



Bedbugs: Identification, Prevention, Treatment, and Liability
Monday, November 22nd, 2010

2:00 p.m. – 3:30 p.m.

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Professional Practice: 1.5

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Bedbugs: Identification, Prevention, Treatment and Liability

NOVEMBER 22, 2010 AGENDA

Identification, Prevent & Treatment (45 minutes) 2:00 – 3:00

Landlord Responsibility for Eradication & Liability (30 minutes) 3:00 – 3:30

TABLE OF CONTENTS

| | Page |
|--|------|
| 1. Gathering Evidence..... | 1 |
| 2. Getting the landlord to properly exterminate..... | 1 |
| 3. Reimbursement of Expenses..... | 5 |
| 4. Rent abatements | 6 |
| 5. Hiring Own Exterminator/Repair and Deduct | 10 |
| 6. Constructive Eviction | 10 |
| 7. Disclosure law | 12 |
| 8. Disclosure of Chemicals Applied | 12 |
| 9. Other Developments .. | 13 |

Bedbugs: Identification, Prevention, Treatment and Liability

1. Gathering Evidence

- a. Complaints should be made in writing and sent certified mail, return receipt requested or by other means with proof of mailing.
- b. Take photographs of the infestation (bite marks, any evidence of bedbugs in the apartment, state of apartment during preparation and eradication).
- c. Log every extermination visit.
- d. Log every interaction with the landlord about bedbugs.
- e. Log all bites, bedbug sightings and sightings of other evidence of bedbugs.
- f. Keep actual, dead bedbugs marked with date of discovery (put in clear tape).
- g. Gather other proof of presence of bedbugs such as result of canine inspection or exterminator's visual inspection.

2. Getting the landlord to properly exterminate

- a. Landlord responsible for keeping premises free of bedbugs.
 - i. Landlord must "[k]eep the premises free from rodents, and from infestations of insects and other pests." HMC (Admin. Code) § 27-2018. "Insects and other pests include . . . bedbugs" HMC § 27-2017. See also MDL § 80(1).

- b. Landlord is responsible for providing exterminator and tenant responsible for preparation, but should press on this responsibility since the preparation is arguably part of getting rid of the bedbugs especially where the tenant cannot do the preparation him/herself because physically unable or does not have the money to pay for it. No reported cases on this, but through negotiations have gotten landlord to reimburse for laundry and to provide vacuums and other supplies. Have also heard of other landlords providing personnel to help with preparation.
- c. Make written demand of landlord sent with proof of mailing.
- d. Tenant should call 311 to get violation written
 - i. will be given a complaint number that should keep to track results
 - ii. HPD may contact the landlord to see if problem corrected
 - iii. HPD may contact tenant to see if problem corrected
 - iv. If no report that corrected, HPD inspector should come to inspect
 - v. Tenant must be home to provide access and make sure to point out evidence of infestation to inspector
 - vi. if find violation, will be a class B violation (give 30 days to correct which can be extended upon request)
 - vii. in most cases will not get recalcitrant landlord to comply because landlord may ignore the violation (no penalty if not corrected) and/or HPD may not write a violation

viii. but, depending on result, will provide documentation of actions you have taken, presences of bedbugs and landlord's knowledge of problem

ix. Go to HPD's website or call 311 to check status of complaint

e. HP action

i. Advantages

1. these cases are not picked up by tenant screening bureaus
2. do not need to wait for landlord to sue for nonpayment to get relief
3. do not risk getting to court on nonpayment proceeding after withholding and not having money for arrears
4. easy for tenant to do without a lawyer

ii. Disadvantages

1. Slow and time-consuming.

iii. HPD will come and inspect

iv. If violation, court will order it remedied in specific time (or will get stipulation to same)

v. If no violation, can still prove presence of bedbugs at trial (or get stipulation to same)

vi. Stipulation should at least specify that extermination be done by professional exterminator licensed by the New York State Department of Environmental Conservation.

- vii. If a stipulation, should also attempt to get more specifics such as which company, that the company be experienced in bedbug remediation, which methods will be used if tenant has preference, who will pay related costs (dry cleaning, laundry, vacuums, garbage bags, Sterifab spray treatment, other chemicals needed) and who will perform preparation.
- viii. Example excerpt from stipulation attached at page 14.
- ix. Treatment of surrounding apartments: recommended but not likely to obtain in HP unless and until treatment of premises ineffective and/or if proof that infestation coming from adjacent apartment.
- x. If building-wide problem, need meeting with all the tenants to explain procedure, answer questions, etc.
- xi. Temporary relocation costs: HP court can order landlord to pay for temporary relocation costs during repair; exterminator may recommend tenant to be out 24 hours if someone pregnant in the household, young child or other medical issue. Farber v. 535 E. 86th St. Corp., 2002 WL 317987, at *1, 2002 N.Y. Misc. LEXIS 118, at *1 (App. Term 1st Dep't, Feb. 4, 2002) (per curiam) (allowing for possibility of relocation costs but denying them in that case).
- xii. An HP judge has no authority to order a respondent-owner to hire any particular person or business to correct violations or to prohibit someone, such as a superintendent or contractor the tenant dislikes,

from repairing. The HP judge also cannot direct how a repair must be done. HP judge may only order the owner to correct all violations by the date set for corrections. However, can obtain this as part of a stipulation.

- f. Have tenants in building get together to make the demand and form a tenants association – this is a building-wide problem.

3. Reimbursement of Expenses

- a. Will usually not get reimbursed for expenses of preparation and property damage loss
- b. Exception is where landlord has acted negligently (i.e. fails to act promptly, failed to properly treat adjacent units)
 - i. In Zayas v. Franklin Plaza, 23 Misc.3d 1104(A), 881 N.Y.S.2d 368, 2009 WL 909664 (Civ. Ct., NY County 2009) (Table, Text in Westlaw), the cooperative cooperation acted negligently in failing to remedy a building-wide bedbug infestation. A unit owner sued for damages in civil court and was awarded damages for loss of personal property and related medical treatment, but denied reimbursement for remediation which was held to be the unit owner's responsibility.
 - ii. Are also reported negligence actions against hotel owners where guests have been awarded compensatory and punitive damages.

See, e.g. Grogan v. Gambler Corp., 19 Misc.3d 798, 858 N.Y.S.2d 519 (Sup. Ct., NY County 2008) (denying summary judgment to hotel on negligence claim for compensatory damages where room had bedbugs, but dismissing punitive damages since owner had attempted extermination of nearby rooms); Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) (upholding jury verdict awarding each of 2 plaintiffs \$186,000 in punitives and \$5,000 in compensatory damages where Motel 6 acted wantonly and willfully in concealing infestation and failed to take effective measures to eliminate infestation).

- c. Seek reimbursement in Small Claims court (up to \$5K), Civil Court (up to \$25K) or Supreme Court (unlimited and authority to also order repairs).
Generally will not be heard as counterclaim in housing court.

4. Rent abatements

- a. Presence of bedbugs is a breach of the warranty of habitability
“It has been well-established that insect infestation is a condition which is considered to adversely impact upon the health and safety of a residential premises.” Bender v. Green, 24 Misc.3d 174, 181, 874 N.Y.S.2d 786, 791 (Civ. Ct., NY County 2009).
- b. Fact that Tenant May Have Brought Bedbugs to Premises Not an Excuse
 - i. The fact that a tenant may have brought the bedbugs into the apartment does not excuse liability. In Bender v. Green, *supra*, the

court found that absent some misconduct by the tenant, the landlord is not excused from liability because the tenant was likely to have been the one who introduced the bedbugs to the premises. The court recognized that “any individual venturing out into the world today, particularly an individual that travels, risks bringing bedbugs back home.”

- ii. But see Matter of 91-31/04 195th St. LLC; DCHR Dckt. No. WD110043RO (2008) (attached at page 16) which is a reduction in services complaint. The tenant complained of bedbugs and the owner responded by exterminating the premises on three separate occasions. DHCR inspected and found evidence of bedbug infestation in the mattress and dead bedbugs in the bedroom but no evidence of infestation in the walls, floors, cabinets, closets and entrance of the apartment. DHCR denied the tenant's complaint holding that the finding of dead bedbugs supported the conclusion that the Owner's extermination services were effective and Owner could not be held responsible for an infestation problem that existed solely in the personal property of the tenant's household. This decision was distinguished in Bender v. Green, *supra*, based on the differing legal standard between a reduction in services complaint and the warranty of habitability which “makes Petitioners strictly liable for conditions in the premises, and

responsible for taking reasonable action to eliminate the condition.”

- c. Methods of seeking: defensively in housing court or affirmatively in Small Claims, Civil Court or Supreme Court
- d. Amount of possible recovery: reported cases range from 8 to 50 % abatements

- i. Ludlow Properties, LLC v. Young, 4 Misc.3d 515, 780 N.Y.S.2d 853 (Civ. Ct., NY County 2004) was the first reported case to expressly state that a bed bug infestation can be a breach of the warranty of habitability holding that there “was no doubt that the presence of the bed bugs in the Premises” materially affected the health and safety of tenants or is a deficiency that reasonably deprives the tenant of those essential functions which a residence is expected to provide. 4 Misc. 3d at 518, 780 N.Y.S.2d at 856.

After trial, court awarded a 45% abatement finding that although the bedbug infestation was severe, the landlord tried repeatedly to exterminate and the tenant did not vacate or raise constructive eviction.

- ii. Bender v. Green, 24 Misc.3d 174, 874 N.Y.S.2d 786 (Civ. Ct., NY County 2009) (awarding 12% abatement where court found that there was almost no evidence of the presence of bedbugs and the extent of the infestation (apart from tenants’ testimony which court found unreliable and inconsistent with other evidence in the

record), and landlord's response was sufficient; rejected excuse of tenant responsibility.)

- iii. Assoc. v. CW, 897 N.Y.S.2d 688, 2009 WL 2232042 (Civ. Ct., Bronx County 2009) (awarded 50% abatement even though finding landlord acted promptly and reasonably) (unreported disposition).
- iv. Choudhury v. Ramtahal, 24 Misc.3d 1211(A), 890 N.Y.S.2d 368, 2009 WL 1916469 (Civ. Ct., Kings County 2009) (awarding 8% abatement for bedbugs and other violations such as lead paint and lack of heat raised in counterclaim after holdover trial for which respondent failed to appear; HPD issued violations that were promptly corrected) (unreported disposition).
- v. Grand Review LLC v. Moore, 11/19/2008 N.Y.L.J. 27, col. 1 (Civ. Ct, Queens County) (awarding 40% rent abatement in nonpayment proceeding where apartment was infested by bed bugs and landlord attempted insufficiently to rectify it).
- vi. Jefferson House Assoc., LLC v. Boyle, 6 Misc.3d 1029(A), 800 N.Y.S.2d 348, 2005 WL 465171 (Justice Ct., Town of Ossining, New York, Westchester County 2005) (awarding the tenant a 50% rent abatement during time she was bit nightly and a 20% abatement during time she was bitten several nights per week when raised as defense in nonpayment suit; abatement also took into account odor from leak from bathroom above hers; excess over

rent claimed dismissed without prejudice since tenant did not raise counterclaim).

5. Hiring Own Exterminator/Repair and Deduct

- a. If the tenant provides reasonable notice to the landlord and the landlord “willfully refused” to make the repairs, the tenant may be permitted to hire an exterminator and deduct the cost from the rent. See, e.g. Katurah Corp. v. Wells, 115 Misc.2d 16, 454 N.Y.S.2d 770 (A.T., 1st Dep’t 1982); Scherer, Residential Landlord-Tenant Law in New York §§ 12:115-16, at 800-01 (2009-10 ed.).
- b. Risks are that if taken to court, court may not find that the above elements were met elements, tenant may spend money and end up at risk of eviction and tenant will be blacklisted if taken to housing court.
- c. If use this remedy, make sure to keep excellent paper trail, get several estimates to show cost was reasonable, keep bills and exterminator reports and send letter to landlord about what doing.

6. Constructive eviction

- a. Under NY. Real Prop. Law § 227, “Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy . . . the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises . . . and he

or she is not liable to pay to the lessor or owner, rent for the time subsequent to surrender.”

- b. Risk is being found responsible for entire amount of rent left on lease.
- c. Also, there is the practical risk that the tenant may just take the problem to a new place.
- d. Reported Cases on constructive eviction and bedbugs are all very old and predate the implied warranty of habitability. Many of the old cases hinged on whether or not the tenant could remedy the condition.
- e. Ludlow Properties, LLC v. Young, 4 Misc.3d 515, 520, 780 N.Y.S.2d 853, 856-7 (Civ. Ct., NY County 2004) (recognizing in dicta in a nonpayment case where a rent abatement was sought that the tenant “may have been relieved of his obligation to pay rent had he vacated”)
- f. Hancock Construction Co. v. Bassinger, 198 N.Y.S. 614 (A.T., 1st Dep’t 1923) (finding constructive eviction where bedbugs so numerous that got into tenant’s clothes and habitually came with him to his business office, tenant had sleepless nights and landlord did not properly care for apartment; noting that tenant could not pull down walls and ceilings to remedy the condition).
- g. Michtom v. Miller, 178 N.Y.S. 395 (A.T., 1st Dep’t 1923) (finding no constructive eviction because bedbugs were mere annoyance; landlord exterminated apartment and no bedbugs found).
- h. Streep v. Simpson, 80 Misc. 666, 141 N.Y.S. 863 (A.T., 2d Dep’t 1913) (bedbugs that infested all parts of apartment due to conditions in another

part of the building over which tenant had no control, despite efforts to exterminate them, and which “continued to increase, befouling the walls, emitting odors and biting the occupants” constituted constructive eviction).

- i. Jacobs v. Morand, 59 Misc. 200, 110 N.Y.S. 208 (A.T., 1st Dep’t 1908) (presence of water bugs and bedbugs not constructive eviction since might have been difficult to eradicate, but not sufficient to relieve tenant of liability).

7. Disclosure law

- a. As of this summer, landlords in NYC must disclose at vacancy lease signing if an apartment or one in the same building has been subject to a bedbug infestation in the last year and whether eradication measures were taken. HMC § 27-2018.1.
- b. Disclosure will be on a form provided with a lease offering (much like lead paint disclosures). Form is attached at page 18.
- c. Information provided will not state whether the problem is eliminated (only if eradication measures were taken).
- d. No mechanism or penalty to penalize landlords who fail to comply (other than to complain to DHCR and seek an order against the landlord to comply).

8. Disclosure of Chemicals Applied

- a. The New York Environmental Conservation Law § 33-0905(5) states that every certified pesticide applicator shall give the occupants of a dwelling a copy of the information, including any warnings, contained on the label of the pesticide to be applied prior to applying the pesticides.

9. Other Developments

- a. New York City Bedbug Advisory Board: created by the City Council in June 2009; comprised of industry experts, entomologists, advocates and representatives of city agencies. The board's very detailed report with recommendations was completed April 2010 and is available at http://www.nyc.gov/html/om/pdf/2010/dm_07-28-10.pdf.
- b. City Council gave \$500,000 in funding to implement board's recommendations; primarily seems to fund web portal for information, but also supposed to have joint HPD and Department of Health and Mental Hygiene enforcement teams to work with property owners to conduct affirmative inspections of neighboring apartments and other city agencies to train their work force. Obviously, not enough to fund all of the reports recommendations.
- c. City Council continuing to examine these issues; e.g., held hearing at end of October 2010 regarding the Department of Consumer Affairs' role in protecting consumers from bedbugs.
- d. Other legislation: State law requiring NYC schools to disclosure presence of bedbug infestations to parents goes into effect July 2011. Other

legislation regarding regulation of used mattresses was vetoed by the governor.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART B

| | | |
|--------------|---|----------------|
| -----X | | |
| [], | : | Index No.: |
| | : | HP [] |
| Petitioners, | : | |
| | : | |
| -against- | : | |
| | : | |
| [], | : | STIPULATION OF |
| | : | SETTLEMENT |
| Respondents. | : | |
| -----X | | |

The parties to the above-captioned consolidated proceedings hereby stipulate and agree to settle these proceedings as follows:

1. Respondent-owners shall correct all items on the list of conditions attached as Exhibit A by January 30, 2009, or be subject to civil penalties of \$25-75 per condition plus \$10 per day per condition, said penalty to accrue from the end of the period set for compliance until the condition is corrected.
2. Respondent-owners shall correct all items checked as "priority" on the list of conditions attached as Exhibit A by December 26, 2009, or be subject to civil penalties of \$25-75 per condition plus \$10 per day per condition, said penalty to accrue from the end of the period set for compliance until the condition is corrected.
3. Access to Petitioners' rooms to correct conditions within an individual Petitioner's room shall be by at least 24 hours advanced written notice to that Petitioner by hand delivery and to Petitioners' counsel by facsimile to 212-227-9798. Upon the failure to gain access, Respondents-owners will provide written notice to cure the default to Petitioner by hand delivery and to Petitioners' counsel by facsimile and mutually convenient access dates and times will be arranged within 7 days after such notification. Petitioners acknowledge that some corrections may require that they temporarily relocate from their rooms. Petitioners and their counsel will be provided with at least 72 hours written notice of any need to relocate. During any relocation Respondent-owners will provide

Petitioners with comparable housing and assist with the moving of their belongings.

4. As to violations pertaining to concealed water leaks, Respondent-owners shall present proof to court of all steps taken to correct said condition if proceeding is restored to the court calendar.

5. Within 10 business days of this Stipulation, Respondent-owners will obtain a written treatment plan and estimate to correct the bedbug infestation and provide routine extermination service for all vermin such as roaches and spiders from Jeff Eisenberg of Pest Away Exterminating at 212-721-2521, or a comparable, reputable extermination contractor licensed by the New York State Department of Environmental Conservation with knowledge and expertise in the eradication of bed bugs. Respondent-owners will provide this estimate and plan to Petitioners' counsel and Respondent-DHPD who will then have 10 business days to raise any objections or submit a counter-proposal. After such time and provided Petitioner and Respondent-DHPD do not object to such plan, Respondent-owners will immediately implement the plan. Notice of the schedule for any extermination visits involving access to Petitioners' rooms will be posted on each floor at least 24 hours before the scheduled visit.

6. Starting immediately, Respondent-owners will provide sufficient janitorial services so that the cleanliness of the public hallways, bathrooms and other common areas of the premises will be adequately maintained and free from mold and mildew.

7. Failure by Respondent-owners to correct conditions on the attached list of conditions within the period required by paragraph a. shall subject them to the contempt power of the Court. Each of the conditions herein agreed to be corrected constitute a separate and distinct order of the Court and any and all failure by Respondents to comply with such orders may be deemed separate and distinct contempts of this Court's order.

8. This Court will retain continuing jurisdiction over this matter.

9. This proceeding may be restored to the calendar of the Housing Part where this order was signed to obtain a hearing on the issue of civil penalties, compliance by any party, a continuing order

SHOPLAND & SCHWARTZ SHOPLAND, LLP
1001 Second Avenue
New York, NY 10017

| | | |
|-------------------------------------|---|------------------------|
| <hr/> | | X |
| IN THE MATTER OF THE | : | |
| ADMINISTRATIVE APPEAL OF | : | ADMINISTRATIVE REVIEW |
| | : | DOCKET NO.: WD110043RO |
| 91-32/34 195 th St., LLC | : | |
| | : | |
| | : | RENT ADMINISTRATOR'S |
| | : | DOCKET NO.: VU110008S |
| PETITIONER | : | X |

On April 28, 2008 the above-named petitioner - owner filed a Petition for Administrative Review (PAR) against an order of the Rent Administrator issued on March 24, 2008 concerning the housing accommodations known as Apartment 6R located at 91-32 195th St., Hollis, N.Y., wherein the Administrator, based on an inspection, ordered a rent reduction and directed the restoration of services.

In the PAR, the owner states, in substance, that monthly extermination service is provided to the apartment to eradicate the bedbug condition and that the owner should not be held responsible for the tenant's failure to maintain a clean environment that causes the bedbug infestation to recur.

The record below reveals that the tenant in her complaint claims that bedbugs exist in the kitchen, the bathroom hamper, her bedroom, her daughter's and mother's beds, in the chair, in the living room, around the apartment entrance, and behind the table in the living room. The owner in response to the tenant's complaint states in the proceeding below that prior to it receiving the tenant's complaint from the DHCR extermination service to eradicate the bedbug infestation condition was provided to the apartment on September 25, 2007. The owner's statement further claims that extermination service was also provided on October 26 and October 31, 2007.

Subsequently, the Rent Administrator requested an on-site inspection of the subject apartment to investigate the tenant's claim of bedbug infestation. The agency inspection, conducted on March 12, 2008, found evidence of bedbug infestation in a mattress and dead bedbugs in the bedroom.

It should be noted that the DHCR onsite inspection of the subject apartment did not find any evidence of bedbug infestation in the walls, floors, cabinets, closets and entrance of the subject apartment. The finding of dead bedbugs by the DHCR inspector suggests that the extermination service provided by the owner is effective. The Commissioner finds therefore that it was an error for the Rent Administrator to hold the owner responsible for the eradication of an infestation problem that exists solely in the personal property of the tenant's household. Accordingly, the owner's claims on appeal should be granted and the Rent Administrator's order should be revoked.

ORDERED, that this petition be, and the same hereby is, granted and that the Rent Administrator's order be, and the same hereby is, revoked.

Leslie Torres
Deputy Commissioner

**NOTICE TO TENANT
DISCLOSURE OF BEDBUG INFESTATION HISTORY**

Pursuant to the NYC Housing Maintenance Code, an owner/managing agent of residential rental property shall furnish to each tenant signing a vacancy lease a notice that sets forth the property's bedbug infestation history.

Name of tenant(s): _____

Subject Premises: _____

Apt. #: _____

Date of vacancy lease: _____

BEDBUG INFESTATION HISTORY
(Only boxes checked apply)

- ☐ There is no history of any bedbug infestation within the past year in the building or in any apartment.
- ☐ During the past year the building had a bedbug infestation history that has been the subject of eradication measures. The location of the infestation was on the _____ floor(s).
- ☐ During the past year the building had a bedbug infestation history on the _____ floor(s) and it has not been the subject of eradication measures.
- ☐ During the past year the apartment had a bedbug infestation history and eradication measures were employed.
- ☐ During the past year the apartment had a bedbug infestation history and eradication measures were not employed.
- ☐ Other: _____

Signature of Tenant(s): _____ Dated: _____

Signature of Owner/Agent: _____ Dated: _____