CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

----------X INDEX NO. 78285/15

GVS PROPERTIES LLC,

Petitioner,

-against-

DECISION/ORDER

RAYBBLIN VARGAS, et al.,,

Respondent.

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SCHNEIDER, J.

These nineteen nonpayment proceedings were referred to me for joint trial. The petitioner is the owner of a 10 storey building at 600 West 161st Street is Manhattan. The respondents are tenants of various apartments in that building. By agreement of counsel for all parties, the petitioner's prima facie case was conceded, and the trial went forward only on respondents' defense under Section 302 of the Multiple Dwelling Law. Respondents assert that this is a complete defense to all of the petitioner's claims, and should result in dismissal on the merits of all nineteen cases. The trial will continue on respondents' other defenses only if the proceedings are not dismissed pursuant to Section 302.

The trial took place on November 7, 10, and 14, 2016. The parties submitted post-trial memoranda on December 19, 2016. There were few if any relevant factual disputes at the trial.

There have been three permanent certificates of occupancy issued for the building by the New York City Department of Buildings ("DOB"). The first, dated April 4, 1952, allows for 47 residential apartments, one in the cellar, one on the first floor, and five each on the second through tenth floors. The second certificate of occupancy, dated March 4, 1970, increases the

number of apartments permitted on the fourth, eighth and ninth floors from five to six, for a total of 50 apartments. The third certificate, dated September 22, 1970, adds a sixth apartment on the second, fifth and seventh floors, for a total of 53 apartments.

The parties agree that the building currently has 60 apartments. Between August of 2006 and November of 2008, DOB issued five temporary certificates of occupancy ("TCO's"). Each of these permitted 60 apartments – one each in the cellar and on the first floor, six each on the third, fourth, sixth, seventh, eighth and tenth floors, eight on the second floor, and seven on the 5th and 9th floors – for a period of three months each. Some of the periods were contiguous, others were not. Each TCO states that there are twelve outstanding requirements for obtaining a final certificate of occupancy. The trial record does not indicate what those twelve requirements were.

In June 2014, two years after petitioner purchased the building, petitioner's application for a final certificate of occupancy, bearing the same application number as all of the TCO's, was rejected by DOB because a majority of the apartments in the building did not have a second means of egress in the event of a fire. The parties agree that two of the apartments on each floor, in the A and B lines, have a second means of egress via an external fire escape on the front of the building. All of the other apartments have only one exit, via the building's original open central staircase.

By 2015 petitioner had developed a plan to create a second means of egress for the other apartments by erecting an exterior staircase at the rear of the building and extending fire rated corridors to that staircase. Because this plan requires changes to the space in 24 rent regulated apartments, petitioner has applied to the Division of Housing and Community Renewal ("DHCR") to proceed with the plan. The application was still pending at the time of trial.

The DOB and the Environmental Control Board ("ECB") have adjudicated at least four violations for occupancy of the building without a valid certificate of occupancy (violations dated August 18, 2013, December 17, 2014 and August 25, 2015), or occupancy contrary to that allowed by the certificate of occupancy (violation dated April 9, 2014). Two of these violations referred specifically to the expiration of the last TCO in November 2008 and specified a remedy of "obtain valid certificate of occupancy." Each of the violations was adjudicated and resulted in petitioner's payment of a fine.

One violation resulted in a vacate order with respect to a particular apartment, in December 2015. The apartment was permitted to be reoccupied only if petitioner deployed fire guards throughout the building as a safety measure.

From these conceded facts, the parties have reached dramatically different conclusions. Petitioner asserts that the September 22, 1970 certificate of occupancy is still in effect and that there is, accordingly no violation of Section 302 of the Multiple Dwelling Law. Respondents argue that because the building is not occupied in compliance with the September 22, 1970 certificate of occupancy, and because the last TCO consistent with the building's current configuration expired in 2008, the rent collection bar of Section 302 is triggered and the proceedings must be dismissed.

Section 301 of the Multiple Dwelling Law states, "No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules, and to all other applicable law ... " Section 302(1)(b) of the same law provides that if any dwelling is occupied in violation of Section 301 for any period, "no rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained

therefor, or for possession for nonpayment of such rent."

In Chazon LLC v. Maugenest, 19 NY 3d 410 (2012) the Court of Appeals rejected a significant body of case law that had, over time, softened and limited the rent collection ban in Section 302(1)(b). The court said, "in the absence of compliance [with Section 301] the law's command is quite clear ...[Judicially created exceptions] may make sense from a practical point of view. But we find nothing ... to explain how they can be reconciled with the text of the statute, They simply cannot ..." The court went on to say that if the rent bar creates an undesirable result, that is a matter for the legislature, not for the courts.

Following Chazon, the Appellate Term, First Department stated that Section 302(1)(b) "prohibits said owner from recovering rent or maintaining a nonpayment proceeding for any period the premises is occupied in violation of the certificate of occupancy." 49 Bleecker Inc. V. Gatien, 51 Misc. 3d 152 (A) (AT 1st Dept. 2016). At the trial level, Judge Marton of this court dismissed a nonpayment proceeding, citing Chazon, because "the premises as configured by petitioner varies substantially from what the certificate of occupancy permits." 742 Realty LLC v. Zimmer, 46 Misc. 3d 1204 (A) (Civ. Ct. NY Co. 2016).See also Momart Discount Store Ltd. v. Rossi, 2016 NY Slip Op 32165 (U) (Civ. Ct. NY Co.), Lispenard Studio Corp. v. Loeb, 2016 WL 3036616 (Civ. Ct. NY Co.)

The New York City Building Code Section 28-118.3.2 provides that "no change shall be made to a building ... inconsistent with the last issued certificate of occupancy ... unless and until the commissioner has issued a new or amended certificate of occupancy." The New York City Administrative Code Section 27-217 states, "No change shall be made in the occupancy or use of an existing building which is inconsistent with the last issued certificate of occupancy for such building ... unless a new certificate of occupancy is issued ..." In 995 Manor Road LLC v. Island

Realty Holdings LLC, 15 Misc. 3d 1147 (A) (Civ. Ct. Richmond Co. 2007) the court held that the building lacked a valid certificate of occupancy because it had been altered after the issuance of a previous, and previously valid, certificate of occupancy.

Here, there is no question that the building has been substantially altered since the issuance of the September 22, 1970 certificate of occupancy. The building now has 60 apartments, not the 53 permitted by the certificate of occupancy. And petitioner cannot now obtain a certificate of occupancy approving the increased occupancy without complying with an important fire safety law. Although the Administrative Code contains a "grandfathering" provision, see Richardson v. Villacon Realty Corp., 2008 NY Slip Op 31175 (U) (Sup. Ct. NY Co.), NYC Admin. Code 27-211, it also requires that when an owner seeks approval for a change in occupancy, as petitioner does here, it must show that the building is in compliance with all applicable laws. NYC Admin. Code 27-112.

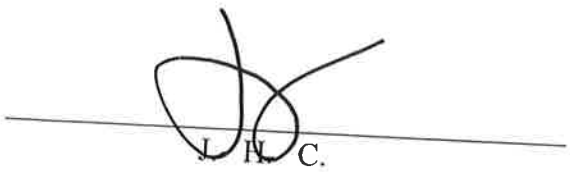
There is no certificate of occupancy for this building as it is currently configured, and the DOB has refused to issue one because of serious fire safety concerns. Petitioner argues, though, that the rent bar of Section 302(1)(b) should not be applied here because the respondents have not shown that any of them live in any of the seven illegally added apartments or that their apartments were specifically affected by the illegal alterations. But the cases cited by petitioner, see, e.g., Coulston v. Teliscope Productions Ltd., 85 Misc. 2d 339 (AT 1st Dept. 1975), Hakim v. Walstrom, 198 AD 2d 139 (1st Dept. 1993), Shoretown Management v. Kahill, 1993 NY Misc. Lexis 673 (AT 1st Dept.), 24th Street Holding LLC v. Martinez, 43 Misc. 3d 8 (AT 1st Dept. 2013), are part of the line of limiting or softening cases specifically rejected by the Court of Appeals in Chazon. The only one of petitioner's cases on this issue decided after Chazon, the 24th Street Holding case, was decided very soon thereafter, and there is no indication that Chazon

was argued in that case.

It is true that the results of the rent collection bar are harsh, but as the Court of Appeals noted, that should be a concern for the legislature.

For all of the foregoing reasons, these proceedings are dismissed on the merits.

Dated: 8/2/17



J.H.C.