

# Nii v. Quinn

Supreme Court of New York, Appellate Term  
February 25, 2003, Decided  
NO. 2002-328 K C

**Reporter:** 195 Misc. 2d 821; 759 N.Y.S.2d 841; 2003 N.Y. Misc. LEXIS 459

Yuko Nii, Respondent, v. Brian Quinn, Appellant.

**Subsequent History:** [\*\*\*1] Case Name Amended May 13, 2003.

**Prior History:** Appeal from an order of the Civil Court of the City of New York, Kings County (Oymin Chin, J.), entered January 23, 2002, which denied a motion by respondent tenant to vacate a stipulation of settlement.

## Case Summary

### Procedural Posture

The Civil Court, Kings County (New York), entered a judgment that denied appellant tenant's motion to vacate a stipulation of settlement entered into in a case where respondent landlord had sought to collect from the tenant rent due, and for use and occupancy, after the tenant remained in the leasehold after the lease expired. The landlord also had sought possession. The tenant appealed.

### Overview

The premises was registered as a multiple dwelling governed by certificate of occupancy requirements. The tenant violated the certificate by making residential use of the commercial storefront premises therein. When the lease term ended, the tenant remained. The landlord brought a residential holdover action to recover rent due under the lease, and for use and occupancy of the premises after the lease expired, plus possession. The landlord and the tenant then entered into a stipulated settlement. The tenant purportedly waived certain defenses. The tenant also stipulated that the landlord was entitled to possession. After the stipulated settlement was approved, the tenant's motion to vacate it was denied. After the tenant appealed, the appellate court found that the record did not show that the landlord had obtained, or tried to obtain, a conforming certificate. It also found that the legal requirement that the landlord have a conforming certificate in order to collect rent, or for use and occupancy, could not be waived. However, it further found that even where the certificate was violated, the law allowed the landlord to maintain a holdover proceeding to recover possession.

### Outcome

The judgment denying the motion to vacate was modified by granting the tenant's motion to vacate the stipulated settlement provisions relating to the tenant's payment of use and occupancy, and the landlord's entitlement to enter a money judgment, and as modified, was affirmed.

**Counsel:** *Brian Quinn, appellant Pro se.*

*Meryl L. Wenig, Brooklyn, for respondent.*

**Judges:** PRESENT: ARONIN, J.P., GOLIA and RIOS, JJ. Aronin, J.P., Golia and Rios, JJ., concur.

## Opinion

[\*821] [\*\*842] 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 [\*822] and occupancy, and landlord's entitlement to enter a money judgment; as so modified, affirmed without costs.

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, *HNI* 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, [\*\*\*2] 302 [l] [b]; Jalinos v Ramkalup, 255 A.D.2d 293, 679 N.Y.S.2d 419 [1998]*). 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 [2001]*). 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 [App Term, 2d Dept 2002]*). *HN2* 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 [2002]*; see *Hallock v State of New York, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 474 N.E.2d 1178 [1984]*; *Kazimierski v Weiss, 252 A.D.2d 481, 675 N.Y.S.2d 124 [1998]*), the proscription provided in *Multiple Dwelling Law § 302[l] [b]*, deemed penal in na-

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ture and strictly applied (e.g. *Goho Equities v Weiss*, 149 Misc. 2d 628, 631, 572 N.Y.S.2d 836 [App Term, 1st Dept 1991]), constitutes a regulatory restraint [\*\*\*3] 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 [2001]) holds to the contrary, it should not be followed. We note that *HN3* 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 [1997]; *Lipkis v Pikus*, 99 Misc. 2d 518, 521, 416 N.Y.S.2d 694 [App Term, 1st Dept 1979], *affd* *72 AD2d 697, 421 N.Y.S.2d 825 [1979]*).

Inasmuch as *HN4* landlord is entitled to maintain a hold-over 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 [1987]) 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 [\*\*\*4] especially where, as [\*823] here, tenant failed to make a sufficient showing of any defenses to landlord's claimed entitlement to possession (*Marrocco v Lugero*, NYLJ, Oct. 6, 1999, at 31, col 2 [Civ Ct, Richmond County]).

Aronin, J.P., Golia and Rios, JJ., concur.