Matter of Kushner

OATH Index Nos. 2736/09 & 2737/09 (June 11, 2009)
[Loft Bd. Dkt. Nos. TR-0784, TA-0185]

ALJ denied owner's motion to dismiss coverage application and granted owner's motion to lift default on rent overcharge application. ALJ declined request for permission to depose proposed witnesses and declined to preclude testimony of former tenants based on Dead Man's Statute.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
JOSEPH X. KUSHNER, VANESSA BROWN and KIMBERLY BURNS
Petitioners

MEMORANDUM DECISION

TYNIA RICHARD, *Administrative Law Judge*

This Loft Board proceeding arises from coverage and rent overcharge applications filed by three tenants of 279 Church Avenue, Joseph X. Kushner, Vanessa Brown, and Kimberly Burns. In the coverage application filed on January 12, 2009, petitioners allege that the building is an IMD, that petitioners are protected occupants, and that their units are entitled to protected status and regulated rents established under the Loft Law. On February 2, 2009, the owner Madeline D' Anthony Ent., Inc., timely filed its answer to the coverage application. The overcharge application was filed on January 13, 2009, and respondent failed to file a timely answer. After the matter was referred to this tribunal, we served a combined notice of trial and notice of default to the parties on April 2, 2009.

This memorandum decision renders a disposition as to two motions and a number of discovery matters.

Motion for relief from default

On January 13, 2009, petitioners filed with the Loft Board an application seeking relief from alleged rent overcharge. The Loft Board served the application on respondent on January 16, 2009, but no answer was received. This tribunal served a notice of default. Loft Board rules

bar all defaulting parties from participating in the proceeding unless they move to vacate their default within 30 days. 29 RCNY § 1-06(i)(2) (Lexis 2008). The owner then timely served the instant motion.

Under Loft Board rules, a default can be vacated if the defaulting party moves for relief within 30 days and establishes "that good cause existed for the failure to file an answer. . . . Good cause can be established by proof of a reasonable explanation for failure to file an answer and a summary of the defense to be presented, which establishes it not be frivolous." 29 RCNY §1-06(i)(2); *see, e.g., Matter of Schwartz,* OATH Index No. 966/08 (Feb. 15, 2008), *adopted,* Loft Bd. Order No. 3430 (Apr. 17, 2008) (owner's late request for relief from default denied); *Matter of Thornley*, OATH Index No. 2180/07 (Sept. 28, 2007) (motion to vacate default granted where owner submitted motion within 30 days of combined notice of hearing and default and provided several explanations for its failure to comply with legalization guidelines). Respondent's motion was timely made within 30 days of notice of the default.

In its motion, the owner plaintively submits that it failed to answer the overcharge application because it never received it (Droege Affidavit ¶5, dated April 20, 2009). Under normal circumstances, this might not be an entirely persuasive assertion but note that the owner did timely answer the coverage application served around the same time and which is directly linked to the claim of rent overcharge. That is, if the tenants fail to prove they are protected occupants covered under the Loft Law, the rent overcharge application would also fail. It would be illogical to defend one but not the other. Thus, I find that respondent's contention that it did not receive the application is credible and constitutes good cause for its failure to file an answer.

In addition, the owner's defense is not frivolous. In support of its motion to dismiss, respondent persuasively argued that the coverage application failed to aver facts critical to petitioners' case, namely that three loft units were residentially occupied during the window period. The application alleged merely that "upon information and belief," the building was occupied as the residence or home of at least three families living independently of one another during the window period (Application ¶5). Although petitioners' amended application enlarges the original application by including allegations that three families residentially occupied three loft units throughout the window period and evidenced attributes of independent living, which is facially sufficient, respondent disputes that one of families actually resided in the building. This defense is appropriate for testing at trial and is not frivolous.

Accordingly, respondent's motion to vacate the default is granted. Additionally, respondent's proposed answer to the overcharge application is hereby accepted.

Motion to dismiss

On April 7, respondent filed a motion to dismiss the coverage application.[1] On April 20, petitioners filed its opposition to the motion to dismiss, submitting, among other things, the affidavits of three former tenants.

On April 23, 2009, petitioners filed an amended coverage application, which the Loft Board served on April 24. The time to answer the amended coverage application expired on May 29, and respondent has asked that it its amended answer be deemed the responsive pleading to petitioners' amended application without necessity of re-service. Its request was granted on May 18, 2009, during a conference call with the parties.

In support of its motion to dismiss, respondent argues that the facts alleged in the application are insufficient. Specifically, the original application alleged "upon information and belief" the building was occupied as the residence or home of at least three families living independently of one another during the window period, April 1, 1980 to December 1, 1981 (Application, ¶5). Respondent disputes there were three residential occupants during the window period, and argues the application makes no allegations of independent living at the premises during that time.

In response to the motion, petitioners submitted three affidavits of former tenants, all of whom claim that they lived in the building during the window period. According to the affidavits, Jeffrey Nesin and his wife Diane were residential tenants of the fourth floor loft unit throughout the window period (Nesin Affidavit ¶4, dated April 8, 2009). Louella Berliner and Corrine Robbins occupied the third floor unit throughout the window period (Nesin ¶6; Berliner Affidavit ¶2, dated April 8, 2009). The third floor unit was raw manufacturing space when Ms. Berliner moved in in 1978, and she configured it for residential use (Berliner ¶3). When Ms. Robbins moved in in 1982, the unit was equipped for residential use with a large kitchen, bathroom and tub, and sleeping loft (Robbins ¶5). Nesin, Berliner and Robbins all believed that Frederick and Janet Nihda residentially occupied the second floor unit throughout the window period (Robbins Affidavit, ¶¶1, 2, 4, dated April 8, 2009; Nesin ¶8). The Nihdas are now deceased (Robbins ¶2). Nesin states that the second floor unit was a live-work space where Mr.

[1] Respondent also submitted to the Loft Board an amended answer dated April 1, 2009.

Nihda created masks, puppets and props, and which the couple also used for residential purposes (Nesin ¶8). Nesin and Robbins recalled the unit contained a kitchen with stove and refrigerator, bathroom with a bathtub, and a sleeping area in addition to an artist's studio (Nesin ¶¶8, 9; Robbins ¶8). These former tenants were aware that the Nihdas also owned a home in Brooklyn (Robbins ¶9). The coverage application was amended to add these and other allegations.

As a result of the additional facts which have been set forth in the amendment, petitioners have alleged facts sufficient to state a claim upon which relief may be granted. The remaining bases for the motion to dismiss are without merit. Respondent's motion is therefore denied.

Other pre-trial matters

On May 18, 2009, the parties participated in a conference call with the tribunal to discuss several disputed discovery matters which were raised in letters to the tribunal dated May 15, 2009. My rulings are memorialized below.

Leave for permission to depose witnesses

Respondent seeks permission to take the deposition of the three affiants mentioned above, the intention of which respondent argues is to "prevent surprise at trial." I find no merit to the application.

Depositions are unusual in administrative proceedings, which have at their core the streamlined and efficient adjudication of cases. *Tenants of 51-55 West 28th Street v. Jo-Fra Properties, Inc.*, OATH Index No. 1019/05, mem. dec. at 2 (July 19, 2005) (owner's motion for permission to take oral depositions denied). Under OATH's rules of practice, depositions are "extraordinary discovery devices," permissible only upon motion for good cause shown. *Id*; 48 RCNY §1-33 (b) (Lexis 2008). We have held that the "good cause" standard is "manifestly stricter" than the "material and necessary" standard applicable to "as of right" discovery, such as requests for document production, *Human Resources Admin. v. Ben-Siyon Man of Jerusalem*, OATH Index No. 790/91, mem. dec. at 9 (Nov. 12, 1991), and that a party seeking permission to take depositions must therefore "show a special heightened need" for depositions before they will be authorized, *Conflict of Interests Bd. v. Katsorhis*, OATH Index No. 1531/97, mem. dec. at 10 (June 27, 1997) (denying motion to take depositions "absent a showing of special need"). *See Jo-Fra Properties*, OATH 1019/05 at 2.

The point is not to deny all requests for extraordinary relief, but to balance the need for such relief against "the complexity of the case," among other factors. *See* 48 RCNY §1-33 (d).

In *Matter of Prince*, a loft board case in which the owner sought permission to serve interrogatories, this tribunal denied the request while noting that "the burden, costs and time associated with fulfilling a discovery demand must be considered when determining whether to authorize discovery which is not as of right, as in this application. The beneficial results anticipated from the discovery should outweigh the costs and burden imposed by it." *Matter of Prince*, OATH Index No. 1506/95, mem. dec. at 2 (Sept. 12, 1995) (denying application to serve interrogatories). *See Matter of Tenants of 223 15th Street*, OATH Index No. 2399/08, mem dec. (Oct. 17, 2008) (petitioners' and respondent's requests for depositions denied); *Jo-Fra Properties*, OATH 1019/05 (respondent landlord was denied permission to depose 22 witnesses in a coverage application that included the applicants and other residents, window period occupants and non-window period occupants identified as witnesses to residential use); *see also Dep't of Buildings v. Fekete*, OATH Index Nos. 1118/07 & 1119/07, mem. dec. (Mar. 23, 2007) (denying motion to take depositions where respondent failed to show "good cause as to why depositions should be permitted"). Respondent has failed to show a "heightened need" for the depositions.

As in *Matter of Prince*, the costs and burden outweigh the need for this "extraordinary discovery device." The trial issues are narrow and finite. These witnesses are expected to testify about their residency during the window period and their observations of the residency of the Nihdas. That is no surprise to anyone. Respondent has failed to show that the information gleaned in any proposed depositions would be anything more than further elaboration of the statements already made by the tenants in their affidavits. Indeed, the affidavits provide the owner with more detail about the content of their likely testimony than is normally available in these proceedings.

Finally, the cases that respondent cites in support of its request are distinguishable as they involve discovery orders made in actions filed in civil court, rather than administrative proceedings. *See The Bromley Co., LLC v. Rachman*, 4 Misc.3d 136A (Sup. Ct. App. Term 1st Dep't 2004) (discovery order in civil court); *Blah, Blah, Blah Realty LLC v. Mazar*, 3 Misc.3d 134A (Sup. Ct. App. Term 1st Dep't 2004) (discovery ordered in civil court); *Houston Village Apartment Co. v. Zitin*, 2001 N.Y. Misc. LEXIS 1095 (Sup. Ct. App. Term 1st Dep't 2001) (discovery order in civil court). As such, the parties were subject to the Civil Practice Law and Rules under which depositions are routinely permitted. In addition, although these cases

involved "summary" proceedings of landlord-tenant disputes, the moving parties were successful in showing a demonstrable need for the depositions, which respondent has not done here.

Accordingly, respondent's request for permission to depose the three witnesses is denied.

Request to preclude testimony

Respondent also seeks to preclude at trial any hearsay statement of prospective witness Corrine Robbins that former tenants Frederick and Janet Nihda told her that they used the second floor unit as their home during the window period (Robbins Affidavit ¶2). Respondent contends that the rules against hearsay and the Dead Man's Statute prohibit such testimony. I disagree.

Precedent has clearly established that hearsay is admissible in the quasi-judicial administrative proceedings conducted at OATH, and that it may even form the sole basis for an administrative adjudication. *People ex rel. Vega v. Smith*, 66 N.Y.2d 130 (1985). While hearsay must be sufficiently reliable and probative in order to be given significant weight, *300 Gramatan Associates v. NYS Division of Human Rights*, 45 N.Y.2d 176, 179-80 (1978), the weight accorded is in the sound discretion of the administrative law judge. *See, e.g., Taxi and Limousine Comm'n v. Arisme*, OATH Index No. 1216/95 (June 13, 1995) (admission and reliance upon hearsay evidence alone does not violate due process rights; respondent's rights adequately protected by the ability to challenge the reliability and the sufficiency of the hearsay). Thus, I find no reason to preclude the proposed testimony on the basis that it constitutes hearsay.

Since the Nihdas are both deceased, respondent also contends that any reports of conversations the trial witnesses may have had with them are inadmissible because of the Dead Man's Statute. C.P.L.R. 4519 (Lexis 2008). This is not the case.

As a general rule, the tribunal does not require strict application of the technical rules of evidence or procedure routinely used in court proceedings. *Compare* Charter §1046(c)(1) (Lexis 2008) ("Adherence to formal rules of evidence is not required") and 29 RCNY §1-06(j)(2)(ii) ("Formal rules of evidence shall not apply to such hearings") *with* C.P.L.R. 101 (the CPLR applies to "civil judicial proceedings in all courts of the state"). The tribunal has ruled specifically on the applicability of the Dead Man's Statute to its proceedings. *See Matter of Sultan*, OATH Index Nos. 1314/98 & 1315/98 (Aug. 18, 1998), *adopted*, Loft Bd. Order No. 2323 (Oct. 27, 1998); *Health and Hospitals Corp. (Lincoln Medical and Mental Health Center) v. Huling*, OATH Index No. 1359/05, at 5 n.1 (July 22, 2005) (noting that "the Dead Man's

Statute rule . . . would not apply in administrative proceedings. Strict or technical rules of evidence are reserved for judicial proceedings.").

In *Matter of Sultan,* a loft board case, the tribunal declared that it would not reflexively apply the Dead Man's Statute to preclude witnesses from testifying about conversations with a decedent. *Matter of Sultan*, OATH 1314/98 & 1315/98 at 14, n.1.

The facts in *Matter of Sultan* are instructive in this case. There the tribunal admitted numerous hearsay statements attributed to the former owner of the IMD who had died 17 years earlier. The proceeding was commenced by tenants who contested parts of the narrative statement and proposed legalization plans, contending that they constituted an unreasonable interference with the use of their loft units. The current owner of the IMD, the daughter of the deceased former owner, made several statements attributed to her father, as did the tenants. The tribunal rejected the tenants' claim that the Dead Man's Statute prevented the use of the hearsay statements and both credited and rejected certain hearsay statements of the deceased owner offered by the owner and tenants, based upon the reliability and sufficiency of the individual statements.

I find no reason to preclude the proposed testimony on the basis of the Dead Man's Statute, therefore respondent's request is denied.

The parties were granted an adjournment of trial, which is presently scheduled for July 27 and 31, 2009, in order to devote time and attention to a settlement of the claims here, which relate to an action currently pending in Supreme Court. If settlement is not reached, the parties should be ready to proceed with trial on the scheduled dates, as any further adjournment is unlikely. The parties should exchange final witness lists, with a copy to the tribunal, at least one week (seven days) prior to trial. Any matters requiring my attention prior to trial should be raised at the earliest possible time.

Tynia D. Richard
Administrative Law Judge

June 11, 2009

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