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

---------- X

LISPENARD STUDIO CORP.,

Petitioner/Landlord,

Index No. /201

- against -

**DECISION/ORDER**

DAMIAN LOEB and ZOYA LOEB,

Respondents/Tenants.

---------- X

Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

| Papers | Numbered |
|---|---|
| Notice of Motion and Supplemental Affirmation Annexed..... | 1, 2, 3 |
| Notice of Cross-Motion and Supplemental Affidavit and Affirmation Annexed | 4, 5, 6 |
| Affirmation In Opposition | 7 |
| Affirmation In Reply | 8 |

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Lispenard Studio Corp., the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Damian Loeb ("Respondent") and Zoya Loeb ("Co-Respondent"), the respondents in this proceeding (collectively, "Respondents"), seeking a money judgment and possession of 45-51 Lispenard Street, Apt. 1E, New York, New York ("the subject premises") on the ground of nonpayment of rent. Respondents interposed an answer containing a number of defenses. Petitioner now moves for summary judgment. Respondents cross-move for summary judgment. The Court consolidates these motions for resolution herein.

Neither party disputes that Petitioner is a residential cooperative corporation and that Respondents are shareholders in the cooperative that entitle them to a proprietary lease

conferring them possession of the subject premises; that Respondent had been a member of the board of the cooperative; and that the certificate of occupancy for the subject premises does not allow residential use therein.

Neither party disputes that when Respondent purchased the shares appurtenant to the subject premises, Respondent entered into a contract of sale ("the Contract")[1] with Petitioner that obligated Petitioner to obtain a zoning variance to enable Respondent to legalize residential use of the subject premises; that the Contract also obligated Respondent to take measures necessary to legalize residential use of the subject premises by a date certain; and that, by its terms, these obligations of the Contract would survive the closing. Neither party disputes that a letter agreement between the parties dated January 29, 2007 extended the time for both parties to meet their obligations under the Contract and that Petitioner subsequently obtained the zoning variance within the time frame set forth by this extension.

Neither party disputes that another letter agreement between the parties dated March 24, 2008 provided, *inter alia*, that Respondents would complete alterations, renovations, and construction of the subject premises to the satisfaction of Petitioner and make all required filings with the New York City Department of Buidlings ("DOB"), including the closure of all permits; nor does not party dispute that another letter agreement between the parties dated August 18, 2010 provides, *inter alia*, that Respondent shall reimburse Petitioner for any future costs sustained as a consequence of the delay in completing a renovation of the subject premises.

---

[1] Co-Respondent was made a co-shareholder of the subject premises after the Contract was executed.

Neither party disputes that another letter agreement between dated June 27, 2012 ("the 2012 agreement") provided, *inter alia*, that Respondents had not yet completed the work necessary to legalize residential use of the subject premises. The 2012 agreement contained a punch list of items Respondents had to complete in advancement of legalization of residential use of the subject premises. The 2012 agreement requires a residential certificate of occupancy on or before September 15, 2012 and provides that, on Respondent's default in meeting this deadline, Petitioner would do the necessary work, and that the cost of this work in accordance "with this agreement" would constitute additional maintenance as per the proprietary lease. The 2012 agreement states that it supplements, but does not supercede, prior agreements.

Respondents annex to their motion a letter from an attorney for Petitioner stating that Respondents finished the work stated in the 2012 agreement by the end of 2012. Co-Respondent avers in support of her motion that it is her understanding that by the end of 2012 Respondents had fully performed all of the work required by the Contract.

The secretary for Petitioner avers in support of Petitioner's motion that Respondents obtained a number of temporary certificates of occupancy, the last of which expired in November of 2014, when DOB refused to issue another temporary certificate of occupancy due to the state of a fire protection plan. Petitioner also annexes to its motion a breakdown of past due maintenance, which includes a number of line items for architect fees.

As Respondent's cross-motion for summary judgment raises a threshold issue concerning the application of MDL §§301 and 302, the Court first considers Respondent's cross-motion. In particular, given that neither party disputes that there is no extant residential certificate of

occupancy for the subject premises, and in particular no temporary certificate of occupancy after November of 2014, before arrears started to accrue as per Petitioner's breakdown and the rent demand, Respondent argues that MDL §302(1)(b) applies, which proscribes a nonpayment proceeding for rent for a time period of occupancy in violation of a certificate of occupancy. [2]

On a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). The Court assumes *arguendo* for the purposes of Respondents' cross-motion (without making a finding as such) that Respondents are culpable for their occupancy of the subject premises without an appropriate certificate of occupancy, because of the Contract, which evinces Respondents' knowledge of the condition prior to their purchase of the shares appurtenant to the subject premises, because of Respondent's long service on Petitioner's board, because of Respondents' lengthy delays in discharging their responsibilities according to the Contract and various extension agreements to legalize their occupancy of the subject premises, and because such delays caused DOB to deny a residential certificate of occupancy, as DOB's requirements changed during Respondents' delays in legalizing residential occupancy of the subject premises.

A substantial body of law supports the proposition that MDL §302 rent forfeiture

---

[2] As a cooperative can sue a shareholder for nonpayment of maintenance pursuant to RPAPL §711(2), which otherwise provides for eviction proceedings based upon nonpayment of rent, 1990 Seventh Ave. Co-operative Corp. v. Edwards, 133 Misc. 831 (App. Term 1st Dept. 1929), Earl W. Jimerson Housing Co. v. Butler, 102 Misc. 2d 423, 424 (App. Term 2nd Dept. 1979), MDL §302 applies to cooperatives. Measom v. Greenwich & Perry St. Housing Corp., N.Y.L.J. Nov. 20, 2002 at 24:3 (Civ. Ct. N.Y. Co.).

provisions do not apply if the tenant was complicit in the existence and maintenance of an illegal apartment, Zane v. Kellner, 240 A.D.2d 208, 209 (1st Dept. 1997), 58 E. 130th St. LLC v. Mouton, 25 Misc. 3d 509, 511 (Civ. Ct. N.Y. Co. 2009), *citing,* Zafra v. Sawchuk, N.Y.L.J., Jan. 9, 1995, at 27:2 (App. Term 1st Dept), if the tenants knew that their occupancy was illegal, Zane, supra, 240 A.D.2d at 209, Eli Haddad Corp. v. Cal Redmond Studio, 102 A.D.2d 730 (1st Dept. 1984), Lipkis v. Pikus, 99 Misc.2d 518, 520 (App. Term 1st Dept. 1979), *aff'd,* 72 A.D.2d 697(1st Dept 1979), *appeal dismissed,* 51 N.Y.2d 874 (1980), Dodds v. 1926 Third Ave. Realty Corp., 2011 N.Y. Misc. LEXIS 3921 (S. Ct. N.Y. Co. 2011), if the tenants somehow prevented the legalization, Chatsworth 72nd Street Corp. v. Rigai, 71 Misc. 2d 647, 651 (Civ. Ct. N.Y. Co. 1972), *aff'd*, 74 Misc.2d 298 (App. Term 1st Dept.), *aff'd*, 43 A.D.2d 685 (1st Dept. 1973), *aff'd on the opinion of the Civil Court of the City of New York*, 35 N.Y.2d 984, 895 (1975), First Edition Composite, Inc. v. Wilkson, 177 A.D.2d 297, 299 (1st Dept. 1991), Hornfeld v. Gaare, 130 A.D.2d 398, 400 (1st Dept. 1987), Amdar v. Armenti, N.Y.L.J. June 23, 1994 at 28:4 (App. Term 1st Dept.), or if the subject premises do not pose a threat to the tenant's health and safety. Zane, supra, 240 A.D.2d at 209, Dogwood Residential, LLC v. Stable 49, Ltd., 2016 N.Y. Misc. LEXIS 1362 (S. Ct. N.Y. Co. 2016), *citing* Beneficial Cap. Corp. v. Richardson, No. 92 Civ. 3785, 1995 US Dist LEXIS 7354 (S.D.N.Y. 1995).

This authority relies upon an "abandon[ment of] a literal application of MDL §302 in favor of allowing equity to control in order to avoid a tenant's unjust enrichment," as one Court put it. B.S.L. One Owners Corp. v. Rubenstein, 159 Misc.2d 903, 908 (Civ. Ct. Richmond Co. 1994). However, a recent Court of Appeals case rejects the abandonment of a literal application

of MDL §302. Chazon, LLC v. Maugenest, 19 N.Y.3d 410, 415-16 (2012)("[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. They simply cannot. ...If that is an undesirable result, the problem is one to be addressed by the Legislature"). The Court's strict application of MDL §302 appears to render the rest of the authority standing for a different result without effect. Accord, 742 Realty LLC v. Zimmer, 46 Misc.3d 1204(A) (Civ. Ct. N.Y. Co. 2014), *citing* Caldwell v. American Package Company, Inc., 57 AD3d 15, 26, 866 N.Y.S.2d 275 (2nd Dept. 2008).

Petitioner argues that Phillips & Huyler Assocs. v. Flynn, 225 A.D.2d 475 (1st Dept. 1996) compels a different result, insofar as it holds that application of MDL §302 could unjustly enrich a tenant. However, not only does this ruling pre-date Chazon, LLC, supra, 19 N.Y.3d at 410, not only does this ruling come from a Court lower than the Court in Chazon, LLC, supra, 19 N.Y.3d at 410, but this ruling favors the position of a commercial landlord, not a residential landlord. MDL §302 evinces a limited application to residential tenants. 455 Second Ave. LLC v. NY Sch. of Dog Grooming, Inc., 37 Misc.3d 933, 936 (Civ. Ct. N.Y. Co. 2012).

Another argument against application of MDL §302 to this proceeding is that the parties have contracted that Respondents were the parties responsible for legalizing their occupancy of the subject premises. Contracts between cooperatives and shareholders valid, Kenneth D. Laub & Co. v. Bear Stearns Cos., 262 A.D.2d 36 (1st Dept. 1999), and indeed, include elements of self-determination not found in leases for apartments in privately-owned buildings, as

shareholders devise by policy themselves through a board of directors elected by them. 930 Fifth Corp. v. King, 71 Misc.2d 359, 364 (App. Term 1st 1972).[3] However, the default proposition is that a cooperative, rather than an individual shareholder, bears responsibility for obtaining a residential certificate of occupancy. O'Flaherty v. Schwimmer, 158 Misc.2d 420, 424-425 (S. Ct. N.Y. Co. 1993)(Tom, J.), *unanimously affirmed for the reasons stated*, 208 A.D.2d 425 (1st Dept. 1994). The proposition that the parties can shift this responsibility rests upon the premise that a tenant's rights as defined by MDL §302 are waivable when, in fact, authority holds that they are not waivable. Dawkins v. Ruff, 10 Misc.3d 88, 89 (App. Term 2nd Dept. 2005), BFN Realty Assocs. v. Cora, 8 Misc.3d 139(A) (App. Term 2nd Dept. 2005), Willoughby Assocs. v. Dance-Lonesome, 2003 N.Y. Misc. LEXIS 822 (App. Term 2nd Dept. 2003).

Petitioner argues that Respondents' hands are "unclean" such as to preclude the relief Respondents seek, relief that Petitioner characterizes as equitable. Petitioner's reasoning is backwards. It is Petitioner that is seeking an equitable relief from the dictates of MDL §302. See B.S.L. One Owners Corp., supra, 159 Misc.2d at 903. The Court of Appeals rejected an "equitable" approach to MDL §302 insofar as it found the statute inconsistent with concerns of unjust enrichment. Chazon, LLC, supra, 19 N.Y.3d at 416.

Chazon, LLC, supra, 19 N.Y.3d at 410, applies MDL §302 to a landlord who has not complied with the legalization schedules set pursuant to MDL §281 *et seq.*, commonly known as the Loft Law. A broad remedial purpose of the Loft Law was to confer rent-stabilized status on

---

[3] While the dissenting opinion of this case stated this proposition of law, the Court deems the position of the dissent to have eventually prevailed, as the Appellate Division reversed the majority opinion, 40 A.D.2d 140 (1st Dept. 1972), *appeal dismissed*, 31 N.Y.2d 1046 (1973).

legalized interim multiple dwellings. Tan Holding Corp. v. Wallace, 187 Misc.2d 687, 688 (App. Term 1st Dept. 2001), Walsh v. Salva Realty Corp., 2009 N.Y. Misc. LEXIS 6056, 7-8 (S. Ct. N.Y. Co. 2009). As cooperatives cannot be subject to the Rent Stabilization Law, 9 N.Y.C.R.R. §2520.11(l), Loft Law coverage does not apply to owner-occupied cooperatives such as the subject premises, Tri-Land Properties, Inc. v. 115 West 28th St. Corp., 267 A.D.2d 142 (1st Dept. 1999), raising a question about the factual distinction between this matter and the facts of Chazon, LLC, supra, 19 N.Y.3d at 410. However, the Court in Chazon, LLC, supra, 19 N.Y.3d at 410 interpreted MDL §302 on its plain language, employing a canon of interpretation that does not depend on the particular facts of the case. Nothing in the text of MDL §302 restricts such an interpretation solely to a landlord of a property subject to the Loft Law and, indeed, MDL §302 pre-dates the Loft Law.

Petitioner argues that Respondents are still commercial tenants in part and that Petitioner still has a cause of action against them for commercial rent, an argument that does not effectively address Respondents' motion, as Housing Court does not have subject matter jurisdiction over disputes over commercial premises. 54-56 Mgt. Corp. v. Birmingham, 13 Misc.3d 1207(A)(Civ. Ct. N.Y. Co. 2006).[4]

Whatever iniquity an application of MDL §302 visits upon Petitioner, the record on this motion practice suggests that Respondents fulfilled their obligations by the end of 2012 and yet a temporary certificate of occupancy did not expire until November of 2014, raising the possibility

---

[4] The Court may raise issues of subject matter jurisdiction *sua sponte*. In re Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Brotherhood of Carpenters & Joiners, 72 N.Y.2d 307, 311 (1988), Roberts v. State, 4 Misc.3d 768, 773 (Ct. Cl. 2004).

that Petitioner may be the party responsible for the current status of the certificate of occupancy after all. For what it's worth, Petitioner's secretary avers in support of Petitioner's motion that Respondents "continued in their failure to remedy the violative conditions, up to and including the date of this affidavit," which was February 24, 2016. Petitioner's secretary's averment indicates a dispute between the parties as to which party is culpable for the lack of a fire protection plan, a requirement that DOB may have imposed as a result of delays, maybe incurred by Respondents, in completing the work otherwise necessary to obtain a certificate of occupancy. Given the applicability of MDL §302 to this matter, the Court does not reach this issue and makes no findings herein except to note that a dismissal of a cause of action for maintenance/rent does not preclude or prejudice other causes of action and/or defenses the parties may have against one another in a plenary action.

Accordingly, the Court grants Respondents' motion to dismiss this proceeding, limited to Petitioner's cause of action for residential rent/maintenance and/or additional residential rent/maintenance, and denies Petitioner's motion as moot.

This constitutes the decision and order of this Court.

Dated: New York, New York
May 25, 2016

HON. JACK STOLLER
J.H.C.