

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS

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CHRISTIAN GRAY,

Index No.  
006086/20

Tenant-Petitioner,

-against-

AMERICAN PACKAGE COMPANY, INC.,

REPLY  
AFFIRMATION

Owner-Respondent,

-and-

THE DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

Respondent.

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Margaret B. Sandercock, an attorney admitted to the practice of law before the courts of the state of NY, does hereby affirm, pursuant to CPLR Section 2106 and under the penalties of perjury, that the following is true:

1. I am a member of Goodfarb & Sandercock, LLP, counsel to petitioner in this proceeding. I submit this affirmation in further support of petitioner’s motion to restore the case to the calendar because respondent landlord has not complied with the stipulation of settlement entered into on June 29, 2021, Exhibit C to the motion in chef, in that the scope of work agreed to was not performed and there still remains mold in petitioner’s Loft Law unit in violation of the Housing Maintenance Code and other local statutes and ordinances concerning assessment and eradication of mold in residential units.

Introduction:

2. The June 29, 2021 stipulation provides at paragraph 9 that the proceeding can be restored “for purposes of enforcing compliance with either parties’ obligations stated in this stipulation or for additional disputed work.” To the extent respondent claims that

restoration is only possible if the agreed scope of work was not performed, this contention is inaccurate under paragraph 9. While it is true that the scope of work agreed to was not performed, it is also true that the stipulation contemplated that respondent landlord might have performed the scope of work but that post remediation testing, specifically provided for in the agreement, might reveal the continued presence of mold and eradication beyond that originally contemplated.

3. I rely on the accompanying affidavit of Edward Olmsted, petitioner's mold evaluator, and his annexed report dated August 18, 2022 which details the ways in which respondent landlord deviated from the agreed scope of work. Olmsted's reply affidavit swears to the content both of his August 18, 2022 report, and his post-remediation report dated August 18, 2021, Exhibit D to the motion in chief. Respondent landlord makes much of the fact that Olmsted did not offer a sworn statement at the time of the motion in chief and therefore the motion in chief was unsupported by admissible evidence – however, at that time Olmsted was ill and unable to provide an affidavit. Further, in view of the fact that our firm employs Olmsted, his post remediation report would in any case come into evidence as a business record of my firm, CPLR Section 4518; lack of my personal knowledge of the content might affect weight but not admissibility. In sum, Olmsted has now sworn to the veracity of his post-remediation report, and it therefore comes into evidence both on that basis and as a business record of petitioner's counsel.

Summary of Reply Argument:

4. It is absolutely clear that this case must be restored to the calendar for a hearing concerning whether respondent landlord performed the agreed on scope of work, and whether there still exists a mold condition in petitioner's loft that violates the Housing

Maintenance Code, local statutes and ordinances regarding assessment and eradication of mold and which prevents petitioner from occupying his loft. It is equally clear that respondent landlord's reliance of Bard v. Mautner-Glick, 2022 NY Slip Op 50025(U)(Civ. Ct. NY Co. 1/19/22, is ill founded as there is little relationship between Bard and the facts of the present case.

- I. The Proceeding Must Be Restored Because the Landlord Did Not Comply with the Scope of Work in the Stipulation:
5. As set forth in the accompanying affidavit of Edward Olmsted, the tenant's mold expert, the scope of work agreed to by the parties, Exhibit C to the motion in chief, was not completed in the following particulars:
  - a. Item 1 of the scope of work involved gut demolition of rooms one, two and three in the loft. This required the removal of the walls to the wood studs, but only one layer of sheetrock was removed and visible mold was found behind the insulation on the sheetrock ceiling in room 1.
  - b. Item 1 also provided for removing the wood flooring to the concrete slab. This was not done in room 1.
  - c. Item 1 also provided for removing the ceilings to the deck above rooms 1, 2 and 3, and for cleaning of the deck. This was not done in rooms 1 and 2.
  - d. Item 1 also provided for cleaning of the wood framing. This was not done – could not have been done – because the wallboard was never removed from the framing.
  - e. Item 2 of the scope of work provided for removal of the raised floor in the bathroom under the tub and hot water heater as mold was trapped under the floor. This was not done.

- f. Item 3 of the scope of work called for removal of the sheetrock on the shared wall between bathroom and kitchen. However, sheetrock was left in place with visible mold.
  - g. Item 5 of the scope of work called for removing the removal of the sheetrock to the cavity on the shared wall with the neighboring unit. This was not done.
  - h. Item 6 of the scope of work called for removing the lower 4 feet of the wall with the common hall. This was not done and there is visible mold on the wall.
  - i. Item 8 of the scope of work called for cutting four two by two feet probes into the wall cavity on the wall shared with the neighboring unit, so as to inspect for mold growth. This was not done.
  - j. Item 9 of the scope of work called for cutting probes into the living room ceiling to the wood deck and inspecting for mold. This was not done.
  - k. As set forth in the settlement agreement, respondent landlord was to manage this work, and as set forth in the Olmsted affidavit, it is legally required to file such remediation work before performing it and also to make a post remediation filing. This was also the responsibility of the owner's professionals and was not done.
6. Inasmuch as respondent landlord's mold professionals claim that the scope of work was completed, there is an obvious dispute of fact and a hearing must be scheduled. The stipulation of settlement at paragraph 9 specifically contemplates restoring the case for a hearing if there is a dispute about whether the scope of work was performed and whether further work is required. Furthermore, regardless of whether the scope of work was performed, the stipulation provides for Edward Olmsted's post-remediation inspection

and testing, which took place as required under the stipulation, and the report of which is Exhibit D to the motion in chief. Where there is still a violation of the Housing Maintenance Code and local statutes and ordinances concerning the presence of mold in residential housing, regardless of the owner's prior efforts and regardless of any stipulation reached, the owner is obligated to correct the condition.

7. Respondent landlord makes much of the fact that its evaluation professionals were on site during the entire remediation work, and that Edward Olmsted was entitled to be present and did not attend. However, the stipulation gave Olmsted the right, not the obligation, to be present during the remediation, and the right to be present at the start and to conduct an evaluation at the end of the work. The respondent owner contracted to a scope of work and was obligated to perform that work whether or not the tenant expert was present. In fact, Olmsted states in his affidavit that it is not customary for him to be present at all times during a remediation, and that doing so would be cost prohibitive for an individual tenant.
8. In sum, the required scope of work agreed on by the parties was not performed. Even if it had been, if further remediation was required, the parties agreed either to perform it or to restore the case for a hearing if further work was disputed. Olmsted was not responsible to police the owner's professionals in carrying out the parties' contract.

## II. Bard v. Mautner-Glick Has Little Bearing on This Case:

9. In the present case, respondent landlord seems to want to avoid the restoration of the case for a hearing. However, in Bard, *supra*, the case was restored for a hearing and the decision relied on by opposing counsel was rendered post-hearing. Other significant differences between Bard and the present case are: the Bard proceeding was five years

old at the time restoration was sought; the landlord's claimed compliance was completed four and a half years prior to restoration; most of the remediation was done before the stipulation was entered into; the tenant employed three different mold experts and made holes in the walls himself, which were claimed to have spread the mold; and HPD had issued, and then dismissed, a mold violation.

10. In contrast, this motion to restore is promptly brought a year after a "one-two shuffle" by the landlord's professionals, who, on visiting the premises post-remediation, in July 2021, stated that further remediation was required and that the landlord's approval would be obtained, but who now, inexplicably, falsely state that the entire scope of work was performed and that nothing further is required.
11. It is also most respectfully suggested that Bard may be incorrectly decided; it is decided as a matter of contract law, but it is difficult to see how contract law can be applied to void the benefit to a tenant of local laws. Otherwise stated, if there exist housing conditions that violate the law, a tenant cannot (or should not be able to) contract away compliance with law.
12. But regardless of whether Bard is correctly decided, its facts are at odds with the facts of the instant case, and its facts are disingenuously misstated by opposing counsel, who claims that in Bard, the expert in the present case, Olmsted, exacerbated the mold condition by making holes in the walls of the apartment when in fact other people, Fiore Deros and a friend of the tenant, made the holes. Opposing counsel also misstates the facts of this case: as noted in the Olmsted affidavit, opposing counsel and the owner's expert were not present at the time of Olmsted's August 2021 visit to the loft, and he did not make any holes of any sort, but was easily able to move aside materials that were not

anchored to walls or floors. In fact, respondent landlord's professionals negligently failed to look behind exterior wall and floor materials, where mold was clearly visible.

13. The request to restore this proceeding was made within a year of the original agreement and was delayed that long only because, according to the Olmsted affidavit, John (Jack) Glass, the landlord's mold evaluator, met with Olmsted at the premises in July 2021 to try to reach agreement about the further work necessary, and Jack Glass agreed that further work was needed and said he would speak to the landlord about it. We waited for a time for this to occur; when it did not, we brought the present motion to restore which is specifically contemplated by the stipulation.

Conclusion:

14. The proceeding must be restored for a hearing. The parties agreed to a scope of work which was not completed. They also agreed to restore this proceeding in the event that there was a dispute about the completion of the work. Bard v. Mautner Glick presents very distinguishable facts to the instant case as the motion to restore is promptly brought and as the tenant's mold professional did not conduct further demolition, did not cut holes, and merely moved aside surface materials to see what lay beneath.

Dated: New York, NY  
August 30, 2022

  
Margaret B. Sandercock