

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER**

-----X
EMMA GREEN RESTAURANT LLC
d/b/a AMELIA’S RESTAURANT and
MARLA GREENFIELD

Plaintiffs,

-against -

BLACKRIDGE DEVELOPMENT CORP.
a/k/a BLACKRIDGE DEVELOPMENT LLC,
and BLACKRIDGE MANAGEMENT LLC,

Defendants.

**DECISION & ORDER
AFTER TRIAL**

Index No. 53554/2020

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LOEHR, J.

The following papers, evidence and testimony were considered in connection with this motion by Plaintiffs seeking four causes of action: breach of the covenant of quiet enjoyment, violation of RPAPL § 853, conversion, and unjust enrichment. Defendants filed an Answer that sets forth affirmative defenses and counterclaims for unpaid rent and attorney’s fees.

PAPERS	NUMBERED
Joint Exhibit Stipulation (NYSCEF 112)	1
Exhibits J-1 – J-30 (NYSCEF 113-142)	2
Trial Transcripts (NYSCEF 143-144)	3
Defendants’ Trial Exhibits A-B	4
Defendant’s Trial Memorandum (NYSCEF 147)	5
Plaintiffs’ Post-Trial Brief (NYSCEF 148)	6
Trial Testimony September 12 th – September 13 th , 2022	7

Upon review and consideration of the foregoing papers, evidence and testimony, the Court determines as follows:

FINDINGS OF FACT

This case involves several disputes arising from Plaintiffs' status as commercial tenants of Defendants' building. The parties submitted a Joint Statement of Stipulated Facts and Procedural History (NYSCEF 111) prior to commencing trial in this action. The Court adopts the entire statement in rendering this determination and summarizes information relevant to its decision from that document as well as the parties' post-trial memoranda.

Plaintiffs are Emma Green Restaurant, LLC, a limited liability company that owned and operated a restaurant named Amelia's Restaurant in Mt. Vernon, New York. Plaintiff Marla Greenfield is the managing member of the LLC. Plaintiffs are referred to as "Emma Green", "Amelia's" and Marla Greenfield individually and "Plaintiffs" collectively.

Defendant Blackridge Management LLC ("Blackridge Management") is a New York State limited liability company with a principal place of business located at 1955 Central Park Avenue, Yonkers, New York. Blackridge Management is the fee owner of a building located on the corner of Union Avenue and East 3rd Street in Mount Vernon, New York ("Building"). Defendant Blackridge Development Corp. a/k/a Blackridge Development LLC ("Blackridge Development") is a New York State business corporation with a principal place of business located at 1955 Central Park Avenue, Yonkers, New York. Blackridge Development is an affiliate of Blackridge Management. ("Blackridge Management" and "Blackridge Development" are collectively referred to herein as "Defendants"). Emilio DiMatteo is the majority and managing member/owner of Defendants with authority to make decisions concerning Defendants and the Building.

The Lease Agreement

On or about February 1, 2017, Tenant bought out the prior tenant's lease at 70 East 3rd

Street, Mount Vernon, New York 10550 (“Premises”). On February 1st, 2017, Tenant took possession of the Premises and commenced operation of a restaurant known as Amelia’s Restaurant (“Amelia’s” or “Restaurant”). At all relevant times, Tenant operated Amelia’s out of the Premises. On November 2nd, 2017, by Standard Lease Agreement with a five-year term of June 1st, 2017 to May 31st, 2022, as amended by a Rider effective July 15, 2017 (“Lease”), Defendants and Tenant entered into a new lease for the Premises. The address in the Lease is stated as 78 East 3rd Street, Mount Vernon, New York.

Prior Landlord Tenant Action

On March 4th, 2019, Defendants commenced an eviction proceeding in Mt. Vernon City Court bearing a caption that contained the address stated in the lease agreement, i.e. 78 East 3rd Street, Mount Vernon, NY 10550 and not 70 East 3rd Street, Mount Vernon, NY 10550. At 78 East 3rd Street, another tenant also operates a restaurant, called Corner Grill.

On March 9th, 2019, process was served in this eviction proceeding at 78 East 3rd Street. On March 28th and April 3rd, 2019, Marlene Hunter, the owner of Corner Grill, who is also Defendants’ tenant, appeared as the Respondent. Neither Plaintiffs nor anyone on their behalf appeared in this action.

In April of 2019, Ms. Hunter retained Karl Scully, Esq. (“Attorney Scully”) to represent Corner Grill in this action. Attorney Scully did not represent Plaintiffs in the LT Action. On June 4th, 2019, during an appearance in City Court, a Stipulation was executed between Attorney Scully and Defendants to settle the action. The Stipulation provided that a final judgment was to be entered and a warrant of eviction issued for possession, with the warrant stayed to June 20th, 2019, if Defendants were paid \$4,000 by June 6th, 2019 and \$3,000 by June 20th, 2019. The Stipulation also provided that upon failure to pay and Defendants’

application to the court, the stay would be vacated, and the warrant would be issued.

On June 24th, 2019, Attorney Romano filed an Affirmation of Failure to Comply with a Stipulation of Settlement, in which he asked the City Court to enter judgment and issue a warrant of eviction with no further stay based on failure to comply with the Stipulation.

Eviction Proceeding

On July 10th, 2019, the City Court issued a Warrant directing Mt. Vernon Chief City Marshal Serapher Conn-Halevi (“Marshal”) to recover possession of the premises defined as 78 East 3rd Street, Mount Vernon, NY 10550. This Warrant also listed the name “Emma Green Restaurant”. The warrant did not include the name “Amelia’s Restaurant” or the names of the Plaintiffs. In Mt. Vernon, the only individuals who are empowered to execute evictions are the Marshal and her deputy, Deputy City Marshal Nahshon Halevi (“Deputy”).

Neither Attorney Romano nor anyone from his office directed the Marshal or Deputy to execute a lockout or eviction at 70 East 3rd Street. Corner Grill was not evicted and remained in possession of 78 East 3rd Street.

In July or August 2019, the locks to the Premises were changed. On August 26, 2019, Ms. Greenfield informed Mr. DiMatteo that she had visited the Premises and could not enter because the locks had been changed. Defendants relet the Premises to a new tenant, Vernia Cooper.

As demonstrated by the joint statement issued by the parties, there is broad agreement between both sides as to the majority of facts in this matter. The crux of the parties’ disagreement hinges over how Plaintiffs were ultimately locked out. A large part of the confusion surrounding the dispute concerns the fact that Defendants were dealing with similar complaints (i.e. rent being withheld due to water leaking from the roof) from two tenants with

similar addresses (70 and 78 East 3rd Street). The parties each argue that the narrative described above, coupled with the testimony elicited at trial supports a finding in their favor. Plaintiffs assert that Defendants changed the locks or caused them to be locked out. Defendants assert that they did not perform or authorize any lock out without authorization, and that the City Marshal must have performed the lock out of Plaintiffs.

Trial Testimony

At trial, Plaintiffs called five witnesses: Marla Greenfield, Plaintiff, Emilio DiMatteo, Defendant, Marshal Serapher Conn-Halevi (“Marshal”), Deputy City Marshal Nahshon Halevi (“Deputy”) and attorney Karl Scully. Defendants’ counsel elicited direct testimony from Defendant Emilio DiMatteo.

Marla Greenfield Testimony

Ms. Greenfield testified that she saved Seventy-Five Thousand and 00/100 Dollars (\$75,000.00) while working as a waitress to open her own restaurant. She named her restaurant Amelia’s Kitchen, after her daughter when she opened it in February of 2017. She chose to rent a commercial location at 70 East Third Street, Mt. Vernon, NY, from Defendants, by paying Twenty-Five Thousand and 00/100 Dollars (\$25,000) to Blackridge Management to buy out the lease of another tenant. She immediately began paying rent at that time. She testified that she also purchased an ice machine, refrigerator, food warmers, a steam table, tables, soda machines, two televisions, and a security system. She showed evidence of cash withdrawals and bank transactions of Nine Hundred Dollars (\$900.00), Five Thousand Two and 65/100 (\$5,002.65), Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00), Three Thousand and 00/100 Dollars (\$3,000.00), One Thousand Eight Hundred and 00/100 Dollars (\$1,800.00), Two thousand Two Hundred and 00/100 Dollars (\$2,200.00), and Five Thousand and 00/100 Dollars

(\$5,000), totaling Twenty Thousand Four Hundred Two and 65/100 Dollars (\$20,402.65), all of which were in support of purchases for the restaurant.

Upon taking over the premises, she began to notice that the roof of the restaurant was leaking every time it would rain. Upon informing the Defendants of the leaks, they responded that they would address the leaks.

Ms. Greenfield further testified that she paid Twelve Thousand and 00/100 Dollars (\$12,000.00) to replace the oven hood, after Defendants informed her that they could not obtain building insurance without this renovation. Plaintiff submitted text messages that corroborated this conversation and sequence of events.

As time went on, Plaintiff testified that she continued to notice leaks in the restaurant. When Ms. Greenfield renewed her lease in November of 2017, she again informed landlord of the leaking, and the landlord again promised to send someone to examine the issue. In January 2018, Plaintiff informed the landlord that there was a lack of running water. Although raised to defendants, this issue was also not addressed, according to Plaintiff's testimony. Ms. Greenfield testified that she attempted to go to the landlord's office in July or August of 2018 to speak to them about the unresolved issues of leaks and rodents.

Plaintiff submitted photographs of rodents caught in glue traps, brown ceiling tiles that appeared to have water damage, and photographs and videos of water leaking through the roof of the kitchen.

Plaintiff further documented her testimony regarding unaddressed complaints of leaks, lack of running water, and rodents over the course of two years with text messages and letters sent to Defendants, and text messages received from Defendants.

In November of 2018, Plaintiff testified that she withheld rent. Following this, she

noticed an accumulation of piles of paper and boxes of paper building up behind the restaurant. She testified that after this appeared, the rodent problem began to worsen.

In February of 2019, Ms. Greenfield sent a letter to Defendants, informing them that they would have to close the restaurant. Following this communication, the landlord sent someone to meet with Ms. Greenfield to inspect the damage to the restaurant. During this period, Defendant DiMatteo communicated with Ms. Greenfield that he would repair the leaks to the roof.

On May 29th, 2019, Ms. Greenfield received a text message from Mr. DiMatteo indicating that the roof had been fixed. When Ms. Greenfield went to the restaurant to inspect, she noticed that the leak had not actually been fixed.

On August 26th of 2019, Ms. Greenfield went to the restaurant and her keys did not work. She went to the back door of the restaurant, which was open, and walked inside. There she found someone cleaning the restaurant equipment. Later that day, Ms. Greenfield reached out to Mr. DiMatteo by text message.

Mr. DiMatteo replied: “Your (sic) were evicted in court and not allowed to step on the premises. Have a good day”

Ms. Greenfield had not received a Notice of Eviction. No Notice of Eviction was posted on the premises at that time.

Emilio DiMatteo Testimony

Mr. DiMatteo confirmed that he had written and exchanged the text messages between Ms. Greenfield offered jointly into evidence by the parties. Mr. DiMatteo disputed the fact that it was his responsibility to fix the leaks in the roof, because he attributed the leaks to the renovations performed when Ms. Greenfield had the new oven hood installed. Mr. DiMatteo submitted no additional evidence of this causation and offered it as his opinion as the landlord.

Mr. DiMatteo testified that ordinarily when a tenant stops paying rent, the practice is to initiate an eviction proceeding after two or three months of nonpayment, with no response received from the tenant. Mr. DiMatteo further testified that he did not know if he had sent a Notice of Default, but that had his company produced one, he would have been able to produce it as evidence at trial. No such evidence was presented. Instead, Defendants presented evidence of an eviction proceeding commenced against a different tenant, at a different address near the address of Plaintiffs' restaurant.

Marshal and Deputy Marshal Testimony

The Marshal and Deputy Marshal described the process of a lockout and distinguished it from an eviction. At a lockout, which the Marshal testified is often noted on a warrant from housing court as "L/O", the Marshal arrives and oversees the changing of locks, whereas during an eviction the locks are changed and property may be removed at that time. Before a lockout or eviction occur, a 72-hour notice of eviction is served.

The Deputy Marshal testified that he specifically recalled serving Corner Grill several times in the past, and that in fact served several businesses under different names at that exact address. He specifically stated that when he serves a 72-hour notice, that he serves any suitable individual he finds at the address, as opposed to attempting to match any name on the warrant with the name of a person or the business itself.

The Marshal and Deputy Marshal further testified (1) that they perform all lockouts in Mt. Vernon; (2) that they only perform a lockout at the address specified in the warrant, and not at the name that may be listed; and (3) they have several other procedures in place to check any discrepancy between a name on a warrant and a name on a physical building located at an address.

Attorney Karl Scully

Attorney Karl Scully testified that he had represented the tenant at 78 East 3rd Street, Corner Grill, for years. In response to the Notice of Eviction served at that address, he filed a Notice of Appearance. He further testified that he in fact appeared on behalf of Corner Grill in the Landlord/Tenant action, and specifically negotiated a settlement with Defendants.

Attorney Karl Scully testified that the Corner Grill similarly owed Landlord for unpaid rent, and had an ongoing dispute with Landlord due to leaks.

Summary:

Defendant has maintained he was justified in evicting the tenant, without any evidence that a proper eviction was conducted. Defendant has attempted to rely on his own mistaken court filing, which unequivocally lists the incorrect address (78 East 3rd Street) for the LLC named therein (Emma Green Restaurant). Emma Green Restaurant, the LLC that owned Amelia's Restaurant, is located at 70 East 3rd Street. Both City Marshals, the only people responsible for overseeing all lawful evictions in the City of Mt. Vernon, unequivocally testified that their practice is to serve and effect evictions based on an address, and not by any name that may be listed in the warrant.

Furthermore, the Court notes that the name "Amelia's Restaurant" was not on any paperwork filed in the eviction proceeding, and the name Emma Green restaurant was not on the building. Emma Green restaurant was only on present LLC paperwork, the lease agreement, the landlord tenant action, and this lawsuit. In short, the Court finds no way for the marshal or deputy marshal to have connected the name Emma Green Restaurant to 70 East 3rd Street at the time of a lockout purportedly performed based on the only warrant of eviction offered into evidence at trial.

At some point between July and August 2019, the locks to Amelia's Restaurant were changed, without notice to Plaintiffs. Defendants benefitted from this changing of the locks. Had Defendant changed the locks with the marshal, the marshal would have had a record of the transaction. Defendant has continuously pointed to the proceeding involving Corner Grill, a neighboring restaurant who was not ultimately evicted, as evidence of a proper eviction of Amelia's Restaurant.

The Court finds Defendants' explanation unpersuasive. Defendant DiMatteo testified on his own behalf, and claimed that he had no record of changing the locks. Defendant produced no evidence or testimony supporting the fact that any proper lockout or eviction occurred, including from his own business, from the tenant who took over, nor any other documentary evidence or business records that might support these claims.

Conversely, Plaintiff submitted credible evidence that while complaining about unsuitable conditions in the commercial space she was renting, one day she appeared at the restaurant and was locked out without prior notice. Plaintiff's summary alone lays out circumstantial evidence of an illegal lockout. The testimony of the parties, and the evidence Plaintiff offered in support, and the lack of evidence offered by Defendant, further justify a finding to this Court in its discretion as the finder of fact that an illegal lockout occurred. Defendants' negligence in recordkeeping and/or his attorney's negligence in filing for eviction is not a suitable explanation for the lack of evidence Defendant presented. To seek out assistance using judicial process, all parties must pay close attention to key details, such as the actual address of the tenant they wish to evict. The Court finds Defendants' explanation inexcusable, and reminiscent of the fact that the Landlord was simultaneously promising Plaintiff to address the issues she had raised, meanwhile attempting to commence eviction proceedings behind her

back.

The parties each moved for summary judgement prior to proceeding to trial. Plaintiff moved for claims for breach of the covenant of quiet enjoyment, unlawful eviction in violation of RPAPL § 853, conversion, and unjust enrichment. The Hon. Damaris E. Torrent, A.J.S.C. denied the motion and cross-motion and referred the matter for trial. Justice Torrent found questions of fact as to whether Plaintiffs were on notice of the landlord tenant action, were afforded due process, were properly served with 72-hour notice of eviction prior to being locked out, and whether defendant's actions forced plaintiffs out of possession of the premises in an "unlawful manner" as contemplated by RPAPL § 853. Justice Torrent found further questions of fact as to whether Plaintiffs were partially evicted due to the leaking roof and presence of rodents.

Having considered the joint statement of the parties, the post-trial submissions, and the testimony at trial, this Court finds that Defendants' eviction was unlawful, and without judicial process. The Court further finds that the persistently leaking roof and untreated presence of rodents constituted a partial eviction prior to the lockout.

ANALYSIS

Plaintiffs' Causes of Action:

Plaintiffs seek rent abatement and other damages due to the constructive eviction, and an award of treble damages due to the actual eviction.

Breach of the Covenant of Quiet Enjoyment

To establish a breach of the covenant of quiet enjoyment, a tenant must show either an actual or constructive eviction. (Grammer v. Turits, 271 A.D.2d 644, 645-46, [2d Dept. 2000], citing *Herstein Co. v. Columbia Pictures Corp.*, 4 N.Y.2d 11 [Ct. App. 1958]).

Plaintiffs have shown constructive eviction based on the failure to promptly correct the problems raised to the landlord, and separately show an actual eviction by the lockout executed without judicial process or lawful authority.

As a result of Defendants' unlawful eviction, and constructive eviction, Plaintiffs have proven their cause for breach of the covenant of quiet enjoyment. (Barash v. Penn. Term. Real Estate Corp. 26 N.Y.2d 77 [Ct. App. 1970]).

Conversion

Plaintiffs' claim for conversion must demonstrate "(1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right". (Giardini v. Settanni, 159 A.D.3d 874, [2d Dept. 2018]). Plaintiffs have successfully demonstrated claims for conversion as to all of the property Defendants improperly seized through the unlawful eviction.

Ouster and Constructive Eviction

Plaintiffs' have similarly demonstrated entitlement to damages based on the constructive eviction that occurred, because Defendants' wrongful acts in negligently maintaining the property substantially and materially deprived the tenant of the beneficial use and enjoyment of the leased premises (Barash, supra).

Defendants' Answer and Counterclaims

Plaintiffs filed a Verified Amended Complaint on August 23rd, 2022. Defendants raised affirmative defenses and counterclaims for unpaid rent and attorney's fees to Plaintiffs' initial Complaint, but failed to file a responsive pleading to Plaintiffs' Verified Amended Complaint,

and thus have admitted the allegations of Plaintiffs' Verified Amended Complaint. (Matter of Young Min Kim, 135 A.D.3d 173 [2d Dept. 2015]).

Furthermore, because the Court has found that Defendants are liable for a constructive eviction and wrongful eviction, Defendants are not entitled to an award of unpaid rent. Such a counterclaim flies in the face of a century of this State's caselaw. (*See: Two Rector St. Corp. v. Bein*, 226 A.D. 73 [1st Dept. 1929]; *Suprunchik v. Viti*, 139 A.D.3d 1389, [4th Dept. 2016]; *Lopez v. Renaissance Prop. Managers LLC*, 2006 N.Y. Misc. LEXIS 2552, 236 N.Y.L.J. 51 *citing New York R. Co. v. Muldoon* [181 N.Y.S. 378 [App.Term 1st Dept. 1920]). Plaintiffs have successfully demonstrated entitlement to a rent abatement for the period between November 2018 and July 2019 based on their claims for breach of the covenant of quiet enjoyment, ouster and constructive eviction.

Treble Damages

Plaintiffs in this matter have additionally sought an award of treble damages based upon their claim of unlawful eviction pursuant to RPAPL § 853. The Appellate Division, Second Department has determined that the legislature intended to leave the question of whether treble damages should be awarded to the discretion of the trial court. (*Lyke v. Anderson*, 147 A.D.2d 18 [2d Dept. 1989]; *see also Hood v. Koziej*, 140 A.D.3d 563 [1st Dept. 2016]). The trial court has full discretion to award treble damages in an unlawful eviction action. (*Clinkscale v. Sampson* 48 A.D.3d 730 [2d Dept. 2008]). Such an award is permissive rather than mandatory. (*Lee v. Park*, 16 A.D.3d 986, [3d Dept. 2005]). Also, an award of treble damages does not require intent of the same type required to award punitive damages. (*Rental & Management Assocaites, Inc. v. Hartford Ins. Co.*, 1992 206 A.D.2d 288)

Such awards have been held to be proper where a tenant demonstrates a wrongful

eviction and thus proven loss of customer leads, records, furniture and other items of personal property discarded by a landlord. (*H & P Research, Inc. v. Liza Realty Corp.*, 943 F.Supp. 328 [S.D.N.Y. 1996]). Given the fact that Plaintiffs proved that a lockout and eviction occurred, without any evidence of legal authority or proper judicial process, and that Defendants' were only able to show evidence of an unrelated eviction proceeding to a neighboring property to justify their actions, the Court finds that treble damages are warranted. (*Hood v. Koziej, supra*). In fact, given the record before this Court of Defendants' self-help measures, it would appear to be reversible error to fail to award treble damages. (*Clinkscale v. Sampson*, 48 A.D.3d 730 [2d Dept. 2008]; *Moran v. Orth*, 36 A.D.3d 771 [2d Dept. 2007]).

Punitive Damages

An award of treble damages in a wrongful eviction action does not preclude an additional award of punitive damages. (*In re Chavez*, 381 B.R. 582, 2008). However, an award of punitive damages must typically demonstrate egregious conduct, above and beyond what a tenant must show in demonstrating entitlement to treble damages. “[P]unitive damages are only available in the extreme case where the defendant has been shown to have been motivated by actual malice or to have acted in such a reckless, wanton or criminal manner so as to indicate a conscious disregard of the rights of others.” (*Moran v. Orth*, 36 A.D.3d 771, 773, [2d Dept. 2007]).

Punitive damages are typically awarded for malicious conduct, such as where evidence demonstrated that a landlord moved tenant's possessions without her permission, contrary to tenant's express written instructions, was sufficient to support award of Five Thousand and 00/100 Dollars (\$5,000.00) in punitive damages in a wrongful ejection action. (*Bianchi v. Hood* 128 A.D.2d 1007, [3d Dept. 1987]).

Similarly an award of Ten Thousand and 00/100 Dollars (\$10,000.00) in punitive

damages was held to be neither unwarranted nor excessive against a landlord who, not only deprived tenant of his home, but in the course of forcibly ejecting him, destroyed and discarded all of his belongings. (Williams v. Llorente 115 Misc.2d 171 [1st Dept. 1982]).

Upon review of the trial testimony, the Court in its discretion does not find conduct that rises to the level that would warrant punitive damages, and thus declines in its discretion to impose Plaintiffs' claim on this ground. Therefore, this Court, having held a non-jury trial on September 12th and 13th, 2022, it is hereby,

ORDERED, that Plaintiffs are entitled to rent abatement for the months of November 2018 through July 2019, and it is further,

ORDERED, that Plaintiffs shall recover from Defendants, jointly and severally, actual and compensatory damages, including attorney's fees, costs and disbursements, in an amount to be determined at inquest; and it is further

ORDERED, that Plaintiffs shall recover of Defendants, jointly and severally, treble damages in an amount to be determined at inquest; and it is further

ORDERED, that Plaintiffs' motion for punitive damages is DENIED; and it is further

ORDERED, that Plaintiffs shall recover statutory pre-judgment interest from Defendants, jointly and severally, accruing from March 1st, 2019, in an amount to be determined at inquest; and it is further

ORDERED that the plaintiff shall file a note of issue, within 20 days of the date hereof, for an inquest as to damages; and it is further

ORDERED that all parties are directed to appear in the Trial Assignment Part, at a date and time to be designated by that Part, to schedule a date for an inquest on damages; and it is further

ORDERED that the plaintiff shall serve a copy of this Order, with notice of entry, on the defendant by first class mail within seven (7) days of entry of this Order; and it is further

ORDERED that plaintiff shall file proof of service of this Order with notice of entry to NYSCEF within three (3) days of service of the Order.

And it is further ORDERED that Defendants' counterclaims and remaining applications are DENIED and DISMISSED with prejudice.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
February 14, 2023



HON. MELISSA A. LOEHR, A.J.S.C.