ANALYSIS

The Barring of Rent in the Absence of a Certificate of Occupancy—A Rule Still In Need of Much Clarification

It has long been understood that if a building which is a multiple dwelling does not have a certificate of occupancy, the owner may not maintain a non-payment proceeding for the recovery of rent. Despite the seeming clarity of the rule, issues concerning a lack of this certificate have spawned considerable litigation, often leading to a surprising number of disparate and conflicting results.

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Landlord Tenant Law

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Since the Court of Appeals issued its ruling in *Chazon v. Maugenest*, 19 NY3d 410 (2012) (*Chazon*), it has long been understood that if a building which is a multiple dwelling (three units of more) does not have a certificate of occupancy (C/O), the owner may not maintain a non-payment proceeding for the recovery of rent.

Seems simple enough—until it's not.

Despite the seeming clarity of the rule, issues concerning a lack of a C/O have spawned considerable litigation throughout the various courts, often leading to a surprising number of disparate and conflicting results.

One must first begin with reviewing the clear public policy reasons behind Multiple Dwelling Law (MDL) Sections 301 and 302 which are the governing statutes that underlie the rent forfeiture rule. MDL §301 provides that no multiple dwelling may be occupied unless a C/O has been issued and MDL §302 goes on to provide that an owner of a multiple dwelling who fails to obtain a C/O cannot recover for rent or money for use and occupancy.

The public policy intended to be served by MDL §302 was explicitly identified by the legislature when it declared in adopting the provision that "the establishment and maintenance of proper housing standards requiring sufficient light, air, sanitation and protection from fire hazards are essential to the public welfare" (MDL §2).

MDL §302 thus represents a legislative determination that regulation of particular conduct is necessary and the Legislature consequently decided to cast the obligation to ensure compliance upon an owner by expressly depriving him or her of any entitlement to rent in the absence of a C/O.

This all brings one to *Chazon* and the breadth of its holding.

Chazon was a case that dealt with a building that was an interim multiple dwelling that did not have a C/O and in which no residential use was allowed. The question raised was whether a "landlord of a New York City loft who has not complied with the Loft Law and has not received an extension of time to comply [with certain Loft Law timetables set forth in MDL §284] may maintain an ejectment action based on nonpayment of rent."

The Court of Appeals reviewed MDL 302 (1) (b) and stated that in the absence of compliance with the timetables set forth by MDL § 284 or the granting of an extension of the relevant deadlines, "the law's command is quite clear: 'No rent shall be recovered by the owner or such premises".

Inasmuch as the owner in *Chazon* was not in compliance with the MDL 284 timetables and thus did not have a certificate of occupancy, the court found that the owner was barred by the strict mandate of MDL 302 from collecting rent and "if this is an undesirable result, the problem is one to be addressed by the Legislature."

While the facts in *Chazon* concerned itself with a building that did not have a certificate of occupancy, the question arose as to what happens when a building has a C/O but, due to some improvement and/or extension performed by the owner, the structure of the building does not conform to the existing C/O. This was the issue in several Appellate Division non-loft cases that have since discussed *Chazon*.

Thus, in *Sky East v. Franco*, 204 AD3d 594, 594 (1st Dept. 2022), the Appellate Division found an issue of fact as to whether the owner was barred from collection of rent where "the tenant presented evidence showing that *the building's CO had been revoked* by a . . . resolution of the New York City Board of Standards & Appeals." Similarly, in *GVS Props. v. Vargas*, 59 Misc.3d 128(A), *1-2 (App. Tm., 1st Dept. 2018), *affirmed*, 172 AD3d 466 (1st Dept. 2019), the Appellate Term found that the owner had "substantially altered" the building and that said multiple dwelling "now has 60 apartments, not the 53 permitted by the certificate of occupancy."

As a result, the Department of Building refused to issue a C/O "because of serious fire safety concerns" relating to the lack of a second means of egress for certain apartments. Citing to *Chazon*, the Appellate Term held "[i]nasmuch as the building as presently configured varies substantially from what the certificate of occupancy permits and that the health and safety of all building residents is affected, landlord is barred from collecting rent for the entire building. The command of the Multiple Dwelling Law 'is quite clear'."

The Appellate Division of this Department affirmed and held, again citing to *Chazon*, that "no rent was due because the building lacked a valid certificate of occupancy."

So far so good. Where things get a bit dicey is what happens when a building does *not* lack a C/O and the building structurally comports with the existing certificate of occupancy, but a tenant uses its space in a manner not in conformity with the C/O—for example, it uses its space for commercial use or uses a cellar space that is designed only for accessory use for habitable means.

In other words, is a violation of the C/O deemed to be equivalent as a building not having a C/O?

Here, in the absence of appellate authority, the lower courts have issues divergent opinions. Some courts have held that "[w]hen a violation exists for occupancy at odds with the certificate of occupancy, the building, essentially, lacks a certificate of occupancy." *936 TYH RM Bronx LLC v. Brujan*, 2022 NY Misc LEXIS 10682 (Civ. Ct., Bx. Cty. 2022).

Other courts have contrastingly held that where there is a valid C/O, a violation of non-conforming use does not warrant the imposition of the rent forfeiture provisions of MDL §302. *See e.g., Schwartz v. 10 87th St. Partners, LLC*, 2002 NY Misc. LEXIS 225 (Sup. Ct., NY Cty. 2020); *De La Cruz v 676 Miller Ave LLC*, 2023 N.Y. Misc. LEXIS 4365 (Sup. Ct., Kings Cty. 2023).

So which range of decisions are more in tune with *Chazon*? Well, since the Court of Appeals found itself wholly bound to the language of MDL §§301 and 302 in issuing such decision, one must revert to the language of those statutes to answer this question.

The term "said dwelling" in MDL §301 clearly refers to the multiple dwelling (i.e., building) in its entirety—and not to an individual unit. As stated by the court in *Chatsworth 72nd Street Corp. v. Rigai*, 71 Misc.2d 647, 653 (Civ. Ct. NY Co. 1972), *aff'd* 74 Misc.2d 298 (App. Tm., 1st Dept. 1973), *aff'd* 43 AD2d 685 (1st Dept. 1973), *aff'd* 35 NY2d 584 (1975) ("*Chatsworth*") "section 302 deals solely with the *absence* of an objective document — a certificate of occupancy. It is keyed to section 301, the provision requiring a certificate of occupancy . . ."

Thus, when a building has no C/O, courts should construe §302 literally and prohibit the owner from collecting any rent. *See Chazon, supra*. On the other hand, when a C/O exists and a challenged use simply does not conform to it, there is no basis to apply MDL §302. *See Schwartz, supra*.

This conclusion is also entirely consistent with well settled law that MDL §§301-302 are penal statutes in derogation of the common law and are to be strictly construed and, therefore, may not be extended to grant to the tenant any right not expressly provided for therein and, conversely, should not be used to deprive an owner of rent due for use and occupation of his/her property. *See e.g.*, (*Coulston v Teliscope Productions, Ltd.*, 85 Misc. 2d 339, 340 [App Term, 1st Dept. 1975]).

To the extent that one may seek to rely upon the quote in *Chazon* that if the barring of rent "is an undesirable result, the problem is one to be addressed by the Legislature," (*Chazon*, at 416) the Court of Appeals was absolutely correct. The clear and unequivocal terms of MDL §302 bar the collection of rent in the absence of a C/O and to the extent that may seem unfair, it is for the legislature to address.

But in the same vein that courts were instructed not to legislate in *Chazon*, they similarly should not seek to re-write MDL §§301 and 302 and expand the scope of this penal statute in derogation of common law to include not only buildings that do not have a C/O, but also those with existing violations of use under an existing and valid certificate of occupancy. To the extent that one may feel otherwise, "the problem is one to be addressed by the Legislature."

Lastly, there remains the question whether there exist any equitable exceptions to MDL §§301 and 302 under *Chazon*. Here, case law is yet again unclear, but it tilts against the imposition of rent forfeiture when a non-conforming use was specifically created by a tenant without the knowledge and/or consent of the owner.

The seminal and most oft cited case on this issue is *Chatsworth*. In *Chatsworth*, the tenants occupied a basement apartment in a building that did not have a C/O and asserted the prohibition against rent collection pursuant to MDL 302 in defense of owner's non-payment proceeding. "Concededly, for some years landlord has been seeking to correct this illegality . . ." but yet "[the tenants] blocked landlord from seeking to cure the illegal condition."

In rejecting the notion that the owner should be barred from collecting rent due to a condition created by the tenant, the court judiciously ruled:

No such absurd result is demanded by the law. The sanctions imposed by section 302 presuppose a certificate of occupancy denied because of volitional illegality. They were designed as a tool to stimulate the conversion of unsafe and substandard dwellings into proper and legal ones. *Where tenants themselves have prevented the carrying out of the legislative objective, it flies in the face, not only of common sense, but of every maxim of statutory construction, that tenants should be allowed to profit from their own actions*. (Emphasis added).

Both the Appellate Term, Appellate Division and Court of Appeals affirmed, with the Court of Appeals wholly adopting and endorsing the reasoning employed by the trial court.

Since the Court of Appeals' issued its decision in *Chatsworth*, it has been continually cited by various appellate courts for the proposition that equitable relief is available from the strictures of MDL §302 in cases where a tenant causes the non-conforming use. *See e.g., Caldwell v. American Package Co*, 57 AD3d 15, 24 (2nd Dept. 2008); *Hart-Zafra v. Singh*, 16 AD3d 143, 143-144 (1st Dept. 2005).

Some lower courts have taken the position that *Chazon* should be read as overturning *Chatsworth* and that "[t]he Court's application of MDL §302 appears to render the rest of the authority standing for a different result without effect." *Lispenard Studio Corp. v. Loeb*, 2016 NY Misc. LEXIS 1933 (Civ. Ct., NY Cty. 2016).

Other courts, however, have continued to consider the *Chatsworth* equitable exception analysis even post *Chazon*. *See e.g.*, *Trafalgar Co. v. Malone*, 2021 N.Y. Misc. LEXIS 6654 (Civ. Ct., NY Cty. 2021), *aff'd*, 73 Misc. 3d 137(A) (App. Tm., 1st Dept. 2021); *Zev Ger Inc. v. Garcia*, 76 Misc. 3d 1205(A), *3-5 (Civ. Ct., Kings Cty. 2022).

It seems to this writer that the equitable exception espoused by the Court of Appeals in *Chatsworth* is, and must remain, good law for two primary reasons. First, to argue that *Chazon sub silentio* overruled *Chatsworth* (and almost fifty years of appellate case law based thereon) would run afoul of yet another long-standing rule that the Court of Appeals "do[es] not overrule important authorities *sub silentio*." *Pratt Inst. v City of New York*, 183 NY 151, 161 (1905).

Furthermore, from a public policy perspective, to discard this rule would yield absurd and wholly inequitable results.

For example, if tenants in a building sought to inexcusably avoid the payment of rent, they could simply throw a mattress and some personal items down in a cellar area (where such habitable use is prohibited) and call a DOB inspector who will inevitably issue a non-conforming use violation. The tenants would argue that the owner would thereby be barred from collecting rent from anyone in the building. This malign pattern could easily repeat itself time and time again and there would inexorably be nothing that could be done to prevent countless reoccurrences of this mischievous charade.

Of course, such a result would wholly defeat the manifest purpose of MDL §§301-302. As the Appellate Division stated in *Hornfeld v. Gaare*, 130 AD2d 398, 400 (1st Dept. 1987), "[c]learly, this bizarre 'Catch-22' situation is unjust and cannot be permitted to continue." Certainly, in other areas of law, it has long been familiar doctrine that where a condition precedent exists to the enforcement of a claim, and one party prevents performance of that condition, one cannot set up nonperformance as a defense. "One may not take advantage of a condition precedent, the performance of which he himself has rendered impossible." (*Kooleraire Serv. & Installation Corp. v. Board of Educ. of City of N.Y.*, 28 N Y 2d 101, 106 [1971].

Chazon should be read in its context and there can thus be no ruling which would allow a violation to the C/O caused by a tenant without the knowledge and/or consent of an owner to relieve an entire building of its obligation pay rent. For otherwise we would reach a result that would approach the level of absurdity rightly decried in *Chatsworth.*

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