CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F
----------X
Trafalgar Company,
Petitioner-Landlord, L & T INDEX NO.:081155/2015

-against-

Georgia Malone
147 East 61st Street
Apartment #2
New York, New York 10065
Respondent-Tenant,

"John Doe" and "Jane Doe",
Respondent-Occupants.
----------X

J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION AND CROSS MOTION:.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED.....	--------1----------
ANSWERING AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED.....	--------2----------
REPLYING AFFIRMATION AND EXHIBITS ANNEXED.....	-------3----------
NOTICE OF CROSS MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED……	--------4----------
ANSWERING AFFIRMATION TO THE CROSS MOTION……	--------5----------

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION AND CROSS MOTION IS AS FOLLOWS:

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F
----------X
Trafalgar Company,
Petitioner-Landlord, L & T INDEX NO.:060025/16

-against- **DECISION/ORDER**

Georgia Malone
147 East 61st Street

Apartment #1
New York, New York 10065
Respondent-Tenant,

"John Doe" and "Jane Doe",
Respondent-Occupants.
----------X

J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS[1] CONSIDERED IN THE REVIEW OF THIS MOTION AND CROSS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED.....	--------1----------
ANSWERING AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED.....	--------2----------
REPLYING AFFIRMATION AND EXHIBITS ANNEXED.....	--------3----------
NOTICE OF CROSS MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED……	--------4----------
ANSWERING AFFIRMATION TO THE CROSS MOTION……	--------5----------

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION AND CROSS MOTION IS AS FOLLOWS:

Petitioner commenced two holdover proceedings against respondent to recover possession of two apartments, #1 & #2, at 147 East 61st Street, New York, New York 10065. The respondent occupies both apartments. The holdovers are based on identical causes of action. The apartments were deregulated by virtue of the luxury decontrol provisions of the Rent Stabilization Law (RSL), the respective leases expired, and the respondent no longer had the petitioner's permission to remain in possession of the apartments. The underlying petitions state the respective apartments are in a multiple dwelling, and the petitioner is seeking a judgment for the fair value of use and occupancy (U&O) from the date of expiration of the tenancy.

Both parties are represented by counsel. Respondent's verified answers, dated March 9, 2017, are identical[2]. The answers interpose seven affirmative defenses and two counterclaims.

[1] During a virtual court conference held on the record for both proceedings, and prior to the submission of the instant motion and cross motion under L&T 081155/15, the parties requested the court treat the instant motion and cross motion under L&T 081155/15 (apartment #2) also as a motion and cross motion for the same relief under L&T 060025/16 (apartment #1), which the court agreed to. During the conference held on the record the parties agreed that there is no dispute that the applicable law and or relevant facts necessary for disposition of the instant motion or cross motion are the same for both proceedings.

[2] Respondent asserts the answers for each of these holdovers are appended as Exhibit B to its instant motion, however, they are not. The verified answers dated 3/9/17 and an affirmation of mail service of the L&T 81155/15 answer are appended as respondent's reply Exhibit A. Both answers and their affirmations of mail service appended petitioner's cross motion Exhibit B.

The first counterclaim states:

> The subject premises do not have a proper certificate of occupancy. The subject premises have been served with multiple violations for failure to have a proper certificate of occupancy and has been cited as being "occupied without a valid certificate of occupancy" The Petitioner has ignored said violations and the premises remain in violation of law. Pursuant to the Multiple Dwelling Law Section 301, 302 and 325, the Petitioner may not recover any rent and/or use and occupancy for the premises.

Respondent moves by notice of motion under L&T 081155/15 (apartment #2) for an order pursuant to CPLR 3212 granting her summary judgment on her first counterclaim[3], based on Multiple Dwelling Law (MDL) Sections 301 and 302 barring petitioner from collecting rent and/or U&O. The counterclaim alleges the building lacks a valid and conforming Certificate of Occupancy (C of O), and therefore the landlord is barred from collecting rent/U&O. Respondent seeks dismissal of petitioner's claim for rent and/or U&O, as well as return of all monies she has deposited with the court, plus all U&O she tendered to the petitioner without prejudice, during the pendency of this proceeding.

Petitioner opposes the motion in its entirety. Petitioner cross moves for an order pursuant to CPLR sections 3211 and 3212 dismissing respondent's first through seventh affirmative defenses. Petitioner seeks a judgment of possession, and issuance and execution of a warrant of eviction. Petitioner's cross motion is silent as to respondent's two counterclaims, including the 1st counterclaim that asserts petitioner is barred by MDL Sections 301 and 302 from collecting rent/and or U&O because the building lacks a valid and conforming C of O. Petitioner requests that if it is determined to be the prevailing party, it reserves its rights to seek attorney fees pursuant to the expired original lease agreement, as well as fair market value U & O from the date of the expiration of respondent's leases.

Respondent's opposition to the cross motion does not dispute petitioner's possessory claims in the proceedings. Respondent's counsel claims the respondent will vacate on or before November 16, 2020. Respondent does not submit an affidavit in opposition to the cross motion. Respondent claims the petitioner would not stipulate to her November 16, 2020 vacate date insisting on conditioning a settlement on respondent agreeing petitioner is the prevailing party. Respondent argues the petitioner's cross motion should be granted solely to the extent that she will vacate on or before November 16, 2020, or denied as moot.

Litigation History

The parties engaged in motion practice during these proceedings, as well as extensive related litigation concerning the respondent's prior DHCR complaints. Respondent's DHCR complaints against the petitioner, asserted each of the subject apartments were illegally deregulated and she

[3] The face sheet of respondent's motion states she is seeking pursuant to CPLR 3212 "summary on her ___ affirmative defense". Paragraph 1a of the affirmation in support of the motion states she is seeking summary judgment on "her first counterclaim and or affirmative defense". Paragraph 16 of the same affirmation states she is moving for summary judgment "with regards to her first counterclaim".

was overcharged. During the course of the litigation, the holdovers were stayed pending the resolution of the DHCR complaints. [4]

The November 17, 2016 DHCR order determined both apartments were legally deregulated. (respondent's B) Respondent filed a PAR of the decision, and it was denied by DHCR decision dated January 5, 2018. (respondent's E) Respondent filed an Article 78 proceeding in New York Supreme Court appealing her DHCR PAR denial. By order dated April 25, 2019, the Supreme Court affirmed the DHCR PAR denial. (respondent's F) Respondent's appeal of the Article 78 determination resulted in a decision, dated December 26, 2019, from the Appellate Division First Department, unanimously affirming the DHCR PAR denial (respondent's G). The Court of Appeals denied respondent's motion for leave to appeal on June 23, 2020. (petitioner's Opposition Exhibit N)

On March 24, 2016, respondent's motion for a stay of L&T 081155/15 was granted pending the determination of respondent's DHCR complaint, on the condition she pay U & O of $4939.58 per month beginning April 1, 2016 and continuing for the duration of the stay. Upon default in payment, the petitioner could move to vacate the stay, and the case could be restored after DHCR decided respondent's DHCR complaint. (petitioner's opposition Exhibit C)

DHCR determined the subject apartments were properly deregulated, and the holdover cases were restored to the calendar. On January 30, 2018, respondent's application for a stay of both holdovers was denied in Housing Court without prejudice to her right to seek a stay in her pending Article 78 proceeding. Both cases were transferred to Part X for trial. Respondent was ordered to deposit accrued rent into court for each of the apartments, and to continue to deposit monthly rent for each apartment into court at the last lease amount from the month following filing of the case through January 31, 2018, and to continue depositing rent at the same rate by the 15th of each month thereafter. $128,429.08 was to be deposited under L&T 08115/15, and $70,087.60 under L&T 060025/16. (respondent's Exhibit I)

The holdover cases were adjourned in Part X to March 26, 2018 for trial. The parties consented, in a stipulation, to mark both cases off calendar pending the determination of respondent's pending Art.78 proceeding[5]. The stipulation states the stay was on the same terms and conditions as outlined in the parties' February 23, 2018 Supreme Court Stipulation[6].

In the parties' February 23, 2018 Supreme Court stipulation, Trafalgar Company was added as an intervenor-respondent on consent. Trafalgar Company consented to a stay of the enforcement of the DHCR's Administrative Review dated 1/5/18 (the PAR Order), as well as a stay of the summary holdover proceedings pending a determination of the Article 78 proceeding. The stay was conditioned upon Georgia Malone's continuing to deposit monthly rent for each of the two apartments into Civil Court in the rent amounts stated in the last lease/lease renewal between the

[4] The affirmation in support of the motion and the affirmation in opposition to the motion give the history of these holdover proceedings, as well as the history of the DHCR proceedings.
[5] New York Supreme Court Index 150814/18, "In the Matter of the application of Georgia Malone, petitioner, for a judgment under Article 78 of the CPLR against DHCR".
[6] Petitioner's affirmation in opposition paragraph 16. An almost illegible copy of the stipulation is appended as petitioner's opposition I.

parties ($3,504.38 per month for apartment 1 and $4,939.58 per month for apartment 2). Ms. Malone's deposit of the rents was "without prejudice to any and all" of her "rights and/or claims and/or defenses regarding the subject apartments and/or the HO Proceedings." (Petitioner's Opposition Exhibit H.)

The parties' subsequent May 22, 2019 Supreme Court stipulation[7] further stayed the underlying holdover proceedings until completion of the Article 78 proceeding, and any subsequent appeals of that action, including to the Court of Appeals, on certain conditions. The conditions included respondent tendering monthly rent to the petitioner for each apartment as it became due commencing on June 10, 2019. Additionally, Ms. Malone waived all her personal jurisdiction defenses and traverse in the holdover proceedings and consented to personal jurisdiction in the housing court proceedings.

The May 22, 2019 Supreme Court stipulation states in pertinent part:

> …The Payments shall be without prejudice to any and all of Petitioner's and/or Intervenor-Respondents rights and/or claims and/or defenses regarding the subject apartments and/or the HO Proceedings…All sums previously paid into Civil Court, New York County pursuant to the Orders entered into in the HO Proceeding and/or the stipulation between the parties dated February 23, 2018 shall remain on deposit with the Civil Court pending a full and final determination of the Appeal…

The parties consented to petitioner's motion to restore these holdovers to the court's calendar pursuant to their February 26, 2020 stipulation. (Respondent's C)

Respondent's Motion

Respondent argues petitioner failed to obtain an amended C of O for its creation of a "new apartment," and continues to ignore three "open" outstanding DOB violations for failing to obtain a valid C of O for the building.

The subject building's C of O, No 27427 dated 3/7/1941[8], states in pertinent part:

> Alt No. 2357-1940 Converted Mul. Dwell.
> Date of completion – January 31, 1941
> Permissible Use and Occupancy
>
Cellar	Boiler room and storage
Basement	One (1) Apartment and One (1) Half apartment
1st Story	One (1) Half apartment
2nd to 4th Story	Two (2) Apartments on each floor

[7] Part of Respondent's Exhibit I.

[8] The affirmation in support of the motion states the C of O is appended as Exhibit D, but it is not. The C of O is not appended to the motion or reply. Petitioner appends a copy of the C of O as petitioner's opposition Exhibit O.

Respondent contends the building was internally reconfigured after the 1941 C of O issued. Respondent argues that according to the 1941 C of O, the building contained a duplex apartment, half, on the basement level and half on the building's first floor. Petitioner later sealed the internal access staircase of that duplex apartment, separating into the two apartments at issue. Respondent points out there is no longer a duplex in the building, and the basement now contains a single apartment. Respondent argues the petitioner many years ago reconfigured the building without obtaining requisite permits.

In her affidavit in support, respondent states she is the tenant of apartment 1 and apartment 2. She rented apartment 2 in September 1995 from the petitioner, and apartment 1 in April 2009. She contends the staircase that at one time connected apartment 2 on the second floor to apartment 1 on the ground floor (when it was one duplex apartment), was sealed off by the petitioner. Respondent argues that in doing so, the petitioner violated the law because the sealing of the internal staircase prevents apartment 2 from having a secondary means of egress. Respondent states at the time she rented the apartments she had no reason to believe the building was illegally reconfigured and did not have a valid C of O.

Respondent states the petitioner created a fire hazard because apartment 2 has no secondary means of egress, no fire escape, and in case of a fire the only way out is through the second floor window. Respondent contends this is in violation of Chapter 10, Means of Egress, Section BC1001 of the NYC Building code, as well as General Administrative Provision 2008 NYC of Construction Codes, Title 28: Section 28-101.4.4 "Alterations that reduce the fire safety or structural safety of exiting building". Respondent argues the sealing of the staircase by covering it with plywood is also illegal because it is structurally unsafe.

Respondent argues the existence of three independent, open Environmental Control Board (ECB)/ Department of Building (DOB) Violations confirm the building was altered and that the petitioner is required to obtain a C of O accurately depicting the building's current configuration. Respondent contends each of the three outstanding ECB violations state "Altered building occupied without a valid certificate of occupancy as required by open alteration. Remedy: Obtain a valid C of O".

The three "open" ECB/DOB violations, issued on 12/13/1989, 4/12/1995 and 11/2/1995, respectively, for the subject premises. (Respondent's J) All three address the premises' lack of a valid C of O.

Each of the 3 ECB/DOB violations state:

> Premises: 147 East 61 Street Manhattan
> Severity: Non-hazardous…Violation Type: Construction
> Infraction Codes B02 Section of Law 27-215 Standard Description Altered bldg. occupied without a valid certificate of occupancy…
> Specific Violation Condition(s) and Remedy: Altered Building occupied without a valid C of O as required by open alteration.
> Remedy: Obtain a new amended final C of O as required by this alteration…
> Dept of Buildings Compliance Information Certification Status: No Compliance

recorded A certificate of Correction must be submitted to the Administrative Enforcement unit (AED) for all violations. A violation that is not dismissed by ECB will continue to remain ACTIVE or "open" on DOB records until acceptable proof is submitted to the AEU, even if you have paid the penalty imposed by ECB.

The three ECB/DOB violations are identical except for the monetary penalty imposed, and hearing date information, as follows:

ECB violation #34034508H dated December 13, 1989 states:
ECB Hearing Status: Written off…ECB Penalty Information Penalty Impose: $1,000.00 Adjustments: $-1,000.00 Amount Paid: $0.00 Penalty Balance Due: $0.00 Court Docket Date 8/31/1990. ECB Violation History Hearing Events Default: 1/29/1990 Written off: 02/01/1990"

ECB violation #3412433OZ, DOB Violation #041295C08M01 dated April 12, 1995 states: The penalty imposed for this ECB violation was $350.00, with "adjustments: $-350.00 Amount Paid $0.00". The ECB Violation History Hearing Events states: "Hearing Assigned on: 8/17/1995, Adjourned: 02/15/1996 Default 07/10/1995 Written Off: 8/17/1995."

ECB violation #34131245J, DOB Violation # 110295C08M07 dated November 2, 1995 states: the ECB penalty imposed was $500.00, with "adjustments: $-500.00 Amount Paid $0.00 and ECB Violation History Hearing Events Default 08/05/1996 Written Off 01/18/1996."

Respondent contends because petitioner has not secured a new C of O, MDL Sections 301 and 302 apply, and petitioner is barred from seeking rent or U&O. Respondent contends all U&O deposited with the court, or tendered without prejudice to the petitioner, should be returned to her in full. Respondent argues the petitioner has ignored the C of O violations for more than thirty years, any claim of prejudice it may raise is irrelevant as the petitioner knowingly and deliberately failed to comply with the requirements of law, and the petitioner is solely responsible for this problem. Respondent argues petitioner was made aware of her MDL Section 301 and 302 counterclaim since the initial stage of the proceedings.

Respondent appends an affidavit from her engineer, Paul Marino, dated January 4, 2017. (respondent's K) Mr. Marino's affidavit describes that the work the petitioner performed claiming it violated the Building Code, MDL, the Fire Code, Uniform Fire Prevention Code, and various other codes designed to ensure all work performed in residential buildings is performed safely and legally.

Mr. Marino states in his affidavit/report that he did a visual inspection of the building "to assess the structural conditions and code compliance of the subject building. He states he inspected the Basement Apartment #1 and 1st Floor Apartment #2, and the Cellar, and reviewed "various plans, documents and codes to determine if code compliance of the subject building has been maintained…"

Mr. Marino states in his affidavit, on pages 6 and 7, in pertinent part:

> …Despite there being a secondary means of egress in Basement Apartment #1, the ceiling between the cellar and basement Apartment #1 and Basement Apartment #1 and 1st floor apartment #2 must be two(2) hour fire rated, as it poses a serious fire hazard to occupants in the 1st floor apartment #2. .. The hallway door leading to the original basement apartment remains and now is the only entrance door off the basement entrance hallway. This is the door that leads to the now single basement level apartment…
> …The separation of the duplex apartment and combine [sic] of the basement level apartment were not performed legally and is in direct violation of the existing C of O and constitutes a fire hazard, by (1) eliminating a secondary means of egress, and (2) failing to fire rate the ceiling between the cellar and Basement Apartment #1 and Basement Apartment #1 and 1st floor Apartment #2.

Respondent argues the petitioner's creation of two new apartments by sealing the internal access staircase in what was once a duplex is a direct violation of the NYC DOB Construction codes Section 28-102.4.2 "Change in Use or Occupancy". Respondent contends the Building Code requires the ceilings between apartment 1 and apartment 2 be two hour fire rated, and the petitioner submitted no evidence this requirement was met.

Respondent argues the Court of Appeals case Chazon LLC v Maugenest, 19 NY 3d 410 (2012), mandates strict compliance with MDL Sections 301 and 302(b), and renders previous judicially carved out exceptions no longer applicable. Respondent additionally contends a recent Appellate Division, First Department case, GVS v Vargas et al, 2019 NY Slip Op 03549 (1st Dept. 2019), cites to Chazon and holds MDL Section 301(b) prohibits a landlord from collecting rent in a building that was occupied in a manner inconsistent with the last issued C of O. Respondent argues because the petitioner herein internally reconfigured the building, petitioner was required to obtain a new C of O that accurately depicts the building's current configuration. Respondent contends because the petitioner failed to obtain a new C of O, it is not entitled to collect U&O.

Respondent cites to a 2016 Appellate Term, First Department case, 49 Bleecker Inv. v Gaiten, 51 Misc 3d 252(A) (AT 1st Dept, 2016). Respondent contends that case, like the instant cases, involve a building that had a C of O, but MDL 302(1)(b) prohibited that landlord from recovering rent or maintaining a non payment proceeding for any time period the building was occupied in violation of the C of O. Respondent cites to a number of cases, including lower court cases, 742 Realty LLC v Zimmer, 46 Misc 3d 1204(A)(Civ Ct, NY Co, 2014) (the owner's alterations rendered an existing C of O invalid, consequently barring the landlord from collecting rent), and 995 Manor Rd LLC v Island Realty Holdings, LLC, 15 Misc.3d 1147(A)(Civ Ct, Richmond Co, 2007) (a landlord's failure to have a final C of O after doing alterations, making the use by the respondent illegal).

Respondent argues that while the petitioner may argue Chazon, supra and Vargas, supra, are distinguishable from the instant holdovers because the landlord is seeking U&O rather than rent, MDL 302 applies to U&O as well. In support of this, respondent cites to Sheila Properties Inc. v A Real Good Plumber Inc 59 AD3d 424 (2nd Dept. 2009)(landlord of a loft unit commenced an ejectment action and was unable to recover U&O as it failed to take any steps to obtain a residential C of O, or otherwise obtain legal authorization to convert the premises to such use during the pendency of that proceeding), and Jo-Fra Props., Inc. v Bobbe, 17 NY 3d 933, 2011

NY Slip Op 90185 (AD, 1st Dept, 2010) (Affirming a portion of the lower court's decision that had held petitioner's failure to register the building as an interim multiple dwelling, and failure to take steps to obtain a C of O for the building's residential portions, precluded it from obtaining U&O.)

Petitioner argues in opposition that the court could deny the respondent's summary judgment motion pursuant to CPLR 3212 because she failed to append a copy of her answer[9]. Petitioner points out the respondent unsuccessfully litigated this matter through five levels of DHCR proceedings and court appeals, and has lived in the subject premises for five years since her lease expired. Petitioner argues the respondent seeks to avoid paying holdover U&O because of an alleged C of O discrepancy, caused by a closure of a stairway within one duplex apartment creating two separate apartments.

Petitioner argues the cases relied upon by the respondent are inapposite, and nearly all involve either nonpayment cases or Loft Law proceedings where the landlord was seeking to collect rent, usually when there was no C of O. Petitioner points out that unlike the instant holdover proceedings, Chazon LLC v Maugenest, supra, was a nonpayment proceeding and the statute relied on by the Chazon Court specifically bars nonpayment proceedings, not U&O in a holdover proceeding. Petitioner argues the instant claim in this case is for equitable damages in the form of U&O based on the respondent illegally holding over at the subject premises, and not for a contractual nonpayment of rent.

Petitioner argues another case respondent cites to Matter of GVS Props LLC v Vargas, supra, also involved a nonpayment proceeding. Petitioner contends despite respondent's claim that "Pursuant to Vargas, the requirement that use and occupancy of a multiple dwelling conform to its C of O is strictly construed.", there is nothing in Vargas that speaks to a "strict construction" or any discussion about conformity of use.

Petitioner states that the premises' C of O permits Class "A" residential use of residential apartments on all floors of the building except for the Cellar. (Exhibit O) Petitioner contends that respondent's affidavit does not specifically state how the two residential apartments she currently lives in are in violation of a C of O that permits such use.

Petition argues the only two cases respondent cites to which are not based on nonpayment, are Sheila Props, supra and Jo-Fra Props, supra, and both are distinguishable from the underlying proceedings. Petitioner contends in Sheila Props, supra, the property involved apparently never had any residential C of O and was illegally converted from a commercial property, which is not the case herein. Petitioner points out the subject premises always had an entirely residential property use and still does. Petitioner argues Jo-Fra Props, supra involved a loft building which had been illegally occupied without a residential C of O, and the owner failed to take appropriate steps to convert the building under the Loft Law and was denied U&O. Petitioner argues in the instant case, the subject premises has a C of O that permits residential apartment use on all floors except the cellar, which is not occupied by the respondent.

Petitioner argues it is not seeking recovery of rent that might be precluded under MDL Section

[9] See footnote 1.

302, but instead seeks U&O as damages for the respondent's illegal holding over at the subject premises. Petitioner points to RPAPL Section 601 entitling it to recover damages. Petitioner argues even if the court finds MDL Section 302 is applicable to U&O claims against illegal holdover tenants, the respondent is not entitled to recover any U&O paid into court, and already paid to the petitioner. Petitioner argues that despite the respondent's claim she has been paying U&O into court, she failed to supply proof of that. Petitioner points out the respondent does not request any specific amount that should be returned to her. Petitioner argues that equity precludes respondent from claiming it would be inappropriate for her to pay the post-petition U&O she was ordered to pay by the court, and she agreed to pay in so ordered stipulations.

Ely Samuels, petitioner's registered managing agent, states in his affidavit in opposition that the petitioner has prevailed on all levels of this proceeding from the DHCR through the Court of Appeals, against respondent's false claim that the petitioner illegally deregulated the apartments. Mr. Samuels states petitioner has been severely prejudiced in this proceeding as respondent owed $218,693.10 in past U&O for apartment #1, and $301,925.63 in past due U&O for apartment #2. Rent ledgers for apartment 1 and 2 are appended respectively as petitioner's opposition exhibits P and Q[10].

Mr. Samuels states that the respondent's lease expired in August 31, 2015. A copy of a renewal lease for apartment 2 expiring on August 31, 2015 with monthly rent of $4939.58 is appended as petitioner's opposition B[11]. Mr. Samuels states the respondent has only made five rent payments to the petitioner in the past five years, and now owes over $500,000.00.

Mr. Samuels states the respondent makes a number of inappropriate allegations regarding the building's C of O. He states the respondent is not an architect or engineer, and the court should discount any of her statements regarding the legality of the subject premises. Mr. Samuels states it was respondent who repeatedly refused access to the petitioner and its agents or workers who sought to inspect the subject premises for any potential violations that needed to be cleared over the years. It is unclear if he is referring to ECB violations, or other building violations, i.e. DHPD violations. Mr. Samuels fails to specify what violations he refers to, and what dates, and years, he is alleging respondent failed to provide access. He states the respondent was unfazed and undeterred by the so-called illegality of the subject premises until petitioner sought to regain possession. Mr. Samuels' affidavit is silent as to what steps, if any, the petitioner has taken since receiving the ECB violations in 1989 and 1995, to obtain an amended C of O.

Mr. Samuels states petitioner would be unfairly prejudiced if the court permits respondent to escape her obligations to pay U&O, based on a violation of the C of O, because there is no dispute the premises are Class "A" residential units and the C of O provides for such use of the

[10] Exhibit P Rent ledger for respondent's apartment 1 dated 9/4/20 that indicates a zero rent balance at the end of 9/2015 and from 10/15 through 8/2020 indicates a $218,693.10 balance at $3504.38 per month.
Exhibit Q Rent ledger for respondent's apartment 2 dated 9/4/20 from 9/1995 through 8/2020 reflecting a zero rent balance at the end of 6/2015 and for the months 7/1/2015 through 9/2020 a balance of $296,986.05 at a monthly charge of $4939.58.

[11] Petitioner does not append a copy of respondent's most recent renewal lease for apartment 1. Respondent does not dispute both leases for both apartments have expired. Respondent's affidavit in support paragraph 5 states her most recent renewal leases for apartment 1 and apartment 2 have expired.

premises. He states any violation, "none of which is conceded" constitute de minimis, technical defaults which should not constitute an impairment on petitioner's rights to collect post petition U&O, which is an equitable remedy in this proceeding. He states if the court denies petitioner's right to the U&O it would be approving respondent's frivolous, litigious behavior over the past five years based on her false assertions regarding the rent regulatory status of the premises. The agent states respondent would thus reap a six figure windfall from her illegal holding over at the premises. He states the respondent is illegally holding over in two fair market apartments and now seeks to escape liability for the U&O.

Mitra Mehr, an architect licensed by the State of New York submits an affidavit in opposition. S/he states s/he has reviewed a variety of public records, had discussions with petitioner and its agents as well as reviewed records of petitioner in preparing this affidavit and he is familiar with the subject building.

Mr./Ms. Mehr states that contrary to the report of Mr. Marino, the engineer, electrical permits were issued for the work converting the subject premises from a duplex to two separate apartments. Petitioner's opposition exhibit R is a copy of "NYC DOB Electrical Application Details for App #M209089 for 147 E 61 Street." Mr./Ms. Mehr fails to state s/he was involved in separating the duplex into 2 separate apartments. Neither does s/he state the date the duplex was separated into 2 apartments. The appended electrical permit has a job start date of 2/11/2002, and a job end date of 8/20/2002. The work category listed is for "Rehabilitation," work to be done as "service work/notify utility." The permit states "Work Related to a New or Amended Certificate of Occupancy: NO". The appended permit gives no indication of an apartment number, or specific location at the subject building this electrical permit was for, or where in the building the electrical work in the permit was performed.

Ms/Mr. Mehta states that regarding the ECB violations, there is no underlying violating condition listed for the alleged violations and therefore they can be dismissed. Ms/Mr. Mehta does not state that s/he, or her/his office, is taking steps to have the three outstanding ECB violations dismissed. Ms./Mr. Mehta states Mr. Marino's report is incorrect in stating there is a fire hazard because the fire rating for the building is less than two hours, and this does not apply to the subject building. S/he states the subject building was built in 1941 for only residential use, and therefore, does not require the two hour fire rating stated in Mr. Marino's report that a mixed use building built pursuant to the Building Code for 1968 would require.

In reply, respondent states that petitioner fails to dispute the critical facts that there are currently open NYC DOB violations that state the subject building is occupied contrary to the C of O, and further state the sole remedy would be to obtain a new valid C of O. Respondent points out the open DOB violations direct the landlord to obtain a new C of O, and the landlord failed to obtain a new C of O. Respondent contends petitioner ignores the 2012 Court of Appeals' holding in Chazon, that rejected all prior abandonment of a literal application of MDL Section 302, and its progeny. Respondent argues nothing in the Chazon opinion indicates the Court of Appeals intended to limit its application to loft units or formerly commercial buildings. Respondent states that several appellate courts after Chazon have applied the Court of Appeals' holding to residential buildings where, as in the instant case, landlords made internal alterations in variance with the last issued C of O. Respondent further contends MDL Section 302 bars the petitioner

from collecting U&O deposited into court and/or paid to petitioner without prejudice.

Respondent argues any monies deposited into court or tendered directly to the petitioner were without prejudice to respondent's defenses, and as a condition of a stay. Respondent contends there has never been an order issued by any court directing her to pay U&O to the petitioner. Respondent further contends all subsequent orders issued by the courts were orders to (a) pay the last rent into court pursuant to RPAPL 748 which payments are specifically mandated by statute to be without prejudice. Respondent argues that payments were explicitly made without prejudice and or deposited into court, without prejudice, and as such she is entitled to recoup those monies. Respondent argues if petitioner is allowed to keep payments which were deposited into court or sent directly to the landlord, it would mean the tender or deposit was with prejudice, which was not the condition for any of the payments.

Respondent argues in reply that the claims of petitioner's managing agent that respondent prevented access to the subject premises are unspecific and unsupported by dates, or times. Petitioner fails to produce any notices from the landlord requesting access. Respondent points out the petitioner's agent fails to claim the petitioner took any steps, or had any intention to obtain a new C of O, to remedy the three outstanding C of O violations that have been pending for twenty five years.

Respondent argues the report from petitioner's architect, Mr. Mitra, was not based on Mr. Mitra's personal inspection of the premises. In addition, Mr. Mitra had nothing to do with the separation of the duplex into two apartments. Respondent points out that petitioner's appended electrical application was obtained in 2002 for work having nothing to do with the 1994 separation of the two apartments. Respondent disputes Mr. Mitra's statements that "there are no underlying violating conditions listed for the alleged [C of O] violations and therefore they can be dismissed", as the three ECB violations are real violations that are open and not alleged violations. Respondent argues it is irrelevant whether or not the three ECB violations "can be dismissed" as Mr. Mitra states, because it is undisputed the violations have not been dismissed. Nor has petitioner ever have taken any steps to address these violations in order to have them dismissed. Respondent points out that the remedy to correct each of the three C of O violations requires the landlord to apply and obtain a new C of O.

DISCUSSION:

A summary judgment motion "…must be supported by an affidavit, a copy of the pleadings and by other available proof…The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit…" CPLR 3212(b). Summary judgment should only be granted where no triable issues of fact exist. Salino v IPT Trucking, Inc., 203 AD2d 352 (1994); Andre v Pomeroy, 35 NY 2d 351(1974)

The moving party of a summary judgment motion must establish a cause of action or defense by admissible evidence sufficient for the court to direct judgment in his favor as a matter of law. Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065 (1979). "…The granting of such a motion is the procedural equivalent of a trial. Falk v Goodman, 7 NY2d 87…"

"…Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Winegrad New York University Medical Center, 64 NY2d 851 at 853, 1985. Only if the moving party meets that burden does the burden then shift to the party opposing the summary judgment motion to lay bare its proof to establish that any real and alleged matters are capable of being established at trial. Zuckerman v City of New York, et.al., 49 NY2d 557 (1980). See also Hasbrouck v City of Gloversville, 102 AD2d 905 (AD 3rd Dept. 1984) aff'd 63 NY2d 916 (1984)

Multiple Dwelling Law (MDL) Section 301(1) provides in part that: " ...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…"

Pursuant to MDL Section 302(1) (b): "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 of said premises for nonpayment of such rent."

"…Multiple Dwelling Law Section 302(1)(b) bars not only an action to recover rent, but also an 'action or special proceeding… for possession of said premises for nonpayment of such rent.' This is such an action, and it is barred. If that is an undesirable result, the problem is one to be addressed by the Legislature." Chazon, LLC v Maugenest**,** supra at 415. (The landlord of a NYC loft who had not complied with the Loft Law and had not received an extension of time to comply, could not maintain an action either to collect rent or to evict a tenant who had not paid any rent in nine years.)

The court in Chazon rejects the "carve outs" and the abandonment of a literal application of MDL 302. Momart Discount Store LTD v. Rossi, 2016 WL 6567058 (Civ Ct, NY Cty 2016) The Court of Appeals in Chazon "... rejects the abandonment of a literal application of MDL 302. (citations omitted) ("in the absence of compliance, the law's command is quite clear...[judicially-carved-out exceptions to MDL 302] 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...If that is an undesirable result, the problem is one to be addressed by the Legislature.") Momart Discount Store LTD at 6. The petitioner in Momart Discount Store LTD argued to distinguish its case from Chazon, as Momart was a holdover proceeding wherein the landlord was seeking U&O and not rent. The court in Momart held that MDL 302 applies to U&O as well as rent.

The court in GVS Properties LLC v. Vargas et al, 2019 NY Slip Op03549 (1st Dept. 2019) after a trial of nineteen nonpayment cases with substantial alterations since the issuance of the C of O, and several apartments lacking a second means of egress in the event of a fire, dismissed all the proceedings on the merits. The court stated that while the results of the rent collection bar are harsh, the Court of Appeals in Chazan noted it should be a concern for the Legislature. The facts in the instant cases are similar as there were substantial alterations after the C of O issued, and the apartments lacks a second means of egress in the even of a fire, in addition to other violations.

New York City Administrative Code Section 28-118.3.2 "Changes inconsistent with existing certificate of occupancy" states in pertinent part: "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 Court of Appeals rejected "carve out" exceptions to the rent bar of Section 302 in Chazon, LLC v Maugenest, 19 NY3d 410 (2012), which was a departure from what had been the judicial trend in how Section 302 is applied." Residential Landlord-Tenant Law In New York, 2019-2020 Edition, Andrew Scherer, Esq. p 866 Section 12:60. See also L&T 78285/15, Matter of GVS Props LLC v Vargas, Civ Ct, NY Co, J. Schneider, 8/2/17, unreported decision[12], aff'd, 59 Misc 3d 128(A)(AT 1st Dept, 2018), aff'd 172 AD3dd 466 (2019).

Under the MDL, an owner cannot collect rent for the time period which its building lacks a valid C of O. Matter of GVS Props LLC v Vargas, supra. An owner is "…precluded from charging respondents rent or other remuneration while the building lacked a certificate of occupancy for residential use.." In the Matter of 49 Bleecker, Inc v Gatien, 157 AD3d 619 at 620 (1st Dept, 2018). "…Likewise, an owner cannot recover use and occupancy from a tenant in the absence of a proper C of O…" Townsend v B-U Realty Corp, 67 Misc 3d 1228(A) at 16 (NY Sup Ct, 2020 [see Sheila Props., Inc v A Real Good Plumber, Inc., 59 AD3d 424, 426 (2nd Dept 2009]…" See also West 48 Holdings LLC v Elyahu, 64 Misc 3d 133(A) (AT, 1st Dept, 2019).

It is undisputed that the 1941 C of O indicates the use of the "Basement" as "One (1) apartment and One (1) Half Apartment" and the "1st Story as One (1) Half apartment". It is apparent from the C of O the "Half Apartment" on the basement level and the "Half Apartment" on the 1st story, pertain to what was at that time a duplex apartment. It is undisputed that the petitioner or its predecessor in interest, at one time, prior to the respondent moving into the building, sealed off an internal stairway of the previous duplex apartment. The sealing off of the internal stairway of the duplex, created two separate apartments: apartment 1 and apartment 2, both of which respondent occupies. Each of the three ECB/DOB violations on the subject building, which issued on 12/13/1989, 4/12/1995 and 11/2/1995 respectively, are "open." The violations clearly state the building was altered and occupied without a valid C of O required by the alteration, and the remedy for each violation is to obtain a new amended, final C of O. It is undisputed the petitioner has not obtained a new amended final C of O. Neither petitioner's agent nor its architect Ms./Mr. Mehr, state the petitioner has taken any steps to obtain a new amended C of O since the ECB/DOB violations were issued in 1989 and 1995.

The claim of petitioner's agent that respondent did not provide access for petitioner to correct "violations" is not supported by any factual allegations, and is disingenuous. The agent fails to specify which violations he is referring to, and he fails to state he is even referring to the 3 ECB/DOB violations. The agent fails to allege that petitioner requested access to correct violations, and fails to offer any specific allegations to support his claim that respondent failed provide access. He fails to state any specific dates or time periods this alleged failure to provide access occurred. The agent also fails to state the petitioner attempted at any time to obtain a new amended C of O. Petitioner has not presented any facts to support petitioner's claims that the facts herein are similar to the circumstances presented in Chatsworth 72nd Street Corp. v Rigai, 71 Misc 2d 647 (Civ Ct, NY Co, 1972 aff'd 74 Misc 2d 298 (AT, 1st Dept) aff'd 43 AD2d 685

[12] Copy of L&T 78285/15 decision dated 8/2/17 appended as respondent's reply Exhibit B.

(1st Dept, 1975) or First Edition Composite Inc. v Wilkson, 177 AD2d 297(1st Dept, 1991). In these two cases, it was held that MDL 302 is inapplicable where tenants prevent the landlord from legalizing the premises. Here there is no claim respondent was complicit in the existence and maintenance of an illegal apartment, that respondent knew the occupancy was in violation of the C of O, or that she somehow prevented the legalization. Lispenard Studio Corp v. Loeb, 2016 WL 3036616 (Civ Ct, NY Cty 2016)

The cases relied on by petitioner, including South Street Limited Partnership v Jade Sea Restaurant, 187 AD2d 397 (1st Dept 1991), Eighteen Associates, LLC v Nanjim Leasing Corp, 257 AD2d 559 (2nd Dept, 1999), BGB Realty, LLC v Annunziata, 12 Misc 3d 136(A) (AT 9th and 10th Depts, 2006), and Bravo v Marte, 117 NYS 3d 441 (unreported decision, Civ Ct, Kings Co 2019) all either predate the holding in 2012 Chazon case, fail to mention a C of O, or are not cases from the Court of Appeals. The body of law holding that the rent forfeiture provisions of MDL 302 do not apply wherein the landlord is seeking U&O relying on an "abandonment of a literal application of MDL 302" in favor of allowing equity to control in order to avoid a tenant's unjust enrichment, has been rejected by the Court of Appeals. Chazon, LLC held that "[i]n the absence of compliance, the law's command is quite clear...[judicially-carved-out exceptions to MDL 302] 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. If that is an undesirable result, the problem is one to be addressed by the Legislature"). Lispenard Studio Corp v. Loeb, 2016 NY Slip Op. 309945(U), (Civ Ct, NY Cty, 2016)

The housing court orders directing respondent to deposit accrued and ongoing U&O for both apartments did not state the deposit was "with prejudice." Additionally, the parties' Supreme Court stipulations, staying the underlying holdovers pending a final resolution of respondent's prior DHCR complaints, specifically state any deposit or tender was "without prejudice".[13]

Respondent has established a cause of action or defense by admissible evidence sufficient for the court to direct judgment in her favor as a matter of law on her first counterclaim in both underlying proceedings. Petitioner fails to establish any real or alleged matters capable of being established at trial as a defense to respondent's first counterclaim.

Therefore, based on the foregoing, the respondent's motion seeking an order granting summary judgment pursuant to CPLR 3212 on her affirmative defense, that MDL 301 and 302 bar petitioner from collecting rent/U& based on the lack of a valid and conforming C of O, is granted and petitioner's claims for rent/U&O during the pendency of these proceedings is dismissed. Respondent is entitled to the funds deposited with the court, and the U & O she tendered to the petitioner, without prejudice, during the pendency of these proceedings.

Petitioner's Cross Motion:

Petitioner argues respondent repeatedly lost her claim that the apartments are rent stabilized including at the DHCR, all appellate levels and by denial of leave to appeal to the Court of Appeals. Petitioner contends that as respondent lost her final appeal, it is appropriate for the court to grant the petitioner summary judgment. Petitioner points out respondent's lease expired

[13] See petitioner's opposition Exhibits C and H, and respondent's Exhibit I.

on August 15, 2015 in the unregulated, fair market apartments.[14] Petitioner seeks possession of the premises and requests the court grant summary judgment for possession of the units in its favor.

Respondent's answers in both holdovers are identical and consist of seven affirmative defenses and two counterclaims. Petitioner argues none of respondent's defenses have merit or are supported by anything other than conclusory allegations. Petitioner points out that respondent waived service of process or traverse related defenses pursuant to the parties' May 22, 2019 stipulation.[15] Petitioner's cross motion is silent as to the respondent's two counterclaims.

The first counterclaim, discussed extensively in this decision, states:

> The subject premises do not have a proper certificate of occupancy. The subject premises have been served with multiple violations for failure to have a proper certificate of occupancy and has been cited as being "occupied without a valid certificate of occupancy" The Petitioner has ignored said violations and the premises remain in violation of law. Pursuant to the Multiple Dwelling Law Section 301, 302 and 325, the Petitioner may not recover any rent and/or use and occupancy for the premises.

Respondent's second counterclaim states:

> The Petitioner has engaged in numerous illegal alterations at the premises.
> The premises have numerous violations and rent impairing violations including but not limited to gas violations, electrical violations, lack of secondary means of egress, fire safety violations, lack of gas service, lack of cooking gas, lack of heat, broken and defective walls and tiles, broken floors, continuous gas leaks, and numerous other rent impairing and life threatening conditions.
> As a result, the Respondent is entitled to a rent abatement and damages in a sum to be determined at trial.

Respondent's 1st affirmative defense states: "The petition fails to state a claim upon relief may be granted." Petitioner argues it clearly states a cause of action, the petition sets forth the parties' interest in the premises and the grounds for respondent's removal therefrom, a description of the premises, the premises regulatory status and the building's status as a Multiple dwelling with a proper registration statements. Petitioner argues nothing more is required by RPAPL 741.

Respondent's 2nd affirmative defense states: "A condition precedent to the commencement of this proceeding has not been complied with." Petitioner argues the 2nd affirmative defense is untrue. The respondent's lease expired, no rent was taken after the lease expired, so therefore no predicate notice had to be served.

Respondent's 3rd affirmative defense states: "The Petitioner failed to make additional mailing of the Notice of Petition and Petition as required by the terms of the lease. Accordingly, the Court lacks subject matter jurisdiction and the Petition must be dismissed." Petitioner points out that

[14] See Footnote 10.
[15] Petitioner's opposition Exhibit K.

this defense relating to service of process has been waived to the parties' stipulation, a copy of which is appended as petitioner's opposition to the instant motion Exhibit K.

Respondent's 4th affirmative defense states: "The Petition is jurisdictionally defective in that it lacks a proper jurisdictional predicate." Petitioner contends the 4th affirmative defense is circular reasoning and untrue as no predicate notice is needed in this case.

Respondent's 5th affirmative efense states: "The Petition is defective on the ground that the Premises are not properly described." Petitioner argues the 5th affirmative defense falsely claims the subject premises were improperly identified but does not state why this is the case. Petitioner argues this defense should be dismissed because the description of the premises matches that in the expired lease.

Respondent's 6th affirmative efense states: "The Petition is defective on the ground that the Petition was not properly verified, as required by law." Petitioner argues the 6th affirmative defense should be dismissed as a matter of law because RPAPL Section 741 permits an attorney to verify a petition, and the petition was properly verified by the petitioner's attorney.

Respondent's 7th affirmative defense states: "The Petition is defective on the ground that the Petition fails to set forth all addresses for the Respondent which the Petitioner had written notice of, as required by law. As a result, the petition is defective and must be dismissed." Petitioner contends the 7th affirmative defense should be dismissed because the affidavit of service annexed as Exhibit D states a copy of the petition was mailed a copy of the underlying petition to her other address at the subject building at apartment 1.

Ely Samuels, petitioner's registered managing agent, submits an affidavit in support of the cross motion. He states this is an end of lease holdover based on the expiration of respondent's last executed renewal lease. He states the lease has not been renewed. Mr. Samuels states the petitioner is the landlord of the subject building which is a multiple dwelling with a current Office of Code Enforcement/HPD registration on file. He states the premises is not subject to rent regulation as it was properly deregulated in 1995 due to a high rent vacancy. Mr. Samuels states the apartments' proper deregulation has been confirmed by DHCR, The Supreme Court, the Appellate Division First Department and confirmed by the Court of Appeals[16]. Mr. Samuels' affidavit fails to state anything regarding respondent's counterclaim of MDL violations, and C of O violations, contained in her 1st counterclaim. He also fails to mention the respondent's 2nd counterclaim.

Petitioner appends a copy of its prima facie documents including petition and notice of petition, the answers, expired lease for apartment 2, the affidavit of service of the notice of petition and petition for 81155/2015, the February 2, 1993 deed for the subject premises, and proof the premises was registered with HPD. (Petitioner's cross motion exhibits A, B, C, D, E and F, respectively[17].)

[16] Mr. Samuels refers to a number of documents which are either appended to the instant cross motion, or were appended to petitioner's opposition to respondent's instant motion.

[17] The court notes the parties have appended numerous documents to the respondent's instant motion, petitioner's opposition to the motion, and the instant cross motion, including a copy of the notice of petition and petition and

Petitioner reserves its rights to attorney's fees, as well as fair market value U&O from the date of the respondent's expired renewal lease.

Respondent fails to submit an affidavit in opposition to the cross motion. Respondent's counsel states in his affirmation the respondent does not oppose petitioner's possessory claim. Counsel states respondent will vacate and surrender possession on or before November 16, 2020. Counsel claims the petitioner would not stipulate to a November 16, 2020 vacate date insisting an agreement be conditioned on respondent explicitly acknowledging the petitioner is the prevailing party. Respondent argues the cross motion should be granted solely to the extent she will vacate by November 16, 2020, or denied as moot.

DISCUSSION:

"A motion to dismiss a defense must be made on the ground that a defense is not stated or that it has no merit… If there is doubt as to the availability of a defense it should not be dismissed…." Arquette v State of NY, 190 Misc 2d 676, at 688 (Ct of Claims of NY, 2010).

There are no facts stated to support respondent's claims in the respondent's seven affirmative defenses, and it is not possible for petitioner to fashion a defense to these causes of action. Respondent has failed to allege sufficient facts in any of the seven affirmative defenses. Petitioner has met its burden of establishing that all seven of the affirmative defenses are without merit as a matter of law. Santilli v Allstate Ins. Co., 19 AD3d 1031 (AD 4th Dept, 2005).

A summary judgment motion "…must be supported by an affidavit, a copy of the pleadings and by other available proof…The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit…" CPLR 3212(b). Summary judgment should only be granted where no triable issues of fact exist. Salino v IPT Trucking, Inc., 203 AD2d 352 (1994); Andre v Pomeroy, 35 NY 2d 351(1974) The moving party of a summary judgment motion must establish a cause of action or defense by admissible evidence sufficient for the court to direct judgment in his favor as a matter of law. Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065 (1979).

Only if the moving party meets that burden does the burden then shift to the party opposing the summary judgment motion to lay bare its proof to establish that any real and alleged matters are capable of being established at trial. Zuckerman v City of New York, et.al., 49 NY2d 557 (1980). See also Hasbrouck v City of Gloversville, 102 AD2d 905 (AD 3rd Dept. 1984) aff'd 63 NY2d 916 (1984)

Respondent fails to submit an affidavit in opposition, and does not oppose the cross motion to the extent petitioner seeks a possessory judgment. Respondent is, according to her attorney, vacating the premises by November 20, 2020, and does not oppose petitioner's possessory

affidavit of same of L&T 60025/16, and court orders and a number of the parties' stipulations. Additionally, paragraph 5 of respondent's affidavit in support of her instant motion states the renewal leases for both apartments expired.

claims.

Therefore, based on the foregoing, the petitioner's cross motion is granted solely to the extent it is entitled to summary judgment striking all of respondent's seven affirmative defenses, and is entitled to a possessory judgment for both of the subject apartments, with the warrant of eviction to issue and execute forthwith subject to any stays, or moratoriums on evictions in effect, and subject to the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020.

Based on the foregoing, respondent is granted summary judgment on her first counterclaim, and she is entitled to return of the funds she deposited into court, and/or paid to petitioner without prejudice.

A Microsoft Teams "DRP-213 conference" pursuant to the conference requirements under AO 160A/26 & DRP-213 is scheduled for March 18, 2021 at 9:30 a.m. The parties will receive a Microsoft Teams Conference invitation, and if the date/time is not convenient for the parties, they can contact the court via email to reschedule.

This constitutes the decision and order of the court.

March 2, 2021

Hon. Marcia J. Sikowitz, J.H.C.