


Supreme Court, Appellate Term, New York.
Second Department.

YUKO NII, Respondent,
v.
Brian QUINN, Appellant.


Feb. 25, 2003.

In residential holdover proceeding, tenant moved to vacate the stipulation of settlement. The Civil Court, Kings County, O. Chin, J., denied the motion. Tenant appealed. The Supreme Court, Appellate Term held that: (1) tenant's residential use of a commercial storefront premises, in violation of the certificate of occupancy, barred recovery of rent due under the lease and of use and occupancy after the lease expired; but (2) portion of stipulation between landlord and tenant which awarded landlord possession of premises occupied in violation of a certificate of occupancy was enforceable.


Order affirmed as modified....

[1] Landlord and Tenant  199.5
233k199.5 Most Cited Cases

Tenant's residential use of a commercial storefront premises, in violation of the certificate of occupancy, barred recovery of rent due under the lease and of use and occupancy after the lease expired; landlord had not obtained conforming certificate of occupancy, and tenant could not waive proscription against recovery of rent for unlawful occupation. McKinney's Multiple Dwelling Law § § 301, 302, subd. 1, par. b.

[2] Compromise and Settlement  89k9
89k9 Most Cited Cases

While tenants' waivers of rent-impairing and nonjurisdictional defenses and counterclaims in settlement stipulations are generally enforced, the Multiple Dwelling Law proscription against recovery of rent for unlawful occupation, deemed penal in nature and strictly applied, constitutes a regulatory restraint on landlord that may not be "waived" by stipulation. McKinney's Multiple Dwelling Law § 302, subd. 1, par. b.

[3] Compromise and Settlement  89k9
89k9 Most Cited Cases

Portion of stipulation of settlement between landlord and tenant which awarded landlord possession of premises occupied in violation of a certificate of occupancy was enforceable; unenforceable terms of stipulation were severable, and tenant failed to make a sufficient showing of any defenses to landlord's claimed entitlement to possession.

Brian Quinn, appellant pro se.

Meryl L. Wenig, Brooklyn, for respondent.

Present: ARONIN, J.P., GOLIA and RIOS, JJ.

MEMORANDUM.

Order unanimously modified by granting tenant's motion to vacate the stipulation of settlement to the extent of striking the provisions thereof relating to the tenant's payment of use and occupancy, and landlord's entitlement to enter a money judgment; as so modified, affirmed without costs.

[1][2] In this residential holdover proceeding, landlord does not dispute that the premises is registered as a multiple dwelling governed by certificate of occupancy requirements (Multiple Dwelling Law § 4[7]). Under the circumstances, tenant's residential use of a commercial storefront premises therein, in violation of the certificate of occupancy, bars recovery of rent due under the lease and of use and occupancy after the lease expired (Multiple Dwelling Law § § 301, 302[1][b]; *Jalinos v. Ramkalup*, 255 A.D.2d 293, 679 N.Y.S.2d 419). Landlord has not obtained, nor manifested efforts to obtain, a conforming certificate of occupancy (*cf. 9 Montague Terrace Assoc. v. Feuerer*, 191 Misc.2d 18, 19, 740 N.Y.S.2d 553). It is irrelevant that the remaining, residential premises are properly certified (*Commercial Hotel v. White*, 194 Misc.2d 26, 752 N.Y.S.2d 779). While tenants' waivers of rent-impairing and nonjurisdictional defenses and counterclaims in settlement stipulations are generally enforced (*Koren-DiResta Constr. Co. v. New York City School Constr. Auth.*, 293 A.D.2d 189, 195, 740 N.Y.S.2d 56; see *Hallock v. State of New York*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 474 N.E.2d 1178; *Kazimierski v. Weiss*, 252 A.D.2d 481, 675 N.Y.S.2d 124), the proscription provided in Multiple Dwelling Law § 302[1][b], deemed penal in nature and strictly applied (*e.g. Goho Equities v. Weiss*, 149 Misc.2d 628, 631, 572 N.Y.S.2d 836 [App.Term, 1st Dept.]), constitutes a regulatory restraint on landlord that may not be "waived" by stipulation. To the extent that *Holder v. Williams*, 188 Misc.2d 73, 725 N.Y.S.2d 793 holds to the contrary, it should not be followed. We note that cases permitting landlord to collect rent or use and occupancy absent a conforming certificate of occupancy generally do so on landlord's proof of substantial conformity to Code standards and condition such payments on landlord's actual procurement of the requisite certificate (*e.g. Zane v. Kellner*, 240 A.D.2d 208, 209, 658 N.Y.S.2d 289; *Lipkis v. Pikus*, 99 Misc.2d 518, 521, 416 N.Y.S.2d 694 [App.Term, 1st Dept.], *affd.* 72 A.D.2d 697, 421 N.Y.S.2d 825).

[3] Inasmuch as landlord is entitled to maintain a holdover proceeding to recover possession of premises occupied in violation of a certificate of occupancy (*Hornfeld v. Gaare*, 130 A.D.2d 398, 400, 515 N.Y.S.2d 258) and the remaining terms of the settlement stipulation are severable from the unenforceable terms and constitute a proper disposition of the parties' rights and interests, we find no basis to strike the portion of the stipulation which awards landlord possession especially where, as here, tenant failed to make a sufficient showing of any defenses to landlord's claimed entitlement to possession (*Marrocco v. Lugero*, N.Y.L.J., Oct. 6, 1999 [Civ.Ct. Richmond County]).