

## ***Matter of Peachy***

OATH Index No. 746/09 (Dec. 3, 2008), *accepted*, Loft Bd. Order No. 3492 (Mar. 19, 2009)  
[Loft Bd. Dkt. No. LB-0170]

ALJ recommends that the Loft Board declare second floor unit abandoned by protected occupant who died, leaving unit vacant. In settlement, deceased's children withdrew objections and any claims for successor rights.

Amendment to abandonment rule adding a one year limitation period had a six month grace period before amendment became effective. New limitation period did not apply where application was filed before the end of the grace period. Amended application, filed after the effective date, related back to the original application.

Loft Board notes that new definition of abandonment implemented by rule amendment was effective immediately, without grace period.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**JOHN FURTH PEACHY**  
*Petitioner*

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### **REPORT AND RECOMMENDATION**

**TYNIA RICHARD**, *Administrative Law Judge*

This Loft Board proceeding arises from an abandonment application filed by architect John Furth Peachy, on behalf of James Macdonell, the owner of 43 Mercer Street, New York, New York, pursuant to Article 7-C of the Multiple Dwelling Law ("Loft Law") and title 29, section 2-10(f) of the Rules of the City of New York ("RCNY"). Petitioner seeks a declaration that the second floor unit of the building is abandoned due to the death of protected occupant Corrine Grad Coleman.

This amended application was filed on June 25, 2008, and, on July 10, 2008, notice of the application and an opportunity to answer were served by mail upon the affected parties: the four

children of Ms. Coleman, Mr. Macdonell, and a commercial tenant. Answers, which were due on August 14, were filed by Anthony, Amy, and Patricia Coleman.

On August 21, 2008, the Loft Board referred the matter to this tribunal. A combined notice of hearing and notice of default was served upon all affected parties on September 9, 2008. The fourth Coleman, Nathaniel, defaulted but later made an application to lift the default against him, which was granted on consent of the parties. A combined answer was later filed on behalf of all four children and the estate of Corrine Coleman by their counsel, John Polakas, Esq. The commercial tenant, Babes in Toyland, continued in default.

A pretrial conference was held on October 10, 2008. The hearing was scheduled for October 15, 2008.

The four Coleman children and the estate, appearing by Anthony Coleman as administrator,<sup>1</sup> appeared on the day of the hearing<sup>2</sup> and entered into a settlement stipulation with the owner by which they agreed (i) to withdraw any claims they had or have to the unit, including the right to fixture fees and assignment rights pursuant to Multiple Dwelling Law sections 286(6) and (12), for the sum of \$8,000 to be paid by the owner within 30 days of the hearing date and (ii) to withdraw their combined answer, dated October 4, 2008, and all objections to the instant abandonment application, and (iii) they specifically reserved any rights they may have to assert a claim to personal property belonging to Ms. Coleman in an action outside of the jurisdiction of the Loft Board and/or this tribunal (Tr. 4-5).

After the stipulation was entered into the record, respondents left and the matter proceeded as an inquest. At the inquest, the owner and his architect John Furth Peachy testified.

I find that petitioner has demonstrated that the unit was abandoned within the meaning of the Loft Law and recommend that the application be granted.

### **ANALYSIS**

#### **Procedural History**

This is the second submission of the instant abandonment application. Mr. Peachy filed the initial application on March 29, 2007, commencing a proceeding in this tribunal. On the scheduled hearing date, September 5, 2007, the owner appeared and was granted an adjournment to October 19, 2007, so the petition could be served on Ms. Coleman's estate, an affected party

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<sup>1</sup> Letters of Administration were awarded to Anthony Coleman on November 5, 2004 (Pet. Ex. 5).

<sup>2</sup> Nathaniel Coleman, who resides in the United Kingdom, participated in the pretrial settlement conference held that day by teleconference. By his counsel, he waived his right to participate in the hearing by teleconference.

not named in the original application. When petitioner's attorney appeared for the October 19 hearing with no information as to whether the estate had been served, petitioner was directed to amend and re-file the petition with the Loft Board and the matter was marked off the tribunal's calendar. *See* Letter of ALJ Rodriguez to Executive Director of the Loft Board, dated January 15, 2008. After many months passed, with no word from petitioner and no refiling, the tribunal returned the work folder to the Loft Board on January 15, 2008. *Id.*

In a letter to Mr. Peachy, dated June 3, 2008, the Loft Board reminded him that an amended application had never been filed and indicated that if it was not filed by June 27, 2008, the case would be dismissed for failure to prosecute. *See* Letter of Martha Cruz to John Furth Peachy, dated June 3, 2008. The abandonment application was resubmitted and filed with the Loft Board on June 25, 2008.

Recent amendments to the abandonment rule require an owner to file an abandonment application within one year of the date that the owner "knew or should have known" that a protected tenant abandoned an IMD unit. 29 RCNY § 2-10(f)(3). This new rule went into effect October 8, 2006, and applies to applications filed more than six months after its effective date, that is, after April 8, 2007. *See* NYC Charter 1043(e); 29 RCNY § 2-10(f)(9). Petitioner's application is timely because it was filed on March 29, 2007, before the new filing requirement went into effect. *See Matter of Peachy*, OATH Index No. 873/08, at 2 n.1 (Apr. 17, 2008) (abandonment application filed March 30, 2007 was timely). The fact that the amended application was filed after the April 2007 deadline does not work a different result, because the amendment relates back to the timely, original application. *See Matter of Legend Corp.*, OATH Index No. 2024/08, at 6 (June 12, 2008) (relation back applied where original application was filed before new rules went into effect but amended application was filed afterward, where amendment reflected necessary additional searches petitioner was instructed to make by the Loft Board and this tribunal to find affected parties); *Matter of 25 Jay Street, LLC*, OATH Index No. 2154/08, at 2 (June 26, 2008); *Matter of VVV Partnership*, OATH Index No. 211/08, at 3 (Oct. 23, 2007).

#### Abandonment

The Loft Board inspected the second floor unit on July 17, 2007, and found it vacant.

Mr. Macdonell testified at the hearing that he purchased 43 Mercer Street in 1994. When he moved into the building in 1982, as a tenant, Corrine Coleman already lived on the second

floor. He said he always had a good relationship with Ms. Coleman. He was out of town in July 2004, when she died, and was notified by his superintendent.<sup>3</sup> He said that none of her children lived with her at the time of her death, and no one had come to him to make a claim of rights to the unit.

According to Mr. Macdonell and Mr. Peachy, the unit has remained vacant since Ms. Coleman's death. Mr. Macdonell has been renovating the unit, with the assistance of Mr. Peachy, and he is in the final stages of obtaining a certificate of occupancy for the building. Mr. Peachy testified that he has been the architect for the building for many years, performing both renovations and legalization work. He said the unit has been under renovation for the past two years and was vacant the last time he visited, two months ago.

Loft Board rules define abandonment as "the relinquishment of possession of a unit and all rights relating to [it] . . . by the death of the IMD tenant." 29 RCNY § 2-10(f)(2).

Even before this rule was promulgated, it was well-settled that the death of a protected occupant established an abandonment. *See Matter of Mak (JSM Properties Inc.)*, OATH Index No. 531/00 (Jan. 10, 2000), *adopted*, Loft Bd. Order No. 2491 (Feb. 22, 2000); *Matter of Marcus*, OATH Index No. 2123/99 (Oct. 26, 1999), *adopted*, Loft Bd. Order No. 2456 (Dec. 13, 1999) (death is considered the voluntary relinquishment of possession and all rights to a unit); *Matter of Chambi*, OATH Index No. 1126/98 (May 5, 1998), *adopted*, Loft Bd. Order No. 2265 (June 25, 1998); *Matter of BLF Realty Holding Corp.*, OATH Index No. 990/97 (May 7, 1997), *adopted*, Loft Bd. Order No. 2120 (June 26, 1997); *Matter of O'Connell*, OATH Index No. 393/97 (Nov. 12, 1996), *adopted*, Loft Bd. Order No. 2050 (Jan. 9, 1997).

The abandonment rule provides, however, that succession rights may be asserted by the deceased tenant's family. The rule provides that death establishes an abandonment so long as "no family member . . . is denied the benefits of succession rights in accordance with 29 RCNY § 2-08.1." 29 RCNY § 2-10(f)(2). Section 2-08.1 provides succession rights to any family member who "has resided with the protected occupant in the unit as a primary residence for a period of no less than two years . . . immediately prior to the permanent vacating of the unit by the protected occupant." 29 RCNY § 2-08.1(c). By the terms of the settlement stipulation, the Coleman children withdrew their answer, which vaguely stated that two of them "claim[]

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<sup>3</sup> The death certificate indicated that Ms. Coleman died on July 4, 2004 (Pet. Ex. 1).

occupancy” to the unit, and released any claims they “had or have to the unit.” Thus, any claim to succession rights has been withdrawn.

I find that the evidence properly establishes abandonment and recommend the application be granted.

### **FINDINGS AND CONCLUSIONS**

1. Corrine Grad Coleman, the protected occupant of the second floor unit at 32 Mercer Street, New York County, died on July 4, 2004.
2. As a result of Ms. Coleman’s death, the loft unit has been abandoned.

### **RECOMMENDATION**

Petitioner’s application to declare unit 2 abandoned should be granted.

Tynia D. Richard  
Administrative Law Judge

December 3, 2008

SUBMITTED TO:

**MARC RAUCH**  
*Chairperson*

APPEARANCES:

**WALTER S. JENNINGS, ESQ.**  
*Attorney for Petitioner*

**JOHN N. POLAKAS, ESQ.**  
*Attorney for Respondents*