Matter 657-665 Fifth Avenue Tenants

OATH Index Nos. 1278/14, 1279/14, 1280/14, mem. dec. (Oct. 30, 2015)
[Loft Bd. Dkt. Nos. TR-1125, TR-1126, TR-1130; 657-665 Fifth Avenue, Brooklyn, NY]

Parties raised the limited issue of whether the owner's rent control documentary evidence constituted a legal objection to the status of the requisite third unit for coverage. Owner failed to show the unit in issue was rent controlled.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
657-665 FIFTH AVENUE TENANTS
Applicant

MEMORANDUM DECISION

KARA J. MILLER, *Administrative Law Judge*

This case concerns coverage applications filed with the Loft Board for buildings located at 657-659, 661, 663, 665, and 665A Fifth Avenue, Brooklyn, New York. Applicants Craig Tilford and Jamie Lee Johnsen live in the second floor unit of 657-659 Fifth Avenue. Applicant Gregory Nelson, who also lives in the second floor unit of 657-659 Fifth Avenue, filed a separate coverage application. The third application was submitted by Justin Johnson and Kelley Cribben, who reside in the third floor unit of 657-659 Fifth Avenue. The issue presented here is whether a first floor unit that is not seeking coverage may be counted towards the three-unit minimum. The owner argues that the first floor unit of 665A Fifth Avenue was registered as a unit subject to rent control and should not be counted as the third unit for the purposes of coverage. The applicants argue that the unit is not subject to rent control and even if it did, it is not a bar to including it in the threshold number of units required for coverage.

After extensive conferencing, the parties requested that a very limited coverage issue be adjudicated without a trial based upon a set of stipulated facts and documentary evidence. The stipulation of facts, submitted on March 11, 2015, specifies that the parties agreed that all elements of section 281(5) of the MDL have been met for granting the applicants' coverage applications. However, the owner asserted that the building does not qualify for coverage because one of the three required units is in a rent-regulated status that precludes it from

coverage. The unit in question is the first floor of 665A Fifth Avenue, occupied by Walter Fernando Perez. The parties submitted memoranda of law outlining their respective postions.

I find that the owner failed to prove that the Mr. Perez's first floor unit 665A is in a rent-controlled status.

ANALYSIS

Section 281(5) of the MDL defines an IMD as any building that: (1) at any time was occupied for manufacturing, commercial, or warehouse purposes; (2) lacks a certificate of compliance or occupancy pursuant to section 301 of the MDL; (3) is not owned by a municipality; and (4) was 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, "provided that the unit" (i) is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, (ii) has at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and (iii) is at least 400 square feet in area. Mult. Dwell. Law § 281(5) (Lexis 2015).

Based on a May 30, 2014, Site Visit Report issued by architect John Peachy ("Site Visit Report"), the parties stipulated, "that for the purposes of coverage under Multiple Dwelling Law Article 7-C the addresses 657, 661, 665, and 665A Fifth Avenue, Brooklyn, New York 11215 are one horizontal multiple dwelling" (Stip. ¶ 2). See 29 RCNY § 2-08(a)(1)(iii) (Lexis 2015) (setting forth the factors to consider when determining whether a structure is a horizontal multiple dwelling).

The building in question is located at addresses 657-659, 661, 663, 665, and 665A Fifth Avenue, Brooklyn New York 11215. The Site Visit Report provides a description of the premises as an assemblage of five three-story buildings that have a history of common ownership dating back to 1971 (Site Visit Report at 2). The buildings appear to be of the same age and construction, and share common architectural features such as the same roll up gates, sidewalk hatches, roofs, and exterior wall finish (Site Visit Report at 4). The buildings are located on the same block and tax lot, have vacant commercial spaces on the first floors and cellars, share a common boiler and share a common sprinkler system (Site Visit Report at 1, 3). The buildings

also have common openings and common egresses (Site Visit Report at 3). The residential units have separate entrances, are over 400 square feet, and have at least one window opening onto a street (Site Visit Report at 1). Addresses 661 and 665 have Certificates of Occupancy on file, but the other addresses do not have certificates of occupancy. The building does not have a Certificate of Occupancy pursuant to section 301 of the MDL.

The parties further stipulated that all elements of section 281(5) of the Multiple Dwelling Law have been met for granting the three coverage applications, which include: the building has been used for manufacturing, commercial or warehouse purposes; it lacks a Certificate of Occupancy pursuant to section 301 of the MDL; it is not owned by a municipality; the premises has been residentially occupied by three or more families living independently from one another for a period of at least twelve consecutive months during the period commencing January 1, 2008 and ending December 31, 2009.

Moreover, the owner failed to raise any of the exceptions listed in section 281(5) of the MDL that could exclude the units from coverage, and the Site Visit Report demonstrates that none of these exceptions apply. Finally, the parties stipulated that the five applicants qualify as the protected occupants of their units.

Although all parties agreed that the building has three units that would generally qualify it for coverage, the owner asserted that he has evidence that will disqualify one of the units on different grounds. There is no dispute the two units occupied by the applicants, the second floor of 657-659 and the third floor of 657-659 qualify for coverage; however, the parties disagree about the status of the unit located on the first floor of 665A. This unit was residentially occupied from January 1, 2008 to December 31, 2009, by Mr. Perez, who is not an applicant in this proceeding. The unit is now vacant.

While the owner stipulated that the first floor of 665A meets the criteria of section 281(5), he asserted that it is precluded from coverage because the unit is rent controlled. The parties requested that I consider a very limited question, "whether rent control documentary evidence submitted by the Landlord constitutes a legal objection to the status of the unit of Walter F. Perez at 665A Fifth Avenue as the requisite third unit for coverage." (Stip. ¶ 5).

The Loft Law was designed to integrate uncertain and unregulated tenancies into the rent stabilization system. *Blackgold Realty Corp. v. Milne*, 119 A.D.2d 512, 515 (1st Dep't 1986). Therefore, when a unit is already in a rent-control status, "there is no need to invoke the aegis of

the Loft Board . . . to provide for . . . regulation." *Blackgold*, 119 A.D.2d at 515. *See also Matter of Disney*, Loft Bd. Order No. 1183, 12 Loft Bd. Rptr. 304, 309 (May 2, 1991) ("[A] scheme under which an individual unit is subject both to rent control and the Loft Law is unworkable.").

In support of his claim that the first floor of 665A was rent regulated, the owner submitted a set of documents from the New York State Division of Housing and Community Renewal Office of Rent Administration (Stip., Ex. A). None of the documents submitted, however, pertain to the first floor of 665A. Instead, the records suggest that a different unit, the second floor of 665A, has a history of rent regulation. One document, titled "Cases By Building Report," indicates that a registration update was granted for the second floor of 665A on January 28, 1994 (Stip., Ex. A at 2). Another form, titled "Request For Registration Information (For Rent Control Units Only)," lists the tenant's name as "M. Rodriguez" and the unit as the second floor of 665A Fifth Avenue (Stip., Ex. A at 3). The last submitted form appears to be a copy of the Rent Control Registration Update Card for 665A Fifth Ave., "2nd Floor" certified on January 28, 1994 (Stip., Ex. A at 4). Although this document does not show the identity of the tenant residing in the second floor unit, it demonstrates that the second floor unit was subject to rent control from 1972 through 1993.

Remarkably, the owner failed to submit any documentary evidence that relates to the first floor of 665A. Instead, the evidence demonstrates that a different unit, the *second floor* of 665A, was in a rent-regulated status in 1994. Further the evidence identifies a different tenant. The parties stipulated that the first floor of 665A was residentially occupied by Mr. Perez, but the evidence demonstrates the unit was occupied by "M. Rodriguez." Because the evidence before me does not relate to the unit in issue, I find the owner failed to prove that the first floor of 665A was rent controlled at any relevant time.

Moreover, that even assuming that one of the allegedly covered units was in a rent-regulated status that would not necessarily mean that the building could not be covered pursuant to the Loft Law. *See Matter of Lerner*, OATH Index No. 1121/14 at 4-5 (Feb. 19, 2015) (although an owner-occupied unit is not eligible for the benefits of coverage, for purposes of a coverage application it may be considered as one of the three residentially occupied units during the window period).

CONCLUSION

The rent control documentary evidence submitted by the owner failed to constitute a legal objection to the status of the first floor unit of 665A as the requisite third unit for coverage.

Kara J. Miller
Administrative Law Judge

October 30, 2015

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