

Slip Copy, 2014 WL 7151319 (N.Y.City Civ.Ct.), 2014 N.Y. Slip Op. 51756(U)  
**(Table, Text in WESTLAW), Unreported Disposition**  
**(Cite as: 2014 WL 7151319 (N.Y.City Civ.Ct.))**

NOTE: THIS OPINION WILL NOT APPEAR IN A  
PRINTED VOLUME. THE DISPOSITION WILL  
APPEAR IN A REPORTER.

Civil Court, City of New York,  
New York County.  
201 W. 89TH OWNERS, INC., Petitioner–Landlord,  
v.  
**Barbara MOSTEL**, Respondents–Tenants.

No. L & T 083986/2013.  
Dec. 2, 2014.

Rosen Livingston & Cholst LLP by [Andrew J. Wagner](#), Esq., for Petitioner's attorney.

Adam Leitman Bailey, P.C. by [Christopher Halligan](#), Esq., for Respondent's attorney.

[PETER M. WENDT](#), J.

\*1 Following trial in this summary holdover proceeding, held on July 8th and 21st, 2014, the court sets forth below its findings of fact and conclusions of law.

Petitioner is the owner and landlord of cooperative unit 2C, located at 201 West 89th Street, New York, New York 10024 (the “subject premises”). In October 2013, Petitioner commenced this holdover proceeding against the Respondent on the ground that Respondent has violated a substantial obligation of her tenancy and has violated substantial terms of the proprietary lease for the subject premises. The Notice to Cure dated and served on April 8, 2013, attached to the petition and incorporated therein by reference, alleges that Respondent, in violation of paragraph “13” and 18(b) of the Proprietary Lease and paragraph (5) of the Landlord's House Rules, has unreasonably

allowed cigarette smoke and/or other odors to escape the subject premises and permeate throughout the public corridor outside the subject premises. The Notice to Cure further alleged that: (1) the Landlord, its agents, employees and/or building service personnel have observed that the odor of cigarette smoke exists in the public corridor outside of the subject premises, and the odor is potent near the apartment door of the subject premises; (2) the building's managing agent has received several complaints from other building tenants about the recurring presence of cigarette smoke odor in the public corridor outside of the subject premises; (3) Despite receiving repeated requests from the managing agent to abate the odor of cigarette smoke emanating from the subject premises, Respondent has ignored such requests, and the condition in the public corridor near the subject premises persists. The Notice to Cure required Respondent to cure this default on or before May 14, 2013. The subsequent Notice of Termination, dated August 15, 2013 and also attached to the petition, alleges that Respondent failed to comply with the Notice to Cure.

In her Answer dated April 18, 2014, Respondent asserted the following affirmative defenses: (1) Petitioner has unclean hands in that there is a lengthy history of hostility against the Respondent by the Petitioner and/or members of its Board of Directors and/or certain unduly powerful shareholders of Petitioner; (2) Petitioner is estopped from bringing this proceeding as Respondent has been caused to change her position to her detriment due to the personal hostility between Petitioner and Respondent. Respondent also asserted the following counterclaims for: (1) attorneys' fees; (2) damages and punitive damages for intentional infliction of emotional distress; and (3) damages and punitive damages for prima facie tort.

At trial, Petitioner's Notice to Admit (Petitioner's

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Exhibit 1), Respondent's response to the notice (Respondent's Exhibit A), a certified copy of the deed (Petitioner's Exhibit 2), and the original proprietary lease (Petitioner's Exhibit 3) for the subject premises was admitted into evidence without objection by either side. Petitioner presented its *prima facie* case through the testimony of Felix Romero, the superintendent, Alfred Nicasio, the property manager for the building, Sandra and Jeffrey Smith, tenants who reside on the same floor as Respondent in the building, and through its exhibits.

\*2 Mr. Felix Romero <sup>FN1</sup> testified that he has been employed by Petitioner for eighteen (18) years as the superintendent for the building located at 201 West 89th Street, New York, New York. He asserted that his duties are to maintain the building, perform repairs with the handyman, assist the handyman and other tasks. He testified he was familiar with the subject premises, and has visited the subject premises approximately three or four times a year for the past ten (10) years to perform repairs. Mr. Romero further testified that the subject premises is on the second floor with three (3) other apartments, including apartment 2A. Mr. Romero asserted that Sandra and Jeffery Smith reside in apartment 2A with their teenage children. He further asserted that apartment 2A and the subject premises are across the hallway from each other; apartment 2B is next to apartment 2A, and has been empty for four (4) years as it is a sponsor owned apartment; and apartment 2D also on the second floor has been vacant for at least four (4) years. Mr. Romero asserts that he has been to apartment 2B at least fifty (50) times in the last two years supervising the renovations being done, and did not detect any odor in apartment 2B. He further asserts that he has visited apartment 2D in the last two (2) years to check on the apartment for leaks, and did not detect any odor. Mr. Romero maintains that he has visited apartment 2A four (4) times in the last two (2) years, and also did not detect any odors. Mr. Romero further testified that he has visited the subject premises at least eight (8) times in the last two (2) years to perform

repairs, and each visit lasted from seven (7) to ten (10) minutes.

**FN1.** On October 31, 2014, the attorneys' for both parties entered into a stipulation agreeing that "the Judge's reading of his notes into the record on September 19, 2014 shall be deemed an appropriate part of the record, and counsel for both sides agree not to object to the Court repeating its notes of the testimony being substituted for the actual testimony. If a portion of the court's notes overlap the actual testimony, the actual testimony shall superseded the notes dictated."

Mr. Romero alleges that since early 2012, he smelled cigarette odor in the subject premises. Further, Mr. Romero asserts that when he left the subject premises into the public hallway, he observed cigarette odor. Thereafter, in March 2012, Mr. Romero asserts he visited the subject premises to address the issue of insufficient heat. Mr. Romero testified that he smelled cigarette odor in the public hallway. Thereafter, in late September and December 2012, he testified he visited the subject premises to perform repairs, and again smelled cigarette odor in the public hallway. He further testified that the severity of the cigarette odor was the same in December 2012 as in March and September 2012. Subsequently, in early 2013, he testified he visited the subject premises to perform further repairs, and still smelled the cigarette odor outside of the subject premises. Mr. Romero asserts his next visit was in March 2014, and although he smelled cigarette odor, the odor was less strong in the public hallway in 2014 than the previous years.

Mr. Romero testified that in early 2012, he received a complaint from Sandra Smith regarding the cigarette odor in the public hallway, which he referred to management. He further testified that he did not receive any other complaints from anyone in the building prior or subsequent to Ms. Smith's complaint.

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\*3 On cross examination, Mr. Romero testified that there are 107 apartments in the building, and knows only one of the co-op owners who smoke. He testified that other than apartment 2C, 3A and 9C, he does not know of anyone else who smokes in the building. He asserts that he's seen the owners of 3A and 9C smoking outside, however he never saw Respondent smoking outside of the building. He further testified that the previous tenant in apartment 2D was a smoker. He asserts that the porter cleans the public hallway on the second floor, and cleans the public areas outside of the subject premises once a week. He testified that the walls on the second floor hallway were painted four (4) years ago, and there are vents on all floors of the building in the public hallways. He asserts that all the floors are connected to the same ventilation shaft, and that all vents are designed to carry the air and odors outside.

On the redirect of Mr. Romero, he testified that there were no apartments below the second floor. Moreover, he testified that the purpose of the exhaust vents is to exhaust smells such as cigarettes and cooking odors. He asserts that the air in the vent flows up through the exhaust vents, however he never received complaints from any tenants above the second floor regarding cigarette odors. He testified that the prior tenant of apartment 2D who also smoked cigarettes vacated the apartment in 2009.

Alfred Nicasio testified that he is employed by Lawrence Properties, a real estate firm. He testified that he is a property manager and manages six (6) buildings, including the building located at 201 West 89th Street, New York, New York. He testified that he has managed the building since April 2011, and his duties are dealing with complaints from the shareholders and receiving rent payments. He asserts that there are 107 units in the building. Admitted into evidence on Petitioner's case without objection by Respondent was the certified copy of the multiple

dwelling registration. Mr. Nicasio testified that **Barbara Mostel** resides in apartment 2C, and that he first visited the subject premises in late 2011 due to a cigarette complaint communicated to him verbally from Sandra Smith who lives on the second floor. He asserted that the day he visited the subject premises, he smelled cigarette odor in the hallway. He states he spoke with Respondent regarding the steps, if any, she took to stop the cigarette odor from penetrating into the hallway. He asserts she stated she would try electric cigarettes and try exiting the cigarette odor through the air conditioning vent in the subject premises. Mr. Nicasio asserted that he sent a letter by certified mail (Petitioner's Exhibit 5) dated February 6, 2012 to Respondent informing her that he found a strong smell of cigarette smoke not only in the subject premises but also in the public hallway, and informed her that a re-inspection would take place two weeks later.

Mr. Nicasio testified that he returned to the subject premises two weeks later, and still detected cigarette odor in the public hallway at the same level as it had been two weeks earlier. Thereafter, Mr. Nicasio testified he sent another letter dated March 28, 2012 reinforcing the idea that there was still cigarette odor in the public hallway. Subsequent to the letter dated March 28, 2012, Mr. Nicasio asserts he conducted another inspection, and found that the smell of cigarette odor in the public hallway had not changed. Mr. Nicasio testified that during all the inspections, he smelled cigarette odor in the subject premises and in the public hallway, and the cigarette odor slightly increased when the subject premises door was opened. Mr. Nicasio asserted that after each inspection, he reported all the information back to the Board.

\*4 Mr. Nicasio testified that in 2013 there was an agreed upon inspection at the subject premises, however he does not recall the month of the inspection. He asserted that between March 2012 and March 2013, he received additional verbal complaints from Sandra

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Smith, but from no other tenants in the building. In the fall of 2013, Mr. Nicasio stated that another inspection of the subject premises was performed. He testified that he, Respondent's attorney, and Felix Romero were present at the inspection. Mr. Nicasio further testified that when he entered the public hallway, there was a less offensive odor. He asserted he smelled some cleaning chemicals but the cigarette odor was still present. He further stated that the inspection in the fall of 2013 was the last time he was on the second floor of the building. Mr. Nicasio testified that in June 2014, he attended the annual shareholder's meeting, and Respondent was present and spoke at the meeting.

On cross examination, Mr. Nicasio testified that Sandra Smith was the only person that ever complained about the odor from the subject premises. He further testified that neither he nor the landlord retained any experts or employed any machines to determine the odor or its strength. He states that the next inspection of the subject premises was not until after the Notice of Cure dated April 8, 2013 was served on Respondent.

Thereafter, Petitioner called Sandra Smith to testify on its behalf. Ms. Smith testified that she resided in apartment 2A of the building for fourteen (14) years with her husband, Jeffrey Smith, and two children. She testified that there are four (4) apartments on the second floor. In describing the layout of the public hallway, Ms. Smith asserted that upon exiting the elevator, her apartment is directly to the left, apartment 2B is next door to her apartment, apartment 2C is across from the elevator, and apartment 2D is to the far right of the elevator. Ms. Smith further asserted that apartment 2D and 2B are vacant, and that Respondent, **Barbara Mostel**, resides in apartment 2C. Ms. Smith testified that she contacted management to complain about the cigarette odor in the hallway. She stated that in 2008, she detected these odors every day, and through 2012, the smell of cigarettes in the hallway remained the same. She further asserted that the

source of the odor was from Respondent's apartment. She testified that Respondent's door would always be open, and that is when the smell in the hallway was really bad. Ms. Smith stated that she requested Respondent keep her door closed to prevent the odor from getting into the hallway. She testified that in 2011, she notified Mr. Romero, the superintendent, and Mr. Nicasio, the property manager of the cigarette odor in the hallway, however, in 2012, Ms. Smith asserted she did not contact anyone from management. Ms. Smith testified that although the smell of cigarette odor still existed, she was in contact with Mr. Nicasio and believed that the Board was handling the complaint by assisting Respondent in getting rid of the smell and the source of the smell. She stated in 2012, she found the odor offensive, and was very concerned about how the second hand smoke would affect her children at the time. She further asserted that, in 2013, the situation did not change, and she was able to detect the odor at least four (4) days out of the week. She testified that some days were better than others when the cigarette odor in the public hallway was less detectable. Ms. Smith asserted that she first complained to Respondent about the odor approximately ten (10) years ago. Thereafter, she stated that a few years after, Respondent informed her to write a note and slip it under her door anytime she smelled the odor in the public hallway. Ms. Smith asserted that in subsequent conversations regarding the odor, Respondent stated that both she and the Board were attempting to remedy the odor. Ms. Smith stated she was unaware of any actions Respondent was taking to remedy the odors, and does not know whether she was home when the entrance door to the subject premises was left ajar.

\*5 On cross-examination, Ms. Smith testified that she is employed as a real estate broker, and has sold several apartments in the building. She testified that although she was not an interested broker in the sale of unit 2B, she was concerned as a shareholder how the odor in the public hallway would affect the sales price for unit 2B. She also asserted that she is not trying to sell her apartment. Nevertheless, Ms. Smith testified

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that when she left her apartment that day <sup>FN2</sup>, the odor was faint, and has been faint for approximately a month. She asserted that a month prior to her testifying, the odor was “on and off” further describing that it meant “sometimes it was stronger than other days.” She stated that when Respondent would leave her door ajar approximately an inch, the odor was very strong. She asserted that in 2003, Respondent would leave the door ajar many times, however she doesn't recall seeing the entrance door to the subject premises left open in the last year. Ms. Smith states that she is also unaware of any other tenants in the building complaining about Respondent's conduct, besides herself. She testified that she does not smoke, has never smoked, and does not like the smell of smoke. She asserted that she sees Respondent smoking outside of the building. Further, she asserted that she has not seen Respondent smoking in the subject premises as she has never been in her apartment, and thus, can only speculate that Respondent smokes in the subject premises. She states that two (2) months after the letter dated January 29, 2013 (Petitioner's Exhibit 6), she was aware, and Respondent informed her, that she was continuing to try and mitigate the odor by smoking electronic cigarettes. Ms. Smith testified that she and Respondent did not have any further conversations subsequent to March 2013.

**FN2.** Sandra Smith testified on July 21, 2014.

On re-direct, Ms. Smith testified she never saw Respondent smoking an e-cigarette. She asserted that Respondent was trying to do things in her apartment such as changing the furniture in the subject premises, but never witnessed her doing so.

Jeffrey Smith, Sandra Smith's husband, testified that he's lived at apartment 2A in the building for approximately 14 years <sup>FN3</sup>. Mr. Smith testified that Respondent resides in the subject premises, and that she's resided there since they moved into apartment 2A. Mr. Smith asserted that he was in court today

regarding the smoke odor on the second floor. Mr. Smith stated that he detected the odor in 2008, 2009, 2011 and 2012, and that the odor was akin to the smell of an ashtray. Mr. Smith testified that he had difficulty ascertaining how frequently he would detect the odor in 2008, since he quickly leaves the apartment in the morning. However, he would certainly smell the odor in the evening when he would walk the dog or take out the garbage. Mr. Smith testified that Respondent would “episodically” leave the subject premises door open, and on those occasions the odor would be stronger. Mr. Smith stated that in 2013, the odor was “still fairly present” explaining that he would sometimes notice it more, and sometimes notice it less. Mr. Smith further testified that he couldn't state it affected his health, nonetheless, he was not happy about the stale smells, and that it concerned his wife because she was “allergic” and had young children at home. Mr. Smith asserted he knew the source of the cigarette odor was from the subject premises, as apartment 2B and 2D were vacant, and no one in his apartment smoked. Mr. Smith further testified that due to the non-smoking regulations in offices and restaurants, he has become very sensitive to the smell of smoke. Thus, he is aware when someone smokes. For the period of January 2014 to July 2014, he asserts that the cigarette odor varied as some days are stronger than others, however, the situation has “generally” improved. Importantly, Mr. Smith could not testify with certainty the last time he detected an odor in the public hallway. Mr. Smith also asserted that he and Respondent never discussed the state, the degree or anything in substance about the odor in the public hallway.

**FN3.** The parties stipulated on the record that Mr. Smith's testimony regarding the description of the location of his apartment in relation to the elevator is identical to his wife, Sandra Smith.

**\*6** On cross-examination, Mr. Smith testified that

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he never discussed the issue of cigarette smoking with Respondent, and never saw Respondent physically smoking in the subject premises. Mr. Smith also stated that he could not state how many times he smelled “even a faint smell of smoke” in the public hallway in 2013 and 2014. Further, Mr. Smith asserted that workers were present in apartment 2B and 2D for the last two years, but more recently in the past several months.

Respondent called Annette Kahn to testify on her behalf. Ms. Kahn testified that since 1985, she has resided in the building in apartment 8B, and has been employed as a French teacher for fifty (50) years. Ms. Kahn asserted that she was a member of the Board in about 2003 to 2004. Ms. Kahn testified that Respondent was an occupant in the building at the time she was a member of the Board. Ms. Kahn stated that she frequently dealt with issues relating to complaints about people smoking in public areas. Ms. Kahn asserted that she became aware of a case being brought against Respondent when it was discussed during an annual general meeting held five weeks previously <sup>FN4</sup>. Ms. Kahn stated Respondent maintained that she believed there was no smell, and in response, she informed Respondent that if she agreed she would be happy to support her. Ms. Kahn testified that since becoming aware of the case, she went to the second floor hallway twice, and did not detect any cigarette odor. She asserted that there was an odor in the hallway, however it was not smoke. She asserted that there was a very strong odor of dried roses, and it came from a basket of dried roses on the common table in the hallways. She stated she was familiar with the smell of cigarettes because she can't stand the smell, but didn't detect the smell of cigarette odors on each of her two visits to the second floor public hallway.

<sup>FN4</sup>. Annette Kahn testified on July 21, 2014.

On cross-examination, Ms. Kahn testified that she didn't remember the last time she visited the second floor of the building prior to those two occasions.

Emily Goodman also testified on behalf of Respondent. Ms. Goodman testified that she is familiar with Respondent, and has known her for more than fifty (50) years. She testified that she became aware of this proceeding against Respondent several months ago, and visited the subject premises in June 2014. Ms. Goodman asserted that during her visit in June 2014: 1) she entered the building; 2) the doorman called Respondent to inform her of a visitor; 3) she took the elevator to the second floor; and 4) she was in the hallway for several minutes prior to Respondent opening the door to let her in. She asserted that she did not detect any odors in the hallway. She further asserted that she did not detect a strong smell of cigarettes at the moment Respondent opened the door to the subject premises to let her in. She stated that she admired the sectional sofa in the subject premises, and thereafter, Respondent informed her that it was new.

\*7 On cross-examination, Ms. Goodman testified that she did not detect any type of odor in the hallway. Moreover, she asserted she did not detect any offensive odors. She asserted that she and Respondent are childhood friends as they went to school together and were in a group of girls that were very good friends. She further asserted that they grew apart, and she didn't see her often unless she ran into her on 89th Street or in the neighborhood. Ms. Goodman stated that the only other time she saw Respondent recently was during a reunion with their friends.

Raina Bretan also testified on Respondent's behalf. Ms. Bretan testified that she resides at 200 East 71st Street, Apt. 8L, New York, New York 10021, and is employed as attorney in the States of New York and New Jersey. Ms. Bretan asserted that she is familiar with Respondent because she was an intern and then an associate of the firm Adam Leitman Bailey, P.C.

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participating and working on this proceeding. Ms. Betran asserted that she terminated her employment with the firm in mid-February 2014, and is currently employed with the Bank of Tokyo. Ms. Betran stated that in working on this case, she visited the subject premises on two (2) separate occasions. Ms. Betran testified that on the first occasion, in September 2013, she was directed to go to the building and inspect the subject premises to take notes of the smell in the second floor hallway and inside of the apartment. She asserted that she was in the hallway for approximately 30 to 45 seconds prior to Respondent answering the door, and did not detect any smoke or odors of smoke. Ms. Betran further asserted that when she entered Respondent's apartment, she could tell that a smoker resided there, and that there was a latent smell of cigarettes mixed with the smell of linens in the subject premises. She stated she discussed with Respondent the course of action in regards to coordinating a cleaning service for the subject premises, and the purchasing of additional furniture.

She testified that after the visit with Respondent, she contacted several cleaning services to coordinate a thorough cleaning of the subject premises to address the smell of cigarettes. Ms. Betran testified that she visited the subject premises for a second time in October 2013. She stated that Respondent informed her that she would not be home, and to let herself into the subject premises as the door was unlocked. Ms. Betran testified that she: 1) took the elevator up to the second floor; 2) went to the apartment door; 3) knocked on the door; 4) went into the subject premises; 5) observed all of Respondent's efforts to address the smell of cigarettes, such as leaving lemons out and using scented sprays and 6) observed new furniture at the subject premises, namely a new couch. She asserted that she did not detect any odor in the hallway, and also noticed that the odor in the subject premises had drastically improved. She stated Respondent arrived two to three minutes later, and they discussed the joint inspection they were going to have with the superintendent and managing agent of the building to ascer-

tain whether or not there were any odors in the hallway subsequent to Respondent and the cleaning company's efforts in cleaning the subject premises.

\*8 Ms. Betran testified that the superintendent and managing agent arrived for the inspection approximately ten (10) minutes after Respondent arrived, and she met them in the hallway. She asserted she is very sensitive to the smell of smoke, and did not detect any odor or cigarette smoke in the hallway. She further asserted that the superintendent and managing agent implicitly agreed with her that there was no odor in the hallway. She testified that she believed everyone was in agreement because the parties shook hands, and the superintendent and managing agent did not have any further inquiries or follow up questions. Thereafter, she stated the superintendent and managing agent requested to enter the subject premises, however, she was under strict instructions by the law firm and Respondent not to allow access into the apartment because the issue in this proceeding concerned whether there was an odor in the common area, and not the subject premises. Ms. Betran further asserted that she did not recall the superintendent and managing agent indicate that there was still an odor in the common area.

On cross-examination, Ms. Betran testified that prior to visiting the subject premises, she had never met Respondent. She further testified that she did not know how the hallway smelled prior to her visit in September 2013. She asserted that the subject premises was scheduled to be cleaned a few days before the inspection. She states she is not a smoker and has never been a smoker.

Respondent testified on her own behalf, and stated that she's lived at the subject premises for approximately fourteen (14) years. She testified that prior to 2013, she never received any complaints related to cigarette smoke issues. She asserted that she is familiar with her neighbor, Ms. Smith, and has known

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her since Ms. Smith moved in. Ms. Mostel testified that she had several conversations with Ms. Smith on or about March 2013, and specifically she recalled showing Ms. Smith her electronic cigarette. She asserted that she switched to electronic cigarettes in or about March 2013 because Ms. Smith informed her that she was allergic to everything, and she was unaware that the building had rules regarding any kind of “annoying” smell, but nonetheless, still attempted to address the issue. She testified that upon becoming aware, she had the superintendent install insulating flaps on the bottom of the back and front door. She asserted she also purchased two new couches, disposed of the old couch and a chair, and retained a cleaning service to do a regular cleaning before the second inspection. From March 2013 until Petitioner served the Notice to Cure, Respondent asserted she would regularly clean the subject premises by vacuuming the floors and walls, and clean the glass and mirrors.

On cross-examination, Respondent testified that she was unaware of any prohibition against causing unreasonable offensive odors from emanating into the common areas from the apartment until she was informed specifically where it was in the proprietary lease. Respondent testified that she became aware of the rule when Mr. Nicasio sent a clipping or a small cut out of pertinent section in the proprietary lease to her. Respondent asserted that prior to 2013, there may have been a complaint, however she was never informed, orally or by written notice, that it was related to odors. Respondent testified that she began taking remedial measures in March 2013. Respondent stated that she did not receive letters from management prior to 2013 regarding the odors in the hallway emanating from the subject premises. Upon being shown Petitioner’s Exhibit 5, Respondent recalled receiving it. Upon being shown Exhibit C of Petitioner’s Exhibit 1, Respondent recalled a few letters that referred to odors emanating into the common areas outside her apartment.

\*9 Subsequently, both sides rested, and the court reserved decision. The burden of proof is upon Petitioner to prove Respondent breached the proprietary lease and house rules by allegedly permitting unreasonable cigarette odor to escape the subject premises and permeate a public area of the building. As further discussed below, the court finds that Petitioner failed prove, by a preponderance of the evidence, that Respondent has violated the proprietary lease and house rules.

The Notice to Cure specifically states that Respondent is “in violation of paragraphs 13 and 18(b) of the Lease and paragraph (5) of the Landlord’s House Rules, you have unreasonably allowed cigarette smoke and/or other odors to escape the Premises and permeate throughout the public corridor outside of the Premises.” Moreover, the Notice to Cure alleged the following:

The Landlord, its agents, employees and/or building service personnel have observed that the odor of cigarette smoke exists in the public corridor outside of the Premises, and the odor is potent near the apartment door of the Premises;

The building’s managing agent has received several complaints from other building tenants about the recurring presence of cigarette smoke odor in the public corridor outside of the Premises; and

Despite receiving repeated requests from the managing agent to abate the odor of cigarette smoke emanating from the Premises, you have ignored such requests, and the condition in the public corridor near the Premises persists.

Paragraphs 13 of the Lease states “The Lessor has adopted House Rules which are appended hereto, and the Directors may alter, amend or repeal such House Rules and adopt new House Rules. The Lease shall be

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in all respects subject to such House Rules which, when a copy thereof has been furnished to the Lessee, shall be taken to be part hereof, and the Lessee hereby covenants to comply with all such House Rules and see that they are faithfully observed by the family, guests, employees and subtenants of the Lessee. Breach of a House Rule shall be a default under this Lease. The Lessor shall not be responsible to the Lessee for the non-observance or violation of House Rules by any other lessee or person.”

Paragraph 18(b) of the Lease states “The Lessee shall not permit unreasonable cooking or other odors to escape into the Building. The Lessee shall not permit or suffer any unreasonable noises or anything which will interfere with the rights of other lessees or unreasonably annoy them or obstruct the public halls or stairways.” The Court notes that although paragraph 18(b) of the Lease mentions “odors,” nowhere in the provision does it prohibit “smoke” or “smoking.” Indeed, nowhere in the proprietary lease does it prohibit “smoke” or “smoking” in the building.

Paragraph (5) of the Landlord's House Rules states, in pertinent part, “No Lessee shall make or permit any disturbing noises in the Building or do or permit anything to be done therein which will interfere with the rights, comfort or convenience of other Lessee ...” The Court notes that paragraph (5) of the House Rules does not even mention odors of any sort.

\*10 Respondent asserts that the Notice to Cure is defective as it states that “the building managing agent has received several complaints from other building tenants, plural, about the recurring presence of cigarette smoke odor in the public corridor outside of the premises,” however, during trial, Mr. Nicasio testified that no “other” tenants complained. It is insufficient to dismiss this proceeding based upon a *de minimus* technicality in the Notice to Cure as it is clear that Respondent could reasonably ascertain the grounds upon which Petitioner commenced this proceeding.

*Hughes v. Lenox Hill Hospital*, 226 A.D.2d 4, 17 (1st Dept 1996) (“[T]he appropriate standard for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances.”)

Respondent also asserts that 2014 standards should not be applied to a lease that was entered by both parties in 2000 since the lease says nothing about smoking and clearly did not mean smoking at the time it was written and did not mean smoking at the time it was executed. The Court also finds this argument unavailing, as it must analyze the facts and laws of this proceeding in accordance with current standards.

Nevertheless, Petitioner failed to prove by a preponderance of the evidence that Respondent violated the proprietary lease and house rules by permitting offensive cigarette odors to emanate from the subject premises and permeate the public hallway outside of her apartment. Although there may have been an occasional odor in the public hallway, the Court finds that the Petitioner failed to prove that the odor was so offensive as to interfere with the rights, comfort or convenience of other tenants within the building. Petitioner did not present any evidence from an expert to prove the content of the air or that the alleged “odor” was dangerous or hazardous. Furthermore, Mr. Nicasio testified that Petitioner did not retain any experts or employ any machines to determine the odor or its strength.

Mr. Romero testified that all the floors are connected to the same ventilation shaft, and that all vents are designed to carry the air and odors upwards and outside, however, he never received any complaints from other tenants in the building prior or subsequent to Ms. Smith's complaint. Notably, Mr. Nicasio also testified that he never received complaints from any other tenants in the building regarding cigarette odors. The Court notes that the subject apartment is located on the second floor, below the great majority of all the apartments in the building.

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The Court finds that Ms. Smith's subjective testimony that the cigarette odor offended her is not sufficient to prove by a preponderance of evidence that Respondent has violated the proprietary lease and house rules by permitting offensive odors to emanate from her apartment and into the common areas of the building. Moreover, Ms. Smith's husband could not definitely testify how frequently he would detect the cigarette odor in 2008, and that the odor was "still fairly present" in 2013. Thereafter, Mr. Smith testified that he could not state how many times he smelled "even a faint smell of smoke" in the public hallway in 2013 and 2014. He also asserted that due to the non-smoking regulations in offices and restaurants he has become "very sensitive" to the smell of cigarette smoke. Furthermore, Mr. Smith was even unable to testify with certainty the last time he detected an odor in the public hallway.

\*11 Ms. Kahn, a former member of the Board and a resident of the building, testified that after becoming aware of this proceeding, she visited the second floor public hallway on two occasions and did not detect any cigarette odor. She further asserted that she is familiar with the smell of cigarettes as she cannot stand the smell, and did not detect the smell of cigarettes on each of her two visits to the public hall on the second floor. Ms. Goodman also credibly testified that upon visiting Respondent at the subject premises, she did not detect any odors in the public hallway.

For all the above reasons, after a trial at which all the testimony and exhibits were carefully considered, as well as the credibility of the witnesses, the Court finds that Petitioner has failed to prove its cause of action by a preponderance of the evidence. Other than the subjective testimony of one witness (Ms. Smith), the landlord failed to produce any objective evidence or reliable testimony of any witnesses to show that Respondent has engaged in a pattern of permitting offensive odors to emanate from the subject premises

and into the public hallway, in violation of paragraphs 13 and 18(b) of the proprietary lease and paragraph 5 of the house rules. In fact, Respondent called three reliable and disinterested witnesses (Emily Goodman, Annette Kahn and Raina Bretan) who all visited the subject premises and credibly testified that they did not detect any cigarette odor in the public hallway outside the subject apartment. Accordingly, after trial, the petition is dismissed with prejudice.

The foregoing constitutes the decision and order of this Court.

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