

Matter of 285 Lafayette Street Condominium

OATH Index No. 2738/09 (Oct. 16, 2009),
[Loft Bd. Dkt. No. LB-0165; 32 East 12th Street, New York, NY]

On remand, Judge found that the tenants' departure from the unit was a turnover in tenancy and recommended that the Loft Board deny the abandonment application.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
285 LAFAYETTE STREET CONDOMINIUM
Applicant

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

On September 25, 2006, 285 Lafayette Street Condominium, the owner of the interim multiple dwelling at 285 Lafayette Street, New York, New York, filed an application seeking a declaration of abandonment pursuant to section 282 of the Multiple Dwelling Law ("Loft Law"), and title 29, section 2-10(f) of the Rules of the City of New York ("RCNY" or "Loft Board Rules"). The application alleged that Kalman Stein and Francesca Gianaris, the protected occupants, voluntarily vacated unit 2E in July of 1981.

On October 10, 2007, notice of the application and an opportunity to answer were served by mail upon the affected parties pursuant to 29 RCNY section 1-06(b). No answers were filed. The Loft Board thereafter docketed the application with this tribunal pursuant to 29 RCNY section 1-06(j)(2)(ii). A hearing was scheduled for June 4, 2007. A combined notice of trial and notice of default was served on all affected parties on April 30, 2007. No party moved to vacate the default and no one appeared at the hearing other than the petitioner's attorney and a witness. The hearing proceeded in the form of an inquest.

At the inquest, petitioner presented evidence establishing that Mr. Stein and Ms. Gianaris had lived in Unit 2E and left in July 1981 when they sold their lease to Ms. Kempner with no intention to return. On September 21, 2007, I found that since Stein and Gianaris left the unit in 1981, prior to the enactment of the Loft Law, they were not protected tenants. *Matter of 285*

Lafayette Street Condominium, OATH Index No. 1430/07 (Sept 21, 2007). As petitioner failed to prove that the unit had been abandoned by protected tenants, I recommended that their abandonment application be denied. *Id.* at 6.

By decision dated January 15, 2009, the New York City Loft Board rejected my report and recommendation and remanded for further hearing on whether Mr. Stein's and Ms. Gianaris's departure was an abandonment under 29 RCNY § 2-10(f)¹ or a turnover of tenancy. *Matter of 285 Lafayette Street Condominium*, Loft Bd. Order No. 3484 (Jan. 15, 2009).

This tribunal scheduled a hearing for September 15, 2009. All affected parties were given notice of the hearing. No one appeared other than petitioner's attorney and his witness. At the hearing, petitioner presented the testimony of Mr. Bemis and the supplemental affidavit of Mr. Stein.

On remand, I find Mr. Stein and Ms. Gianaris did not abandon the unit. Since the facts surrounding their departure are more akin to a turnover in tenancy, I recommend that the Loft Board deny the application.

BACKGROUND

Mr. Stein and Ms. Gianaris were the former tenants of Unit 2E. During the summer of 1981 they decided to move. Mr. Klein and Ms. Gianaris informed the landlord that they were moving out and had no intention of returning. The landlord did not object. They did not request permission to sublet. Mr. Stein and Ms. Gianaris had made improvements to the unit and wanted to recoup some of the costs (9/15/09 Pet. Ex. 1).² Thus, according to Mr. Stein, they "sold their lease" to Ms. Kempner (6/14/07 ALJ Ex. 2). Mr. Stein did not remember how much money they received "for the fixtures," but did recall that they vacated in July of 1981 (9/15/09 Pet. Ex. 1).³

¹ Because this application was filed prior to the 2006 amendments to Loft Board Rules, the abandonment rules that existed at the time of the filing apply. All references herein will be to the version of the rules that applied at the time of the filing.

² As the exhibits come from two different hearings, I am inserting the date of the corresponding hearing into the citations for clarification.

³ While Mr. Stein stated that he "sold his lease" to Ms. Kempner, his statement that this was to recoup the costs of the "improvements" and that they received money "for the fixtures" suggests that this was a sale of improvements, not a sale of rights (6/4/07 ALJ Ex. 2; 9/15/09 Pet. Ex. 1). As this sale was prior to the enactment of the Loft Law,

In 1982, when the Loft Law was enacted, Lina Kempner, Francine Fleischer, and Mark Weber were living in Unit 2E (Tr. 9). The building was subsequently registered with the Loft Board (Tr. 11). Around 1990 the building was foreclosed upon and purchased by 271 Mulberry Street LLC, which was made up of the IMD tenants and a developer (Tr. 12). As the tenants became owners/occupants of the building, the residential units were no longer subject to rent regulation. *See* Multiple Dwelling Law § 286(8)(Lexis 2009). The building was subsequently converted into condominiums (6/4/07 Pet. Ex. 5, 6; Tr. 13).

The offering plan for the condominiums, dated June 8, 1998, lists Lina Kempner, Francine Fleischer, and Mark Weber as the owners of Unit 2E (6/4/07 Pet. Ex. 6). On November 17, 1999, Kempner, Fleischer and Weber transferred the unit to Steven Paul (6/4/07 Pet. Ex. 8). Mr. Paul then transferred the unit to Michael P. McCormick on July 9, 2004 (6/4/07 Pet. Ex. 8). Mr. McCormick transferred the unit to its current owner, Danielbridge, LLC on November 17, 2004 (6/4/07 Pet. Ex. 8). As of the initial filing, the unit was being rented to David Shaffer (9/15/09 ALJ Ex. 1).

Petitioner filed a Co-op/Condo exemption form with the Loft Board on July 15, 2005 (9/15/09 ALJ Ex. 1). The Loft Board rejected the exemption form in part because the listed tenants of units 2E did not correspond with their records indicating that the IMD tenants were “Stein & Gianiaris” (6/4/07 Pet. Ex. 1). As a result, petitioner commenced this proceeding, seeking a finding that Stein and Gianaris abandoned Unit 2E.

ANALYSIS

This matter was remanded because the Loft Board does not believe the Loft Law requires a person alleged to have abandoned a unit to be a “protected occupant.” *Matter of 285 Lafayette Street Condominium*, Loft Bd. Order No. 3484, at 2. In reviewing the facts, the Loft Board found that more evidence was needed to determine whether section 2-10(f) of the Loft Law compels a finding of abandonment in this case or if there was merely a turnover of tenancy.

Section 2-10(f)(2) of the Loft Law defines abandonment as “the voluntary relinquishment of possession of a unit and all rights relating to a unit with the intention of never resuming

the Loft Board’s sale of improvements regulation does not apply and the sale does not constitute a sale pursuant to MDL § 286(6). *See* 29 RCNY § 2-07(h)(iii).

possession or of reclaiming the rights surrendered.” In determining whether a unit has been abandoned, the Loft Board considers a variety of factors enumerated in its rules, including:

- (1) the length of time since the occupant allegedly abandoned the unit;
- (2) whether the occupant owed rent at the time the occupant allegedly abandoned the unit and whether court proceedings to attempt to collect this rent have been installed;
- (3) whether the occupant’s lease for the unit has expired;
- (4) whether the occupant provided notice of an intent to vacate or requested permission to sublet the unit;
- (5) whether the unit contained any improvements which were made or purchased by the occupant and whether the occupant was reimbursed for those improvements;
- (6) whether any prior harassment findings have been made by the Loft Board concerning the occupant(s) of the unit or whether any harassment application remain pending;
- (7) whether any violations or notices to appear pursuant to the Loft Board’s Minimum Housing Maintenance Standards have been issued;
- (8) whether the owner has made affirmative efforts to locate the occupant to attempt to purchase rights pursuant to Multiple Dwelling Law § 286(12) or improvements pursuant to Multiple Dwelling Law § 286(6); and
- (9) whether an inspection of the unit by the Loft Board staff indicates that the unit is presently vacant.

See 29 RCNY § 2-10(f)(3). The Loft Board has stated that the definition of abandonment in section 2-10(f)(2) does not stand alone, but the Board may consider the nine factors in section 2-10(f)(3), otherwise “any time a tenant moved from an IMD unit, such move would constitute an abandonment and would suffice to deregulate the unit. Such an interpretation of the abandonment rule would be inconsistent with § 286 of the Multiple Dwelling Law.” *Matter of EPDI Associates LLC*, Loft Board Order No. 3524 at 5 (Sept. 17, 2009).

In determining whether a departure constitutes a turnover as opposed to an abandonment, the Loft Board has looked at the circumstances around the tenant’s departure. For example, in *Matter of 67 Vestry LLC*, Loft Board Order No. 3476 (Nov. 20, 2008), the Loft Board declined to adopt the administrative law judge’s finding of abandonment. The Board noted that the agreement between the owner and the tenant required the tenant to provide 2 months notice of its intent to vacate. *Id.* at 4. The tenant had provided such notice. *Id.* The tenant did not owe any

back rent when it moved out. *Id.* Because the Loft Board found that the tenant's departure complied with the terms of the lease, it found that the departure could not constitute an abandonment but was merely a turnover. *Id.* Likewise in *Matter of 25 Jay Street, LLC*, Loft Board Order No. 3491 (Mar. 19, 2009), the Loft Board did not adopt the administrative law judge's finding of abandonment. The Board noted that the tenant had provided the owner with 1 month's notice of her intent to vacate. *Id.* at 3. The Board also found that, since the owner had returned the tenant's security deposit, she likely did not owe any rent at the time of her departure. *Id.* This departure, the Board found, "was in the nature of a departure at the expiration of a lease by a tenant in good standing in the ordinary course, not an abandonment of the unit." *Id.*

While the aforementioned orders suggest that a turnover requires both notice to the landlord of intent to move and a showing that the tenant owed no back rent, the Loft Board has restated the rule as requiring one or the other; "evidence that a tenant gave notice to the building owner or left without owing rent arrears suggests the termination of one landlord/tenant relationship in a way that creates the opportunity for the seamless creation of another. By contrast, a tenant who departs without notice to the owner or owing rent arrears evidences the type of relinquishment captured by the abandonment concept." *Matter of EPDI Associates*, Loft Board Order No. 3524 at 5.

Here, the evidence suggests that the departure of Mr. Stein and Ms. Gianaris was more akin to a turnover than an abandonment. In response to the factors in section 2-10(f)(3), petitioner presented credible evidence that: Mr. Stein and Ms. Gianaris had not lived in the unit for 28 years; they provided notice of their intent to vacate and did not request permission to sublet the unit; the unit contained improvements for which they were reimbursed (9/15/09 Pet. Ex. 1); there were no harassment findings relating to Unit 2E or the building; and no violations or notices to appear exist in relation to Loft Board Minimum Housing Maintenance Standards (Abandonment Application at 5). These facts do not support a finding of abandonment, but rather suggest that the Mr. Stein's and Ms. Gianaris's tenancy was turned over to Ms. Kempner.

Since Mr. Stein and Ms. Gianaris provided notice of their intent to vacate and were reimbursed for their improvements, a finding of abandonment should not be made under section 2-10(f).

FINDINGS AND CONCLUSION

Mr. Stein and Ms. Gianaris turned over their tenancy of Unit 2E to Ms. Kempner in 1981, this does not constitute abandonment.

RECOMMENDATION

Based on the foregoing conclusions, I recommend that the Loft Board deny the abandonment application.

Kara J. Miller
Administrative Law Judge

October 16, 2009

SUBMITTED TO:

LANNY R. ALEXANDER
Executive Director

APPEARANCES:

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