

Matter of Tenants of 51, 53, & 55 West 28th Street

OATH Index Nos. 2408/09, 2734/09, 2735/09 (Oct. 27, 2009)

[Loft Bd. Dkt. Nos. TA-0179, TA-0180, TA-0181]

Undisputed evidence established that landlord overcharged tenants rent. Tenants' overcharge applications should be granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TENANTS OF 51, 53, & 55 WEST 28TH STREET
Applicants

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

On July 25, and August 7, 2008, the residential tenants of three interim multiple dwellings ("IMDs") located at 51, 53, and 55 West 28th Street, New York, New York, filed rent adjustment applications with the Loft Board pursuant to sections 282 and 286(2) of the Multiple Dwelling Law ("MDL" or "Loft Law") and title 29 of the Rules of the City of New York ("RCNY" or "Loft Board rules"). Petitioners, tenants Sophicles and Janine Starvi, Colin Brown, Cara Negrycz, Nancy Hagin, Leland and Robin Bobbé, Jerry Moriarty, Michael Combs, and Glen and Shauna Hansen, seek a rent adjustment claiming that they were overcharged. Respondent Jo-Fra Properties, Inc., the owner of the subject IMDs, opposes the applications. The Loft Board referred the cases on March 9, 2009, for conference and hearing.

Following a conference and various motions by the parties, a hearing was held on September 9, 2009. The tenants relied on documentary evidence and the testimony of two tenants: Mr. Bobbé and Ms. Hagin. Jo-Fra did not submit any proof to contradict the tenants' evidence regarding the overcharges. Instead, Jo-Fra argued that the applications should be dismissed because they are barred by a prior stipulation of settlement. The record closed on October 16, 2009, with the filing of post-hearing briefs.

I find that the overcharge applications are properly before this tribunal, that the tenants were overcharged, and that their applications should be granted.

BACKGROUND

The buildings in question and the parties involved have been the subject of extensive litigation and orders from various forums. The inception of this action dates to 2004, when the tenants filed coverage applications with the Loft Board for the subject buildings. Jo-Fra opposed the applications and the matter was referred to this tribunal for conference and hearing. While the matter was pending, Jo-Fra unsuccessfully sought to have the coverage claims removed to New York State Supreme Court. *Matter of Jo-Fra Properties Inc.*, 27 A.D.3d 298, 299 (1st Dep't 2006), *lv. denied*, 8 N.Y.3d 801 (2007).

On August 28, 2007, the parties appeared at OATH before Administrative Law Judge Faye Lewis and entered into a stipulation of settlement (Resp. Ex. A). The tenants agreed to withdraw their coverage applications without prejudice and Jo-Fra agreed to register the buildings as IMDs. Following the stipulation on the record, the parties attempted to memorialize their agreement in writing but failed to do so.

On December 30, 2007, the tenants sent Jo-Fra a letter setting forth purported rent overcharges for the period September 2004 through September 2007 (Resp. Ex. B).¹

On February 29, 2008, the Loft Board rejected Judge Lewis' letter advising that the matter had been settled, found the buildings to be IMDs subject to the Loft Law, granted the tenants' coverage applications, and accepted Jo-Fra's building registrations. *Matter of Tenants of 51-55 West 28th Street*, Loft Board Order No. 3407 (Feb. 21, 2008). Jo-Fra filed an Article 78 petition seeking to correct Loft Board Order No. 3407 to reflect that the tenants' coverage applications had been withdrawn, not granted.

On November 5, 2008, Justice Alice Schlesinger granted Jo-Fra's Article 78 petition. She found that the tenants withdrew their coverage applications pursuant to the stipulation and that the Loft Board erred in finding there were pending applications. Justice Schlesinger directed the Loft Board to strike that portion of Order No. 3407 which granted the tenants' coverage applications. *Jo-Fra Properties Inc.*, Index No. 107654/08 (Sup. Ct. N.Y. Co. Nov. 5, 2008).

The Loft Board issued an order consistent with the Court's decision. *Matter of Tenants of 51-55 West 28th Street*, Loft Board Order No. 3486 (Feb. 19, 2009).

¹ A complete copy of the exhibit is attached to Jo-Fra's answer as well as the tenants' June 11, 2009, submission.

The parties filed three pre-trial motions which were denied by this tribunal. On April 23, 2009, Jo-Fra moved to stay the overcharge proceedings on the ground that the tenants raised the same issue as a counterclaim in a case currently pending before Justice Carol Edmead. *See Jo-Fra Properties Inc. v. Bobbé*, Index No. 114288/08 (Sup. Ct. N.Y. Co.). The tenants argued that they were seeking a determination from the Court of the overcharges only as determined by the Loft Board and that this issue should be heard in the first instance by the Board which has jurisdiction and expertise in this area. Jo-Fra's motion was denied. *Matter of Tenants of 51, 53, and 55 West 28th Street*, OATH Index Nos. 2408/09, 2734/09, 2735/09 mem. dec. (May 27, 2009).

On June 2, 2009, Jo-Fra moved to dismiss the tenants' overcharge applications arguing that they improperly asserted a claim commencing with the filing of their 2004 coverage applications, which were withdrawn, and that, under 29 RCNY section 1-06.1, any overcharge must be calculated from the date Jo-Fra filed the registration applications. Jo-Fra's motion was denied. *Matter of Tenants of 51, 53, & 55 West 28th Street*, OATH Index Nos. 2408/09, 2734/09, 2735/09 mem dec. (June 22, 2009).

On July 23, 2009, the tenants moved for partial summary judgment seeking a determination of the base rent for the disputed units. The tenants' motion was denied because Jo-Fra alleged issues of fact which precluded summary judgment. *Matter of Tenants of 51, 53, and 55 West 28th Street*, OATH Index Nos. 2408/09, 2734/09, 2735/09 mem. dec. (Aug. 24, 2009).

On August 4, 2009, Justice Edmead granted in part and denied in part the parties' motions for summary judgment in the action pending before her. With regard to the tenants' counterclaim against Jo-Fra for overcharges, Justice Edmead denied Jo-Fra's motion to dismiss. She found that the tenants' coverage applications were withdrawn without prejudice and held that the counterclaim was not barred, under 29 RCNY section 1-06.1, by Jo-Fra's filing of the IMD registrations. She noted that the tenants were simply seeking an award based on any overcharge award issued by the Loft Board. *Jo-Fra Properties Inc. v. Bobbé, et al.*, Index No. 114288/08, at 28 (Sup. Ct. N.Y. Co., Aug. 4, 2009).

ANALYSIS

At the hearing Jo-Fra's sole defense was that the overcharge applications are barred by the August 28, 2007, stipulation, in which the tenants withdrew their coverage applications without prejudice and Jo-Fra agreed to register the buildings as IMDs. Jo-Fra made an offer of proof of subsequent correspondence (August and September 2007) between counsel and draft stipulations of settlement in order to clarify "what was really agreed to on August 28, 2008 [sic]" (Tr. 54-55, 65-66). These documents were marked for identification as respondent's exhibits F through O (Tr. 45-51). Jo-Fra claimed that these documents demonstrated that when the parties settled the coverage dispute it was with the understanding that the tenants would not be able to collect on any overcharge claims that were triggered by the filing of the coverage applications (Tr. 54, 57-61). I reserved decision on the admissibility of the documents (Tr. 79).

I now find that the proposed exhibits consist of parol evidence and that they should not be admitted into evidence to vary the clear terms of the 2007 stipulation. *See W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (evidence outside the four corners of an agreement "as to what was really intended but unstated or misstated is generally inadmissible to add or vary the writing"). In any event there is nothing in the offer of proof to suggest that the tenants waived their rights to file the instant overcharge applications. To the contrary, the exhibits indicate that the tenants were seeking to preserve all claims in relation to any other rent regulatory scheme. As held by Justice Schlesinger, Justice Edmead, and Judge Spooner, the withdrawal of the tenants' coverage applications was without prejudice. Nothing in the settlement, the related decisions, or the actions by the parties precludes the tenants from pursuing their overcharge claims. To the extent Jo-Fra suggests that the tenants should be estopped or that they have unclean hands, the Loft Board has declined to consider equitable claims finding that it has no jurisdiction to do so. *Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06, mem. dec. at 2-3 (Oct. 27, 2006), *adopted in part modified in part*, Loft Bd. Order No. 3457 (Sept. 18, 2008)); *Matter of Hoppe*, Loft Bd. Order No. 1314, 13 Loft Bd. Rptr. 289A, 297 (Feb. 27, 1992).

At Jo-Fra's request, I reconsidered the argument that, under the Loft Board rules, any overcharge must be calculated from October 1, 2007, the date Jo-Fra filed the IMD registration applications and not from August 10, 2004, the date the tenants' coverage applications were

filed. Jo-Fra failed to raise any new arguments and I find Jo-Fra's claims to be without merit for the reasons in my decision of June 22, 2009. Since my conclusion that the overcharges should be calculated from the filing of the tenants' coverage application is consistent with Justice Edmead's denial of Jo-Fra's motion to dismiss the tenants' overcharge counterclaim, I need not determine whether Jo-Fra is barred by *res judicata* as alleged by the tenants.

Turning to the merits of the claims, the maximum legal rent for an IMD unit is the last rent actually paid under the lease in effect on July 27, 1987, (or, if no lease was in effect, the rent actually paid in July 1987) plus subsequent increases as permitted by the Loft Law and/or the Loft Board's rules. 29 RCNY § 2-06.1. Section 2-06.1 permits a one-time increase which begins with the next rent payment after the IMD is registered, provided that the owner gives the tenants written notice of the increase within 30 days of issuance of the IMD number. 29 RCNY § 2-06.1(b). The size of this one-time increase depends on when the last prior increase occurred: 16 percent if the last prior increase was between October 29, 1986, and October 28, 1988; 24 percent if the last prior increase was between October 29, 1984; and October 28, 1986, and 33 percent if the last prior increase was before October 29, 1984. 29 RCNY § 2-06.1(c)(iii), (iv), (v). In an overcharge case, an IMD owner is entitled to credit for the one-time increases even though no demand was made at the time the disputed rents were paid. *Matter of Chin*, OATH Index No. 1142/97, at 2 (June 24, 1997), *adopted*, Loft Bd. Order No. 2154 (Oct. 10, 1997).

The tenants submitted undisputed evidence concerning the base rents for units 2 and 4 in number 51, units 2, 3, and 4 in number 53, and units 2, 3, and 4 in number 55 including rent rolls obtained from Jo-Fra for the period 1980 through 1987 (Pet. Exs. 1A, B, C), copies of relevant leases (Pet. Exs. 4, 5), and Jo-Fra's response to the tenants' discovery demands (Pet. Exs. 6A, B, C). The leases and the rent rolls show that there were no escalators paid to Jo-Fra by any of the tenants (Pets. Exs. 1-5) and Ms. Hagin and Mr. Bobbé testified that they never paid any amounts to Jo-Fra other than the monthly rents (Tr. 29, 32).

The record shows that only the 2nd (Hagin) and 4th (Krieger) floors of number 55 had leases in effect on July 27, 1987. According to the leases and the rent rolls, the base rents for the 2nd and 4th floor units are \$500 and \$800, respectively (Pet. Exs. 1C, 4, 5).

The July 1987 rent rolls show that the base rents for the 2nd (Bobbé) and 4th (Moriarty) floors of number 51 are \$700 and \$550, respectively (Pet. Ex. 1A) and that the base rents for the

3rd and 4th (Aricha and Cooper) floors of number 53 were each \$450 (Pet. Ex. 1B). The 3rd and 4th floors are currently occupied by Mr. and Mrs. Hansen, so the base rent is \$900. With regard to the 3rd floor of number 55, the rent roll shows that it consisted of two units in July 1987: 3F occupied by Brown at a rent of \$425 and 3R occupied by Matakos at a rent of \$450 (Pet. Ex. 1C). Thus, the base rent for the 3rd floor as one unit currently occupied by Ms. Negrycz and Mr. Brown is \$875. According to Mr. Petrucci, the parties have stipulated that the base rent for the 2nd (Combs) floor at number 53, formerly occupied by Debbie Gaventa (Pet. Ex. 2), is \$375.²

Jo-Fra filed revised IMD registrations on November 29, 2007 (Pet. Ex. 7). The Loft Board issued IMD numbers in March 2008 (Pet. Exs. 13A, B, C). Jo-Fra notified the tenants of increases on June 23, 2008 (Pet. Ex. 8). The 1980 to 1987 rent rolls indicate the month and year of the last rent increase for the disputed units (Pet. Exs. 1A, B, C). Jo-Fra also filed alteration applications in August 2008 (Pet. Exs. 9A, B, C), resulting in a six percent increase in accordance with 29 RCNY section 2-12(c) as of September 2008. *See Matter of Harmacol Realty Co.*, OATH Index No. 1975/96, mem. dec. at 32 (Oct. 25, 1996), *adopted*, Loft Bd. Order No. 2082, 17 Loft Bd. Rptr. 107 (Mar. 20, 1997) (filing of alteration application considered a milestone which accrues automatically). Jo-Fra has not reached any other legalization milestones at this time (Pet. Exs. 10 A, B, C).

The following chart shows the 1987 base rent, the month and year of the last increases prior to July 1987 as indicated in the rent rolls, the applicable percentage increase in accordance with 29 RCNY Section 2-06.1(c), and the current maximum legal rents including the six percent increase for filing an alteration application:

² The rent rolls indicate that Ms. Gaventa last paid \$375 in 1985 in the amount of (Pet. Ex. 1B). With the exception of Mr. Combs, the base rents and one-time increases asserted by the tenants are identical to the ones asserted by Jo-Fra in its June 23, 2008, demand for rent increases pursuant to 29 RCNY section 2-06.1. For Mr. Combs, Jo-Fra listed the base rent as \$350 (Pet. Ex. 8). Tenants' overcharge calculations used \$350 as the base rent, not \$375 as alleged. *See* Petrucci letter dated October 16, 2009, at 8. The parties did not explain these discrepancies.

Unit/Current Tenant	Base-Date Rent	Month & Year of Last Increase	Increase Upon Registration & Notice	Max Legal rent Upon Notice	Max Legal rent Including Alt App 6% Increase
51 West 28					
2/Bobbé	\$700	Sept. 1986	24%	\$ 868	\$ 920.08
4/Moriarty	\$550	Jan. 1987	16%	\$ 638	\$ 676.28
53 West 28					
2/Combs	\$375	Jan. 1984	24%	\$ 465	\$ 492.90
3 & 4/Hansen	\$900 (\$450 x 2)	Jan. 1987	16%	\$1,044	\$1,106.64
55 West 28					
2/Hagin	\$500	Jan. 1986	24%	\$ 620	\$ 657.20
3/Negrycz/ Brown	\$875	Jan. 1987	16%	\$1,015	\$1,075.90
4/Stavri	\$800	Jan. 1987	16%	\$ 928	\$ 983.68

The tenants also submitted undisputed evidence which showed that they paid monthly rent as claimed from September 2004 through September 2007, with the exception of Michael Combs (Unit 2 at number 53), who paid through June 2007. Jo-Fra's rent rolls from 2004 to 2007 confirm the payments except for the last three months of 2005, when no payments are recorded for any tenant in any building (Pet. Ex. 1). The tenants requested that Jo-Fra produce James Mistratta, who maintained the records for Jo-Fra, to explain the absence of any entries for these months, but he did not appear (Tr. 25-27, 34-35). Jo-Fra did not produce any other evidence to show that the rent was not paid in 2005 when it was not recorded. In any event, the tenants produced proof of their rent payments for October, November, and December 2005 in the form of cancelled checks and money orders (Pet. Ex. 12A-F) confirming that rent was in fact paid for these three months.

Accordingly, the rents paid during the period under review, the maximum monthly rents for the periods of review, and the overcharges are:

Unit/Current Tenant	Rent Paid Sept. 04 – Sept. 07	Max Legal Rent Sept. 04 – Sept. 07	Rent Overcharge
<hr/>			
51 West 28			
2 Bobbé	\$35,150 (950 x 37)	\$25,900 (700 x 37)	\$ 9,250
4/Moriarty	\$29,600 (800 x 37)	\$20,350 (550 x 37)	\$ 9,250
53 West 28			
2/Combs	\$31,450 (925 x 34)*	\$12,750 (375 x 34)	\$18,700
3 & 4/Hansen	\$55, 500 (1500 x 37)	\$33,300 (900 x 37)	\$22,200
55 West 28			
2/Hagin	\$26,825 (725 x 37)	\$18,500 (500 x 37)	\$8,325
3/Negrycz- Brown	\$37,000 (1000 x 37)	\$32,375 (875 x 37)	\$4,625
4/Stavri	\$29,600 (800 x 37)	\$29,600 (800 x 37)	\$0

* The period under review for Mr. Combs is September 2004 through June 2007.

FINDINGS AND CONCLUSION

I find the tenants were overcharged and recommend that the Loft Board grant the applications.

October 27, 2009

Alessandra F. Zorgniotti
Administrative Law Judge

SUBMITTED TO:

PHYLLIS ARNOLD
Chair

APPEARANCES:

ROBERT PETRUCCI, ESQ.
Attorney for Petitioners

MAURICE A. REICHMANN, ESQ.
AURY BENNETT STOLLOW, ESQ.
Attorneys for Respondent