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Inside

Chazon—The Court of Appeals Weighs in on New York City's Loft Wars

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I. Introduction

Substandard multi-family housing plagued New York State during the end of the nineteenth century and the beginning of the twentieth century, especially in the tenements of Lower Manhattan. The Multiple Dwelling Law ("MDL"),[1] enacted in 1929, sought to combat that plague and was considered landmark legislation, which was said to provide for "the highest standards for [residential] construction in the world."[2]

The Multiple Dwelling Law mandated that multiple dwellings (buildings in which three or more families reside) must conform to certain minimum standards of habitability. No multiple dwelling could be occupied until a residential certificate of occupancy was issued confirming that the dwelling complied with the habitability requirements of the Multiple Dwelling Law.[3]

Compliance was compelled under MDL § 302(1)(b). In the event a multiple dwelling did not have a residential certificate of occupancy, then "[n]o rent shall be recovered by the [landlord], and no action or special proceeding shall be maintained...for possesion of a [multiple dwelling] for nonpayment of...rent."[4] Landlords faced a stark choice—either obtain a multiple dwelling with a residential certificate of occupancy or lose the right to collect rent.

The Multiple Dwelling Law substantially lessened the scale of substandard housing. Later, in the second half of the Twentieth century, tenants in sections of New York City began to use old commercial manufacturing lofts, which had become plentiful and cheap, for residential purposes. The lofts were not designed for residential occupation, but tenants willingly sought out lofts and made improvements at their own expense to make them habitable. The lofts, however, did not have a residential certificate of occupancy and therefore the landlord was technically barred under MDL § 302(1)(b) from collecting rent or evicting a tenant for nonpayment of rent.

This wholesale violation of MDL § 302(1)(b) was—at least initially—gladly tolerated by tenants, who were happy to live in a large open space, a highly prized quality in New York City residential rentals. Landlords were happy to be able to find *any* tenants because by the 1960s commercial manufacturing tenants had almost completely disappeared from Lower Manhattan. Public welfare in general benefited because the residential use of lofts expanded New York City's housing stock.

This happy medium, rarely achieved between landlord and tenant in New York City, did not last. Though tenants willingly invested sums to make the interiors of lofts habitable, they still expected their landlords to provide common area services. Landlords may have looked the other way when tenants modified their lofts for residential use, but were not prepared to invest the sums to formally convert the building to residential use. A new front opened in New York City's landlord/tenant wars, and tenants were inevitably lured into withholding rent and using MDL § 302(1)(b) as a defense. In the 1970s, a flood of cases overwhelmed the New York City Civil Court in New York County.

The "Loft Law," passed by the New York State Legislature in 1982, addressed this conundrum. It directed landlords of lofts which were "de facto" multiple dwellings to register the buildings as such. The new law also set forth a timetable by which the landlord had to obtain a residential certificate of occupancy. A landlord was granted an exemption from MDL § 302(1)(b) and was permitted to collect rent while it sought a residential certificate of occupancy.

Decades later, many lofts that registered as interim multiple dwellings still had not obtained their residential certificates of occupancy. Courts once again returned to deciding whether MDL § 302(1)(b) prevents a landlord from recovering rent when it has failed to obtain a residential certificate of occupancy within the timetable set forth in the Loft Law.

Last year—thirty years after the Loft Law was enacted—a loft case found its way to the Court of Appeals. *Chazon, LLC v. Maugenest*[5] reemphasized that MDL § 302(1)(b) retained its punitive power. A landlord of a "de facto" multiple dwelling who did not have an excuse for failing to obtain a residential certificate of occupancy as required under the Loft Law cannot "collect rent or... evict the tenant" even if the tenant could spend years living rent free in a loft.[6]

II. Background

In the late nineteenth and early twentieth centuries, Lower Manhattan experienced an explosion of commercial manufacturing construction. Old residential areas south and north of Houston Street were razed. Not only were tenements replaced; New York City's first residential cooperative established in 1880 (which had been promoted and occupied by the actor Edwin Booth) was torn down to build lofts.[7] Open floor buildings for manufacturing and storage were built in their place. The frenzy started south of Canal Street, moved up to Houston Street, pushed to 14th Street, and ended with an orgy of "mega" lofts north of 23rd Street just after the end of the nineteenth century.[8]

Loft buildings retained their value through the 1940s. Thereafter, manufacturing in Lower Manhattan severely declined. Vacancies multiplied. While the garment industry, and other industries, continued to provide some demand for the more modern structures north of 23rd Street, Lower Manhattan lofts were abandoned *en masse*.

Nature abhors a vacuum.[9] So does New York City real estate, especially a vacuum well situated in Manhattan just north of the financial district and just south of the East and West Village. Artists were the first to lay claim to the abundant vacant and cheap loft space. By the early 1960s, artists had taken over thousands of lofts as studios and living quarters.[10]

Landlords were more than happy to look the other way when tenants under "commercial" leases were using lofts to live in as well as work. Building inspectors, on the other hand, were not so happy. Though the residential use of lofts was obviously barred under the Multiple Dwelling Law, it was hard to prove that someone was or was not living in a loft. Instead of issuing residential violations, the Building Department began a crackdown by issuing commercial code violations.

Artists were angered by what they perceived as harassment from the building inspectors. The harassment was also arguably misdirected because enforcing commercial code requirements on lofts used as residences did not even address the real issue, *i.e.*, were the lofts safe for human habitation?

In 1961, an artists' group, including Willem de Kooning, threatened to "strike" if building inspectors did not stop issuing violations which were causing artists to be evicted.[11] The planned strike involved a refusal of artists to sell their work, therefore depriving galleries and museums of new product. The Legislature, which may or may not have been cowed by the threat of gallery and museum stagnation, enacted Article 7B of the Multiple Dwelling Law to address this quandary.[12]

Article 7B, entitled "Occupancy For Joint Residential-Visual Fine Arts Purposes," stated as follows:

> It is hereby declared...that persons regularly engaged in the visual fine arts require larger amounts of space for the pursuit of their artistic endeavors [and] there exists in [NYC] buildings in the past occupied for manufacturing and commercial purposes which contain...physically and economically suitable space for use by persons regularly engaged in the visual fine arts for the combined purposes of pursuit of their artistic endeavors and residences.[13]

Article 7B allowed "certified" artists to occupy loft space as long as those lofts complied with certain minimum habitability requirements.[14]

Not surprisingly, interest in loft space for residential use began to expand beyond artists. A new breed of tenant arrived. *The New York Times* noted in 1970 that "Madison Avenue advertising men"—known then and now as "Mad Men"—wanted to live among artists.[15] They could afford higher rents. The market responded; rents rose.[16] Residential use of lofts increased substantially in the 1970s. Property values rose. Tenants would make their own improvements to make the lofts habitable (if not necessarily code compliant). An incoming tenant would pay "fixture money" to an outgoing tenant to reimburse the outgoing tenant for his or her improvements.[17] Some tenants grouped together, bought out their landlords, and transferred ownership of the buildings to a cooperative.[18]

This scramble brought to the forefront the lurking conflict between MDL § 302(1)(b)'s prohibition on collecting rent absent a residential certificate of occupancy and voluntary residential use of commercial lofts. Litigation proliferated. The Civil Court of the City of New York, New York County, suffered a surge of loft summary proceedings best described by Civil Court Judge Leonard N. Cohen in *Lipkis v. Pikus*,[19] as follows:

> These nonpayment summary proceedings illustrate the unregulated twilight zone of commercial loft conversions for residential reuse in our city, resulting in widespread illegality, absence of housing code enforcement, hazards to health and safety, owner abuses and manipulation of tenants, and housing law confusion.[20]

The landlord in *Lipkis* was seeking to evict loft tenants notwithstanding the fact that the landlord was well aware of the residential use of the lofts and encouraged such use (though he evasively sought to deny it at trial). The Civil Court held that the landlord could not collect rent because he knew the lofts were being used for residential purposes and he could therefore not collect rent under MDL § 302(1)(b) without a residential certificate of occupancy.[21]

The Appellate Term ostensibly affirmed the Civil Court ruling, but modified Judge Cohen's order and directed that the tenants pay all rent arrears and ongoing rent with the clerk of the court until the landlord obtained a residential certificate of occupancy.[22] Judge Riccobono issued a vigorous dissent based primarily on the proposition that MDL § 302(1)(b) said what it meant and meant what it said.[23] If the loft conversion field was rendering the application of MDL § 302(1)(b) inappropriate, Judge Riccobono opined that such judgment should emanate from the Legislature rather than the courts.[24]

The New York State Legislature addressed the morass created by the residential use of lofts in 1982 by enacting Multiple Dwelling Law Art. 7–C, "Legalization of Interim Multiple Dwellings" ("Loft Law").[25]

The Legislature found that in cities having a population of over 1,000,000 residents (the Legislature's traditional euphemism for New York City):

> [A] serious public emergency exists in the housing...by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws. [T]enants in such buildings would suffer great hardship if forced to relocate...[I]ntervention of state and local governments is necessary to effectuate legalization....[26]

The goal was to legally convert "de facto" loft multiple dwellings in New York City so that they could obtain residential certificates of occupancy. The Loft Law defined buildings that housed three or more families in commercial lofts from April 1, 1980 through December 1, 1981 as "interim multiple dwelling[s]."[27] Landlords were required to meet deadlines by which the units would have to be modified to meet residential occupancy standards and ultimately obtain a residential certificate of occupancy.[28]

A "Loft Board" was created (to be staffed by mayoral appointees) and would rule on various issues regarding the conversions.[29] A landlord could obtain an extension of the certificate of occupancy deadlines from the Loft Board for "good cause."[30] If a landlord were in compliance with the requirements set forth in the Loft Law, the landlord could bring an action for possession of the units for non-payment of rent notwithstanding the prohibition under MDL § 302(1)(b).[31] Rent was regulated both during and after the process of obtaining a residential certificate of occupancy.[32]

Lofts that were registered as interim multiple dwellings worked their way towards obtaining residential certificates of occupancy at a glacial pace.[33] The Loft Law was modified repeatedly to extend the deadlines for obtaining residential certificates of occupancy.[34]

Years passed, and a second surge of loft litigation commenced. Tenants once again used MDL § 302(1)(b) as a defense against evictions. Once again, the Civil Court was faced with the issue of whether to allow landlords to collect rent where they had not obtained a residential certificate of occupancy. And, again, the New York City Civil Court, as it did in *Lipkis*, at times declined to strictly apply MDL § 302(1)(b) and instead allowed some landlords to seek eviction and collect rent notwithstanding the absence of a residential certificate of occupancy.[35] For example, in *99 Commercial Street*, the Second Department allowed a landlord, which had not obtained a residential certificate of occupancy, to recover possession of a loft (although the court did not permit rent to be recovered).[36]

Last year—over thirty years after *Likpis* and after the Loft Law was enacted—the Court of Appeals addressed this issue in *Chazon, LLC v. Maugenest*.[37] A landlord in Brooklyn (where many of the loft wars have migrated) sought to remove a loft tenant by way of an ejectment action. The landlord did not seek to recover rent (which the tenant had stopped paying in 2003). The lower court ruled, and the Second Department agreed, that the landlord could recover possession of the premises.[38]

The Court of Appeals reversed the Second Department, holding that the landlord could not "collect rent ***or*** evict the tenant."[39] The Court reviewed the history of the Loft Law, noting that it was not completely successful in effectuating the transition of commercial loft space into loft space approved for residential occupancy.[40] The landlord in *Chazon* had not met the timetable set forth in the Loft Law to obtain a residential certificate of occupancy, and the Loft Board declined its request for an extension on the ground that the landlord had not been hindered by circumstances beyond its control.[41]

The Court conceded that it might have made "sense" for the lower courts to permit a landlord to recover possession by way of ejectment (without seeking to recover rent), but such an avenue was inconsistent with MDL § 302(1)(b), which bars both an action to recover rent and an action "for possession...for nonpayment of such rent."[42] Any "undesirable" result was to be addressed by the Legislature.[43]

III. Conclusion

Before the enactment of the Loft Law, courts at times allowed landlords of commercial loft buildings to recover rent from residential tenants notwithstanding the prohibition under MDL § 302(1)(b). The Loft Law thereafter allowed recovery of rent as long as the landlord took timely steps to qualify for a residential certificate of occupancy. But thirty years later, the Court of Appeals has made clear that MDL § 302(1)(b) retains its punitive power to defeat a landlord's right to be paid rent if the landlord has not obtained the necessary extensions of time to obtain a residential certificate of occupancy.

Endnotes

1. N.Y. Mult. Dwell. Law § 2 (McKinney 1992).
2. John W. Harrington, *Tenement Hazards A Problem For City*, N.Y. Times, March 11, 1934 at XX2.
3. N.Y. Mult. Dwell. Law § 301(1) (McKinney 1992).
4. N.Y. Mult. Dwell. Law § 302(1)(b) (McKinney 1992).
5. *See* Chazon, LLC v. Maugenest, 19 N.Y.3d 410, 416, 971 N.E.2d 852, 855 (2012).
6. *Id.* at 413, 948 N.Y.S.2d at 572.
7. *Edwin Booth House Turned Into Lofts*, N.Y. Times, November 27, 1910.
8. The largest loft building as of 1910 was 22 stories high at 36th Street, just west of Broadway. *Demand For Lofts Near Fifth Avenue*, N.Y. Times, December 11, 1911.
9. Sun Oil Co. v. Traylor, 407 Pa. 237, 243, 180 A.2d 235, 238 (1962).
10. Yoko Ono moved into a loft in 1960 in which the windows were darkened (presumably to keep the interior cool and keep workers focused), but the skylight was clear and provided a beautiful skyward view. Sam Roberts, *Urban*

Memories; With John and Yoko, N.Y. Times, February 22, 2013, at MB3.

11. McCandlish Phillips, *Artists May Strike To Save Lofts*, N.Y. Times, July 3, 1961, at 1.
12. N.Y. MULT. DWELL. LAW § 275-278 (McKinney 1992).
13. N.Y. MULT. DWELL. LAW § 275 (McKinney 1992).
14. N.Y. MULT. DWELL. LAW § 276 (McKinney 1992) (defining an artist); N.Y. MULT. DWELL. LAW § 277 (McKinney 1992) (defining the habitability requirements of the premises).
15. Leslie Gourse, *Cost for 'SoHo' Lofts Are Rising Drastically*, N.Y. Times, July 26, 1970, at 200. Indeed, Don Draper's very first adulterous affair captured on the show "Mad Men" was with a fetching free spirited Manhattan artiste. *See Madmen: Smoke Get in Your Eyes* (AMC Networks July 19, 2007).
16. Leslie Gourse, *Cost for 'SoHo' Lofts Are Rising Drastically*, N.Y. Times, July 26, 1970, at 200.
17. *Id.*
18. *Id.*
19. *See* Lipkus v. Pikus, 96 Misc. 2d 581, 584, 409 N.Y.S.2d 598, 600 (N.Y. Civ. Ct. N.Y. Cnty. 1978), *aff'd*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979).
20. *Id.* at 584, 409 N.Y.S.2d at 600.
21. *Id.* at 590, 409 N.Y.S.2d at 603.
22. *See* Lipkus v. Pikus, 99 Misc. 2d 518, 519, 416 N.Y.S.2d 694, 695 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979).
23. *Id.* at 521, 416 N.Y.S.2d at 697 (J. Riccobono, dissenting).
24. *Id.* at 522.
25. N.Y. MULT. DWELL. LAW § 280 (McKinney 1982).
26. *Id.*
27. *Id.* § 281.
28. *Id.* § 284.
29. *Id.* § 282.
30. N.Y. MULT. DWELL. LAW § 284(1).
31. *Id.* § 285.
32. *Id.* § 286(4), (5).
33. *See* Dennis Hevesi, *The Loft Law's Pursuit of Lofty Goals*, N.Y. Times, Jun. 20, 1999, http://www.nytimes.com/1999/06/20/realestate/the-loft-law-s-pursuit-of-lofty-goals.html (stating that out of 835 registered interim multiple dwellings in 1999, only 375 had achieved code compliance).
34. *See* Gerald Lebovits & Linda Rzesinowjecki, *The New York Loft Law*, 38 N.Y. Real Prop. L.J. 21 (2010) (stating that the Loft Law was extended in 1992, 1996, 1999 and 2007); *see also* Carla Buckley, *That Cheap, Roomy Loft Can Now Be a Legal One, Too*, N.Y. Times, Jul. 25, 2010, http://www.nytimes.com/2010/07/26/nyregion/26loft.html (noting that the last extension was granted in 2010).
35. *E.g.*, Lipkis v. Pikus, 99 Misc. 2d 518, 521, 416 N.Y.S.2d 694, 696 (Supt. Ct. App. T. 1st Dep't 1979).
36. 99 Commercial Street, Inc. v. Llewellyn, 240 A.D.2d 481, 483, 658 N.Y.S.2d 130, 132 (2d Dep't 1997), *citing* Aponte v. Santiago, 165 Misc. 2d 968, 630 N.Y.S.2d 869; Broome Realty Corp. v. China Print. Co.,157 Misc.2d 572, 598 N.Y.S.2d 138; N.Y. MULT. DWELL. LAW § 302 (1)(b)) (Consol. current through 2013).
37. Chazon, LLC v. Maugenest, 19 N.Y.3d 410, 413, 971 N.E.2d 852, 853, 948 N.Y.S.2d 571, 572 (2012).
38. *Id.* at 410, 971 N.E.2d at 852.
39. *Id.* at 413, 971 N.E.2d at 852 (emphasis added).
40. *Id.* at 414, 971 N.E.2d at 852.
41. *Id.* at 415, 971 N.E.2d at 852.
42. *Id.* at 416, 971 N.E.2d at 855.
43. *Chazon*, at 416. This was the same point made in the *Lipkis* dissent. Lipkis v. Pikus, 99 Misc. 2d 518, 522, 416 N.Y.S.2d 694, 697 (Supt. Ct. App. T. 1st Dep't 1979) (Riccobono, J., dissenting). The Court of Appeals was not entirely clear in its holding. Clearly, the landlord in *Chazon* was required under the Loft Law to obtain a residential certificate of occupancy and had not obtained the necessary extensions to obtain one. Accordingly, the landlord could not perform an "end run" around that requirement by seeking possession of the premises by way of ejectment. However, a landlord not subject to the Loft Law should be able to obtain possession of the premises by ejectment even though the landlord would be barred under MDL § 302(1)(b) from either recovering rent or recovering possession due to non-payment of rent.

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