| **Sam & Joseph Sasson LLC v Guy** |
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| 2018 NY Slip Op 33231(U) |
| December 14, 2018 |
| Civil Court of the City of New York, New York County |
| Docket Number: 77516/2016 |
| Judge: Jack Stoller |
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART N
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SAM AND JOSEPH SASSON LLC,

Petitioner,

Index No. 77516/2016

- against -

**DECISION/ORDER**

CORINTHIANS GUY and PENNY GUY,

Respondent.
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Present: Hon. Jack Stoller
Judge, Housing Court

Sam and Joseph Sasson LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Corinthians Guy ("Respondent"), a respondent in this proceeding, and Penny Guy ("Co-Respondent"), another respondent in this proceeding (collectively, "Respondents"), seeking possession of 110 West 14th Street, Apt. 2, New York, New York ("the subject premises"), on the ground of breach of a substantial obligation of their tenancy, to wit, that Respondents engaged in illegal alterations of the subject premises and use of the subject premises for a karate school in derogation of, *inter alia*, the Zoning Resolution. Respondents interposed an answer containing a defense that Petitioner knew about the alterations, that Petitioner waived an objection to the alterations, and that Petitioner interfered with an ability to cure. The Court held a trial of this matter on September 25, 2017, November 6, 2017, February 1, 2018, February 6, 2018, March 15, 2018, March 19, 2018, April 13, 2018, May 2, 2018, May 3, 2018, May 21, 2018, and August 2, 2018 and adjourned the matter for submissions, ultimately to November 20, 2018.

**The trial**

Petitioner proved that it is the proper party to commence this proceeding and that the subject premises is subject to the Rent Stabilization Law. Petitioner effectuated service of a notice to cure dated August 23, 2016 ("the notice to cure") on Respondents stating that Respondents engaged in illegal alterations and that Respondents used the subject premises for commercial use in violation of, *inter alia*, the Zoning Resolution. Petitioner then effectuated service of a notice of termination dated September 9, 2016 ("the notice of termination"). The Court refers to the notice to cure and the notice of termination, collectively, as "the predicate notices."

Petitioner introduced into evidence a letter of no objection ("the letter of no objection") from the New York City Department of Buildings ("DOB") indicating that a certificate of occupancy ("C of O") dated January 10, 1994 for the building in which the subject premises is located ("the Building") shows that the subject premises is a class A apartment.[1] The letter of no objection does not address a karate school at the subject premises. Petitioner also introduced into evidence a C of O effective May 14, 2014 showing the same information and also showing that the subject premises has been an interim multiple dwelling subject to MDL Article 7C ("the Loft Law"), and that the zoning use group applicable to the subject premises is use group two.[2]

Petitioner introduced into evidence a lease dated 2003 ("the Rent-Stabilized lease") between Respondents and Petitioner's predecessor-in-interest ("the prior owner"). The lease

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[1] "A" dwellings are those occupied for permanent residence purposes. MDL §4(8).

[2] Zoning use group 2 is for residential use. Wirth v. Chambers-Greenwich Tenants Corp., 87 A.D.3d 470, 473 (1st Dept. 2011).

states that the subject premises is for living purposes only, that Respondents require the prior owner's written permission for alterations, and that Respondents must comply with all applicable laws and regulations.

Petitioner and Respondent both introduced into evidence floor plans (collectively, "the floor plans") on file with DOB. One of them ("Respondent's floor plan") designates part of the subject premises as having a karate school and one of them ("Petitioner's floor plan") does not.

The prior owner's son ("the member") testified that he is a member of the LLC that is Petitioner; that the prior owner, had also been a member; that he has been involved with day-to-day management of the Building on a full-time basis since 2009; that he knows the subject premises; that, without Petitioner's permission or permission of the prior owner, Respondents subdivided the subject premises into four rooms with walls that are movable, which are not reflected in approved DOB-filed plans for the subject premises and which he saw for the first time around the end of November or mid-December of 2015; that there is an electrical subpanel in the subject premises that Petitioner did not install; that the only part of the subject premises he had previously seen for over ten years was a karate school that Respondents have been operating; and that Petitioner did not give permission for that use.

The member testified on cross-examination that he does not know when partition walls were put up; that he is unaware of any previous electrical problems in the subject premises; that his family took over the Building in 1986; that he helped the prior owner with books and records before 2014; that he lived in the Building since 2007; that he did not see the subpanel until August of 2016; that, before December of 2015, when he first saw the partitions, he was only in the part of the subject premises where the karate school was; that he had seen the karate studio

more than ten, but less than fifteen times previously, at some point before 2014, possibly as far back as 1994, 1997, or 2005, he did not remember; that the prior owner died during the pendency of this proceeding, on August 22, 2017; that the prior owner had maintained a store on the first floor of the Building; that, by 2016, the store had been closed; that he sends an exterminator once a month to the subject premises; that he does not enter the subject premises with the exterminator; and that he does not remember inspecting the subject premises with the prior owner on September 25, 2008.

Respondent introduced into evidence a violation that the Loft Board placed on the subject premises on October 22, 1997 for defective outlets throughout the north room of the subject premises and a narrative of work necessary for the legalization of the subject premises as per the Loft Law which included a remedy for inadequate electrical distribution throughout the subject premises. Respondent also introduced into evidence an open application at DOB for electrical work needing to be done in the subject premises in 1998. The member testified on cross-examination that he did not know of electrical work done on behalf of the owner from 1998 through 2016.

Respondent introduced into evidence a Loft Board Order indicating that the prior owner had testified at a hearing of the Office of Administrative Trials and Hearings ("OATH") held in January of 1988 that if Respondent agreed to fix something, the prior owner would pay Respondent for that work.

Respondent introduced into evidence a stipulation dated August 30, 1994 from a prior summary proceeding between another predecessor-in-interest of Petitioner and Respondent, captioned at 110 W. 14th St Rlty. Co. Inc. v. Guy, Index # L/T 80965/1994 (Civ. Ct. N.Y. Co.),

which provided that arrears at the time were $13,781, that the landlord at the time gave Respondent a rent credit of $10,000, and that Respondent would do a fairly extensive amount of work and repairs at his own cost and expense at the subject premises.

Respondent introduced into evidence a holdover petition commenced against Respondents, captioned at 110 West Realty Corp. v. Guy, Index # L/T 64562/1996 (Civ. Ct. N.Y. Co.) verified on January 26, 1996, alleging that Respondents were in violation of a substantial obligation of their tenancy by operating a karate school.

The Court granted Petitioner's application to qualify its next witness, an architect ("Petitioner's first expert witness") as an expert. Petitioner's first expert witness testified that the C of O is the last word on the permissible use of the subject premises; that use of the subject premises as a karate school is not permissible; that the floor plans appear to be the same, save for the distinction between the two regarding the designation of the karate school; that there should have been an indication in Respondent's floor plan, marked by a bubble, showing an alteration of a previously-approved plan; that the floor plans were both amended on September 25, 1992; that the floor plans are secondary to the C of O; that a karate school is typically a physical culture establishment as per the Building Code and the Zoning Resolution, requiring approval from DOB and the Bureau of Standards and Appeals ("BSA"); that a classification known as a "home occupation" are typically permissible for use consistent with residential use, such as child care, an architect's office, or a home office; that a karate school would not be appropriate for a home occupation because of noise, about which zoning is explicit; that partition walls after the date of the floor plans would constitutes construction without a permit; that windowless rooms are not allowed under the Code; that the partition walls created rooms without light or air; and that

subject premises is in zone "C6-2a."

Petitioner's first expert witness testified on cross-examination that a karate school would not have been a non-conforming use in 1974 because it would have been a conforming use, as the Building was a commercial building; that it would have been a conforming use in 1978; that a special permit could be required for a physical culture establishment; that if a windowless room is only used as a closet that it needs to appear as a closet to an inspector and on the plans; and that the current configuration of the windowless room cannot be a closet because of its size.

Respondent introduced into evidence Loft Board plans for the subject premises, which refer to a karate school. Petitioner's first expert witness testified on cross-examination that the DOB does not necessarily approve what the Loft Board approved.

Petitioner's first expert witness testified on redirect examination that the Loft Board plans do not indicate anything about a home occupation, meaning that the karate school is not permitted; and that the issuance of the C of O in 1994 eliminated any other uses for the subject premises besides what was shown thereof. Petitioner's first expert witness testified on recross examination that the Construction Division of DOB would have inspected the Building and that advertisements and signs and lockers there would have prevented the issuance of a C of O.

The Court granted Petitioner's application to qualify a licensed electrical contractor ("Petitioner's second expert witness") as an expert. Petitioner's second expert witness testified that he does residential work and commercial work; that he knows the Electrical Code; that he was in the subject premises in August of 2017; that he observed an electrical panel that was overloaded, with unprotected wires that are improperly placed, creating a fire hazard and a possibility of blowing fuses; and that DOB did not issue and permits for this work. Petitioner's

second expert witness testified on cross-examination that correction of violations would require a permit with DOB that requires Petitioner's sign-off.

Petitioner introduced into evidence an offer of DOB to cure a violation placed on the Building for work done without permits by obtaining permits or by restoring the subject premises to its previous condition.

The Court granted Respondent's application to qualify an enforcement audit specialist for DOB ("Respondent's first expert witness"). Respondent's first expert witness testified that she is a licensed architect; that the plans for the subject premises refer to a "karate studio," thus permitting the use of the subject premises for that purposes; that BSA approval is not required for use of the subject premises as a karate school because it was approved as use group two;[3] that the subject premises had been converted and therefore not a typical use group two, which means that before the use group was established, an artist lived in a loft and it wasn't a lawful use group two; that the subject premises had a manufacturing or commercial use before and Petitioner went to the Loft Board to legalize that use; that the absence of a mention of a karate school in the C of O does not preclude the legal use of the karate school because home occupations are not listed in a C of O; that Respondents may use up to 49% of the subject premises for commercial purposes because the subject premises has been an interim multiple dwelling pursuant to the Loft Law; and that DOB would not issue violations for the use of the karate school.

Respondent's first expert witness testified on cross-examination that use of the subject premises contrary to the C of O would be illegal; that she has not seen many instances of a karate school as a home occupation; that the Multiple Dwelling Law allows for a home occupation; that

[3] See footnote 2.

she interpreted karate to be an art; that the letter of no objection limited commercial use to 25% or 500 square feet of the subject premises; that a special permit would allow Respondents to deviate from that plan; that only four students may permissibly attend the karate school even if it is a home occupation; that "bubbles" on plans are only for construction, for example, if a partition is moved; that a class "A" apartment is an apartment that has a kitchen and a bathroom; that a "home occupation" is an accessory use which is incidental to the use of a dwelling unit; that the C of O does not trump everything, is complimentary with the plans; that both of the floor plans are legitimate because they are both in the DOB records; that a permitted commercial use would not be on a C of O; that the subject premises is in a C6-2A zone; that a karate school is not a physical cultural establishment; that her interpretations have been challenged a lot but they have never been reversed; that the commissioner of DOB makes a final determination; and that it is possible that a letter of no objection be needed for a karate school, which entails a showing of legitimate commercial and an absence of multiple showers. Respondent's first expert witness testified on redirect examination that when DOB approves floor plans, they always approve three sets and as examiners they might not notice differences.

Respondent introduced into evidence his first lease for the subject premises commencing on April 1, 1974, which did not contain a clause prescribing a use for the subject premises. Respondent also introduced into evidence a check for rent drawn on the account of the karate school from that time period.

Respondent testified that he has lived in the subject premises for since 1973; that he is a locksmith and a martial artist; that when he first saw the subject premises, it was filthy, with two functional bathrooms, no kitchen, and no separate rooms; that he installed walls and a kitchen in

the subject premises in 1973 and 1974 with the approval of the landlord at the time; that a flag advertising the karate school was visible from the street; that he saw his landlord at the Building about once every seven months; that Respondent and Co-Respondent's son ("Respondents' son") was born in 1985 and lived there since; that different parts of the subject premises were separated from one another by sheets and bookcases around that time that Respondents' son was born; that the prior owner first purchased the Building in some kind of corporate incarnation in 1986; that the prior owner had a retail store next to the Building; that the prior owner typically was in front of his store; that he talked to the prior owner all the time; that when the prior owner took title to the Building, the condition of the subject premises was poor, in particular, that electrical things were taken out and not put back; that the prior owner was the super as well as an owner; that he would do repairs himself; that the prior owner was happy if the work was done; that the prior owner did not really require DOB filings; that the prior owner wanted things done as cheaply as possible; that he had no written agreement with the prior owner; that his grandson, granddaughter, and mother moved into the subject premises in 1994; that he used nonpermanent dividers to create spaces where all the occupants can sleep; that, in 1998, he brought sheetrock into the Building to construct partitions from a delivery truck parked right in front of the Building near the prior owner's shop; that he ordered maybe twelve or twenty-four bundles of metals studs and maybe twenty or twenty-four boards of sheetrock; that the prior owner saw Respondent unloading the sheetrock; that the member also saw what was being done; that the prior owner saw the subject premises after Respondent did the work and said that it looked good; that, in other contexts, Respondent told the prior owner about the partitions he put up in the subject premises; that the prior owner raised no objections and in fact told Respondent that he

knew Respondent's work and that it was good;[4] that he did the work in August or September of 2008; that he gave the prior owner access to the subject premises in November of 2008; that on September 25, 2008, the prior owner, the member, and other people came to the subject premises and saw everything that was being done, including the newly-created rooms, the electrical subpanel, and the karate school; that, after 2008, the prior owner was in the subject premises three to five times and the member has been to the subject premises ten times, both accompanying the exterminator; and that the Loft Board placed violations for inadequate electrical outlets in the subject premises; and that Petitioner's electrician was the last person to touch the electrical panel.

Respondent introduced into evidence an addendum to the Rent-Stabilized lease ("the addendum"). The addendum, which is dated February 18, 2002, is only signed by Respondent and not Petitioner, states that Respondent did $15,000 worth of renovation work and refers to a "karate studio."[5]

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[4] Petitioner objected to this testimony pursuant to CPLR §4519, colloquially and archaically known as "the Dead Man's Statute." CPLR §4519 renders inadmissible communications with a deceased person against a party, *inter alia*, deriving its title from that deceased person. Although Petitioner is a corporate entity, the deed in evidence shows that Petitioner derived its interest from the prior owner as a tenant-in-common. However, the member, who is also the prior owner's son, had earlier testified that the prior owner did not give Respondents permission to engage in the work in controversy in this matter, opening up an exception outlined in CPLR §4519 when testimony of the deceased person is given in evidence concerning, inter alia, the same transaction. In re Estate of Wood, 52 N.Y.2d 139, 145 (1981), Lief v. Hill, 151 A.D.3d 1047, 1048 (2nd Dept. 2017).

[5] Petitioner objected to the introduction of the addendum into evidence, because it is only signed by Respondent, because its date is different from the rest of the Rent-Stabilized lease, which was executed on February 3, 2003, and because the addendum states that it is "item 33," which does not follow the way that the Rent-Stabilized lease identifies paragraphs. While the implication of Petitioner's objection was that Respondent unilaterally wrote the addendum and stapled it to his copy of the Rent-Stabilized lease, Respondent testified that the addendum was

Respondent testified on cross-examination that he did not remember if the prior owner was at the subject premises in 2008 because it has been a long time since then; that he got along with the prior owner to the point that the prior owner was like family to him; that he did not remember if the prior owner's store was operating in 2008; that he is a senior citizen and had trouble remembering; that the prior owner did not give him written permission to put up partitions in 2008; that the prior owner gave him permission to put up a part of the partitions in 1998; that the prior owner reneged on his representation that he would pay him; and that he didn't allow anyone to do electrical work in the subject premises other than Petitioner's contractors.

Petitioner showed Respondent an affidavit he executed in this matter on February 20, 2017, which said that he caused a subpanel to be installed in 2008 and Respondent's response to a notice to admit stating that he did electrical work in the subject premises in 2007. Respondent testified on cross-examination, however, that he did not do the electrical work in the subject premises.

The addendum, dated in 2002, also referred to walls that were put up. Respondent testified that 2002 could have been the date that he put walls up. Then Respondent testified that it was possible that the walls he put up in 2008 replaced walls that were already there.

Respondent testified on cross-examination that he did not know if there was a limit on the number of students he could have at the karate school; that he has had more than four students at a time at the karate school; that, in 1974, he had signs on the window regarding the karate school;

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attached to his fully-executed lease when he received it from Petitioner. Respondent's sworn foundational testimony is adequate to admit the lease into evidence, without prejudice to Petitioner's arguments as such as to weight.

that the prior owner took the signs down; that he put the signs back up; and that he took the signs back down when Petitioner served the predicate notice in this matter on him.

As a general matter, Respondent was unable to answer many questions, referring them to Co-Respondent.

Co-Respondent testified that the karate school has had advertisements in the window since the 1970s and that she received the addendum from her lawyer; that she first saw the subject premises in 1974 when she was signing up for karate classes; that she and Respondent are married; that a wall was put up in 1973 separating the existing karate school from existing closets as they appeared in Respondent's floor plan; that Respondents, over the years, installed walls in the subject premises; that Respondents' son was born in 1985; that her grandson and granddaughter had also moved into the subject premises by 1997; that the subject premises was open at that point and that bookcases separated the spaces in which the various family members slept; that Co-Respondent's mother also moved into the subject premises on September 11, 2000 and stayed there for three years; that Respondents decided to address the issue of the number of people in the subject premises by putting up walls in 2008; and that before Respondents put up walls, the prior owner said that he did not mind if Respondents did that as long as he didn't have to pay anything for it and if it was up to code.

Respondents introduced into evidence a stipulation Respondent and Petitioner's predecessor entered into in Housing Court on December 1, 1997 obligating Petitioner's predecessor to effectuate repairs, including defective outlets and an order from the same case dated June 1, 1998 awarding Respondents an abatement of rent based on serious problems of repairs of broken electrical outlets. Co-Respondent testified that, from 1986 to 1988, six outlets

were added to the subject premises; that the prior owner did not complete the work; that there still weren't enough outlets by the early 2000s, although the ones there did work; that some outlets still did not work or have ground fault interrupters; that Respondents formulated a plan to put in electrical outlets to the subject premises; that the prior owner's lawyer sent Respondents a letter regarding alterations; that Respondent then set up the date of September 25, 2008 for the prior owner to inspect the subject premises; that a long-time student of Respondent ("the karate instructor") was in the subject premises at the time and actually opened the door of the subject premises for the prior owner and the member; that Respondents' son was also in the subject premises at the time; that the prior owner and the member saw the subpanel that Respondents had worked on and switched the lights on and off; that the prior owner and/or the member were in the subject premises once a month after that until the prior owner's death, usually with an exterminator, and to inspect and/or repair housing maintenance code violations; and that the prior owner never complained to her.

Co-Respondent testified on cross-examination that she asked the prior owner and the member for permission to do electrical work and to work on the walls; that the prior owner consented; that when she responded to Petitioner's notice to admit that Respondents engaged in electrical work in 2007, she had written an incorrect date because she did not consult back-up documents, which are voluminous; that, when she wrote a letter to Petitioner after having been served with the predicate notices in this matter, that she did not state that Petitioner had given her permission to make the alterations because she had consulted with a law student who suggested that she say something different; that her statements in an affidavit previously submitted to the Court on this matter that Petitioner sent electricians to work on a box in the subject premises and

that she did not know that Petitioner was doing work in the Building were incorrect; that, although she averred in that same affidavit that she read Respondent's affidavit, she perused Respondent's affidavit and did not read it closely; that the affidavit was incorrect insofar as it said that electrical work was done in 1998; and that the prior owner and/or the member would escort the exterminator to the subject premises once a month about fifty percent of the time, and that they would wait outside the subject premises because the member did not like to come to the subject premises. Petitioner introduced into evidence a letter Petitioner sent to Respondents seeking access to the subject premises from December of 2015.

Petitioner introduced into evidence a letter from Respondent dated February 18, 2002 asking the prior owner to sign the addendum. Co-Respondent testified on cross-examination that the prior owner did not countersign the addendum.

Co-Respondent testified on cross-examination that Respondents are still operating the karate school, although without four students at a time, although there have been occasions where more than four students were there at a time; and that Respondents applied for the letter of no objection after receiving the notice to cure in this matter.

Co-Respondent testified on redirect examination that she did not request written permission from the prior owner to do the work in 2008 because the prior owner did not write well, they never communicated in writing, and she thought that communicating verbally was better; that she proposed doing electrical work in 2008 because there were so few outlets and they were out of date, with only one receptacle; that her prior attorney wrote the affidavit that she signed; that had poor communication with her prior attorney; and that the addendum ended up in her lease because her lawyer wanted it in the lease and it went back and forth and back and forth

over a protracted period of time.

The Court granted Respondent's application to qualify Respondent's second expert witness ("Respondent's second expert witness") as an expert. Respondent's second expert witness testified that he consults in engineering and construction; that DOB has approved many of his plans; that he drew Respondent's floor plans; that he personally observed the subject premises; that the layout in the floor plans anticipated existing conditions accommodating the type of occupancy there, i.e., a karate school; that a windowless storage room is legal; that everything in the subject premises complies with the code; that the panel and subpanel are not currently legal, but it is possible to make them legal; that it would take a week to design the plan to legalize the panel and subpanel, another week for DOB to approve it, and then a month for the job to be bid out, for a total of two months at worst; and that Petitioner's consent is needed for DOB to approve the work.

Respondent's second expert witness testified on cross-examination that he consulted with the C of O to determine the occupancy; that he drew plans for the existing use; that only four students could attend the karate school at one time, legally; that, while the C of O controls what can be done with the space, another document that operates as a kind of de facto sub-C of O called a "permission of use" could be issued; that a letter of no objection also could serve that purpose; that he does not know if the karate school is illegal with regard to egress issues; that he invoiced Co-Respondent for his testimony, but Co-Respondent has not paid him yet; that the main electrical panel is a fire hazard because the connection from the subpanel is not properly attached and the subpanel is otherwise not proper or legal; and that Respondents cannot have a karate school if there is no letter of no objection regarding the karate school.

The karate instructor testified that he knows the member and knew the prior owner; that he was at the subject premises on September 25, 2008 and saw the prior owner and the member there at that time; and that he saw the prior owner come in and out on other occasions. The karate instructor testified on cross-examination that the doors to the residential part of the subject premises were closed when he was there; that he never went back there and that he had had altercations with the prior owner.

Respondents' son testified that he is thirty-two years old; that he has lived in the subject premises for his entire life; that he knew the prior owner and the member; that, on September 25, 2008, they came to the subject premises; that he saw them check every room in the subject premises; that the prior owner came into the residential part of the subject premises four or five times since then; and that the prior owner and/or the member would come to the subject premises with an exterminator on a monthly basis. Respondents' son testified on cross-examination that September 25, 2008 was a big day because Respondents were trying to make sure that everything was up to code; that work was done on the walls and the electricity about two weeks before September 25, 2008; that the karate school was closed when that work was being done, and he had to stay at a friend's house; and that the karate instructor was there at the time.

The Court granted Petitioner's application to qualify as an expert an architectural consultant ("Petitioner's third expert witness"). Petitioner's third expert witness testified that he teaches zoning at four different locations; that he works as a consultant to a wide range of projects; that he had been a deputy borough commissioner for DOB; that a key role of DOB was to enforce the zoning resolution; that DOB has little discretion as to that; that he dealt with the approval of physical cultural establishments in reference to the BSA; that "physical cultural

establishments" encompass martial arts and therefore require approval to be operated; that the "physical cultural establishments" process was set up in the 1970s to try to filter out "bad actors"; that DOB's denial of an application to operate a physical cultural establishment confers permission upon the applicant to seek approval of a physical cultural establishment from BSA; that the C of O for the subject premises shows that the use permitted therein is "R2," meaning residential use; that the C of O removes the subject premises from Loft Law coverage; that the lack of a BSA record number indicates that a physical cultural establishment is not allowed in the subject premises; that the subsequently-issued C of O does not reference the karate school; that the omission of a karate school from a C of O indicates that BSA approval would be required; that the C of O always controls, even over a prior plan that references a karate school; that Zoning Resolution 12-10 precludes martial arts; that Zoning Resolution 22-12 shows allowable uses within use group two residential zones; that 49 percent of space for accessory use for up to three people is permissible; that the karate school does not fall under accessory use; that he knows Respondent's first expert witness; that he was higher in the DOB hierarchy than she was; that he has had occasion to disagree with Respondent's first expert witness' decisions; that he disagrees with her about a karate school being permissible in use group two; that the Building is not a use group for a joint artist in residence because an operator of a karate school is not an artist, which requires licensing; that a "home occupation" is an accessory use to a space in use group two; and that Respondent's second expert witness may have been correct about karate schools not needing BSA approval some time ago, before an amendment.

Petitioner's third expert witness testified on cross-examination that an inspector would not have the duty to report an advertisement for a karate school; that inspectors only respond to

complaints or an order from the Commissioner; that there would have been inspection in 1994 before the C of O issued; that the inspection would have entailed an applicant calling DOB; that sometimes an applicant will self-inspect and certify; that a new C of O will entail an inspector walking through the Building from top to bottom, which would presumably include the subject premises; that an inspector would have to see students attending a karate school, not indicia of the existence of a karate school, in order to take remedial action; that physical cultural establishments came into effect in the 1970s; that a nonconforming use can conceivably be maintained, but it would have to be reflected on a C of O, which invalidates a claim of grandfathering; that, in a C6 zone, a physical cultural establishment with BSA approval is legal; and that he did not know if that was the case in 1974.

The Court granted Petitioner's application to qualify a deputy borough commissioner of DOB ("Petitioner's fourth expert witness") as an expert. Petitioner's fourth expert witness testified that he has worked at DOB since 2004 and to his familiarity with zoning laws; that physical cultural establishments are not permitted by zoning, but by a special permit by BSA; that he issued the letter of no objection for the operation of a home occupation yoga studio for the subject premises for a maximum of four people, using not more than 500 square feet; that he limited the use to that size because that it what the zoning permits for a home occupation; that a karate school operation would require a different zoning use group; that a different use group and description of the subject premises would appear on a C of O if the karate school was permitted; and that the C of O controls.

Petitioner's fourth expert witness testified on cross-examination that no BSA approval was sought for use of the karate school; that he thinks that physical cultural establishments came

into effect in the 1980s, although 1978 sounded right; that nonconforming uses, including legally established physical cultural establishments, can continue until a new C of O defines the legal use for the property; that, despite the fact that the subject premises was an interim multiple dwelling, the subject premises was not a live/work conversion because that would have been a different use group; and that, while some loft law conversions involve residential conversions in manufacturing districts, the subject premises is located in a commercial district.

An exterminator testified that for two or three years he has gone to the subject premises; that the member and the prior owner did accompany him to the subject premises, but they did not go into the subject premises.

The member testified that the prior owner did not hire Respondent to work around the Building; that Respondent did not get the prior owner to consent to contractors; that they did not hire Respondent to paint, as they employed people who painted already; that the prior owner stopped having a store in 2007; that he only went to the subject premises with an exterminator one time in 2016; that he never saw the prior owner accompany the exterminator to the subject premises; that he was not in the subject premises on September 25, 2008 because the first time that he was in the residential part of the subject premises was in December of 2015, because Respondents always denied access to that part of the subject premises; that he first saw the subpanel on October 31, 2016; that Respondent did not ask for permission to do work in 2008; that he never saw the addendum; and that he had seen the karate school in the past. The member testified on cross-examination that he did not know of his father giving consideration to Respondent in return for work they did there; that his father kept all documents at a cabinet in Brooklyn; and that, in 2008, he was living in the Building, although he did not go to the subject

premises at that time.

**Discussion**

The record reveals no dispute of fact that Respondents have been using the subject premises as a karate school from very closely after the inception of Respondent's tenancy in the mid-1970s through the commencement of this proceeding. Ascertaining the legality of the karate school at the subject premises entails a somewhat labyrinthine odyssey through various aspects of land-use law.

Zoning Resolution 12-10 defines a "physical cultural establishment" so as to include any establishment to provide instruction in physical exercise, including martial arts,[6] a definition that encompasses the karate school. Zoning Resolution 32-31 prohibits the operation of a physical cultural establishment in the zone in which the subject premises is located without a variance from the BSA,[7] a requirement the New York City Board of Estimate first enacted on November 16, 1978. Whitehall Dev. Corp. v. Eldad, LLC, 2006 N.Y. Slip Op. 30814(U), ¶¶ 6-7 (S. Ct. N.Y. Co.). Respondents proved by a preponderance of the evidence, including but not limited to a check for the rent for the subject premises drawn on a business checking account for the karate school, that Respondent operated the karate school prior to November 16, 1978.

An extant use of land lawfully existing before the enactment of a zoning ordinance that would otherwise render the use noncompliant is a permissible "nonconforming" use. New York v. Bilynn Realty Corp., 118 A.D.2d 511, 513 (1st Dept. 1986). The distinction between a

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[6] This section of the Zoning Resolution can be found at https://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-text/art01c02.pdf.

[7] This section of the Zoning Resolution can be found at https://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-text/art03c02.pdf.

"nonconforming" use that may continue and an impermissible use turns on the legal status of the use at the time it started. Costa v. Callahan, 41 A.D.3d 1111, 1114-15 (1st Dept. 2007), People v. Hecht, 125 Misc. 2d 601, 601-02 (Crim Ct. N.Y. Co. 1984). Insofar as the karate school permissibly existed before the amendment of the Zoning Resolution requiring physical cultural establishment permit, then, the amendment of the Zoning Resolution as such does not per se prohibit continued use of the karate school.

However permitted nonconforming uses, as so defined, may be, nonconforming uses are detrimental to zoning schemes, such that public policy favors their eventual elimination. Buffalo Crushed Stone, Inc. v. Town of Cheektowaga, 13 N.Y.3d 88, 97 (2009), 550 Halstead Corp. v. Zoning Bd. of Appeals, 1 N.Y.3d 561, 562 (2003). Accordingly, the protection of vested rights in a nonconforming structure does not extend to subsequent construction, Sterngass v. Town Bd. of Clarkstown, 10 A.D.3d 402, 406 (2nd Dept. 2004), which the Court infers had to have occurred to effectuate the C of O the prior owner for the Building in 1994.

Moreover, the C of O itself provides that the use of the subject premises shall be for residential purposes. The newly-issued C of O wipes the slate clean in terms of terms of permissible use. See, e.g., Matter of Terrilee 97th St. LLC v. N.Y.C. Envtl. Control Bd., 146 A.D.3d 716 (1st Dept. 2017)(a subsequent C of O supplants the permissible use provided on prior I-card). As the C of O for the Building does not allow for commercial use of the subject premises generally or a karate school specifically, the operation of the karate school is illegal, New York v. Victory Van Lines, Inc., 69 A.D.2d 605, 608 (2nd Dept. 1979), giving rise to Petitioner's cause of action for possession. See Mason v. 12/12 Realty Assocs., 158 A.D.2d 334, 335 (1st Dept. 1990). Respondents argue that the issuance of the C of O compels the conclusion

that DOB inspected the subject premises and that the issuance of the C of O with DOB's presumed knowledge of the karate school indicates DOB's approval of it. However, a landlord has a cause of action for possession for such conduct even if DOB has not yet determined that a lessee's conduct violates an applicable Building Code provision. 1050 Tenants Corp. v. Lapidus, 289 A.D.2d 145, 147 (1st Dept. 2001).

Respondents argue that Petitioner may not prevail on a theory that the karate school violates the C of O because the predicate notices do not refer to the C of O. The predicate notices, however, state that Respondents are in breach of their lease by using the subject premises for commercial purposes and further that the commercial use violates the Zoning Resolution. The purpose of a notice to cure is to specifically apprise a tenant of claimed defaults in a tenant's obligations under a lease and of a termination of a lease if the tenant does not cure. 542 Holding Corp. v. Prince Fashions, Inc., 46 A.D.3d 309, 310 (1st Dept. 2007), 240 W. 37th LLC v. BOA Fashion, Inc., 24 Misc. 3d 145(A)(App. Term 1st Dept. 2009). The notice to cure makes clear that Petitioner took the position that the operation of the karate school violates Respondents' lease and that continued operation thereof would precipitate a summary proceeding. The citation of the Zoning Resolution as opposed to the C of O does not alter the notice to Respondents of Petitioner's position and the consequences of continued operation of the karate school, and the predicate notices therefore discharged their purpose. Hughes v. Lenox Hill Hospital, 226 A.D.2d 4, 17 (1st Dept. 1996), *appeal dismissed*, 90 N.Y.2d 829 (1997)(the standard upon which the Court evaluates a predicate notice in a holdover proceeding is whether the notice is reasonable under the circumstances). Compare Fanny Grunberg & Assocs., LLC v. Hyatt, N.Y.L.J. Dec. 9, 2002 at 21:5 (App. Term 1st Dept.)(a predicate notice that explicitly sets forth the factual

predicate for a landlord's theory of the case does not trump its erroneous citation of an incorrect section of a statute therein).

Respondents further argue that the use of the karate school is permissible as a "home occupation," which Respondent's first expert witness testified does not need to be in a C of O. Zoning Resolution 12-10 defines a "home occupation" as an accessory use which is incidental to or secondary to the residential use of a dwelling unit and, if teaching is involved, may be taught to not more than four pupils at a time. Zoning Resolution 15-13 provides that, in C6 districts, 49 percent of the total floor area may be used for a home occupation.[8] Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on a fact-based analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question that will clearly benefit from the expertise of specialists in land use planning. N.Y. Botanical Garden v. Bd. of Standards & Appeals, 91 N.Y.2d 413, 420 (1998).

Respondents did not plead that the karate school is a "home occupation." Whether Respondents pleaded it or not, an assertion that Respondents can defend against a violation of the C of O, if true, is excusable as a "home occupation" is an assertion in the nature of an affirmative defense and Respondents would therefore bear the burden of proving the elements thereof. Respondents did not introduce evidence as to the percentage of the floor area of the subject premises devoted to the karate school. In addition to that, Petitioner introduced into evidence photographs of Respondents in the karate school with more than four students and both

[8] This section of the Zoning Resolution can be found at: https://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-text/art01c05.pdf?v=1102

Respondents testified that they have had more than four students at a time.

Moreover, as a "home occupation" is an exemption from zoning norms, the Court shall narrowly construe it. Mason v. Dept. of Bldgs., 307 A.D.2d 94, 100 (1st Dept. 2003). The legislative thrust of the exemption conveys a goal of protecting artistic and professional uses, but not general commercial uses. Id. at 102. For Loft Law purposes, an "artist" means a person who is regularly engaged in the fine arts, such as painting and sculpture or in the performing or creative arts, including choreography and filmmaking, or in the composition of music on a professional basis, and is so certified by the city department of cultural affairs and/or state council on the arts, MDL § 276, a definition that does not encompass karate trainers. The expert evidence at trial supporting the proposition that a karate school is appropriate for "home occupation" is equivocal at best. As Respondents are not artists as such, as Respondents taught more than four students at a time, as the record does not contain proof of the square footage at the subject premises devoted to the karate school, and as a karate school is not a "professional" use,[9] the preponderance of the evidence does not show that the karate school is a home occupation.

Respondent raised a defense that Petitioner waived an objection to the karate school. As noted above, the Court found that Respondents proved that they operated the karate school for more than forty years prior to the commencement of this proceeding. The floor plans dated in 1992 refer to a karate school. The member testified that he was aware of the karate school perhaps as far back as the late 1990s but no later than 2005, after the issuance of the C of O for

[9] Compare People v. Cully Realty, Inc., 109 Misc.2d 169, 170 (App. Term 2nd Dept. 1981), *appeal dismissed*, 55 N.Y.2d 879 (1982)("a professional person" does not include a real estate broker).

residential use in 1994. A condition of such a duration gives rise to a presumption that Petitioner and/or the prior owner acquiesced in its use. Conforti v. Goradia, 234 A.D.2d 237, 238 (1st Dept. 1996), Rubin v. Glasner, 2002 N.Y. Misc. LEXIS 2095, at *5-6 (Civ. Ct. N.Y. Co. 2002). See Also 601 West Realty LLC v. Grigoff, N.Y.L.J. August 30, 2000 at 23:4 (Civ. Ct. N.Y. Co.)(waiver by acceptance of rent may be found in such circumstances).[10] Aside from this proposition of law, the timing of the commencement of this holdover petition for the use of the karate school, more than forty years into its operation and more than twenty years after the issuance of a residential C of O, belies the proposition that the operation of the karate school actually aggrieved Petitioner in any way.

As the operation of the karate school violates the C of O, Petitioner argues that Respondents' waiver defense does not apply and, indeed, a default in a tenancy can bar a waiver defense when it is serious enough as to implicate public policy, Charles Altenkirch & Son Inc. v. CDK Restaurant Inc., N.Y.L.J. June 26, 1986 at 17:5 (App. Term 9th and 10th Dists.), or when such a default adversely affects others, such as in the case of an illegal trade, business, or manufacture, Bel Air Leasing L.P. v. Kuperblum, 15 Misc.3d 986, 991 (Civ. Ct. Kings Co. 2007), Hudsonview Co. v. Jenkins, 169 Misc.2d 389, 393 (Civ. Ct. N.Y. Co. 1996) or when a tenant engages in illegal construction. 508 Columbus v. Beasley, 2010 N.Y. Misc. LEXIS 7067, at *12 (Civ. Ct. N.Y. Co. 2010).

However, while the operation of a commercial business in a residential premises can

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[10] While the lease between the parties contains a nonwaiver clause, the course of conduct of the parties can nullify such a clause. Simon & Son Upholstery, Inc. v. 601 W. Assocs., LLC, 268 A.D.2d 359, 360 (1st Dept. 2000), Franpearl, LLC v. Orenstein, 59 Misc.3d 130(A)(App. Term 1st Dept. 2018).

potentially preclude a waiver defense, it does not do so as a matter of law, particularly in the absence of a violation of health and safety standards or injury to the building. El-Kam Realty Co. v. Epstein, 148 Misc.2d 835, 836 (App. Term 1st Dept. 1990). While one could theorize about the adverse effects of a karate school on the Building, such as noise or egress issues or foot traffic, the record does not contain any evidence of such effects or any implications of the karate school that bear on "health and safety standards." Notably, the subject premises is located in a C6 District, which the Zoning Resolution defines as a "General Central Commercial District[]", which is "designed to provide for the wide range of retail, office, amusement service, custom manufacturing and related uses normally found in the central business district and regional commercial centers…." Zoning Resolution 31-16.[11] While the Building's zoning district does not render a use in violation of a C of O legal, it underscores the difficulty of showing a violation of "health and safety standards" serious enough to bar a waiver defense. Accordingly, the Court finds that Petitioner has waived its objection to the operation of the karate school.

The testimonial evidence of Respondents and affidavits they executed demonstrate that Respondents effectuated alterations in the subject premises without Petitioner's written permission, to wit, the electrical work and the construction of partitions. Respondents argue that Petitioner also waived an objection to the alterations. The record reveals much more of a fact dispute between the parties as to Petitioner's awareness of the alterations than there was with regard to the karate school. But even setting aside such a factual dispute, Respondents' alterations implicate two critical concerns of building regulation in New York, i.e., light and air,

[11] This section of the Zoning Resolution can be found at: https://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-text/art03c01.pdf?r=1102

Leventhal v. Straus, 197 Misc. 798, 800 (Mun. Ct. Bronx 1950), Schulte Realty Co. v. Pulvino, 179 N.Y.S. 371, 373 (App. Term 1st Dept. 1919), and that electrical work be done safely. N.Y.C. Admin. Code §27-3018(b). These concerns implicate an improper construction, which complicates Respondents' waiver argument. 508 Columbus, supra, 2010 N.Y. Misc. LEXIS at 7067. Even Respondents' own expert witness testified that the current state of the panel and the subpanel is improper and a fire hazard.

A landlord can waive an objection to an alteration in violation of a lease when a landlord did not respond to a tenant's repeated complaints and demands to repair conditions, Mengoni v. Passy, 254 A.D.2d 203, 203-204 (1st Dept. 1998), Haberman v. Hawkins, 170 A.D.2d 377 (1st Dept. 1991), Riveredge Apt. Co. v. Rosenfeld, 2003 N.Y. Misc. LEXIS 470, 1-2 (App. Term 1st Dept. 2003), 655 West Assocs. v. Asencio, N.Y.L.J., August 10, 2001, at 18:1 (App. Term 1st Dept.), or when a tenant repaired a previously uninhabitable premises, Freund & Freund & Co., Inc. v. Biscuits & Baths Tribeca, LLC, 23 Misc.3d 1129(A)(Civ. Ct. N.Y. Co. 2009). While Respondent introduced evidence of violations concerning electrical outlets from the 1990s, Co-Respondent testified that these had been remedied by 2008 and that her grievance was that there were not enough outlets and the ones there were not updated, which does not constitute a basis to find a waiver of an objection to alterations.

A landlord can also waive an objection to an alteration if the landlord gives permission or consent as such. Graham Ct. Owners Corp. v. Taylor, 34 Misc.3d 153(A)(App. Term 1st Dept. 2012), *modified on other grounds*, 115 A.D.3d 50, (1st Dept. 2014), *affirmed*, 24 N.Y.3d 742 (2015), 106 & 108 Charles LLC v. Hohn, 96 A.D.3d 511, 512 (1st Dept. 2012), Harar Realty Corp. v. Michlin & Hill, Inc., 86 A.D.2d 182, 187 (1st Dept. 1982), 5 Sunset Park Holdings, LLC

v. Brito, 34 Misc.3d 156(A)(App. Term 1st Dept. 2012), Nunz Equities E. LLC v. Mangan, 24 Misc.3d 144(A)(App. Term 1st Dept. 2009), Duell v. Brown, N.Y.L.J. Nov. 7, 1994 at 28:4 (App. Term 1st Dept.). Respondents argue that the prior owner and the member observed the alterations for seven years prior to starting this proceeding, thus demonstrating a waiver. One hurdle that Respondents have is the lease requirement that written consent is required for an alteration. See Roger Morris Apartment Corp. v. Varela, 53 Misc.3d 151(A)(App. Term 1st Dept. 2016). Another hurdle is the ambiguity in the record as to the extent of the prior owner's or the member's knowledge of the alterations. Without the written consent for the alterations required by the parties' lease, Respondents' only evidence of Petitioner's permission or consent is testimonial evidence. The Court does not find that Respondents provided reliable evidence to this effect. Respondent himself was unable to remember significant facts and dates on his testimony. Co-Respondent's testimony was inconsistent with her sworn statements submitted earlier in this matter. The karate instructor and the Respondents' son testified to the presence of the prior owner and the member in the subject premises, but such testimony is insufficient to show Petitioner's "permission or consent." Respondents have not met their affirmative burden of proving by a preponderance of the evidence that Petitioner waived its objection to the alterations. The Court therefore dismisses the waiver defense in relation to the alterations and finds that Petitioner is entitled to a final judgment of possession on those grounds.

When a landlord obtains a final judgment against a tenant on the basis of a breach of an obligation of a tenancy, RPAPL §753(4) normally entitles the tenant to a ten-day stay to effectuate a cure of the breach. Petitioner argues that Respondents are not entitled to a cure. If a tenant's alteration causes "lasting or permanent injury" to an apartment, the Court may deny the

tenant an opportunity to cure when a tenant, for example, guts a bathroom by removing and replacing all walls, flooring, lighting, and fixtures without first conducting an asbestos test before removing the walls or insuring that new sheetrock had the proper fire rating. 259 W. 12th LLC v. Grossberg, 28 Misc.3d 132(A)(App. Term 1st Dept. 2010), *aff'd*, 89 A.D.3d 585 (1st Dept. 2011). However, when the evidence fails to establish that a tenant "gutted and demolished" a bathroom as such, a landlord does not prove that the alteration rose a level such as to deny a tenant a statutory opportunity to cure. Sherman Realty LLC v. Kevelier, 58 Misc.3d 144(A)(App. Term 1st Dept. 2017).

The alterations here consist of the construction of non-load-bearing partition walls and electrical work, neither of which rises to the level of gutting a bathroom. Instructively, when tenants made alterations as dramatic as altering a balcony enclosure, enlarging a bedroom, and removing a door and an outer window without proper approvals and permits required by DOB and by unlicensed and uninsured contractors, Cornell Univ. v. Gordon, 2007 N.Y. Misc. LEXIS 9323, at *1 (S. Ct. N.Y. Co. 2007), *aff'd*, 76 A.D.3d 452 (1st Dept. 2010), a tenant's ultimate cure of such conditions preserved the tenancy anyway. Cornell University v. Gordon, N.Y.L.J. April 25, 2001 at 18:1 (App. Term 1st Dept.). Similarly, the removal of a sink, a medicine cabinet, and a toilet did not preclude an opportunity to cure. 201 W. 54th St. Buyer LLC v. Rodin, 47 Misc.3d 154(A)(App. Term 1st Dept. 2015). See Also Benjamin Scott Corp. v. Lydia, 23 Misc.3d 128(A)(App. Term 1st Dept. 2009)(alterations to floors are curable). The opportunity to cure the above cases afforded tenants is consistent with the proposition that the benefits of RPAPL §753(4) to tenants are to be spread as widely as possible. 201 W. 54th St. Buyer LLC, supra, 47 Misc.3d at 154(A), *citing* Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19, 24 (1984). The partition

walls and the electrical work therefore do not deprive Respondents of an opportunity to cure.

Accordingly, the Court dismisses so much of Petitioner's cause of action as seeks a judgment on a theory of commercial use of the subject premises, without prejudice to a cause of action sounding in nuisance if such a case would have any merit. The Court awards Petitioner a final judgment of possession only against Respondents for Respondents' breach of the lease requiring consent for alterations. The Court stays issuance of the warrant of eviction through December 24, 2018 for Respondents to cure the breach by legally removing the partition walls and engaging in the necessary and legal work to restore the panel and subpanel to their original condition. On breach, the warrant may issue. To the extent that Respondents require Petitioner to sign off on any document to obtain permits necessary to cure, the Court directs Petitioner to do so pursuant to New York City Civil Court Act §110(c).

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York
December 14, 2018

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HON. JACK STOLLER
J.H.C.