



OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Hearings Division

DECISION

Caroline Kane, Esq. - Nacmias Law Firm, PLLC 592 Pacific Street, 1st Floor Brooklyn, NY 11217	Summons No: 039105763M et al. (1 Summons) DEPT OF BUILDINGS, -against- THE DNV MANCHESTER, LLC Hearing Date: 03/28/2025 Hearing Location: Remote Type of Hearing: By Telephone
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Total Penalty Amount: \$625.00
Community Service(Hr): Not Applicable

SUMMONS #	SUMMARY DISPOSITION	DATE OF OCCURRENCE	PLACE OF OCCURRENCE
039105763M	Sustained	02/12/2024	55 EAST 128 STREET Manhattan

LINE ITEM	OATH CODE	CODE SECTION/RULE	RESULT	PENALTY
1	B254	28-301.1	Sustained	\$625.00

Findings of Fact & Conclusions of Law

A hearing was held on March 28, 2025 via telephone in connection with summons number 039105763M ("the summons") which cites a violation of N.Y.C. Building Code 28-301.1. The Issuing Officer observed on February 12, 2024 at 55 East 128th Street, New York, New York ("the premises") an inoperable household honeywell thermostat to be uncontrollable and causing excessive heat to tenant who occupies the dwelling. The remedy in the summons includes the maintenance of the boiler and submission of a certificate of correction. April 12, 2024 was the cure date within the summons.

The Petitioner appeared through its authorized representative: Mr. Sahni.

The Respondent appeared through its authorized representative: Attorney Caroline Kane.

The parties waived the reading of the summons.

The Respondent requested an adjournment of the hearing due to two civil lawsuits neither for which the Petitioner is a party of. However, the Petitioner's representative was required to give testimony at one or both of the civil lawsuits. The Petitioner did not object to the Respondent's request for an adjournment. However, the prior adjournment order dated October 17, 2024 specifically indicates that the adjournment was final as to the Respondent. As such, the Respondent's application for another adjournment of the summons was denied.

The Petitioner presented its case, including the production of the Officer, Luis Tua, at the hearing. The inspector testified that there were numerous complaints at the premises due to no heat at the premises. However, the inspector testified that, on the date of the inspection, there was excessive heat at the premises due to a modern day thermostat he observed which was incompatible with the boiler which resulted in the boiler operating non stop. The inspector testified that he had to appear in civil court in connection with the cited code violations within the summons. The Petitioner rested on the summons after questioning Inspector Tua.

Thereafter, the Respondent sought dismissal of the summons. The Respondent cross examined Inspector Tua regarding the cited charge violation within the summons. Also, in defense of the summons, the Respondent submitted a fourteen page decision from one of the civil lawsuits it is involved in which is entitled *DNV v. Davis*, Civil Court, City of New York, Housing Division, Index No. 300976/2023 ("the nonpayment action"). The Respondent's Representative indicated that the nonpayment action addresses what was wrong with the boiler at the premises, and who was responsible for the boiler at the premises. The Respondent's Representative contended that, based on the decision in the nonpayment action, that a tenant at the premises was at fault. The Petitioner's Representative objected to the admission of the decision from the nonpayment action based on the position that the owner of a building is legally responsible for the maintenance of the premises. In support of the Petitioner's objection to the admission of the decision from the nonpayment action as proffered at the hearing by the Respondent, the Petitioner's Representative cited to Appeals No. 1701012 *NYC vs. Parkash*. Upon evaluation of the decision in the nonpayment action, along with consideration of the respective positions of the Petitioner and the Respondent as it relates to the relevancy and admissibility of the decision from the nonpayment action, the decision shall be admitted into the record as evidence over the objections by Petitioner. The decision from the nonpayment action shall be identified as Respondent's Exhibit 1.

Since the Respondent's Representative took the position during the hearing that the tenant was at fault for the cited violation charge within the summons, an opportunity was given to produce actual caselaw supporting the position to which the Respondent was unable to do so. However, Respondent was unable to provide any applicable caselaw supporting this position.

The Respondent asserted an additional defense to the summons during the hearing based on the impossibility defense. In that respect, the Respondent's Representative contended that physical impossibility is another basis for dismissing the summons. In response, the Petitioner contended that the defense of impossibility is not a viable defense for the instant summons since the defense is only available when a Respondent can prove that there was both physical impossibility and legal impossibility. In response to the Petitioner's contention that impossibility is not a viable defense to the instant summons, the Respondent cited to Appeal 2100994, *DOB vs. U.S. Trust, N.A* in support of the argument that the legal defense of impossibility exists when the Respondent is physically and legally barred from making necessary repairs. In that respect, the Respondent's Representative contended that the legally barred element is met for purposes of the impossibility defense based on the nonpayment action as evident by the decision from that action (i.e. Respondent's Exhibit 1). In response to the Respondent's contentions that the legally barred element was met for purposes of the applicability of the impossibility defense, the Petitioner's Representative referred to Appeals No. 240074 *DOB vs. Rita Walters* to refute that a pending eviction proceeding for non payment of rent, such as Respondent's Exhibit 1, establishes an impossibility defense.

The summons makes out a prima facie violation N.Y.C. Building Code Section 28-301.1. The Respondent has not established a meritorious defense to the summons.

Preliminarily, as the Respondent is the owner of the premises, it bears responsibility for the maintenance of the premises. See *per e.g. NYC v. Juan Gonzalez*, Appeal No. 900562; and *NYC v. 20 Warren Street LLC*, Appeal No. 1301237. The decision from the nonpayment action relied upon by the Respondent (i.e. Respondent's Exhibit 1) does reference that the tenant sabotaged the thermostat. It will be noted that the decision does not indicate whether the tenant sabotaged the thermostat on or around the date and time of the occurrence (within the summons). It will be further noted that the decision does not include any opinion by a qualified expert supporting that any sabotage of the thermostat at the premises by the tenant was the cause of the excessive heat that was evident at the premises at the time that the Issuing Officer observed the cited violation within the summons. Of significance, even if the tenant caused the circumstances that resulted in the issuance of the summons by Issuing Officer, this would not obviate the Respondent of its legal responsibility as a premise owner for the maintenance of the premises. Hence, the summons will not be dismissed based on the tenant allegedly being at fault for the building code violation cited in the summons.

Additionally, the case cited by the Respondent, Appeal 2100994, *DOB vs. U.S. Trust, N.A* is highly relevant as it is instructive relative to the applicability of the impossibility defense requiring both physical impossibility and legal impossibility to refute a violation of N.Y.C. Administrative Code 28-301.1. In *DOB v. U.S. Trust*, it was determined that the Respondent was not entitled to successfully rely upon the impossibility defense as a defense to a violation of N.Y.C. Administrative Code 28-301.1. (*DOB v. U.S. Trust*, p. 1 and 2). Regarding the physical impossibility aspect of the defense of impossibility, it was determined in *DOB v. U.S. Trust* that the Respondent failed to produce any evidence whatsoever supporting that it was barred from accessing the premises. (*DOB v. U.S. Trust*, p. 1). In connection with the legal impossibility aspect of the defense of impossibility, it was determined in *DOB v. U.S. Trust*, that the Respondent failed to establish the relevancy of a pending eviction action between the Respondent (as the owner of the premises) and squatters as respects the Respondent's ability to access the roof at the premises for the purpose of addressing the building code violation which was cited in the summons. (*DOB v. U.S. Trust*, p. 2).

As similar to the Appeal decision in *DOB v. U.S. Trust*, the Respondent has not established the physical impossibility aspect of the impossibility defense. In that respect, the Respondent has not met the burden of establishing that it was actually barred from gaining access to the premises for purposes of addressing the cited charge within the summons. In that respect, the Respondent did not produce any witness and/or any other information from an individual with knowledge regarding the inability of the Respondent to gain any access to the premises. Respondent's Exhibit 1, which consists of the Court's decision in the non-payment action between the Respondent and a tenant at the premises, does not actually address any difficulties experienced by the Respondent in gaining access to the premises. Instead, the decision in the nonpayment action (i.e. Respondent's Exhibit 1), reflects the following:

Pages 3 and 4 of Respondent's Exhibit 1 references the DOB violation which is the subject of this hearing.

Pages 7 and 8 of Respondent's Exhibit 1 references to the testimony given by Inspector Tua in the nonpayment action.

Page 9 of Respondent's Exhibit 1 references testimony by an electrician in the nonpayment action reflecting that the tenant was sabotaging the thermostat, and that the tenant could have been running the boiler and then turning it off when the inspector comes.

Page 10 of Respondent's Exhibit 1 references testimony by the Respondent's Managing Agent reflecting that the tenant had removed the thermostat on several occasions which caused the boiler to malfunction, and that the Respondent replaced the thermostat in February of 2024.

On Page 11 of Respondent's Exhibit 1, which includes the Court's decision in the nonpayment action, it is concluded that, by a preponderance of the evidence that, the tenant's disconnection of the thermostat caused subsequent problems with the boiler. The Court specifically referenced that the tenant testified as to disconnecting the thermostat to stop the nuisance of summertime heat and, subsequent to October of 2023, which is when the landlord would be responsible for providing heat, that the tenant disconnected the thermostat.

Essentially, the decision in the nonpayment action supports that the tenant may have been at fault for the cited violation observed by the Issuing Officer. However, the decision in the nonpayment action does not support or establish that the Respondent was barred from gaining access to the premises. As such, the Respondent has not met the element of physical impossibility for the purpose of relying upon the impossibility defense.

The Respondent has established the relevancy of the nonpayment action. In that respect, the nonpayment action does address the issues with the thermostat, boiler and heating related issues at the premises, including the allegations that the tenant was manipulating and/or sabotaging the thermostat. However, while the decision in the nonpayment action, which was admitted into the record, is relevant in a general sense, it still does not establish the applicability of the legal impossibility defense as addressed in *DOB v. U.S. Trust*, p. 2. In that respect, the Board has repeatedly found that a pending eviction proceeding for non-payment of rent in and of itself is insufficient to establish an impossibility defense where Respondent failed to show it was barred from gaining access through other legal means. See *FDNY v. 382 Bay St., LLC.*, Appeal No. 2000476 (May 21, 2020); *FDNY v. Diplomat Property Manager, LLC*, Appeal No. 1900428 (June 27, 2019); *NYC v. Parkash 2625 LLC*, Appeal No. 1701012 (November 30, 2017); *NYC v. Chen Jiang Fen*, Appeal No. 1300100 (April 25, 2013). To that end, the decision in the nonpayment action does not support that the Respondent was barred from accessing the premises. Instead, the decision in the nonpayment action references that the Respondent was at the premises in February of 2024 and replaced the thermostat, which was during the timeframe in which Inspector Tua visited the premises. The Respondent did not produce any evidence, such as an affidavit from the Respondent, transcript(s) and/or other credible evidence supporting that the Respondent was actually prohibited from accessing the premises on February 12, 2024 or at anytime prior thereto. It will be noted that in connection with the decision in the nonpayment action that there is no reference to any restraining order or other legal prohibition to the Respondent accessing the premises.

The impossibility defense requires satisfaction of both elements, i.e. physical impossibility and legal impossibility. Neither one of the elements of the impossibility defense are met. Moreover, it will be noted that the decision in the nonpayment action does not specifically indicate that the tenant was responsible for the installation of the thermostat that resulted in excessive heat at the premises on February 12, 2024. Instead, the decision from the nonpayment action references that the Respondent replaced the thermostat in February of 2024, which was during the month in which the Issuing Officer, Inspector Tua, inspected the premises. Indeed, Inspector Tua testified that the cause of the excessive heat at the premises was likely the result of the installation of a thermostat that was incompatible with the boiler.

Based on the foregoing, the summons is hereby sustained.

	
03/31/2025	03/31/2025
April Forbes, Hearing Officer	Date