Multiple Dwelling Rule

Changed Consequences for Non-Compliance
Warren A. Estis, a founding partner at Rosenberg & Estis, specializing in commercial litigation and transactions, and William J. Robbins, a partner at the firm, write about the recent decision in *Czerwinski v. Hayes*, where the Appellate Term overruled its own prior decisions and changed the consequences an owner faces for not registering a building as a multiple dwelling.

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A multiple dwelling is a dwelling which is either rented out to be occupied, or is occupied, "as the residence or home of three or more families living independently of each other."[1] A "family" includes a single person "occupying a dwelling and maintaining a household."[2] In New York City, the owner of a multiple dwelling must register the building with the City of New York Department of Housing Preservation and Development, commonly known as HPD.[3] The registration gives information about, inter alia, the owner and the managing agent.

In the recent case of *Czerwinski v. Hayes*,[4] the Appellate Term, Second and Eleventh Judicial Districts, overruled its own prior decisions and changed the consequences an owner faces for not registering a building that should be registered as a multiple dwelling. Often, that situation arises where there is a two-family house and an apartment is added and rented out to another family. The geographical jurisdiction of the Appellate Term, Second and Eleventh Judicial Districts, is Brooklyn, Queens and Staten Island, boroughs in which the housing stock includes many two-family houses.

Previously, that appellate court had essentially held that the owner of an unregistered multiple dwelling was barred from bringing a non-payment or a holdover proceeding, pursuant to RPAPL § 711, in the Housing Court. Now, in *Czerwinski*, the court held that "the owner of an unregistered multiple dwelling may maintain a holdover proceeding and may recover possession in such a proceeding where the ground for recovery is not rent-based, although no ancillary money judgment may be sought or awarded. "Recognizing that there is a line of cases from that very court standing for precisely the opposite proposition, the Appellate Term expressly stated that "[t]o the extent that our prior cases are to the contrary, they are overruled."

In *Czerwinski*, the landlord commenced a holdover proceeding after service of a 30-day notice terminating the tenant's month-to-month tenancy. The petition alleged that the building was a two-family owner-occupied premises and thus not a multiple dwelling, and that the tenant was in possession of the second floor apartment.

The Civil Court, Queens County (James R. Grayshaw, J.) concluded that the building contained a third, unoccupied apartment in the basement. The Civil Court summarily dismissed the petition on the ground that the proceeding could not be maintained because the building was an unregistered "de facto" multiple dwelling. In doing so, the Civil Court relied on a line of cases from the Appellate Term, Second and Eleventh Judicial Districts, standing for the proposition that a holdover proceeding cannot be maintained where the premises are part of an unregistered "de facto" multiple dwelling, whether or not rental arrears and/or use and occupancy awards are sought as part of the proceeding.

The Appellate Term unanimously reversed the Civil Court, reinstated the petition and remanded the matter to the court

below. The Appellate Term judges sitting on the panel were Michael L. Pesce (presiding judge), Michelle Weston Patterson and Joseph G. Golia. The Appellate Term held that its own line of cases that the Civil Court had cited "should no longer be followed."[5]

The Appellate Term began its analysis with a discussion of the applicable statutes. Multiple Dwelling Law Section 325(2) sets forth the penalty for failing to register, providing in relevant part as follows:

. . . [N]o rent shall be recovered by the owner of a multiple dwelling who fails to comply with such registration requirements until he complies with such requirements. If a resident of an unregistered dwelling voluntarily pays rent or an installment of rent when he had a right to withhold the same under this subdivision, he shall not thereafter have any claim or cause of action to recover back the rent or installment of rent so paid. A voluntary payment within the meaning of this subdivision means payment other than one made pursuant to judgment in an action or special proceeding.

Similarly, Section 27-2107(b) of the Administrative Code of the City of New York provides that an owner who fails to file the required registration statement "shall be denied the right to recover possession of the premises for nonpayment of rent during the period of noncompliance, and shall, in the discretion of the court, suffer a stay of proceedings to recover rents, during such period." That same section of the Administrative Code also provides that in any proceeding pursuant to RPAPL § 711, "the owner shall set forth his or her registration number issued by the department, and shall allege that he or she has filed a statement of registration and shall annex a copy of the receipt of such registration to his or her petition." (RPAPL § 711 sets forth grounds for bringing a summary proceeding where a landlord-tenant relationship exists. These include holding over after expiration of the lease term, non-payment of rent, adjudication as a bankrupt, use of the premises for an illegal trade or business, and removal of a smoke or fire detector.)

Section 208.42(g) of the Uniform Rules for the New York City Civil Court implements these provisions by requiring that in every summary proceeding pursuant to RPAPL § 711, the petitioner "shall allege" either:

"(1) that the premises are not a multiple dwelling; or

(2) that the premises are a multiple dwelling and, pursuant to the Administrative Code, section 27-2097 et seq., there is a currently effective registration statement on file with the office of code enforcement in which the owner has designated a managing agent, a natural person over 21 years of age, to be in control of and responsible for the maintenance and operation of the dwelling."[6]

Section 208.42(g) also requires that the petitioner allege the following information:

"the multiple dwelling registration number, the registered managing agent's name, and either the residence or business address of said managing agent. The petitioner may (optionally) list a telephone number which may be used to call for repair and service."

The Appellate Term emphasized that the penalties enunciated in these statutes are rent-related. The Multiple Dwelling Law's "substantive penalty" for failure to register a multiple dwelling is "a bar to the recovery of rent." The Administrative Code, the court pointed out, "speaks both of a bar to the recovery of rent and the attendant legal consequences thereof, i.e., a bar to the recovery of possession based on the non-payment of such rent."

In light of this, the Appellate Term concluded in Czerwinski that the "failure to plead registration information" should have different consequences depending on whether it is a proceeding under RPAPL 711(2), i.e., based on non-payment of rent, or a proceeding under any of the other provisions of RPAPL 711. In the former case, the consequence is "a total bar to the relief sought, i.e., possession based on non-payment of rent as well as the rent sought." In the latter situation, "the recovery of an ancillary money judgment for rent and/or use and occupancy is barred but an award to the petitioner of a final judgment for possession only is not precluded."

In other words, the court held, the existence of an unregistered "de facto" multiple dwelling does not bar the remedy of recovery of possession on a holdover claim. A multiple dwelling registration or a showing that the premises are not a multiple dwelling is not a substantive element of a holdover cause of action. However, landlords of unregistered or improperly registered multiple dwellings are "divest[ed] . . . of the ability to make money from such premises." Therefore, there can be no monetary judgment ancillary to the holdover proceeding.

In addition to basing its holding on the statutory language, the court also set forth a public policy ground for its holding. The court noted that holdover proceedings are "more expeditious" than ejectment actions, which are brought in Supreme Court (and which do not require a showing of multiple dwelling registration at any stage of the action). In cases involving premises being used for an illegal trade or business or where the tenant has removed the smoke detector, the court continued, "[p]ublic policy and the public interest mandate that these cases be processed as quickly and efficiently as possible." It is the Housing Court that "is particularly well suited to render efficient and consistent resolution of cases in this sensitive area, and its judges have the specialized expertise required to accomplish this goal."

Therefore, reasoned the Appellate Term, the statutory intention could not have been to preclude the maintenance of a holdover proceeding in the specialized and expeditious Housing Court, even if the landlord did not comply with multiple dwelling registration requirements. Indeed, continued the Appellate Term, it is precisely by allowing such landlords to present their cases in Housing Court that enforcement is assisted by efficiently "bringing actually or potentially unsafe premises to the attention of the appropriate authorities." The court observed that, under its ruling, there is still a financial disincentive to non-compliance with multiple dwelling registration requirements, since a non-complying landlord is prohibited from collecting rent or use and occupancy from any tenant in such a building.

The following are additional points to consider in reviewing *Czerwinski v. Hayes*:

As recited in the Appellate Term decision, the trial court concluded that there was a third, unoccupied apartment in the basement "[b]ased on a report of a resource assistant to the Housing Court who was dispatched to inspect the building." The Appellate Term's view was that such a determination could not be made summarily without giving the landlord an opportunity at trial to deal with the issue.

The Appellate Term stated in relevant part:

"We note that under the circumstances presented, it was improper for the court to make such a finding [of a de facto multiple dwelling] prior to affording landlord a trial as to said issue."

The Appellate Term also expressly made clear that nothing in its decision should be construed as its having "passed upon" the issue of whether the building actually is a de facto multiple dwelling.

The point discussed in the preceding paragraph is briefly mentioned in the Appellate Term decision. The major significance of the case, and its major focus, is its substantive holding overturning its own prior decisions and permitting landlords not in compliance with multiple dwelling registration requirements to pursue non-rent related holdover proceedings and obtain a possessory judgment therein. The holding is binding only in the Second and Eleventh Judicial Districts. It remains to be seen whether the holding will be applied outside those judicial districts.

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Endnotes:

1. Multiple Dwelling Law § 4(7). See also Multiple Dwelling Law §§ 4(8) and (9).

2. Multiple Dwelling Law § 4(5).

3. See Multiple Dwelling Law § 325(1); New York City Administrative Code §§ 27-2097 et seq.

4. 2005 WL 711915, NYLJ, April 6, 2005, p. 27, col. 1, 33 HCR 254A (A.T. 2nd and 11th Jud. Dists. 2005).

5. Its own prior cases, which the Czerwinski court stated, in its view, should no longer be followed, are Santos v. Aquasvivas, NYLJ, July 10, 1997 (A.T. 2nd & 11th Jud Dists.); Lado v. Brown, NYLJ, July 8, 1997 (A.T. 2nd & 11th Jud Dists.); Raicovi v. Tobin, NYLJ, Oct. 23, 1995 (A.T. 2nd & 11th Jud Dists.); Glatzer v. Malkenson, NYLJ, Aug. 31, 1976 (A.T. 2nd & 11th Jud Dists.). It also included the following cases from other courts in the list of "above cited cases"it believed should no longer be followed: Mandel v. Pitkowsky, 102 Misc.2d 478, 425 N.Y.S.2d 926 (A.T. 1st Dep't 1979), aff'd on opn below, 76 A.D.2d 807 (1st Dep't 1980); Vidod Realty Co. v. Calvin, 147 Misc.2d 488, 577 N.Y.S.2d 825 (Civ. Ct. Bronx Co. 1989).

6. 22 NYCRR § 208.42(g).