At a Special Term of the Niagara Falls City Court held at 1925 Main Street, Niagara Falls, New York on the 5th day of March 2021.

PRESENT: HON. DANIELLE M. RESTAINO, Presiding Judge

STATE OF NEW YORK

CITY COURT OF NIAGARA FALLS: COUNTY OF NIAGARA

RALPH PESCRILLO,

Petitioner

v

AKILLAH PROCTOR and ALL OTHERS,

Respondents

DOCKET NO. LT-440-20/NF

DECISION AND ORDER

This matter is brought by Order to Show Cause on behalf of the Respondent-Tenant. Petitioner-Landlord appeared pro se, Respondent-Tenant appeared with counsel, Matthew F. Finamore, Esq. of Neighborhood Legal Services, Inc. The matter was scheduled for a virtual hearing March 5, 2021 and the parties provided testimony. The nature of the testimony and examinations were contentious and unproductive, such that the Court stopped the proceeding and asked the parties to submit written briefs in summation of their arguments on liability and any calculations with respect to damages. There is an underlying eviction petition for hold-over filed by Petitioner that is not the subject of this decision. That proceeding will be scheduled in accordance with the rules and procedure issued by the Office of Court Administration and the controlling Executive and Administrative Orders that have issued in this latest phase of the global Covid-19 pandemic, and that courts across the State of New York are bound to abide by.

Respondent, in her Order to Show Cause, alleges that in mid-January of 2021 she returned to her residence at 1109 – 20th Street in the City of Niagara Falls, which she rents from Petitioner, to find the electricity had been disabled and as a consequence, so too was the heat. By Respondent's testimony, she attempted to contact Petitioner in the way she has always made contact, by calling and going into the office, known to tenants of Petitioner, as a place to find him and his staff. Respondent testified she attempted to make contact three times. At the time of the hearing on March 5, 2021, it was undisputed that the power and heat remain disabled in

the subject premises. As a consequence, Respondent has not been able to live in the premises and has been living elsewhere. She also provided testimony that she was recently hired by the American Red Cross as a phlebotomist and passed drug and background checks.

For his part, Petitioner testified that he believed Respondent was no longer living at the premises, and that she had been gone since October of 2020. Petitioner also provided testimony that he was never aware Respondent was attempting to contact him with respect to the electricity and heat until being served with this filing in early February 2021. Petitioner stated a number of times that Respondent never called his cell phone. At no time did Petitioner dispute that the electricity and heat were disabled at the subject premises, and moreover did state on the record that he would not be restoring those utilities as long as Respondent was still involved with the property. Petitioner testified that he believed, and still believes, that Respondent and/or some other individual associated with respondent, sells illegal drugs and/or has firearms on the premises.

The duty of a landlord to supply basic utilities and quiet enjoyment of a premises to his tenant is not a new concept in the lexicon of Landlord-Tenant Law in the State of New York. In fact, it is one of the most straight forward sections in the law as to what the duties of a landlord are to his tenant. There is no question here, Petitioner has a duty to Respondent to provide these basic utilities of electricity and heat. It is also undisputed here that currently there is no electricity or heat at the premises and Petitioner is aware of it. Article 7, Section 768 of the RPAPL is quite clear that Petitioner is required to restore those services to the property and a failure to do so is unlawful. Respondent made attempts to ask for help from Petitioner, before seeking legal counsel to file the instant action, in the usual course of action she would take to communicate with him. Even when taking Petitioner at his word, that he was never aware Respondent was reaching out to him, there is no question he became aware that the electricity and heat were disabled on February 1, 2021, when his prior attorney informed him of the filing. It was incumbent upon him to restore those utilities. He did not.

Petitioner offers two "defenses" here, one that he believed Respondent to be gone from the property, that she "abandoned" it. Secondly, he offers his belief that Respondent is engaged in some kind of criminal activity in the premises, either on her own or with some associate. Those two claims seem to be at odds with one another. If Respondent had indeed, "abandoned" the apartment, in Petitioner's words, then how would she be there conducting some kind of illicit behavior or somehow tangentially involved in some kind of criminal actions? Respondent testified that 1109 – 20th Street is still her residence. The underlying petition has not been heard due to the restrictions on the Court because of the pandemic, so Respondent's tenancy has not been terminated.

With respect to the second "defense" offered by Petitioner, there has been no credible evidence offered to prove that any such behavior is taking place and that Respondent is either directly or indirectly involved. Furthermore, if Petitioner believes this type of illegal behavior is going on at the property, his remedy is mapped out for him by the State Legislature and Administrative Order 340-20 (AO) issued by Judge Marks to further guide litigants, attorneys and the Courts in how such relief can be requested and granted. The underlying hold-over

petition filed by Petitioner in November of 2020 makes no allegations of nuisance or criminal activity. And to date, the Court has not received any new petition from this Petitioner alleging any type of nuisance behavior at this property that would exempt him from the moratorium on filed evictions. If in fact, there were credible allegations of nuisance behavior, filing the appropriate petition would have been the proper remedy to bypass the delay in having the matter heard. Instead this Petitioner opted for self-help, which has never been sanctioned by New York State Law and in this case runs directly counter to Petitioner's obligation under the law to this Respondent. Petitioner, in his written submission, preemptively suggests that holding him accountable for his unlawful behavior, or not agreeing with his position is in some way political. The Court can assure him politics has nothing to do with the Court's responsibility to uphold the law. Contrary to what he may believe it is his failure to act on his obligation under the laws of the State of New York, the same laws this Court is bound to uphold, that make his behavior unlawful. As the Court laid out above, there is a process set forth by the AO to address Petitioner's concerns, and he did not avail himself. The Court does not have the ability or discretion to dispense with procedures set out by administrative order or statute on a whim.

Cutting through all of the misdirection and excuses it is fairly straightforward what has taken place in this matter. It is undisputed by both parties that the electricity and heat at the subject premises is disabled. Under Article 7, Section 768 of the RPAPL, Petitioner in this case is required to take steps to restore those utilities. By his own testimony to the Court he has indicated he is refusing to do so. Based upon the credible testimony and submissions and a preponderance of evidence, the Court has no other conclusion to make but that Petitioner has acted unlawfully and is liable for Respondent's constructive eviction from the premises.

Respondent's application requests injunctive relief and restoration of her utilities as well as civil penalties that are laid out in the statute. It should also be noted Respondent is entitled to seek treble damages by law but is declining to do that here and reserves her right to seek such damages in further litigation. As for the civil penalties, those too are proscribed by Section 768 of Article 7 in the RPAPL. The statute states that a penalty of "not less than one thousand nor more than ten thousand dollars" shall be issued for "each violation," it further states that where there is a "failure to take all reasonable and necessary action to restore an occupant ... such person shall be subject to an additional civil penalty of not more than one hundred dollars per day from the date on which restoration to occupancy is requested until ....restoration occurs."

Here the Court will assess a civil fine for the event that is the subject of this decision, the disabling of Respondent's electricity and heat. It should be noted at this point that during the hearing when Petitioner was being cross examined by counsel for Respondent he did testify that during a separate proceeding with similar allegations of electricity being turned off, yet a distinctly different fact pattern, and a different Respondent at a different premises he "took the fifth" which the Court understood as meaning he declined to provide testimony in that case so as not to incriminate himself. This Court took judicial notice of the fact that invoking the Fifth Amendment in a civil matter does not absolve the person invoking it of any adverse inference against him. All that to say, this Court is concerned that the present matter is not the first time this Petitioner has engaged in this type of self-help, and that it should not become some kind of pattern that is left unchecked. The behavior here, especially during a global pandemic, is unkind

and indecent at best, and perhaps most importantly, regardless of the state of the public health crisis, it is blatantly unlawful.

With respect to the additional "daily" penalty as prescribed by section 768 of RPAPL, there is sufficient evidence here to require the Court to assess a fine in that manner as well. Petitioner has told the Court he will not take the necessary measures to restore Respondent's electricity and heat. That type of behavior is precisely what this section is meant to address and the law leaves the Court without discretion in imposing a "daily" penalty. As for when this clock will begin to tick, since it is unclear the exact date when Respondent first attempted to request restoration, the Court will begin its calculation from February 1, 2021. This is the day, according to testimony, Petitioner was made aware of this application, so there is no question he knew of the lack of electricity and heat, and of Respondent's request for it to be remedied. As of the last submissions, it is the Court's information that restoration has not been made, counsel for Respondent shall verify with the Court when the electricity and heat are restored so that the Court can calculate and issue a final penalty amount.

Based upon the foregoing, it is the DECISION and ORDER of this Court that Petitioner:

1. Immediately restore electricity and heat to the premises located at 1109-20th Street, 2nd Floor, in the City of Niagara Falls;
2. Is enjoined from taking any further steps to unlawfully evict, dispossess or otherwise impair Respondent's tenancy or use of the subject premises;
3. Pay a civil penalty in the amount of $2,500.00 in accordance with Article 7, section 768(2)(b) of the RPAPL;
4. Pay a civil penalty in accordance with Article 7, section 768(2)(b) of one hundred dollars per day beginning from February 1, 2021 and ending when the electricity and heat are restored at the premises located at 1109-20th Street, 2nd Floor in the City of Niagara Falls. Counsel for Respondent shall verify with the Court when restoration is made.

ENTER,

HON. DANIELLE M. RESTAINO
City Court Judge

Dated: March 22, 2021