receive a violation related to dust and construction debris inside the building, despite numerous inspections by various City agencies. Inspector Delacruz confirmed that there were no violations issued concerning the Tenant Safety Plan (Tr. 49-51).

Likewise, the tenants' claims that construction work was performed anywhere from 7:00 a.m. until 3:00 a.m. were unsupported and not convincing. On at least six occasions DOB responded to complaints of after hours work and found no construction being performed (Resp. Ex. P). I credit the testimony of Mr. Gavalas and Mr. Theologitis as corroborated by Mr. Moctezuma that construction work was performed during regular working hours. It seems unlikely that the owners would pay men overtime to work 20-hour days.

Also implausible was Mrs. Soto's claim that between 2005 and 2007 all the bathrooms on the seventh floor were closed and that she had to use a bathroom on the sixth floor. This allegation was not supported by Mr. Soto who testified that for nine months he had to use a bathroom which was 50 feet from the room. Since all the bathrooms were removed on the sixth floor (Tr. 218), it is unlikely that Mrs. Soto was using one for two years. In addition, Mr. Soto's claim that the bathroom was taken out of service without notice was contradicted by Mrs. Soto, who acknowledged that she had notice that it would be remodeled when the construction began (Tr. 57). I also credit Mr. Gavalas and Mr. Theologitis as supported by Mr. Moctezuma that there always was a bathroom available on the floors where tenants were living.

Mr. Galvez's claim that the owners left live wires uncovered for five months and that these wires shocked him was unbelievable (Tr. 97, 119-20). I credit the testimony of Mr. Gavalas and Mr. Theologitis that they replaced all the wiring and cable throughout the building, that at no time live wires were exposed, that the inactive wires were about nine feet off the floor, and that they were eventually enclosed when the job was completed and the power turned on. Mr. Galvez's own photographs indicate that the wires were up near the ceiling well out of reach (Pet. Ex. 9A-C). Moreover, there is no evidence that HPD or DOB issued a violation for such an extreme hazard. The fact that there were inactive wires exposed is not harassment since the owners were endeavoring to provide new electrical and cable for everyone and at no time was service interrupted. Finally, Mr. Galvez's claim that he had no notice of the construction was incredible in light of the owners' outreach efforts before the construction began.

DOB Violations: Elevator Service, Illegal Alterations, and Hotel Use

Petitioner submitted copies of 14 open DOB violations issued during the inquiry period for failure to maintain the elevator, non-conforming work on the first floor and building bathrooms, and use of units contrary to the certificate of occupancy (Pet. Ex. 7).

There is no dispute that the elevator, which was very old and not working properly, was taken out of service around January 2005. Mrs. Soto's testimony that the owners "stopped doing maintenance" on the elevator (Tr. 55) was contradicted by Mr. Gavalas and Mr. Theologitis, who credibly explained that around this time the owners got a permit to fix the elevator, which would not stop evenly on each floor. The delay in repairing the elevator was due to their inability to obtain the necessary parts to fix the motor. Indeed, Mr. Galvez testified that when the elevator was out of service he was told a needed part was on order from California (Tr. 91). Moreover, I do not credit the tenants' testimony that the elevator was out of service for almost nine months. DOB responded to complaints about the elevator in March and May 2005 and found it to be working properly (Resp. Ex. P). Also, the Housing Court stipulation dated June 30, 2005, required that the elevator be restored to full service (Pet. Ex. 8). Mr. Theologitis testified that he did so (Tr. 245). After it was restored the building got a DOB violation in July 2005 for the leveling of the elevator (Pet. Ex. 7D). They got another DOB violation in October 2005 for water leaking from the skylight and for not stopping level (Pet. Ex. 7H). I credit the testimony of Mr. Theologitis that they fixed the leak problem but were only able to service the leveling problem, not fix it, because they could not find the necessary part (Tr. 248). When Inspector Wycoff visited the building in 2006 he found that "the elevator was working properly" (Resp. Ex. D). Indeed, there were no more violations for the elevator after July 2005. The only tenants who testified as to the inconvenience caused were the Sotos. Contrary to petitioner's claims (Tr. 353), there was testimony from Mr. Soto and Mr. Gavalas that the Sotos were offered the option to move to a lower floor while the elevator was out of service but that they refused (Tr. 75, 180). I also credit Mr. Gavalas and Mr. Theologitis as corroborated by Mr. Moctezuma that tenants were provided with notice that the elevator would be out of service.

Moreover, the use of plywood was a reasonable safety precaution because it prevented tenants from opening the elevator doors and falling down the shaft. I credit the testimony of Mr. Gavalas and Mr. Theologitis that no one from management wrote threatening messages on the plywood and that they immediately replaced it when the graffiti was discovered. The writing about raising rents and moving tenants out of the building seems more likely to have been created by angry tenants rather than building managers. Mr. Galvez's claim that the writing was left on the second and third floors for five months was contradicted by Mr. Moctezuma who

testified that he never observed the writing even though he lived on the fourth floor and walked up and down the stairs three or four times a day (Tr. 275).

To the extent petitioner claimed that respondent improperly demolished SRO units, it appears that petitioner was relying upon allegations made by Mr. Poe, who claimed that the work was in violation of the permits obtained. However, on cross-examination Mr. Poe acknowledged that he was advised by HPD that an inspector visited the building in March 2005 and determined that the "gut demolition work" was being done in compliance with the permit (Tr. 137-38). Moreover, DOB inspected the building on January 12, April, 26, May 15, 21, and 23, June 5, 6, and 10, 2005, concerning complaints of illegal demolition and construction and found them to be unfounded (Resp. Ex. P). While the renovation plans do not specify that SRO units would be removed as part of the joist replacement project (Pet. Ex. 6), petitioner did not rebut the testimony of respondent's witnesses who stated that it was necessary to remove SRO units around the bathrooms in order to replace the rotten joists which spanned from wall to wall. Given the extensive and expensive nature of this work, it is unlikely that the owners would demolish rooms unnecessarily. I credit the testimony of Mr. Markowitz, who had no apparent interest in whether the current owner obtains a CONH (Tr. 309), that every time he visited the building he observed work consistent with the filed plans. I also credit the unrebutted testimony of Mr. Gavalas that all the demolished SRO units were restored to the same floor plan that existed prior to construction and that no SRO units were eliminated. There were no violations issued concerning the demolition or alteration of SRO units. Indeed, Inspector Wycoff confirmed that all pre-existing SRO units were intact in 2006 and noted that there are actually more units than permitted by the certificate of occupancy (Resp. Ex. D).

Petitioner also offered proof that the owners engaged in the illegal removal of apartments on the first floor. It should be noted that the reconfiguration of the apartments resulted in an increase of available SRO units and it is unclear how this constitutes harassment. In any event, I credit the testimony of Mr. Theologitis that the apartments were altered before the building was purchased and that some of the DOB violations for illegal construction were issued even though no construction in those areas was actually being performed. The violations do not explain when the condition concerning the removal of the apartments first existed. Also, the violations for the non-conforming work on the bathrooms are cryptic and I am unable to draw any conclusions without an explanation from someone who actually visited and observed the alleged construction

being performed during the inquiry period. DOB Inspector Delacruz did not provide any testimony concerning these demolition/alteration violations.

At page three of counsel's closing memorandum, petitioner claims that respondent's harassment of tenants also included "the partial use of the premises as a hotel for transient tourists" and cites to paragraph 8 of the petition. However, this claim was never pled anywhere in the petition (ALJ Ex. 1). Thus, when petitioner sought to introduce evidence from Inspector Delacruz that she issued violations for the owner's use of the building as a hotel, counsel for respondent objected on the grounds that it was beyond the scope of the hearing (Tr. 46-47). Here, there is no basis to amend the petition to adjudicate the issue whether the allegations of a hotel use would constitute harassment. Furthermore, it would be unfair to amend the petition *sua sponte* where no timely application was made by petitioner's attorney. Counsel's insertion of this charge into her closing memorandum does not constitute a motion to amend the pleadings. Amendment of charges in administrative proceedings, where pleadings serve only a notice-giving function, is freely granted absent irremediable prejudice. Notice is sufficient as long as the charges apprize the party of the conduct at issue so as to enable him to adequately prepare and present a defense. *Human Resources Admin. v. St. Louis*, OATH Index No. 895/05, at 2 (May 26, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-03-SA (Feb. 9, 2007). Nevertheless, the Court of Appeals has held that "no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged." *Murray v. Murphy*, 24 N.Y.2d 150, 157, 299 N.Y.S.2d 175, 181 (1969); *see also Brown v. Saranac Lake Central School District*, 273 A.D.2d 785, 709 N.Y.S.2d 706 (3d Dep't 2000). Even assuming *arguendo* that the issue could be reached, there was insufficient evidence to conclude that the undisputed use of the building as a hotel was intended to cause SRO tenants to vacate their units. The only evidence came from Mrs. Soto who complained that guests use the bathroom and "they're always dirty" (Tr. 60) and Mr. Galvez who stated that he is friendly with the tourists which is "going to be good for me" (Tr. 112).

FINDINGS AND CONCLUSIONS

For the reasons set forth herein, I find that petitioner has not proven that there were statutory acts or omissions occurring at 306 West 94th Street which fall within the definition of harassment contained in section 27-2093(a) of the Administrative Code. Even if these

allegations were to fall within the statutory definition of harassment, respondent has rebutted the presumption contained in section 27-2093(b) of the Administrative Code that such acts or omissions were committed with the intent to cause a person lawfully entitled to occupancy of an SRO unit to vacate the unit or to surrender or waive a right in lawful occupancy. Therefore, I find that harassment did not occur at the premises during the inquiry period.

RECOMMENDATION

The application of respondent for a Certificate of No Harassment should be granted.

Alessandra F. Zorgniotti
Administrative Law Judge

March 31, 2008

SUBMITTED TO:

SHAUN DONOVAN
Commissioner

APPEARANCES:

SUSAN BRONSON, ESQ.
Attorney for Petitioner

BELKIN, BURDEN, WENIG, & GOLDMAN, LLP
Attorneys for Respondent
BY: KARA I. SCHECTER-RAKOWSKI, ESQ.
AMY M. MACK, ESQ.