Matter of Gatien

OATH Index Nos. 2121/13, 1033/14, & 2233/14 (May 13, 2016), *adopted*, Loft Bd. Order No. 4553 (Sept. 15, 2016), **appended**
[Loft Bd Docket Nos. TR-1060, TR-1111 & TR-1163;
43-49 Bleecker Street, New York, N.Y.]

In a coverage proceeding, applicants established that the building located at 43-49 Bleecker Street is an interim multiple dwelling, their three units are covered, and that they qualify for protection under the Loft Law. ALJ recommended that the applications be granted.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
JEN GATIEN, DAVID MULLEN,
GEORGE DEWEY, AND KELLY GIRTH
Petitioners
against -
ROGERS INVESTMENTS NV LP AND 49 BLEECKER, INC.,
Respondents

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

These are three tenant-initiated Loft Law coverage applications involving a building located at 43-49 Bleecker Street, New York, New York (the "Building"), pursuant to section 281(5) of Article 7-C of the Multiple Dwelling Law ("MDL" or "Loft Law") as amended on June 21, 2010 and on January 30, 2013, and title 29 of the Rules of the City of New York ("RCNY" or "Loft Board Rules"). MDL § 281(5) (Lexis 2016); 29 RCNY §§ 2-08, 2-09 (Lexis 2015). Petitioners Jen Gatien (Unit 306), David Mullen (Unit 503), and George Dewey and Kelly Girth (Unit 406), filed applications with the Loft Board on January 31, 2013 (Loft Board Docket No. TR-1060), August 30, 2013 (Loft Board Docket No. TR-1163), and January 29, 2014 (Loft Board Docket No. TR-1111), respectively, pursuant to Article 7-C, section 281(5) of the MDL and the Loft Board Rules. Petitioners seek a finding that the Building is an interim multiple dwelling ("IMD"), that their units are covered under the Loft Law, and that they are protected occupants of their respective units. Rogers Investment NV LP, the owner of the

Building ("respondent-owner"), filed answers to the coverage applications, as did 49 Bleecker Inc., lessee of the third floor of the Building ("respondent-overtenant") (ALJ Exs. 1A-1C, 3A-3C, 6A-6C). The Loft Board referred the applications for conference and trial. *See* 29 RCNY § 1-06(j) (Lexis 2015).[1]

A trial was conducted over the course of ten days during which the parties presented extensive documentary evidence and the testimony of 14 witnesses.[2] On November 30, 2015, post-trial briefs were filed on behalf of applicants Gatien, Dewey, and Girth, and on behalf of the owner of the Building. Respondent-overtenant did not submit a post-trial brief.

For the reasons below, I find that the Building is an IMD, units 306, 406, and 503 are covered, and petitioners are the protected occupants of their respective units.

PRELIMINARY MATTERS

Respondent-owner's Recusal Application

Prior to the start of testimony, respondent-owner requested that I recuse myself from presiding over this matter. The request was made on June 9, 2014, after Michael Kozek, Esq., counsel for several petitioners, forwarded to me e-mails that respondent-owner maintained contained communications that involved the merits of the case, including what may have been a general summary of settlement options, and attorney-client communication that had been divulged to a third party. The e-mails were forwarded to refute respondent-owner's contention that its principal, whom Mr. Kozek's clients sought to subpoena, was too ill to actively participate in the trial. Harry Shapiro, Esq., counsel for respondent-owner, stated that respondent-owner did not believe that I could remain impartial as a result of that disclosure and in view of this tribunal's rule that a judge other than the trial judge is to preside over settlement conferences. *See* 48 RCNY § 1-31 (Lexis 2015). I denied respondent-owner's request by e-mail on June 13, 2014, and again on the record prior to the commencement of testimony (Tr. 14-15).

This tribunal's rules provide that an administrative law judge:

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[1] On April 4, 2014, several petitioners moved for summary judgment, arguing that no material issues of fact exist and they were entitled to a judgment as a matter of law on their applications for coverage of the Building as an IMD. Respondents submitted their opposition to the motion. Finding that there were issues of material fact that warranted an evidentiary trial, I denied the petitioners' motion. *See Matter of Gatien et. al.*, OATH Index Nos. 2121/13, 2161/13, 1033/14, 1034/14, 1381/14, & 2233/14, mem. dec. (June 4, 2014). The parties' motion papers are incorporated into the record as ALJ Exhibit 7.

[2] In the course of the trial, the parties settled several applications, which were referred back to the Loft Board.

> shall be disqualified for bias, prejudice, interest, or any other cause for which a judge may be disqualified in accordance with § 14 of the Judiciary Law. In addition, an administrative law judge may, *sua sponte* or on motion of any party, withdraw from any case, where in the administrative law judge's discretion, his/her ability to provide a fair and impartial adjudication might be reasonably questioned.

48 RCNY § 1-27(b) (Lexis 2015).

The Judiciary Law, which is incorporated by reference into OATH's rules, requires recusal on enumerated grounds, none of which apply here. *See* Judiciary Law § 14 ("A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."). Furthermore, "[w]here bias is alleged by a party, evidence of bias must be established and shown to have been derived from an extra judicial source (citation omitted). '[A] mere allegation of bias will not suffice. There must be a factual demonstration to support the allegation of bias . . . .'" *Dep't of Housing Preservation and Development v. 331 West 22nd Street, LLC,* OATH Index No. 912/06, mem. dec. at 2 (May 15, 2006) (quoting *Matter of Warder v. Board of Regents*, 53 N.Y.2d 186, 197 (1981)).

The communication at issue here was limited and offered no meaningful insight into the details of the parties' settlement discussions. In addition, respondent-owner did not identify any basis for its belief that I could not remain impartial. *See People v. Moreno*, 70 N.Y.2d 403, 406 (1987) ("Unlike a lay jury, a Judge by reasons of . . . learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision.") (quotation omitted); *see also People v. Grasso*, 49 A.D.3d 303, 308 (1st Dep't 2008) (recognizing a judge's "broad discretion to determine whether recusal was warranted," Appellate Division upheld judge's decision not to recuse himself after he had participated in a settlement meeting with the parties but reported that nothing of substance or sensitivity was disclosed during that meeting). Having carefully considered respondent-owner's application, I determined that I could remain fair and impartial and render a decision based upon the appropriate legal criteria.

Withdrawal of Counsel

On July 15, 2015, David Brody, Esq., counsel for respondent-overtenant 49 Bleecker, Inc., filed an application for leave to withdraw as counsel to respondent-overtenant, contending that his firm, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., had not heard from and had been unable to reach Doron Zabari, the principal of 49 Bleecker, Inc. This was the second such application by Mr. Brody within a three-month period.[3] In support of his application, Mr. Brody submitted an affirmation which detailed his efforts to reach Mr. Zabari. Mr. Brody's July 2015 application was made just before respondents were to commence their defense (Tr. 644). It should be noted that a trial date scheduled for the preceding week had already been vacated at Mr. Brody's request because he had been unable to contact Mr. Zabari (Tr. 644). In an e-mail dated July 16, 2015, Mr. Zabari indicated that he did not object to Mr. Brody's motion as they had irreconcilable differences. He requested a brief adjournment to secure new counsel, to which Mr. Kozek objected on the grounds that it would delay the proceedings. I granted Mr. Brody's request for leave to withdraw as counsel and granted respondent-overtenant's request to adjourn the next scheduled trial date of July 20, 2015, which I converted into a conference.

On July 20, 2015, in proceedings held on the record, I granted respondent-overtenant's request to adjourn the trial to secure new counsel, over objection from Mr. Kozek, and the trial was adjourned for over seven weeks, until September 8, 2015 (Tr. 640-55). Respondent-overtenant did not retain new counsel and sought further adjournment of the proceedings, which request was denied (Tr. 660-63). Respondent-overtenant's failure to communicate with its previous attorney had already precipitated two motions to be relieved and adjournment of the trial. Moreover, in granting the lengthy adjournment in July 2015, I directed Mr. Zabari to advise this tribunal and all parties whether he had secured new counsel by August 14, 2015, which he neglected to do (Tr. 653). When asked for an update on August 19, 2015, he stated that he had identified possible new counsel, but no new attorney filed a notice of appearance or

[3] In April 2015, Mr. Brody sought leave to withdraw from representation in this matter because his firm had been unable to reach Mr. Zabari for five months and was therefore unable to adequately prepare for respondent-overtenant's defense. This request was made after several days of testimony had concluded and additional scheduled days of testimony were pending. Mr. Zabari opposed the motion, which Mr. Brody withdrew after discussions with Mr. Zabari (Tr. 647, 662). Mr. Brody's affirmations in support of his motions are incorporated into the record as ALJ Exhibit 8.

contacted this tribunal on respondent-overtenant's behalf (Tr. 660-63). The request for another adjournment appeared dilatory and was denied. *See* 48 RCNY § 1-32(b) (Lexis 2015) (applications for adjournments shall be granted for good cause only; delay in seeking an adjournment shall militate against request). I noted on the record that while parties are entitled to representation in this tribunal, it cannot be at the expense of the proceedings moving forward (Tr. 662). *See Dep't of Correction v. Cortes*, OATH Index No. 1230/06 at 2-3 (June 16, 2006) (respondent may not use right to counsel to delay hearing). I explained to Mr. Zabari, the representative for respondent-overtenant, the procedures for the remainder of the trial, and the trial proceeded as scheduled (Tr. 663-66).

Pending Civil Court Action

Pending before the Appellate Term, First Department is an appeal by applicant Gatien of a March 14, 2014 decision in a non-payment action brought by respondent-overtenant, in the Housing Part of Civil Court (*49 Bleecker, Inc. v. Gatien*, Index No. 064244/13). In the decisions on appeal, Judge Brenda Spears granted 49 Bleecker, Inc.'s request to depose Gatien regarding her Loft Law coverage claim and denied her motion for summary judgment, finding issues of fact existed as to her occupancy of the premises (Pet. Ex. 38). Respondent-owner contended in its post-trial brief that this tribunal "should await a decision by the Appellate Term before deciding this case" (Respondent-owner's Brief ("Resp. Br.") at 2). However, respondent-owner articulated no basis for holding this proceeding in abeyance.

Moreover, this tribunal has declined to stay Loft Law proceedings on the grounds that a related court case is pending. *See Matter of Tenants of 51, 53, & 55 West 28th Street*, OATH Index Nos. 2408/09, 2734/09, 2735/09, mem. dec. at 1 (May 27, 2009) (denying respondent's motion to stay Loft Board proceedings in rent adjustment application, this tribunal found "[t]here is no merit to the owner's contention that the pending Loft Board proceedings must be held in abeyance due to a pending nonpayment action.") (citing *Matter of Tenants of Jo-Fra Properties Inc.*, 27 A.D.3d 298, 299 (1st Dep't 2006) ("Assuming judicial jurisdiction concurrent with the Loft Board, resort to the courts should be withheld in deference to the Loft Board's expertise.")).

ANALYSIS

Multiple Dwelling Law

To be covered by the Loft Law under section 281(5), a building must: **(**1) at any time have been occupied for manufacturing, commercial, or warehouse purposes; (2) lack a certificate of occupancy or of compliance permitting residential use on the qualifying unit on June 21, 2010; (3) not be owned by a municipality; and (4) have been occupied for residential purposes as the residence or home of three or more families living independently from one another for a period of 12 consecutive months during the period commencing January 1, 2008, and ending December 31, 2009 ("window period"). MDL § 281(1), (5) (Lexis 2016).

To qualify for coverage under MDL section 281(5), the unit must (i) not be located in a basement or cellar; (ii) have at least one window opening onto a street or lawful yard or courtyard as defined in the zoning resolution for such municipality; (iii) have at least one entrance that does not require passage through another residential unit to obtain access to the unit; and (iv) be at least 400 square feet in area. MDL § 281(5) (Lexis 2016).

The Building is Eligible for Coverage

The evidence establishes that the Building, a six-story structure, has been occupied for manufacturing, commercial, or warehouse purposes and that it is located in a district zoned for manufacturing uses (Tr. 715-16; Pet. Ex. 1). Respondent-owner stipulated that there are no commercial uses in the Building that are inherently incompatible with residential use (Tr. 5).

Respondent-owner contends, however, based on a 2013 printout from a web page, that the New York City Department of Housing Preservation and Development ("HPD") classified the Building as including eight class A units and "HPD is exclusively charged with the obligation of registrations of Multiple Dwelling units in the City of New York" (Resp. Br. at 2). Without evidentiary support or citation to authority, respondent-owner contends that as the agency responsible for registering multiple dwelling units, HPD only makes such a classification when it is "fully satisfied that the building in fact meets all of the requirements for registration of a given building and the units therein as multiple dwelling units" (Resp. Br. at 2). Therefore, according to respondent-owner, this tribunal must find that the Building has eight class A multiple dwelling units and petitioners have failed to establish that they do not occupy those units. Respondent-owner urges that "[w]hile it may be true that some of the Applicants have resided in the building and that they may have used there [sic] spaces residentially, all of the

Applicants failed to establish that they are not occupying the 8 units classified by HPD as a class A Multiple Dwelling Units [sic]" (Resp. Br. at 2).

As can be gleaned from its bare-bones post-trial brief, respondent-owner argues that the Building does not qualify for coverage as an IMD because HPD has already classified units in the Building as residential. Respondent-owner relies on a printout from the HPD website, dated July 22, 2013, which, in a page displaying various data concerning the Building, has a numeral "8" underneath a heading that reads "A Units" (Resp. Br. at 2; Pet. Ex. 38 at 262). The same document states, in capital letters, "this property is not currently validly registered with HPD" (Pet. Ex. 38 at 262). In response to petitioners' subpoena for all records "concerning the registration of and classification of the Building," HPD produced certified records, dated June 6, 2014, which indicate that there is "No Valid Registration Information on File" for the Building (Pet. Ex. 133). The 2013 HPD printout upon which respondent-owner relies is ambiguous and, absent additional evidence that would clarify its accuracy and significance, does not establish that the Building is a legal multiple dwelling or is otherwise ineligible for Loft Law coverage.

To qualify for coverage, the Building must lack a residential certificate of occupancy pursuant to MDL section 301.[4] *See* MDL § 281(4) (Lexis 2016). Petitioners have established that the Building lacks a certificate of occupancy for residential use of the premises, although it has temporary commercial certificates of occupancy that permit use of the cellar and first floor of the premises for a theatre and for mechanical, boiler, and elevator machine rooms, and storage (Pet. Ex. 1).

Respondent-owner admits that there is no residential certificate of occupancy for the Building, but contends that this is because such documents were not required when the Building was constructed at the turn of the century (Resp. Br. at 1). However, respondent-owner advances no substantive argument or evidence to refute petitioners' contention that the Building lacks a certificate of occupancy pursuant to MDL section 301. Indeed, while section 301 states that certificates of occupancy are not required for specified categories of buildings that existed prior

[4] MDL section 301 prohibits occupancy of a multiple dwelling before issuance of a certificate of occupancy, except that no certificate of occupancy is required: (a) for class B multiple dwellings that existed before April 18, 1929, for which a certificate of occupancy was not required before that date and in which no alterations have been made, and (b) for any old-law tenement or class A multiple dwelling erected after April 12, 1901, that was occupied for two years immediately before January 1, 1909, in which no changes or alterations have been made. MDL § 301(1) (Lexis 2016). An "old-law tenement" is "a tenement existing before April twelfth, nineteen hundred one, and recorded as such in the department before April eighteenth, nineteen hundred twenty-nine, except that it shall not be deemed to include any converted dwelling." MDL § 4(11) (Lexis 2016).

to certain dates, respondent-owner offered no evidence that the Building fell within the exceptions set forth in the Loft Law.[5] Nor did respondent-owner direct this tribunal to any information on this issue in either the Department of Building or HPD records.

The record and argument regarding respondent-owner's contention that the Building does not qualify for coverage as an IMD are markedly underdeveloped and provide no basis for finding the Building ineligible for Loft Law coverage.

Gatien Coverage Application (Unit 306)

The remaining contested issue regarding coverage of the Building is whether the Building was residentially occupied for 12 consecutive months by three or more families living independently from each other during the window period.

An applicant seeking to establish that a unit qualifies for coverage under the Loft Law must show "sufficient indicia of independent living" to demonstrate the unit's use as a family residence, as well as some physical conversion of the unit to a dwelling. *Madeline D'Anthony Enterpirses Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep't 2012)*; Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986); *Franmar Infants Wear, Inc. v. Rios*, 143 Misc.2d 562, 563 (App. Term, 1st Dep't 1989); 29 RCNY § 2-08(a)(3) (Lexis 2015). Under the Loft Board Rules, determining whether the families are "living independently" of each other requires an examination of whether a unit has a separate entrance accessible from a public hallway or street, and has areas such as a kitchen area, a bathroom, a sleeping area, and a living room area that are

[5] Although respondent-owner contended that there were issues of fact and law regarding whether the Building is an old-law tenement which precluded coverage under Article 7-C in its opposition to petitioners' motion for summary judgment (ALJ Ex. 7), it did not expressly assert an old-law tenement defense at the trial or in its post-trial brief. The argument that can be deduced from careful reading of respondent-owner's post-trial brief, however, is that the Building is ineligible for Article 7-C coverage because it was constructed at the turn of the century before a certificate of occupancy was legally required and it is listed with HPD as having class A multiple dwelling units. While respondent-owner's brief is bereft of citation to case law or statutory authority, its argument appears to rest on the Loft Board having determined that "the multiple dwelling registration of an old law tenement is deemed equivalent of a certificate of occupancy pursuant to section 301 of the Multiple Dwelling Law," thus, rendering the old-law tenement ineligible for Article 7-C coverage because it is already a legal residential premises. *See Matter of Disney*, Loft Bd. Order No. 1183, 12 Loft Bd. Rptr. 304, 310 (May 2, 1991); *see also Matter of Esainko*, Loft Bd. Order No. 627, 6 Loft Bd. Rptr. 2 (June 17, 1987) (old -law tenement with a multiple dwelling registration and legal residential use not covered by Article 7-C). However, respondent-owner offered no proof that the Building is an old-law tenement with a multiple dwelling registration. Moreover, its evidence that HPD designated the Building as including class A multiple dwelling units is ambiguous.

arranged to be occupied exclusively by members of a family and their guests. *See* 29 RCNY § 2-08(a)(3)(i), (ii) (Lexis 2015).

Determination of the sufficiency of the indicia of residential nature of the loft requires a case-by-case analysis in which no single factor is determinative. *See Matter of Boyers*, OATH Index Nos. 1338/12, 1381/12 & 1403/13 at 14 (Feb. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4302 (Sept. 18, 2014); *Matter of Gareza*, OATH Index Nos. 2061/12 & 760/13 at 6 (Dec. 12, 2012), *adopted in relevant part*, Loft Bd. Order No. 4243 (Feb. 20, 2014); *Matter of 333 PAS CoO Tenant Group*, OATH Index No. 968/08 at 7 (June 30, 2009), *adopted*, Loft Bd. Order No. 3552 (Nov. 19, 2009); *see also Matter of South 11th Street Tenants' Assoc. & Matter of Lid Fla Realty Corp.*, OATH Index Nos. 1242-44/96 at 41-43 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999) (hereinafter "*Matter of South 11th Street").*

In determining whether there are sufficient indicia of residential use and physical conversion of the unit to a dwelling, this tribunal has considered "the presence of permanent improvements, such as bathrooms, bathing facilities, closets, and walls erected to separate living areas, and the presence of non-permanent items reflecting residential use such as refrigerators, stoves, and beds." *Matter of Boyers*, OATH 1338/12 at 14; *see also Matter of Pels*, OATH Index No. 2481/11 at 5-6 (June 20, 2012), *adopted*, Loft Bd. Order No. 4161 (June 20, 2013) (finding the installation of a kitchen, stove, refrigerator, cabinets, a desk and shelves, and the addition of walls to separate the living area and an additional doorway, were sufficient indicia of independent living and conversion); *Matter of 333 PAS CoO Tenants Group*, OATH 968/08 at 16 (finding refrigerator, stove, bedroom with built-in closets, and a bathroom with mirrors "sufficient proof of conversion to residential use"); *Matter of South 11th Street*, OATH 1242-44/96 at 44-46 (sufficient indicia of residential conversion where tenant cleared out debris, erected sheet-rock walls and hung a heavy curtain to enclose his living area, built a loft bed and shelving, installed a bathtub and a mail slot, and had personal property in the loft, including a table, chairs, hot plates, refrigerator, and stereo).

It is petitioners' burden to establish that they are entitled to the relief that they seek in their application by a preponderance of the credible evidence. 29 RCNY § 1-06(i)(4) (Lexis 2015); *Matter of Gareza*, OATH 2061/12 at 4. Petitioners have met their burden.

Piero Incisa occupied unit 306 from about 2003 to 2010, including during the window period. He testified that around 2003 he entered into an agreement with Saul Stollman, his

landlord, to rent unit 306 (Tr. 216-17; Pet. Ex. 43). Stollman lived on the third floor in a unit across from unit 306 (Tr. 216-17, 220). During his tenancy, Incisa paid rent to Stollman (Tr. 226, 239-41; Pet. Ex. 141). He believes that he signed a lease with Stollman, but is not certain. According to Incisa, although he paid rent to Stollman, he was aware that the Building was owned by someone who lived in Las Vegas (Tr. 274). Incisa lived in the unit until the end of 2009, but he may have paid rent until the beginning of 2010. He recalled moving out a few of his remaining belongings in early 2010 (Tr. 239, 251, 268, 278-79; Pet. Ex. 43). Incisa testified that while he and several other occupants on the third floor worked out of their units, they used the units primarily for residential purposes (Tr. 219-20).

Petitioners submitted into evidence an affidavit Incisa provided in a holdover proceeding filed by respondent-overtenant against Gatien. In that affidavit, Incisa stated that he moved into the unit in 2002. Attached to the affidavit are copies of several monthly rent, utility, and real estate tax statements that he received from Stollman between 2003 and 2009, including statements for September and November 2008, and September 2009 (Pet. Exs. 43, 141).

Before Incisa moved into unit 306, he had Stollman construct a wooden structure in the unit with stairs leading up to an area for his bed (Tr. 216-17). When he moved into the apartment its furnishings included: the newly built wooden structure for his bed with a built-in closet underneath; a kitchen with a stove and refrigerator; a bathroom with a shower, sink, and toilet; and three windows in the living and sleeping area and windows in the kitchen (Tr. 218, 236-39; Pet. Ex. 16). Incisa moved in with a mattress, table, chairs, couches, stools, kitchenware, clothes, and toiletries (Tr. 217-18). While living in the unit he added some shelves in the closet and kitchen and the shower was replaced because there was mold in the walls. Otherwise the structure of the apartment remained the same (Tr. 250-51).

In the face of limited documentary evidence in the form of three rent statements that span September 2008 through November 2009, the determination of whether Incisa resided in unit 306 during the window period turns on his credibility. In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of witness' testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies,* OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998); *see also Matter of Cohen*, OATH Index No.

2015/12 at 11 (Aug. 23, 2013), *adopted*, Loft Bd. Order No. 4261 (Mar. 20, 2014).

I found Incisa to be credible. He is not an applicant in this proceeding and testified that he met Gatien only a few times in the context of this litigation; therefore, there are no indicia that he has a vested interest in the outcome or has a bias against respondents or motive to favor petitioners (Tr. 258, 273). While there was some uncertainty as to the precise year that he moved into the unit, his testimony was otherwise consistent and persuasive. Furthermore, Incisa's description of the unit is corroborated by Gatien's testimony and photographs of the unit (Pet. Ex. 19).

Respondents did not refute Incisa's testimony that he lived in the unit during the window period, such as by offering evidence that the unit was not outfitted for residential use or that Incisa resided elsewhere during the window period. Moreover, the minimal documentary evidence of Incisa's residential use of the premises is not fatal, as his unrebutted testimony and the documentary evidence is persuasive. *See Matter of Cohen*, OATH 2015/12 at 12-13 (absence of documents supporting applicant's testimony regarding his residential use of the premises not fatal to applicant's case because his testimony and that of his witness was sufficiently persuasive and comported with common sense); *Matter of Gareza*, OATH 2061/12 at 8 ("While petitioners did not provide documentary evidence to support most of these indicia [of residential use], this omission is not fatal.").

Petitioners' evidence establishes that unit 306 was residentially occupied for more than 12 consecutive months during the window period. The unit, which is located on the third floor and has its own separate entrance, is over 400 square feet in area and has windows that face onto a street (Tr. 234-39; Pet. Exs. 16, 43). Therefore, petitioners have established that unit 306 qualifies for coverage under the Loft Law.

Having determined that the unit is covered, the next issue to be resolved is whether applicant Gatien is the protected occupant of unit 306.

Petitioners maintain that pursuant to Loft Board Rules 2-09(b)(1) and (2), Gatien is entitled to protection because she is the current occupant in possession of the unit and she commenced residential occupancy prior to the June 21, 2010 effective date of the Loft Law (Petitioners Gatien, Dewey, and Girth Brief ("Pet. Br.") at 30-31).

Section 2-09(b)(1) of the Loft Board Rules provides that "[e]xcept as otherwise provided herein, the occupant qualified for protection under Article 7-C is the residential occupant in

possession of a residential unit, covered as part of an IMD." 29 RCNY § 2-09(b)(1) (Lexis 2015). Where the residential occupant in possession is not the prime lessee, [6]

> the lack of consent of the landlord to a sublet, assignment or subdivision establishing such occupancy does not affect the rights of such occupant to protection under Article 7-C, provided that such occupant was in possession of such unit prior to: . . . (iii) June 21, 2010, for an IMD unit covered by MDL § 281(5) . . .

29 RCNY § 2-09(b)(2) (Lexis 2015). This rule "provides coverage for a residential occupant in possession of a covered residential unit, even if the occupant is not a prime tenant and even if the landlord did not consent to a sublet, assignment or subdivision, as long as the occupant was in possession prior to [the effective date of the Loft Law]"). *545 Eighth Ave. Assocs. v. NYC Loft Bd.*, 232 A.D.2d 153, 153 (1st Dep't 1996). Thus, an applicant who did not occupy her unit during the window period and who lacks privity with the Building's owner may be deemed the protected occupant if she was in possession of a covered unit before June 21, 2010.

Gatien, a documentary and independent film producer, testified that she has lived in unit 306 since March 2010 (Tr. 374, 381, 459). Before moving into the unit, she resided at 484 Broadway with her boyfriend, but when they broke up on February 22, 2010, she needed to find a new place to live (Tr. 374-75). After finding an advertisement for the apartment on Craigslist, she contacted Stollman in late February 2010 about renting the unit (Tr. 375-76; Pet. Ex. 15). Stollman showed her unit 306, which had a loft bed with a king-sized mattress left by the previous tenant. He offered to provide her with additional furniture, such as a TV, couch, table, and chairs, which appealed to Gatien because it allowed her to move in quickly (Tr. 380-81). The agreed upon rent was $2,800 per month (Tr. 384). Upon moving into the unit, Gatien had shelves installed and the apartment painted (Tr. 381-82).

Petitioners produced e-mails between Gatien and Stollman that support her contention that she met with Stollman and made arrangements to rent the unit in February 2010. The e-mails indicate that Gatien contacted Stollman on February 24, 2010, regarding a Craigslist advertisement, and he responded that "the apartment is available; I feel the only way to condider [sic] a living space is to be in it." Stollman indicated that he lived across the hall and would be

[6] A "prime lessee" is "the party with whom the landlord entered into a lease or rental agreement for use and occupancy of a portion of an IMD, which is being used residentially, regardless of whether the lessee is currently in occupancy or whether the lease remains in effect." 29 RCNY § 2-09(a) (Lexis 2015).

happy to show the space to Gatien (Pet. Ex. 15). After Gatien and Stollman met at the Building, she told him, in an e-mail dated February 25, 2010, "[r]arely do I walk into a place and immediately sense that I could call it home" (Pet. Ex. 15). She described the attributes of Stollman's floor that made it attractive, and stated she was "committed to closing a deal for [her] to stay there" (Pet. Ex. 15). Gatien disclosed that she would be sharing custody of her dog with her ex-boyfriend, and asked if that would be acceptable to Stollman (Pet. Ex. 15). These e-mails establish that Gatien sought "living space" that she could consider her "home."

After Gatien moved into unit 306, she and Stollman continued to communicate by e-mail. On March 26, 2010, in response to her inquiry about where to dispose of trash, Stollman provided detailed instructions. He also expressed concern that Gatien would bump her head on the low bridge by her bed, and offered to install a bumper (Pet. Ex. 15). In an e-mail dated April 2, 2010, Gatien asked Stollman if she could move a television and coffee table out of the unit, and thanked him for making the space "so home-y." She and Stollman communicated about a non-working refrigerator in the unit on June 15, 2015 (Pet. Ex. 15). The e-mails demonstrate that Gatien used the unit as her residence as she inquired into domestic issues such as discarding trash, repairing a refrigerator, and redecorating. They bolster petitioners' contention that Gatien began to make residential use of her unit around March 2010.

When Gatien moved into the unit, it was already outfitted for residential use (Tr. 402-04). Gatien described unit 306 as including a built-in bed on a wooden platform which is accessed by a wooden staircase, a living space with windows looking out onto a courtyard, a kitchen with a stove, refrigerator, and sink, and a bathroom with a shower, sink, and toilet (Tr. 386; Pet. Ex. 16). Photographs of the unit correspond to Gatien's description and show the following: a living room with a TV, couch, shelving, tables, chairs, and art on the walls; a bed on a platform that is accessed by a set of wooden stairs and is situated along one of the walls in the living room area; a closet with clothes and shoes; a kitchen with a stove, oven, refrigerator, sink, cabinets, shelving, and kitchenware; and a bathroom with a sink and mirror, shower, toilet, and toiletries (Pet. Ex. 19A, 19C-M; Tr. 399-402). Although some of the furniture and decorations changed during the time Gatien lived in the unit, the layout of the living room, kitchen, and bathroom has remained the same since March 2010 (Tr. 402-04). The photos also show three windows in the living room area and two windows in the kitchen (Pet. Exs. 19A, 19E, 19F).

Although theatrical at times, Gatien's testimony was detailed and consistent. Moreover, her account was corroborated by documentary evidence and the testimony of Scott Hunter-Smith, her next-door neighbor at the Building.

Hunter-Smith's testimony supports petitioners' contention that Gatien took possession of unit 306 before June 21, 2010. According to Hunter-Smith, he moved into apartment 305 at 49 Bleecker Street around November 2009 and lived there for approximately four years (Tr. 440). He testified that Gatien was his next-door neighbor in unit 306 and he specifically remembered that she moved into the unit in March 2010 because it was right around his birthday, which is on April 18 (Tr. 440-41, 453-54). He recalled seeing her move into the Building with "boxes and stuff" (Tr. 441, 452). Hunter-Smith went into Gatien's unit a few times in 2010, although he could not recall precisely when (Tr. 442, 447, 451-52, 454-55). He described the unit as including an elevated loft with closet space underneath and a spacious bathroom. Hunter-Smith testified that photographs of the unit depict how it appeared when he saw the unit (Tr. 442-43).

Hunter-Smith acknowledged that he did not recall details of his interaction with Gatien, such as specific dates. In addition, he seemed unclear as to precisely which year he moved out of the Building. Hunter-Smith testified that he moved out of the Building in February 2012, but his name appears on a final bill from Stollman to several people for December 2012. A note on the bill indicates that Stollman was leaving the Building and New York City and would no longer be the landlord for the third floor (Tr. 440, 445-46, 450-55; Pet. Ex. 35). When shown the document, Hunter-Smith testified that he had never seen it and that Stollman could have given it to his wife. He maintained that he moved out of the Building in the beginning of 2012 (Tr. 450-51).

In support of their contention that Gatien moved into the unit in March 2010, petitioners submitted documentary evidence, including a rent statement to Gatien titled "Bill for utilities as of March 8, 2010 and real estate tax for April, 2010." The statement indicates the rent due for unit 306 for April 2010 was $2,800 (Pet. Ex. 20 at 1). A similar document to Gatien for utilities as of April 6, 2010, and real estate taxes for May 2010 includes rent due for May 2010 in the same amount for unit 306. A bill for utilities to Gatien as of May 4, 2010, does not specify a rent amount, but lists the total amount due for June 2010 as $3,000 (Pet. Ex. 20). Gatien testified that she received an invoice for rent each month from Stollman. She explained that initially the monthly amount billed for utilities, real estate taxes, and rent fluctuated, so she and Stollman

agreed to a flat rate of $3,000 per month for rent, utilities, and taxes (Tr. 404, 488-89; Pet. Ex. 20). Petitioners also submitted a note signed by Stollman indicating that on March 1, 2010, he received a $2,800 check as a security deposit or last month's rent for the unit[7] (Pet. Ex. 17) and rent checks dating April 15, 2010 (in the amount of $2,800), May 3, 2010 (in the amount of $3,099), and June 2, 2010 (in the amount of $3,700). The checks are made out to Stollman and signed by Gatien (Pet. Ex. 18). These documents are persuasive evidence that Gatien took possession of the unit before June 21, 2010.

An applicant's residential use of the unit may be established by evidence such as receipt of mail at the subject unit and use of the unit's address on official documents. *See Matter of Gallo*, OATH Index No. 2401/13 at 6 (Oct. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4349 (Jan. 15, 2015), *reconsideration denied*, Loft Bd. Order No. 4426 (Sept. 17, 2015); *Matter of Muschel*, Loft Bd. Order No. 33, 1 Loft Bd. Rptr. 27, 30 (Nov. 23, 1983) (indicating the loft as the applicant's address on tax returns, checks, and a passport was persuasive because "the Board considers where one holds oneself out as residing as probative of where one resides in fact").

Petitioners submitted additional documentary evidence that they contend establishes Gatien's residential use of the unit before June 21, 2010, including an e-mail dated March 3, 2010, from Time Warner Cable to Gatien regarding installing phone, cable, and internet service at 49 Bleecker Street (Pet. Ex. 29), a Chase Bank statement from May 18, 2010, through June 15, 2010 (Pet. Ex. 25 at 1); bills from a veterinary office addressed to Gatien at the unit dated May 26, 2010, and June 14, 2010 (Pet. Ex. 23 at 2-3); an e-mail dated June 9, 2010, from Vanity Fair magazine summarizing Gatien's subscription which lists her address as suite 306, 49 Bleecker Street (Pet. Ex. 30); and a receipt for shoes dated June 16, 2010, that shows Gatien's billing and delivery address as 49 Bleecker Street, suite 306 (Pet. Ex. 33).

Respondents highlighted irregularities regarding some of the documents. Specifically, the Time Warner Cable e-mail identifies the unit in which the services were to be installed as apartment 100, not 306, and the Chase account statement lists Gatien's unit number as 308, not 306. Gatien, however, convincingly denied knowing why the Time Warner Cable document reflected unit 100, explaining that there is no such unit in the Building. She testified that service

[7] On voir dire, Gatien testified that the note may have been post-dated March 1, 2010, but that she paid a security deposit and the document would have been created within the first 60 days of her moving into the unit (Tr. 389-91).

was, in fact, provided to her unit (Tr. 480). Regarding the incorrect apartment number on the Chase Bank account statement, Gatien posited that it was a typographical error (Tr. 493-94). While these two documents, standing alone, do not show that Gatien resided in unit 306 before June 21, 2010, they establish that she used the Building's address to receive mail and services. Considered with other credible evidence, including testimony and contemporaneous documents, they support petitioners' contention that Gatien resided in unit 306 before the effective date of the Loft Law.

Petitioners offered additional documentary evidence in support of their contention that Gatien occupied unit 306 for residential purposes. This evidence includes Gatien's New York State driver's license, issued on July 26, 2010, which lists her address as "49 Bleecker Street 306" (Pet. Ex. 21), and her application with the New York City Board of Elections dated July 17, 2010, to change her address to 49 Bleecker Street, apartment 306 (Pet. Ex. 24B at 1). While these documents post-date the June 21, 2010 effective date of the Loft Law, they are proof of Gatien's residential use of the unit in July 2010, a period shortly after that effective date. Indeed, obtaining a driver's license that reflects one's new address and changing one's address for purposes of voting are consistent with having established residence in the unit and thus support Gatien's testimony that she moved into the unit prior to June 21, 2010.

Petitioners also submitted Gatien's federal and New York State income tax returns for 2009 and 2010 and her amended federal tax return for 2009, all of which list her home address as unit 306 at 49 Bleecker Street (Pet. Exs. 26-28). The 2009 federal and state tax returns were prepared on October 14, 2010, several months after the June 21, 2010 effective date of the Loft Law, because Gatien obtained an extension of the deadline for submitting her taxes (Pet. Ex. 26; Tr. 494-95). The application for an automatic extension of filing for the 2009 tax returns was filed on or about April 15, 2010, and lists 484 Broadway as Gatien's address (Pet. Ex. 26; Tr. 495). Gatien could not remember whether she reviewed the application for an automatic extension, but offered a plausible explanation for the use of 484 Broadway instead of the Building's address: her accountant, who she had used since 2008, may have completed the form on her behalf using information that was already in her file, including an old address (Tr. 496). An amended tax return for 2009, filed on February 10, 2011, lists Gatien's address as unit 306 at 49 Bleecker Street (Pet. Ex. 27). As proof that Gatien resided in the premises prior to June 21, 2010, her income tax returns, which were prepared after June 2010, are of little value.

Respondents disputed petitioners' claim that Gatien occupied the unit prior to June 21, 2010. In addition, respondent-owner contends that she used the unit for commercial, not residential, purposes (Resp. Br. at 2, 4).

Respondent-owner's evidence consisted of the testimony of Monilal Mannie, the Building's superintendent, who denied knowing that units in the Building were used residentially (Tr. 726-28). Mannie has been the superintendent at the Building for 27 years and his duties include cleaning the common areas, maintaining the boiler, and operating the freight elevator (Tr. 704, 715). He recalled meeting Gatien in Stollman's unit during Hurricane Sandy, which occurred in 2012, and having seen her in the Building with her dog on a few occasions in the year before the storm (Tr. 705-06). However, he did not know when she moved into the Building and did not help her when she moved in because Stollman had keys to the freight elevator (Tr. 708, 735).

Mannie testified that he did not enter unit 306 and he never saw Gatien in 2010 (Tr. 708-09). He recalled that at least two people moved into and out of unit 306 during the spring or summer in 2010, but he could not recall the exact months (Tr. 707-08). Mannie, who operated the freight elevator during the moves, observed desks, cabinets, a computer, and chairs being moved into unit 306 (Tr. 707-09). He later testified that he was not aware of any tenants who lived in their units during 2010, that all of the tenants were working in the Building, and that his boss informed him that the tenants only held commercial leases (Tr. 726-28). However, he also testified that Mullen has lived in his unit with his son for a "long time," although he could not say precisely how long (Tr. 739, 740).

Overall, Mannie was not credible. His testimony was inconsistent as he denied being aware that tenants resided in the Building, yet acknowledged that Stollman and Mullen lived there (Tr. 736, 739, 740). In addition, it seemed implausible that Mannie has served as the Building's superintendent for 27 years, yet was unaware of its residential occupants. As an excuse, he stated that there are 42 units in the Building; however, he seemed selectively forgetful or ignorant, rather than unable to keep track of the Building's occupants.

Respondents' other evidence is similarly unpersuasive. Respondents noted that a tax lien assessed against Gatien with an assessment date of July 19, 2010, indicates that her address was 484 Broadway, not unit 306 at the Building (Resp. Br. at 5; Tr. 474; Pet. Ex. 38 at 282). However, Gatien credibly testified that the lien reflected an old address to which the Internal

Revenue Service continued to send notices after she moved following her breakup with her boyfriend in February 2010 (Tr. 374-75, 542-43).

Respondents further contend that Gatien was a commercial, not residential, occupant of the unit. Respondent-owner noted that Gatien listed the unit as the address of her business in both her 2009 and 2010 federal tax returns (Pet. Exs. 26-28; Resp. Ex. D). Additionally, in 2010 she deducted $26,000 in rent for use of 80 percent of her home for business purposes (Resp. Ex. C; Tr. 523). Respondent-owner contends that Gatien's income tax returns, as well as her payment of rent using a business checking account, establish that she used the unit for commercial, rather than residential purposes (Resp. Br. at 4; Pet. Exs. 26, 27, 28; Resp. Exs. C, D).

Gatien testified that she works out of her home and did so in 2010 (Tr. 525). She shot a film in her apartment over one day in August 2010, and she uses her apartment to meet with people during the preproduction of a film (Tr. 459). She also has dedicated an area in her apartment as a home office with a desk, two book shelves, and a filing cabinet which is approximately two feet by a foot and a half (Tr. 460, 572). According to Gatien, the work space occupies about 15 to 20 percent of the unit and is located next to a window in one of the corners in the living area (Tr. 460, 573-74; Pet. Ex. 16). She sometimes sits on her couch to read a script and does not solely conduct work at her desk (Tr. 575). She also uses the work area for her volunteer projects and other activities, such as making family albums (Tr. 574-75). In June and July 2010, she rented a windowless office next to the elevator on the third floor of the Building because she was filming a movie and needed extra work space (Tr. 396-97). Gatien testified that she did not claim a deduction for all of the rent she paid that year and that she "definitely did not write off [her] apartment" because she lives there and her "apartment is primarily residential" (Tr. 524, 557).

The evidence demonstrates that Gatien deducted most, but not all, of the rental payments for her unit as a business expense. However, this tribunal and the Loft Board have declined to consider income tax returns dispositive of an applicant's residence, although they may be considered in assessing where one resides in fact. *See Matter of Boyers*, OATH 1338/12 at 23-24; *Matter of Muschel*, Loft Bd. Order No. 33, 1 Loft Bd. Rptr. 27, 30 (Nov. 23, 1983) ("testimony taken in connection [with a tax return] might very well lead to an analysis based on the tax laws, rather than Article 7-C, taking the inquiry away from the issue of residency"). In

Boyers, the applicants' testimony that they residentially occupied the subject premises was contradicted by evidence that they deducted 100 percent of the rent, utilities, and other items relating to the loft as expenses relating to a fitness business they operated in the premises. After a comprehensive analysis of the weight to be given to tax returns that contain representations contrary to those asserted in a Loft Law proceeding, this tribunal determined that "[a]t a minimum [the applicants'] contradictory statements on their tax returns should be assessed in analyzing their credibility . . . ." *Matter of Boyers*, OATH 1338/12 at 23-24.[8]

Here, petitioners established that Gatien resides and works in her unit. Respondents did not demonstrate that Gatien made pervasive commercial use of the unit sufficient to establish that she was not its residential occupant. That the predominant character of Gatien's use of the unit is residential rather than commercial is supported by credible testimony and photographs of the unit, as well as by her communications with Stollman, in which she described the unit as a home. Gatien's rental of additional space on the third floor of the Building in June and July 2010 because she needed extra work space lends credibility to petitioners' contention that her use of the unit was primarily residential: it suggests that instead of allowing her work to overtake her home, she acquired additional work space (Tr. 396-97). In sum, respondents failed to demonstrate that Gatien was a commercial, not residential, occupant of unit 306.

Respondent-owner also points to Gatien's use of a business bank account to pay rent, rather than a personal one, as evidence that she was a commercial occupant. However, while Gatien's use of a business account to pay for her residence suggests that she may have comingled her personal and business affairs, it is insufficient to overcome the credible evidence that she resides in her unit. *See Matter of Romano*, OATH Index No. 2661/14 at 18 (Nov. 18, 2015), *adopted*, Loft Bd. Order No. 4459 (Jan. 21, 2016) (lack of judgment in financial matters does not mean applicant lied at trial regarding when he moved into the unit and improvements he made, particularly given documents that corroborate his testimony).

[8] *C.f. Matter of Ansonia L.P. v. Unwin*, 130 A.D.3d 453 (1st Dep't 2015) (tenant who declared under penalty of perjury on her income tax returns that she did not occupy her apartment for personal use and deducted 100 percent of her rent as an expense of her S corporation was precluded from claiming that the apartment was her primary residence for purposes of defending against eviction proceedings under the Rent Stabilization Code); *Matter of Ukai*, OATH Index Nos. 1394/14 & 1220/15 at 22-23 (Nov. 2, 2015) (while noting that *Ansonia* concerned rent stabilized apartments, not coverage under the Loft Law, this tribunal found that preclusion was not warranted for other reasons).

It is undisputed that Gatien is the current occupant in possession of unit 306 (Tr. 374, 418), a covered unit. Gatien is not a prime lessee of the unit, having no lease or rental agreement with the owner of the Building. *See* 29 RCNY § 2-09(a). Instead, she rented the unit from Stollman in 2010, and paid rent to him until December 2012, when he notified her that he was moving out of the Building and New York City (Tr. 505; Pet. Ex. 35). At about the same time, respondent-overtenant entered into a commercial lease with respondent-owner for the third floor of the Building, and became the prime lessee of the unit (Tr. 505-06; Pet. Exs. 6, 35). Respondent-overtenant has challenged Gatien's coverage application in this proceeding and seeks to gain possession of her unit, seemingly for commercial use (ALJ Ex. 3C; Gatien: Tr. 505-06; Mannie: Tr. 710-11).

The credible evidence establishes that Gatien commenced residential occupancy of unit 306 at the Building before the June 21, 2010 effective date of the Loft Law, and remains the residential occupant in possession of that unit. Accordingly, she qualifies as the protected occupant of unit 306 under Loft Board Rules 2-09(b)(1) and (b)(2). *See Matter of Mignola*, Loft Bd. Order No. 4509 at 7-8 (Apr. 21, 2016 (non-prime lessee applicants who moved into their units before the effective date of the Loft Law qualified for protection under sections 2-09(b)(1) and 2-09(b)(2)); *Matter of Kuonen*, Loft Bd. Order No. 4333 at 3 (Oct. 24, 2014) (an occupant who rented a room within an IMD unit from the net lessee of several floors in the building held to be a protected occupant where she took occupancy prior to the effective date of the 2010 amendment pursuant to an agreement with the net lessee, who was acting as the landlord for the unit).

Accordingly, petitioners have established that unit 306 qualifies for coverage under the Loft Law and that Gatien is the protected occupant of the unit.

Dewey and Girth Coverage Application (Unit 406)

Dewey and Girth testified that they have lived together in unit 406 since August 2007 (Dewey: Tr. 332-33, 341; Girth: Tr. 355-56, 362). They had visited the unit before moving in because Dewey worked with the previous tenant (Dewey: Tr. 332-33; Girth: Tr. 355). When the previous tenant informed Dewey and Girth that he was moving out they expressed their interest in the unit and eventually signed a two-year lease, beginning in August 2007 and ending in July 2009 (Dewey: Tr. 332-33; Girth: Tr. 355). Their lease was with Allan Buchman, to whom they

paid a monthly rent of $3,600 (Tr. 333, 352).[9] Dewey testified that they renewed the lease in 2009 for a year, but then it became more of a "handshake deal" and he did not recall signing a lease after 2010 (Tr. 350-51). Dewey did not retain a copy of the lease or any renewals (Tr. 350-51).

When Dewey and Girth moved in they purchased some items from the previous tenant, such as shelves, lockers, and a dishwasher, and did not make any changes to the unit's structure (Dewey: Tr. 334; Girth: Tr. 356-57). They also bought a new large sectional couch and dining room table since they were moving from a smaller apartment, in addition to other furniture and decorations to make the space their own (Dewey: Tr. 334; Girth: Tr. 356-57). They initially moved in boxes with clothes and kitchenware and the newly purchased furniture arrived a few days later (Tr. 334-35).

Dewey and Girth described the layout of the unit as follows: the entrance opens into a narrow hallway which has bookshelves; immediately to the right of the entrance is a bathroom which has a sink, toilet, and shower; the hallway leads to a large loft space with a living area with a TV, desk, sectional couch, rug, coffee table, and chairs; the kitchen is also located in that large space and has a stove, refrigerator, sink, wash machine, dishwasher, an overhang with pots, cabinets, and shelving with glasses, cups, and plates; the kitchen area also has a large dining room table with four chairs; and there is a separate room with a bed, nightstand, lamp, and closet space with clothing (Dewey: Tr. 335, 337-38; Girth: Tr. 357-59; Pet. Ex. 94). The unit has at least three large windows in the front that face out onto Bleecker Street (Dewey: Tr. 336, 338; Girth: Tr. 358).

Photographs of the unit show a large room with a TV, desk, coffee table, couch, dining room table, lamp, art on the walls, and chairs, a kitchen area with a refrigerator, stove, sink, cabinets, and shelves holding glassware and kitchenware, and a separate room with a bed and nightstand holding items such as books and a fan (Pet. Exs. 98A-K; Dewey: Tr. 339-40; Girth: Tr. 360-62). The photos also show Dewey and Girth celebrating Easter and Christmas with family in the unit (Pet. Exs. 98G-K; Girth: Tr. 361-62). Dewey and Girth testified that the

[9] Buchman filed a coverage application for unit 407, which is next door to Dewey and Girth's unit (ALJ Ex. 5A; Pet. Ex. 139). That matter was settled and referred back to the Loft Board.

photographs accurately represent the configuration of the unit since 2007, including during the window period (Dewey: Tr. 340; Girth: Tr. 362).

Dewey and Girth's testimony is corroborated by that of Elizabeth Dewey, Dewey's sister, and Mary McInerney, a long-time personal and professional friend of the couple. Both witnesses testified that they have visited the unit on several occasions and that it was used by Dewey and Girth for residential purposes during the window period and since the beginning of 2010 (McInerney: Tr. 306-07, 313; Elizabeth Dewey: Tr. 318-19, 327-28). The witnesses' testimony as to the layout of the unit and its furnishings also corroborated that of Dewey and Girth (McInerney: Tr. 307-12; Elizabeth Dewey: Tr. 320-27).

Petitioners also submitted documentary evidence that supports their contention that Dewey and Girth were the residential occupants of unit 406 during the window period. Girth received bank and insurance statements and telephone bills addressed to her at the unit in 2007, 2008, and 2009 (Pet. Exs. 87-92). Dewey received financial, tax, and bank statements at the unit in 2008 and 2009 (Pet. Exs. 93, 95-97). He also listed the Building as his home address on his federal income tax returns for 2008 and 2009 (Pet. Exs. 142, 143).

I found Dewey, Girth, and their witnesses to be forthright, consistent, and clear in their testimony, which was supported by documentary evidence.

Petitioners' credible evidence, which was undisputed, establishes that unit 406 of the Building was residentially occupied during the window period by Dewey and Girth, who continue to reside in the unit (Tr. 332-33, 355). Petitioners have further established that the unit, which is located on the fourth floor of the Building, is over 400 square feet in area, has windows that overlook a street, and has its own separate entrance (Tr. 334-38; Pet. Exs. 94, 98A-K).

Accordingly, unit 406 qualifies for coverage under the Loft Law. Dewey and Girth, who have resided in the unit since 2007, are the protected occupants of the unit pursuant to Loft Board Rules 2-09(b)(1) and (b)(2).

Mullen Coverage Application (Unit 503)

Respondent-owner concedes that unit 503 was occupied residentially during the window period, that it is in excess of 400 square feet and has a window facing to the street, and that there is a separate entrance to the unit (Tr. 5-6, 31-32). Thus, the remaining issue is whether Mullen is the protected occupant of the unit.

Mullen's unrefuted testimony establishes that he has lived in unit 503 since September or October 2006, including during the window period. Mullen testified that he was looking for a space in which he could live and work and, after seeing an advertisement on Craigslist for the unit, he contacted Ross Kaufman, who advertised the unit. Mullen signed a lease with Kaufman after viewing the unit, but did not submit a copy of the lease into evidence (Tr. 33-35, 38). According to Mullen, Kaufman, the overtenant, held leases for units 503 and 504 on the fifth floor and occupied unit 504 (Tr. 38; Pet. Ex. 8). When Mullen moved into unit 503, it was outfitted for residential use, with a kitchen, living area, and bathroom. A few months after he moved into the unit, he renovated the kitchen, installing a new counter, sink, and appliances. He also removed a wall and added a sliding door to partition off his bedroom, but made no other significant changes to the unit (Tr. 35-38; Pet. Ex. 47). Mullen continues to reside in unit 503 (Tr. 33).

Respondents offered no evidence to dispute Mullen's' testimony that he lived in the unit during the window period or that he continues to do so. In fact, respondent-owner's witness acknowledged that Mullen and his family have lived in the Building for a long time (Mannie: Tr. 738-39).

In sum, unit 503 is covered by the Loft Law. Mullen, who resided in the unit prior to June 21, 2010, including during the window period, and is the occupant in possession of the unit, is qualified for protection under section 2-09(b)(1) and (2) of the Loft Board Rules.

Other Units Residentially Occupied During Window Period

In addition to the units for which they seek coverage, petitioners contended that the evidence establishes that units 407, 501, 502, and a unit Stollman occupied on the fourth floor were residentially occupied during the window period (Pet. Br. at 6-28, 30). While petitioners' evidence regarding unit 502 was persuasive, it was less so regarding the other units.

Christine Ambrosino testified that she moved into unit 502 in September 2001, when she was looking for live/work space and learned about the Building from one of her clients (Tr. 92-93, 119). Between 2002 and 2006, she moved into units 509 and 506 of the Building because her work as a Pilates instructor expanded. However, she and her husband moved back into unit

502 in 2007 and resided there until 2012, including during the window period (Tr. 90, 105, 119, 153). In 2012, she moved into unit 501 in the Building (Tr. 92-93).[10]

Ambrosino entered into a lease for unit 502 with Stephen Weir, the prime tenant for several units on the fifth floor of the Building (Tr. 92-93). When Ambrosino moved into the unit, it was already outfitted for residential use: it had a kitchen, bathroom, and two small rooms, one of which had been used as a bedroom and the other as a closet by the previous occupants. Ambrosino and her husband at the time removed the dividing wall to enlarge the bedroom, which is how unit 502 is presently configured (Tr. 92-93; Pet. Exs. 139). The unit's furnishings included shelving, dishes, furniture, and appliances (Tr. 97; Pet. Ex. 140). The unit has three windows that look out onto a street, an entrance that is accessible from a common hallway, and is 950 to 1000 square feet (Tr. 94-95, 148; Pet. Ex. 139).

Ambrosino and her husband at the time entered into written lease agreements with Weir to occupy unit 502 during 2008 and 2009 (Tr. 119-21; Pet. Exs. 62A-B). While the leases state that the unit was to be used as a Pilates studio, petitioners' evidence supports a finding that Ambrosino resided in the unit during the window period.

Ambrosino credibly testified that unit 502 was her only residence during the window period (Tr. 119, 153). Her testimony is supported by documentary evidence in the form of photographs that depict dinner parties in the unit. The photographs, some of which were taken during the window period, show a kitchen and dining area with tables and chairs, shelves, dishes, appliances, and a washer and dryer (Tr. 97-99; Pet. Exs. 140A-C). In addition, federal and New York State income tax returns for 2008 and 2009 filed by Ambrosino and her then husband, list the unit as their home address. Bank and investment account statements, and personal checks also reflect the unit as her home address (Tr. 122-26,133-34; Pet. Exs. 56, 60, 63, 66).

Several witnesses corroborated Ambrosino's testimony. Dewey, who resided in unit 406 during the window period, testified that after he and Girth moved into the Building, they became friends with Ambrosino and her husband and took yoga lessons from her in unit 502. He estimated that they visited the unit several dozen times during the window period (Tr. 342-44). In addition, while he was uncertain as to the dates, Mullen, who occupies unit 503, testified that

[10] Ambrosino's coverage application for unit 501 (ALJ Ex. 2A) was withdrawn after her testimony, pursuant to an agreement reached in the course of the trial, and was referred back to the Loft Board.

Ambrosino and her husband were his next-door neighbors until Ambrosino moved into unit 501 (Tr. 50-51; Pet. Ex. 139).

In sum, petitioners established that unit 502 was residentially occupied for 12 consecutive months during the window period. However, no applicant in this proceeding seeks coverage for unit 502 or protection under the Loft Law.

The evidence regarding units 407, 501, and the Stollman unit is limited and less convincing. There is some evidence that unit 407 was residentially occupied during the window period. Dewey credibly testified that Buchman lived in the unit. According to Dewey, because the freight elevator is accessed through Buchman's unit, he visited the unit when he needed to use the elevator. He recalled going into the unit six to twelve times during the window period (Tr. 336, 343-44). He described the unit as cluttered, with books and a television, and Girth recalled seeing a bed in the unit (Tr. 344; Girth: Tr. 363). Dewey testified that Buchman remains their next-door neighbor (Tr. 343). In addition, Incisa testified that Buchman lived on the fourth floor, although he could not identify the precise unit (Tr. 218-19, 252).

Similarly, petitioners offered evidence that unit 501 was residentially occupied during the window period. Ambrosino testified that Joshua Sussman occupied the unit from 2007 or 2008 until 2010 (Tr. 117-19). In addition, petitioners submitted an affidavit from Joshua Sussman, who attested to having resided in unit 501 from 2007 until 2011. In his affidavit, Sussman stated that when he moved into the unit it was outfitted for residential use, with a living room, bathroom, kitchen, and sleeping area. Although Ambrosino testified that Sussman vacated the unit in 2010, while Sussman's affidavit stated that he did so in 2011, they are consistent in their assertion that the unit was residentially occupied during 2008 to 2009 (Tr. 118-19; Pet. Ex. 67).

Petitioners also allege that Stollman occupied a unit on the fourth floor of the Building during the window period (Pet. Br. at 25). However, Incisa and Hunter-Smith testified that Stollman resided in a unit on the third floor. According to Incisa, Stollman lived on the third floor during Incisa's tenancy in unit 306, between 2003 and 2009 (Tr. 253). Similarly, Hunter-Smith testified that Stollman lived on the third floor and that he visited Stollman many times to help him fix or move things in his unit (Tr. 444). While there is evidence that Stollman occupied a unit in the Building, petitioners' evidence does not identify the precise unit or establish that it was residentially occupied during the window period.

Accordingly, there is insufficient evidence in the record to establish that units 407, 501, and the Stollman unit were residentially occupied for 12 consecutive months during the window period.[11]

FINDINGS AND CONCLUSIONS

1. Petitioners demonstrated that the building located at 43-49 Bleecker Street, New York, New York, is an interim multiple dwelling under the Loft Law.

2. Petitioners demonstrated that unit 306 is a covered unit and Gatien is the protected occupant of the unit.

3. Petitioners demonstrated that unit 406 is a covered unit and Dewey and Girth are the protected occupants of the unit.

4. Unit 503 is a covered unit and the evidence establishes that Mullen is the protected occupant of the unit.

RECOMMENDATION

I recommend that the Loft Board grant petitioners' coverage applications.

Astrid B. Gloade
Administrative Law Judge

May 13, 2016

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Chairperson

[11] Petitioners further claimed that other units were residentially occupied during the window period (Pet. Br. at 6-28), relying largely on Mullen and Ambrosino's summary of occupants they observed and interacted with in the Building (Mullen: Tr. 43-79; Ambrosino: Tr. 100-19). Although Mullen generally recalled that many units on the fifth floor and other floors of the Building were residentially occupied, he conceded that he could not specifically recall details, such as dates and names of occupants (Mullen: Tr. 43-79). Similarly, Ambrosino's testimony lacked sufficient detail to find that the units were residentially occupied for 12 consecutive months during the window period (Ambrosino: Tr. 100-19).

APPEARANCES:

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ORDER

NEW YORK CITY LOFT BOARD
In the Matter of the Applications of

JEN GATIEN, DAVID MULLEN, GEORGE DEWEY AND KELLY GIRTH

Loft Board Order No.: 4553

Docket Nos.: TR-1060
TR-1111
TR-1163

RE: 43-49 Bleecker Street
New York, New York

IMD No.: None

ORDER

The New York City Loft Board ("Loft Board") accepts in part and rejects in part the report and recommendation of Administrative Law Judge Astrid B. Gloade dated May 13, 2016 ("Report").

BACKGROUND

Unit 306 (Jen Gatien)

On January 31, 2013, Jen Gatien, occupant of unit 306 in the building located at 43-49 Bleecker Street, New York, New York ("Building'"), filed an application seeking Article 7-C coverage for her unit and protected occupant statt.1s pursuant to § 281(5) of the Multiple Dwelling Law ("MDL"). The Loft Board docketed the application under TR-1060.

On March 7, 2013, 49 Bleecker. Inc., lessee of the third floor of the Building, filed an answer opposing the application.

On May 7, 2013, Rogers Investments, NV LP ("Owner"), the owner of the Building, filed an answer opposing the application.

Units 203 and 503 (Douglas Thomas and David Mullen)

On August 30, 2013, Douglas Thomas, occupant of unit 203 and David Mullen, occupant of unit 503 in the Building filed a joint application seeking Article 7-C coverage for their respective units pursuant to MDL§ 281 (5). The Loft Board docketed the application under TR-1111.

On October 2, 2013, 49 Bleecker, Inc. filed an answer opposing the application.

On October 18, 2013, Owner filed an answer opposing the application.

On October 21, 2013, Antoni Ghosh, occupant of unit 201 and lessee of the second floor in the Building filed an answer opposing the application.

Unit 406 (George Dewey and Kelly Girth)

On January 29, 2014, George Dewey and Kerly Girth, occupants of unit 406 in the Building filed an application seeking Article 7-C coverage for their unit and protected occupant status pursuant to MDL§ 281 (5). The Loft Board docketed the application under TR-1163.

On February 5, 2014, 49 Bleecker, Inc. filed an answer opposing the application.

On March 7, 2014, Owner filed an answer opposing the application.

The Loft Board transferred the applications to the Office of Administrative Trials and Hearings ("OATH"), which assigned the matters to Administrative Law Judge Astrid B. Gloade for adjudication.

On April 4, 2014, Jen Gatien, George Dewey, Kelly Girth and David Mullen ("Tenants") submitted a motion for summary judgment regarding the issue of Article 7 -C coverage for the Building. On May 13, 2014, Owner submitted its opposition to Tenants' motion. Tenants submitted their reply on May 20, 2014. On May 27, 2014, 49 Bleecker, Inc. submitted its opposition to Tenants' motion.

On June 4, 2014, Judge Gloade issued a Memorandum Decision which denied Tenants' motion for summary judgment. Judge Gloade found that issues concerning material facts warranted a hearing.

A ten day trial was held between July 9, 2014 and September 10, 2015. In a letter dated April 30, 2015, Mr. Thomas's attorney withdrew his claims with prejudice. On November 30, 2015, Tenants and Owner submitted post-trial briefs.

In the Report, Judge Gloade recommended that the Loft Board find that: 1) the Building is an interim multiple dwelling ("IMD") building pursuant to MDL§ 281 (5) and unit 306 on the third floor, unit 406 on the fourth floor and unit 503 on the fifth floor are IMD units; and 2) Tenants are the protected occupants of their respective units. Judge Gloade also considered the evidence and recommended findings for units 407, 501, 502 and a unit referred to as the "Stollman" unit. However, Tenants never requested coverage for these units in their applications.

For the reasons explained below, we agree with Judge Gloade's recommendations regarding units 306, 406 and 503. However, the Loft Board rejects Judge Gloade's findings and recommendations regarding units 407, 501 , 502 and the Stallman unit. Tenants did not seek Article 7-C coverage for those units in their applications. Furthermore, Judge Gloade did not need to make these findings and recommendations to reach a decision in these coverage cases.

ANALYSIS

Coverage Under MDL§ 281(5)

In 2010 and again in 2013, the New York State Legislature amended Article 7-C of the MDL to expand the definition of an Interim Multiple Dwelling ("IMD"), Coverage under MDL§ 281 (5) requires, among other things, that the building:

- was at any time occupied for manufacturing, commercial, or warehouse use,
- lacks a residential certificate of occupancy,
- has been occupied by three or more families living independently from one another for twelve (12) consecutive months beginning on January 1, 2008 through December 31 , 2009 ("Window Period"), and
- does not actively and currently contain a use set forth in use groups fifteen through eighteen of the New York City Zoning Resolution.

In addition, the IMD unit:

- may not be located in a basement or cellar;
- must have at least one entrance that does not require passage through another residential unit;
- must be at least 400 square feet in area; and
- must have at least one window opening onto a street or a lawful yard or court.

At the outset, Owner does not dispute that the Building was formerly used for manufacturing purposes. *See*, Tr. at 715-716. Nor does Owner dispute that there are no use group fifteen through eighteen activities in the building.[1] *See,* Tr. at 5. However, Owner did dispute other eligibility factors for Article 7-C coverage. With respect to the coverage of the units 306 and 406, Judge Gloade found that these units had windows that face a street or a lawful yard or court; were more than four hundred (400) square feet and were not in a cellar. We agree.

Residential Certificate of Occupancy

Owner admits that there is no residential certificate of occupancy for the Building, but argues that the residential occupancy is legal because the Building, which was built at the turn of the century, was not required to have a residential certificate of occupancy under MDL § 301. Owner's Post-trial Brief at 1. As evidence that residential occupancy in the Building is legal, Owner introduced, without any explanation or foundation, an HPD "Closed Violation Summary Report" showing that the Building has eight class A units.

As noted by Judge Gloade, Section 301 of the MDL includes two exceptions to the certificate of occupancy requirement. One exception, which, if proven, might be relevant here, includes old-law tenements erected after April12, 1901 and occupied for two years immediately before January 1, 1909 that meet certain additional conditions. Judge Gloade found that Owner failed to offer evidence that would bring the Building under this exception. See, Report at 7-8. We agree. The HPD record is insufficient.

Article 7-C *Coverage for Unit 306*

With respect to Window Period occupancy, Piero lncisa, a former occupant of unit 306, testified at the hearing. Mr. lncisa testified that in 2003 he entered Into a rental agreement for unit 306 with Saul Stallman, the over-tenant. and used unit 306 for residential purposes. *See,* Tr. at 216-217, 219-220, 226, 239-241. Judge Gloade found Piero lncisa credible. *See,* Report at 9 and 11. We accept Judge Gloade's credibility assessment. Evidence of residential

[1] Use group fifteen through eighteen occupancies consist of commercial uses that are incompatible with residential use.

occupancy prior to and through the Window Period included copies of monthly rent, utility, and real estate tax statements from Mr. Stallman between 2003 and 2009. Mr. Incisa's description of the unit is also corroborated by Jen Galien's testimony and photographs of the units.

Based on this evidence Judge Gloade found that unit 306 met the eligibility criteria for coverage. *See,* Report at 20. We agree.

Article 7-C *Coverage for Unit 406*

With respect to Window Period occupancy, Judge Gloade found that George Dewey and Kelly Girth provided credible testimony and evidence, undisputed by the Owner, establishing that they residentially occupied unit 406 during the Window Period. *See,* Report at 22. We agree. Mr. Dewey and Ms. Girth further corroborated their testimony regarding their residential occupancy from 2007 with documentary evidence, which included bank statements, insurance statements, and telephone bills addressed to Mr. Girth at the unit in 2007, 2008, 2009 financial, tax, and bank statements Mr. Dewey received at the unit in 2008 and 2009 and federal income tax returns for 2008 and 2009 listing the Building as Mr. Dewey's address. Judge Gloade found that unit 406 met all of the eligibility criteria for coverage. *See,* Report at 22. We agree.

Article 7-C *Coverage for Unit 503*

Owner stipulated that unit 503 met all of the eligibility criteria for coverage. *See*, Tr. at 5-6 and 31-32.

Based on the foregoing, the Loft Board finds that the Building is an IMD and units 306, 406 and 503 are IMD units.

Article 7-C *Coverage for Other Units*

As to the findings for units 407, 501 , 502 and the Stallman unit, the Loft Board rejects Judge Gloade's further analysis regarding the residential occupancy. Tenants did not seek coverage of these units and the Loft Board does not need to rely on these findings to reach a decision on the applications.

Protected Occupant Status Claims

Protected occupancy determinations are governed by Title 29 Rules of the City of New York ("29 RCNY") § 2-09(b). The first subsection, 29 RCNY § 2-09(b)(1), provides that unless otherwise provided in the rule, the occupant in possession of a covered IMD unit is the protected occupant of the unit. Therefore, before the Board can make a determination under subsection (b)(1), the Board must first consider the rule as a whole, including the provisions in (b)(2), (b)(3) and (b)(4).

Section 2-09(b)(2) provides that where a residential occupant, who is not the prime lessee, was in possession of a covered unit prior to the effective date of the law, in this case, June 21 , 2010, the lack of consent of the landlord to a sublet, assignment or subdivision that established the occupancy cannot be used as a defense against a finding of protected occupant status.

The record shows that Tenants are not prime lessees of their respective units and their residential occupancies predate June 21 , 2010. Judge Gloade recommended that the Board find that Ms. Gatien, Mr. Dewey, Ms. Girth and Mr. Mullen are the protected occupants of their respective units pursuant to § 2-09(b)(1) and (2). We agree. Ms. Gatien testified that she has been in possession of and has used unit 306 residentially since March of 2010. Ms. Gatien corroborated her testimony with e-mails between herself and Saul Stallman showing that she met with him to rent unit 306 in February 2010. Subsequent e-mails dated prior to June 21 , 2010 show that after Ms. Gatien moved into unit 306, she asked Mr. Stallman about trash collection, her rent and utility bills, her refrigerator, her furniture and the former tenant's mail. Ms. Gatien's testimony is further corroborated by rent statements from Saul Stollman for unit 306 from March through June of 2010, a note signed by Mr. Stallman indicating that on March 1, 2010, he received a $2,800 check as a security deposit or last month's rent for unit 306, rent checks payable to Mr. Stallman and signed by Ms. Gatien from April15, 2010 through June 2, 2010 and the testimony of Scott Hunter-Smith, her next-door neighbor in the Building.

Owner disputed that Ms. Gatien occupied unit 306 prior to June 21, 2010 and also argued that she used the unit for commercial rather than residential purposes. See, Owner's Post-trial brief at 2 and 4. However, Judge Gloade found that the credible evidence established that Ms. Gatien residentially occupied unit 306 prior to June 21 1 2010 and that Owner failed to demonstrate that Ms. Gatien was a commercial rather than a residential tenant. Report at 19 and 20. We agree. Accordingly, the Loft Board finds that Jen Gatien is the protected occupant of unit 306.

Mr. Dewey and Ms. Girth testified that they took possession of unit 406 in August of 2007. Dewey and Girth's testimony was corroborated by the testimony of Elizabeth Dewey, Mary McInerney and documentary evidence including telephone bills, insurance statements, financial statements, tax statements and federal income tax returns showing Dewey and Girth's address at unit 406 in the Building prior to the effective date of the law. Owner did not dispute Mr. Dewey and Ms. Girth's testimony. Report at 22. Accordingly, the Loft Board finds that George Dewey and Kelly Girth are the protected occupants of unit 406.

As to Mr. Mullen, although he did not explicitly claim In his application that he was seeking protected occupant status, he raised the claim during the course of the trial. Owner responded with testimony supporting Mr. Mullen's claim. *See*, *Tr.* at 738-739. Thus, the claim is properly before the Board. Based on the unrefuted testimony, the Loft Board finds that David Mullen is the protected occupant of unit 503.

CONCLUSION

Based on the foregoing, the coverage application is granted to the extent that it sought coverage of units 306, 406 and 503 pursuant to MDL § 281 (5). The claims of protected occupant status for Ms. Gatien, Mr. Dewey, Ms. Girth and Mr. Mullen are granted. The Loft Board hereby directs the Owner to register the Building and units 306, 406 and 503 with the Loft Board in accordance with this Order within 30 days of the mailing date of this Order. Failure to do so may result in additional proceedings and fines.

DATED: September 15, 2016

Renaldo Hylton
Chairperson

Board Members Concurring: Carver, Barowitz, Roche, Hylton, Delaney, Bolden-Rivera, Shelton

Board Members Absent: Schachter

DATE LOFT BOARD ORDER MAILED: **SEP 23, 2016**