Matter of Ukai

OATH Index No. 1394/14 & 1220/15 (Nov. 2, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4686 (Sept. 21, 2017), **appended**

[Loft Bd. Dkt. Nos. TR-0988, LS-0166; 57 Jay Street, Brooklyn, N.Y.]

Petitioners applied for coverage under the 2010 amendments to the Loft Law. ALJ found that petitioners, Ms. Ukai and her son, Mr. Ukai, resided in the subject premises for 12 consecutive months during the window period, and the unit should be covered as an IMD unit, and respondent's application to decover the unit should be denied. Applying prior Loft Board precedent, ALJ found that Ms. Ukai is a protected occupant, as she is the prime lessee who continues to pay the rent, and was in possession of the premises on the effective date of the Loft Law. Mr. Ukai, who is not a lessee, is not protected, and is, at best, entitled to succession rights. Alternatively, applying a "primary residence" analysis, Ms. Ukai, as the prime lessee, is not entitled to protection because the premises is not her primary residence. Also in the alternative, Mr. Ukai, who is not a lessee, but who was the residential occupant in possession of the premises at the effective date of the Loft Law, is entitled to protection pursuant to section 2-09(b)(1) and (2) of the Loft Law.

Loft Board adopts recommendation that owner's decoverage application be denied, and that the building and unit 5C are IMDs. Loft Board notes that subsequent to the ALJ's issuance of her report and recommendation, Ms. Ukai withdrew her claims with prejudice. With the prime lessee no longer asserting rights, the Loft Board found that Mr. Ukai is entitled to protection under 2-09(b)(1) and (2), because he took occupancy prior to the effective date of the Loft Law and because he remains in occupancy. Under these circumstances, Mr. Ukai need not demonstrate that the owner consented to his occupancy or that the unit is his primary residence.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS
In the Matter of
KAY UKAI and ALLEN KOJI UKAI
Applicants

AMENDED REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This case concerns premises located at 57 Jay Street in Brooklyn, New York. On or around January 29, 2013, the prior owner of the premises filed a registration application with the Loft Board, pursuant to which the building was registered as an interim multiple dwelling ("IMD"). Unit 5C of the premises was not among those listed as an IMD unit on the registration application. Petitioner Kay Ukai, current tenant of unit 5C and her son, Allen Koji Ukai ("Koji"), filed a coverage application with the Loft Board ("Board") on October 24, 2013. Petitioners' application was not processed by the Board, and on December 3, 2013, they filed another application (Loft Board Docket No. TR-1131). Petitioners seek a finding that their unit is an interim multiple dwelling ("IMD") unit pursuant to section 281(5) of Article 7-C of the Multiple Dwelling Law ("MDL" or "Loft Law"). The building's owner at the time filed an answer on October 30, 2013, challenging the application on the basis that, among other things, petitioners neglected to seek protected occupancy status and therefore have no standing to seek coverage of the unit. Respondent also contended that the unit was not converted for residential use at any time during the inquiry period articulated in section 281(5) of the MDL (ALJ Ex. 2).

The Loft Board referred the matter to this tribunal on January 2, 2014. In August 2014, the premises was sold to 57 Jay Street, LLC. On or around August 22, 2014, the new owner filed a Second Amended Registration application with the Loft Board, listing unit 5C, among others, as a covered unit, and petitioners Kay and Koji Ukai as protected occupants, without prejudice. Under Loft Board rule 2-05, an owner does not divest itself of its rights to challenge coverage by virtue of its registration application. Rather, an owner, occupant or prime lessee, has 45 calendar days after service of the registration application or after the filing date with the Loft Board, whichever is later, to contest the registration application. 29 RCNY § 2-05(b)(4) (Lexis 2014). In this case, the owner filed a timely application to decover unit 5C, on or around September 25, 2014 (Loft Board Docket No. LC-0166). Answers to the owner's application were received on or around October 16, 2014.

Following multiple conferences, a four-day trial commenced on March 11, 2015, at which, petitioners testified on their own behalf, and presented the testimony of Steven Seagrest, a neighbor and residential occupant of the premises, Julian Gonzalez, a friend of Koji Ukai, and Kathleen Laziza, a friend of Kay Ukai. Petitioners also presented documentary evidence. Respondent Gregory Jones, a principal of the current owner who purchased the premises in

August 2014, testified, and presented documentary evidence. The record closed on July 31, 2015, upon submission of closing briefs by both parties.

For the following reasons, I find that petitioners resided in unit 5C for 12 consecutive months during the inquiry period, and the unit should therefore be covered as an IMD. Accordingly, respondent's application to decover the unit should be denied. However, applying prior Loft Board precedent, Ms. Ukai is entitled to Loft Law protection, because she is the prime lessee who continues to pay the rent, and was in possession of the premises on the effective date of the Loft Law. On the other hand, Mr. Ukai, who is not a lessee, is not entitled to protection, and is, at best, entitled to succession rights.

Alternatively, applying a "primary residence" analysis, Ms. Ukai, as the prime lessee, is not entitled to protection because the premises is not her primary residence. Also in the alternative, Mr. Ukai, who is not a lessee, but who was the residential occupant in possession of the premises at the effective date of the Loft Law, is entitled to protection pursuant to section 2-09(b)(1) and (2) of the Loft Law.

ANALYSIS

Section 281(5) of the June 21, 2010 iteration of the Loft Law created a new qualifying window period for residential units to qualify for coverage as IMDs. The law was also expanded to add approximately 300 buildings, including the subject building, that had not been previously covered by the Loft Law.[1] It defines an IMD as any building which: (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 this chapter; (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

[1] *See* Majority Counsel and Program, June 7, 2010, Bill Jacket, L. 2010, Ch. 135; Annotated Calendar, June 8, 2010 Bill Jacket, L. 2010, Ch. 135; Loft Law Expansion and Extender Talking Points, Bill Jacket, L. 2010, Ch 135.

such municipality, and (iii) is at least 400 square feet in area. Mult. Dwell. Law § 281(5) (Lexis 2015).

Respondent stipulated that the building is a registered IMD (Tr. 655). There is no dispute as to the location, size or window requirement of the Loft Law as it pertains to unit 5C. The issues to be determined are: (1) whether unit 5C was residentially occupied for 12 consecutive months during the inquiry period and is entitled to coverage as an IMD unit, and (2) whether petitioners are entitled to protected occupancy status.

Occupancy of Unit 5C During the Inquiry Period

Petitioner Kay Ukai is a dancer and choreographer who testified that she and her husband first leased space in the building in or around 1985, approximately 30 years ago, after responding to an advertisement in a community newspaper. They initially shared the fifth floor with another business tenant who occupied two-thirds of the space. Their portion was a large open area with a kitchen and bathroom and some partitions of sheetrock. Ms. Ukai and her husband originally used the space for art creation. Then around 1986, after their co-tenant lost his business, Ms. Ukai assumed his lease with the landlord's permission. She and her husband renovated the bathroom and kitchen, painted walls, and varnished the floor, to make the space more livable. They then subdivided the space into four rooms and for approximately ten years, sublet to about four to five artists who lived and worked at the premises, including Steven Seagrest (Tr. 7-15, 565-66).

In 1988, Ms. Ukai's son, Koji, was born at Lennox Hospital on the upper east side of Manhattan. Ms. Ukai testified that she and her husband modified unit 5C to make it safe for Koji by building a loft bed and a futon bed and creating a play area. Koji attended pre-kindergarten in Brooklyn Heights (Kay: Tr. 14-16; Koji: Tr. 188). A year later, Ms. Ukai enrolled him in a school in the East Village where her husband had an apartment. Koji was about five or six years old. Ms. Ukai described the Dumbo area as deserted, and testified that the bathroom in their unit malfunctioned, and the water was dirty. But she opted to raise Koji in Dumbo, and not the East Village apartment, where they were subjected to verbal and physical harassment by a neighbor. Besides, Dumbo suited them because they were immigrants who did not have money, were dedicated to the arts, the space accommodated her husband's huge paintings and her dance and

choreography, and the rent was low. She also suggested that in the East Village, Koji's safety was imperiled because his friends had found a hypodermic needle in the nearby park, another friend was almost shot during a gang-related shooting, and the children at the Earth School were "wild," using the furniture during fights (Kay: Tr. 14-18, 20-22; Koji: Tr. 188-92).

Around 1995, Ms. Ukai sent Koji to Warwick, New York to be with his father, where he attended the Park Avenue School. Ms. Ukai and her husband had decided to live apart because it was in Koji's best interests. She noted that she was in charge of finances and her husband was responsible for raising Koji. Thus, she remained in New York City where she worked four days each week as a translator or substitute teacher, and commuted by bus to Warwick. On weekends, her husband taught at a Japanese School in Queens, which Koji also attended on Saturdays for almost six years. When they commuted from Warwick, father and son would stay at unit 5C (Tr. 22-28).

Ms. Ukai testified that also in 1995, the prior owner of the building came to the premises to discuss renovating. He proposed a rent increase which she contested but eventually settled. The landlord renovated their space and divided it into four self-contained apartments with bathroom, shower, sink and kitchen. Ms. Ukai signed a three-year agreement for unit 5C, which was followed by year-to-year agreements (Tr. 29-30). Ms. Ukai submitted two leases for unit 5C, which named "K-2 Dance & Arts" ("K2 Dance,"), her not-for-profit organization, as lessee. They covered November 2007 through October 2008, and November 2009 through October 2010 (Tr. 118-20, 125-26; Pet. Exs. 8, 9).

Ms. Ukai's description of unit 5C as it is currently configured, matched a free-hand floor plan of the unit which Koji and his father prepared (Kay: Tr. 109-13; Koji: Tr. 288). Petitioner also presented photographs of the unit which Ms. Ukai claimed to have been taken by Koji in or around 2012 or 2013, but which Koji testified, were taken in June 2014, in preparation for trial (Kay: Tr. 113-17; Koji: Tr. 290-93; Pet. Exs. 2A-F). The photos showed a screened-off kitchen with a large sink, stove and a refrigerator. Pots, dishes, spice bottles and other items were displayed against the wall and on shelves. Outside the kitchen was a metal card table with three folding chairs. On the floor were gallon bottles of Poland Spring water. To one side of the screen was an open door to the bathroom/toilet area. The photo of Ms. Ukai's bedroom displayed the wooden frame of a bed or futon with a dark covering over a huge unidentifiable

mound. A pillow and several other unidentifiable items were also on the bed. Against one wall were DVDs or CDs, and against another, were two metal folding chairs. The room also held a chest of drawers and a window air conditioner. On the floor were sneakers and a mound of what Ms. Ukai claimed to be soiled clothing from Koji's friends who had stayed at the unit when she had travelled to visit her mother in Japan a few years prior. In a large living area was a couch in front of a window facing Water Street. An assortment of papers was scattered on the floor, while ladders were against the wall outside Ms. Ukai's bedroom. Another photo showed what Ms. Ukai identified as the entrance to a loft, which her husband built for, according to her, Koji's use when he visited New York. Koji testified that he erected the supporting wall to the loft in 2010 (Kay: Tr. 115-17; Koji: Tr. 304-06, 293-94; Pet. Exs. 2A-2F). Ms. Ukai initially testified that her husband built the loft to accommodate the birth of their newborn son (Tr. 14).

In 1998, Ms. Ukai and her husband purchased a two-story ranch house in Warwick. But she kept most of her belongings at the subject premises (Tr. 33-35). Meanwhile, after completing middle school in Warwick, Koji began high school at the Lawrenceville School, a boarding school in New Jersey (Kay: Tr. 35-36, 87; Koji: Tr. 200). While there, he occasionally visited friends in Brooklyn and practiced baseball in the parks in Brooklyn and in Central Park. When he did, he stayed in unit 5C with Ms. Ukai (Kay: Tr. 90-91; Koji: Tr. 201-02).

Ms. Ukai testified that she worked at the Harlem Children's Zone and the Police Academy in Harlem in or around 2004, and became a full-time employee from 2005 through 2006 (Tr. 87-88). She continued to reside in unit 5C, but used the East Village apartment to sometimes meet with friends. This conflicted with her testimony that in 2001, she had surrendered the East Village apartment, pursuant to a stipulation of settlement with the landlord in a non-primary residence eviction proceeding against her (Tr. 88-90).

Towards the end of 2007, Ms. Ukai worked part-time at the Ross Global Academy ("Academy"). In August 2008, she assumed a full-time position as an associate teacher with the Academy (Tr. 91-95; Pet. Ex. 3). Copies of her earnings statements from the academy from December 2007 through February 2008, display the subject premises as Ms. Ukai's address (Tr. 95; Pet. Ex. 4). Ms. Ukai left the Academy voluntarily in May 2008, before the end of the school year, and was denied unemployment benefits. The denial letter from the State Department of Labor, and a decision in Ms. Ukai's appeal to the Unemployment Insurance Appeal Board, were

sent to Ms. Ukai at the subject premises (Tr. 98; Pet. Ex. 5). While part-time at the Academy, Ms. Ukai also worked part-time for The Educational Alliance, Inc. (Tr. 103-04; Pet. Ex. 6). In or around October 2009, she began to work on a part-time basis as an art and music consultant for NYSARC Inc., an organization for the developmentally disabled (Tr. 103, 105). Copies of Ms. Ukai's W-2 Wage and Tax Statements from the Academy for 2008 and 2009, from NYSARC Inc., for 2009, and from Image Early Learning Centers LLC for 2009, all displayed the subject premises as her address (Pet. Ex. 7).

Ms. Ukai testified that from 2008 to 2010, she used their Warwick home primarily for storage. But she also toted her clothes from Brooklyn to be laundered in Warwick, because she did not have a washer and dryer at unit 5C. She usually took the New Jersey Transit ("NJ Transit") bus from the Port Authority on a Friday evening, and would be driven back to New York City by her husband, either on Saturday evening or Sunday morning. Sometimes she paid for her trip in cash and sometimes she paid by debit card against her account with Bank of America ("BoA"). Her husband used his E-Z pass card when coming to New York (Tr. 128-29, 455-56). She insisted that she has no friends in Warwick, does not belong to any social clubs, and has no gym membership there (Tr. 528).

BoA statements in Ms. Ukai's and her husband's name for the period December 2007 through December 2009, show that in October 2008, Ms. Ukai used her debit card on one occasion to purchase a ticket from NJ Transit (Pet. Ex. 10). She began to use her debit card more frequently for the purchase of NJ Transit tickets in January 2009. The statements reflect ticket purchases (which were highlighted in yellow) for each month in 2009. The tickets were all the same price and in most months, she purchased multiple tickets for a total of 25 tickets over the course of the year. While the statements did not indicate Ms. Ukai's destination, they lent credence to her testimony regarding her trips to Warwick.

As evidence of her commute between New York City and Warwick, Ms. Ukai submitted copies of her husband's E-Z pass statements from February to June, 2008, February to October 2009, December 2009 to June 2012, and February 2013 to February 2014, which showed numerous toll charges particularly over the George Washington Bridge. She could not account for the missing statements, but what she presented had handwritten markings and a note that "Kay maintained living in City." Ms. Ukai admitted that in preparation for trial, she reviewed the

statements and wrote on them to indicate the days on which she commuted between Warwick and New York City (Pet. Ex. 33). She did so by matching the dates on the E-Z pass statements against a calendar for the respective year (Tr. 457-66). The E-Z Pass statements only showed the location where the pass was scanned for toll charges which Ms. Ukai acknowledged, are only charged on the George Washington Bridge ("GW"), and the Lincoln and Holland Tunnels upon entry into New York City. She linked the frequency with which her husband's vehicle crossed the GW to his job at a camera company in New Jersey, and also to an insurance company job which involved transporting clients who lived in the New York area (Tr. 557-60, 564-65). It was clear that Ms. Ukai had no independent recollection of the dates that she had commuted from Warwick a few years prior, and therefore, her markings, were at best, guesses. Accordingly, I was skeptical as to how Ms. Ukai allocated her time between the subject premises and her Warwick home.

Ms. Ukai also submitted copies of her Japanese passports which were issued in 2000 and renewed in 2010, and which listed her address as 57 Jay Street, Unit 5C (Tr. 469-73; Pet. Exs. 35A, B). Her gym membership contract with Eastern Athletic Club, dated December 16, 2009, listed the subject premises as her address (Pet. Ex. 36). Attached were account activity summary sheets for 2008, 2009 and 2010, showing that she was an active member of the gym for those years (Tr. 474-76).

Con Edison bills for the subject premises in Ms. Ukai's name, for some of the months between April 2008 and February 2009, classified the usage as residential (Tr. 479-480; Pet. Ex. 37). Calvin Merritt, a customer service representative at Con Edison, testified that Ms. Ukai's account was opened in October 1999, and has always been residential. He opined that the size of the bills suggested a small amount of electricity usage, but admitted that he had not visited the subject premises and therefore did not know what appliances it contained (Tr. 572, 574-76, 578-79). The statements for April, July and August 2008 were "Final Turn-Off Notice(s)." Ms. Ukai suggested that the Con Ed worker could not access the meter. She also admitted that she did not timely pay her bills and surmised that she might not have received them due to problems with the mailboxes (Tr. 583-84). But this was at odds with her son's testimony that by 2008, the problem with the mailboxes no longer existed and that he directed his bank statements to the subject premises (Tr. 315, 430). Thus, when it was pointed out that the premises was listed as the

mailing address on her husband's E-Z Pass statements, Ms. Ukai claimed it was "an accident" (Tr. 550). And she did not have an explanation for any of her other documents such as bank statements, and her Verizon phone statements for the period September 2008 to February 2009, which were sent to her at the subject premises (Tr. 483-84; Pet. Ex. 39).

Ms. Ukai's current driver's license displays her address in Warwick (Pet. Ex. 34). She stated that this was because she took driving lessons upstate on her husband's vehicle, and she does not drive in New York City. Also, she tends to use the Warwick address for safety reasons because "57 Jay Street mailbox is always broken and always very unreliable" causing her to lose many important documents. Her driver's license is important, so she used the Warwick address on it (Tr. 468, 539-40). Ms. Ukai posited that since the current owner purchased the premises in 2014, little has been done with the mailboxes, although there have been improvements to the entrance door (Tr. 635-36). Meanwhile, certified records of her New York State DMV history show that in 1996, Ms. Ukai listed her husband's apartment in Warwick as her mailing address. In 1998, she listed the Warwick address as her mailing address. In 1999, she changed her mailing address to their East Village apartment address, and in 2003, she changed it back to their home address in Warwick. In October 2014, Ms. Ukai changed her mailing address with the DMV to the subject premises (Resp. Ex. B).

Ms. Ukai admitted that the landlord of the East Village apartment had initiated a non-primary residence proceeding against her and her husband, but she denied that she had changed her address with the DMV in 1999, to give the impression that she was actually residing at that address. Nevertheless, her explanation for the various changes was extremely convoluted. She acknowledged that after they lost the East Village apartment, she changed her address with the DMV back to the Warwick address (Tr. 541-43). She admitted that she changed her mailing address with the DMV to the subject premises after filing her Loft Board application for coverage, but indicated that it had been on her mind to do so for about 15 years (Tr. 548-50).

Ms. Ukai presented statements from J.P. Morgan Chase Bank for September through December 2010, and from Sovereign Bank for December 2007 to February 2010, for accounts in the name of K2 Dance (Tr. 491-96; Pet. Exs. 40, 41). All the statements were addressed to the subject premises. Copies of rent payment checks for each month were attached to the respective statements. Ten of those checks covering December 2007 to October 2008, which were drawn

on the Sovereign Bank account, displayed the address of the Ukais's East Village Apartment as the address for K2 Dance. The remaining checks reflected the subject premises as the address for K2 Dance. Ms. Ukai testified that she started her dance company when her address was 336 East 5th Street, New York, and she made the payments from a residual check book (Tr. 496). Her dance company put on no performances in 2008 and 2009, because she was working at the Ross Academy and had no energy to rehearse. Consequently, the company had no income, which generally comes from tuitions and grants. Ms. Ukai estimated that from 2010 to the present, her company, which comprises three dancers, has put on less than 10 performances. The money that the company raises from admission fees is distributed amongst the dancers and videographers (Tr. 497-500, 593-97). She testified that she deposited her salary into the K2 Dance account, which is how the rent for the subject premises was paid from that account (Tr. 642-43).

A copy of Ms. Ukai's and her husband's federal and New York State Resident income tax returns[2] for 2008, displayed the couple's address as the Warwick address (Tr. 500-02; Pet. Ex. 42). Both returns were filed jointly. The NYS resident return listed Kiyoshi Ukai as the primary taxpayer and Ms. Ukai as his spouse. On it, Mr. Ukai declared Orange County as his New York State county of residence, and that his spouse resided in New York City for 12 months during 2008. However, while the return indicates that New York City taxes were withheld, Ms. Ukai did not pay New York City resident tax (see line 47).

A copy of the Ukais's original and amended tax returns for 2009, which were prepared by their accountant, was also presented (Tr. 505-10; Pet. Ex. 43). Their federal return was filed jointly, but unlike their 2008 returns, on their New York State return, they checked the box that indicated "Married, filing separately." Mr. Ukai listed his address in Warwick. Ms. Ukai's return displayed her mailing address as the subject premises, but her county of residence as Orange County in Warwick. She indicated on the return that she had resided in New York City for the entire 12 months of 2009. As opposed to 2008, Ms. Ukai's State returns for 2009 indicate that she paid NYC resident tax.

Tax returns for K2 Dance for 2005 and 2006, listed Ms. Ukai and her husband as officers of the company, and displayed their address as Warwick, New York (Resp. Exs.I, J). For each

[2] All tax returns that petitioners submitted were redacted to conceal financial information.

year, the income from contributions, grants and other sources was over $6,000. But the income was offset by expenses which primarily comprised "occupancy, rent, utilities and maintenance" in the sum of $10,488 and $11,885, for the respective years, which represented rent for the subject premises for the respective years. Ms. Ukai admitted that she filed similar returns for K2 Dance for 2007, 2008, and 2009, but none of those returns was produced (Tr. 599). She testified that the returns were prepared by her accountant and the offsets were made in accordance with his recommendation since the rent for the subject premises was, in effect, being paid from her teacher's salary (Tr. 643-44).

Respondent presented a copy of a 1983 deed, which showed that many years prior to moving in to the subject premises, Ms. Ukai and her husband had purchased a building located at 171 Sullivan Street in Manhattan. Ms. Ukai conceded that the building was a 14-unit rent-stabilized building, claimed that it was associated with her husband's business, and continued to maintain that at the time, they were "very, very poor" (Tr. 545-46; Resp. Ex. H). She suggested that her only business with 171 Sullivan Street was that she stored her lighting equipment in its basement (Tr. 638-39). Meanwhile, the 1996 Coles Directory for Manhattan listed separate telephone numbers for Ms. Ukai and her husband at 171 Sullivan Street, since 1987 and 1993, respectively. Ms. Ukai argued that someone else must have opened a telephone account in her name, but could not account for the number in her husband's name. The 1999 Coles Directory for Manhattan also listed a telephone number for Ms. Ukai's husband at 336 East 5th Street, their East Village apartment. Ms. Ukai acknowledged that that telephone number was maintained in her husband's name until they vacated the East Village apartment in 2002 (Tr. 621-25; Resp. Exs. N, O). The 2009 Coles Directory for Brooklyn listed separately, the same telephone number for K2 Dance and for Ms. Ukai at the subject premises, 57 Jay Street, from 2005 and 2003, respectively (Tr. 625-26; Resp. Ex. P).

Respondent submitted copies of the Ukais' Application for School Tax Relief ("STAR") Exemption, submitted to the town of Warwick in 2005 and 2014 (Resp. Ex. F). Both names were listed on the applications. The 2005 application informed that the STAR Program "provides an exemption from school taxes for owner-occupied, primary residences." The 2014 application included similar information but added an income limit qualification. Both applications required "the name and mailing address of each person who both owns and

primarily resides in the property." When asked about their applications for the STAR exemption, even though Koji had not attended school in Warwick since 1998, Ms. Ukai became flustered. She stated that her husband told her that they were eligible for the exemption. She therefore signed the forms without reading the caution regarding the penalties for misrepresentation (Tr. 531-39, 631).

In 2011, Ms. Ukai and her husband took out a second mortgage in the sum of $60,000, on the house in Warwick, which Ms. Ukai initially denied until the document was produced (Tr. 602-04; Resp. Ex. K). On her Home Equity Loan Application, Ms. Ukai listed the Warwick address as the place at which she had resided for 15 years. She also listed an employer in Manhattan (Tr. 604-05; Resp. Ex. L). Utility records for the Ukais' premises in Warwick, for 2008, 2009 and 2010, from Orange and Rockland Utilities, Inc., a Con Edison company, show that the utilities account was opened in 1998, in Ms. Ukai's name, and to date, remains in her name (Resp. Ex. M).

In spite of the numerous documents that show her Warwick address, Ms. Ukai insisted that the subject premises has been her primary residence for well over 20 years (Tr. 632).

Koji Ukai testified that he has resided with his mother at unit 5C of the premises since birth. He also conceded that he resided with his father in Warwick (Tr. 186-87). His earliest recollection of being at unit 5C was from age two or three years when his family shared the space with other artists. Because of the size of the space, he learned to play baseball and ride a bike indoors (Tr. 188-89). Photographs of Mr. Ukai as a toddler at the premises show him: (1) standing on the bare floor of an empty space which appears to be a dance studio; and (2) seated on a tricycle, surrounded by what appears to be his father's art equipment such as cans of paint and paint boards (Pet. Ex. 46).

Mr. Ukai's assessment of the neighborhoods in which he resided and attended school was similar to his mother's. He described the Dumbo area as "abandoned," and insisted that he split his time between there and East Village apartment, which was very small. He recalled commuting from each to the school in the East Village (Tr. 189-92, 361, 364-65).

Mr. Ukai testified that when he attended school in Warwick during second through eighth grades, his parents divided their time between New York City and Warwick, where he and his father lived in an apartment until his parents purchased a two-story ranch house in Warwick. He

then moved his cat from Brooklyn to the new home in Warwick (Tr. 320, 360-61, 392; Resp. Ex. E). Mr. Ukai corroborated his mother's testimony that on weekends, he attended the Japanese school in New York City, where his father taught, and returned to Warwick on either Sunday or Monday (Tr. 192-97, 316, 322). In New York City, he stayed at unit 5C, or at the East Village apartment. He played baseball in Central Park and at Randall's Island with a team called the Brooklyn Dumbos (Tr. 195, 197-98, 204, 362). From 2002 to 2006, while at high school in Lawrenceville, Mr. Ukai visited unit 5C during school breaks, and sometimes on weekends. He would sleep in the loft area where he stored books, clothes, and baseball equipment. It originally held three futons. His friend, Julian, also spent time at the loft (Tr. 201-04, 306). Mr. Ukai testified that before he started college, his mother slept in the loft "in one of the other two beds upstairs." Her bedroom was built during his first or second year at college (Tr. 205).

Mr. Ukai could not recall precisely how he got from Lawrenceville to Warwick but mused that either his father drove him or he took the bus from Port Authority in New York (Tr. 441-43). During that time, the house was being renovated, so he used it primarily to store outdated clothes and books (Tr. 207-08, 436). Both his handwritten "Candidate Statement" to the Lawrenceville School and his 2006 transcript reflect the Warwick address as Mr. Ukai's home address (Tr. 368, 371; Resp. Ex. C). Mr. Ukai got his first job as a teaching assistant at the Harlem Children's Zone where his mother worked, while he was still in high school (Tr. 205-06).

After graduating from the Lawrenceville School in 2006, Mr. Ukai attended the College of William and Mary from 2006 through 2010, inclusive of the window period (January 1, 2008 to December 31, 2009). While there, he visited the subject premises during winter, spring and summer breaks, at Thanksgiving, and on the occasional weekend (Tr. 208-09). A September 19, 2014 letter on college letterhead, addressed to "Human Resources," and signed by Carole Shaver from "Verifications" stated that Mr. Ukai listed 57 Jay Street Apt. 5C as his remittance address with the college. Mr. Ukai testified that he had requested the letter by telephone (Tr. 212-14, 372-73; Pet. Ex. 13). A more detailed report produced pursuant to respondent's subpoena revealed that from September 2006 to May 2011, Mr. Ukai listed the Warwick address as his parents' address, and as his initial, mailing, and forwarding address, as well as the address to be used by the bursar's office. The report confirmed that in May 2011, respondent provided the

college with the address of the subject premises as his remittance address. Mr. Ukai denied that he made a specific request from the college, for a letter that would support only the subject premises as his address (Tr. 379-82; Resp. Exs. D1, D2).

An article in his college newsletter dated March 31, 2009, and featuring Mr. Ukai, referred to him as hailing from Brooklyn, New York (Tr. 215-17; Pet. Ex. 14).

Mr. Ukai testified that while in college, he worked in the cafeteria. He did not stay in the Warwick home during his first two summer breaks because it was undergoing renovations (Tr. 317, 396-97). Toward the end of his first year, he worked as a summer camp counselor in Brownsville, Brooklyn. Mr. Ukai also testified that at the end of his sophomore year (2007-2008), he and a few friends worked for Verizon but he was paid through a company called Morello & Company, LLC (Tr. 386-87). The next summer, he worked at a restaurant in Brooklyn, near to the subject premises (Tr. 210-11).

During his college summer breaks, Mr. Ukai socialized with friends at unit 5C. He recalled getting together for holiday celebrations such as New Year's Eve (Koji: Tr. 240-41; Gonzalez: Tr. 153-55). After graduating from college in 2010, Mr. Ukai sent some personal belongings to the Warwick home while he went to 57 Jay Street (Tr. 245-46, 436). He interned in Ghana from July 27 to August 29, 2010, and then joined the Peace Corps, traveling to El Salvador in January 2011 (Tr. 246-47; 252-53; Pet. Ex. 21). Mr. Ukai testified that in 2013, when he returned from the Peace Corps, he spent about two to three weeks in Warwick to decompress and make a cultural readjustment as he was experiencing "some reverse culture shock." After that readjustment, he returned to 57 Jay Street (Tr. 254-55, 436).

Mr. Ukai asserted that the photographs which he took of unit 5C in June 2014, in preparation for the hearing, represented how the unit looked in 2008. He stated that he had installed the stove in the kitchen, including its connection to the gas line, at some time in 2013. He also installed the supporting structure for the overhead loft which his father had built. No photo of the loft was provided but Mr. Ukai's description of it suggested a space of much larger proportions than what its underlying frame support in the photos indicated. He testified that it contained two large mattresses and a smaller one. His only explanation for failing to provide photos of the loft was that it was not relevant to the floor plan. Mr. Ukai could not recall if the

furnishings that his parents had in the East Village apartment were eventually moved to 57 Jay Street (Tr. 287-95, 304-09, 312, 397-98, 429; Pet. Exs. 1, 2A-F).

Mr. Ukai conceded that he was not named on the lease and he never asked to be added to it because the lessee for unit 5C was K-2 Dance. But he claimed that he paid the rent for the unit for about two or three months in "either the summer of 2013 or summer of 2014" when his mother visited his ailing grandmother in Japan, by effecting a funds transfer from his Chase Bank account. He testified that he also contributed a portion of the rent at some point in 2008, when he was working with Verizon (Tr. 298-301, 418-20, 423-25, 448-49). Mr. Ukai had trouble recalling when exactly he actually contributed to the rent and his testimony in this regard was unsupported by documentary evidence (Tr. 420-22).

Mr. Ukai testified that his mother kept her personal belongings at unit 5C, including old videos, books, CDs, kitchen items, and bathroom-related items. He could not recall her using the Warwick address for any reason other than to visit his father, in spite of her testimony that she took laundry to Warwick since she did not have the facilities to do her laundry at the subject premises (Tr. 242, 257). He opined that his parents needed to live apart because as an artist, his father needed more space than what the renovations at the 57 Jay Street permitted him, while his mother likes living in New York City, and identifies with being a choreographer, and having a space where she can live and also have dance rehearsals (Tr. 243-44). But they tended to spend the Christmas and New Year's holidays in Warwick, and Thanksgiving at "friends' places in New York City" (Tr. 434-35). Mr. Ukai stated that he kept few personal belongings in Warwick, and would bring clothes from New York City whenever he visited. He also claimed that at some point, his father had rented out his room. He produced a photo of a tree on the Warwick premises, attached to which was a sign advertising a furnished room for rent. The photo was admittedly taken by respondent pre-trial, and provided to petitioner (Tr. 436-40).

Mr. Ukai submitted copies of eight check payments that he received from the Brooklyn restaurant where he worked during the summer of 2009 (Pet. Ex. 15). They covered the months of June and July, 2009. W-2 Wage and Tax statements for: 1) 2008 and 2009; and 2) 2010 and 2013, show his address as 57 Jay Street, Apt. 5C (Tr. 218-27; Pet. Ex. 16). Mr. Ukai's 2008 federal tax return and Virginia nonresident income tax return, which were prepared by his father's accountant in Warwick, displayed his apartment number at the premises as 5L, while the

attached earnings summaries displayed apartment 5C (Tr. 239-40, 382-83; Pet. Ex. 19). On his New York Resident Income Tax Return for the year ending 2008, during which he was at the College of William and Mary, Mr. Ukai listed his address as 57 Jay Street and indicated that he resided in New York City for 12 months (Tr. 385-86; Pet. Ex. 19). On the same return, he checked the box that indicated that he could be claimed as a dependent on another taxpayer's federal return, but testified that he was unaware that his parents were taking a deduction on their return, for a portion of his college tuition (Tr. 405). On the other hand, his mother maintained that she was not aware that her son was filing his own tax returns, hence the reason that she and her husband claimed him as a dependent and took deductions for the interest on Koji's student loan, and for earned income credit (Tr. 610-11).

During 2008, 2009 and 2010, Mr. Ukai maintained bank accounts with Chase Bank, BoA and ING Bank (Tr. 280). His ING Bank statements from July 2009 to December 2010, and his BoA statements from July 2007 to December 2009, listed his address at the Warwick home. He testified that his mail was more secure at that address (Tr. 281-82, 285; Pet. Exs. 28-30). The BoA statements showed ATM and other transactions such as Metrocard purchases, cinema charges, and purchases at Staples, Duane Reade, Barnes and Noble, and J's Wines and Spirits, in January, March, June, July, August, and December of 2008, and in January, May and June of 2009, in downtown Brooklyn. Mr. Ukai's Chase Bank college checking account statements displayed the subject premises as his address. He explained that by the time that he had opened the Chase account, the situation with the mailbox at 57 Jay Street had improved in that by 2008, it was less likely that his mail would be stolen (Tr. 314-15, 430-32). Purchases against his Bank of America checking account statements support that during his college breaks, Mr. Ukai spent some of his time in New York City. The statements also reveal purchases from New Jersey Transit in Princeton and Penn Station, and for Metro-North tickets during each break (Pet. Ex. 31). Mr. Ukai's Chase Bank account statements from June 2008 to September 2010, exhibited a similar pattern of purchases as his other bank accounts. He identified the Metro-North ticket purchases as purchases to visit friends, while the New Jersey Transit charges were for trips to his Warwick home (Tr. 406-07).

Mr. Ukai's current New York State driver's license which was issued in December 2013, displays his address as 57 Jay Street, apartment 5C (Pet. Ex. 23). Certified DMV records show

that from June 2005, when he was first issued a driver's license, up until 2013, Mr. Ukai listed his parents' Warwick home as his address (Resp. Ex. B). He acknowledged that he only changed his mailing address to the subject premises in 2013, after his application was filed with the Loft Board, but claimed that he did so only because his license had been stolen at a bar (Tr. 365-68).

Mr. Ukai's certified voter registration documentation from the Board of Elections showed that in 2008, he registered to vote in Kings County, Brooklyn, and listed his address as 57 Jay Street, apartment 5C (Pet. Ex. 26). But he believes that he voted in the 2008 presidential elections in Virginia (Tr. 391). In 2012, he voted by absentee ballot from El Salvador (Tr. 270-72, 388-89). The voter registration documents also showed that in September 2014, Mr. Ukai, who was already a student at Harvard, was sent an absentee ballot for the New York mayoral elections. Mr. Ukai explained that when he showed up at a polling station in Brooklyn to vote, his name was not on the voter list, and he was therefore given an absentee ballot (Tr. 389-91, 446-53).

A September 17, 2014 certified letter from Harvard Kennedy School confirmed that Mr. Ukai is a full-time student in its Master of Public Policy program, and that his permanent home address on file with the school is unit 5C at the subject premises (Pet. Ex. 22). A September 18, 2014 letter from the Peace Corps confirms that Mr. Ukai received training from January through March 2011, before becoming a full-fledged volunteer in El Salvador from March 2011 through April 2013. His passport also showed his date of entry in El Salvador (Pet. Exs. 20, 21). The Peace Corps letter advised that when he first signed up, Mr. Ukai indicated that 57 Jay Street was his address of record, but changed it to the Warwick address in January 2011 (Tr. 249; Pet. Ex. 2). Mr. Ukai stated that he made the change in order to obtain a larger travel reimbursement from the Peace Corps (Tr. 249-50, 400).

Other documents submitted by Mr. Ukai included an August 23, 2008 e-mail to the Brooklyn Dumbos team from one of its members, reporting the individual team members' statistics for the 2008 season, and an undated photo of the team on Randall's Island, which he guessed might have been taken in the summer of 2010 (Tr. 228-31, 236-37; Pet. Exs. 17, 18). A printout dated January 20, 2015, from his mother's cell phone carrier, T-Mobile, showed a billing address of 57 Jay Street. It listed different telephone contact numbers for Ms. Ukai. Her

primary contact number had an "845" area code, which Mr. Ukai stated was his father's land line in Warwick (Koji: Tr. 273-77; Kay: Tr. 485-88; Pet. Ex. 27).

Kathleen Laziza is an educator and dance choreographer who resides in Boerum Hill, Brooklyn. Ms. Laziza testified that she and Ms. Ukai first met when, in 1980, she leased dance space in Manhattan to Ms. Ukai. They became and have remained friends because they share common interests, having similar not-for-profit art organizations. Ms. Laziza testified that she has visited Ms. Ukai at the subject premises from as early as around 1986, when she attended an art exhibit by Ms. Ukai's husband. The premises was a "typical artist loft" with a bathroom, small kitchen, and a big room "that was sort of a universal room and then some bedroom sort of off through the side" (Tr. 336-339, 343, 349). It was also "filled with art, all kinds of art-making things and art products" and personal items such as "pots, pans [and] laundry." She knew that other people lived at the premises (Tr. 350-52).

Ms. Laziza stated that during 2008 and 2009, she and Ms. Ukai maintained their friendship through late night phone calls. In fact, in 2008, they went to Manhattan Beach to celebrate Ms. Ukai's birthday. They met in the Sheepshead Bay area, close to where Ms. Ukai worked (Tr. 340-41, 352-53). They continue to meet occasionally to celebrate holidays, but she equivocated over which holidays they actually celebrated. Ms. Laziza was aware that K-2 Dance was operating from the subject premises (Tr. 342-43, 351-54).

Ms. Laziza visited Ms. Ukai's apartment on Fifth Street in the East Village even less than she did the subject premises. The apartment was tiny, and she did not know if or how many bedrooms it contained. But she observed that while the subject premises was filled with art-related materials, the Fifth Street apartment was filled with toys (Laziza: Tr. 350-51; Koji: Tr. 359-60). Notably, Mr. Ukai speculated that Ms. Laziza would not have seen his toys in the Dumbo apartment because they were located in a different section of the apartment from where she visited (Tr. 361-62). Of the Ukai's home in Warwick, Ms. Laziza stated, "Well, it's mostly her husband's home. I mean, she mostly lives there and she went back and forth, you know, occasionally as I understood it she went back and forth on the weekends" (Tr. 344-45).

As a testament to the strength of their friendship, Ms. Laziza added that since her husband became disabled in January 2015, Ms. Ukai has been helping her by driving him to doctors' offices and meetings (Tr. 342, 355-57). However, Ms. Ukai claimed that it was actually

Kiyoshi, her husband, who would extend his visits to New York, and assist in driving Ms. Laziza's husband to the doctor. She admitted that she sometimes took over the wheel on the way home (Tr. 540).

Ms. Laziza testified that on each of her visits to the premises in 2010, 2011, 2012 and 2013, she had seen Koji. She became flustered when told by respondent's counsel that Koji was in the Peace Corps in Costa Rica in 2011. In an attempt to rehabilitate herself, Ms. Laziza stated that she was "trying to get [her] bearings here" and mused that perhaps she did not see Koji at the premises in 2012. Nor was she certain that she had seen him in 2013 (Tr. 346-48).

Julian Gonzalez, a regulatory analyst for an environmental consulting firm in Washington D.C., met Koji Ukai in 2002 at the Lawrenceville School, where they became close friends (Tr. 148-49). He testified that as far as he knew, Koji resided at 57 Jay Street in Brooklyn, because when he visited New York City on holidays and during spring and summer breaks, and on the occasional weekend, he would often meet Koji and other friends at unit 5C or somewhere in the Dumbo neighborhood (Tr. 150-51).

Upon leaving the Lawrenceville school in 2006, Mr. Gonzalez attended the University of Connecticut for one year and the University of Delaware for three years, while Koji attended the College of William and Mary (Gonzalez: Tr. 153; Koji: Tr. 208). While at college, Mr. Gonzalez and Mr. Ukai saw one another infrequently at unit 5C. When they did, Ms. Ukai, and sometimes Koji's dad, would be present. Mr. Gonzalez recalled getting together with other friends at unit 5C on New Year's Eve, to see fireworks from the rooftop of 57 Jay Street (Tr. 153-55).

Mr. Gonzalez corroborated Mr. Ukai's testimony that during the summer of 2008, he, Mr. Ukai and other high school friends, did marketing work for Verizon in New York City. They accomplished their work by car, with Koji as the driver of one of two cars whose owner, Nick, had lost his license. Mr. Gonzalez and Nick lived in Westchester, so Koji would commute by train from Brooklyn to Westchester[3] to meet them. At day's end, they returned to Westchester and Koji would return to Brooklyn (Tr. 158-59, 173-74, 183-84). During the summer of 2009, Mr. Gonzalez came to the City once or twice per month and stayed at Koji's loft (Tr. 177-78). In addition, he and other friends celebrated Koji's 21st birthday at unit 5C. Mr. Gonzalez could not

[3] Koji's BoA statements showed daily Metro-North purchases in July 2008 (Pet. Ex. 29).

recall the exact year, but given that Koji was born in 1988, he celebrated his 21st birthday in 2009. A photo of the event showed Mr. Gonzalez, Koji, and the other friends who were present (Tr. 156-58, 181; Pet. Ex. 12).

Upon graduating from college in 2010, Mr. Gonzalez returned to his home in Westchester, but periodically visited Koji in Brooklyn. Koji later joined the Peace Corps and travelled to El Salvador (Tr. 159-62, 178-79). Mr. Gonzalez attended law school and graduated in 2013. While they were studying for the July 2013 bar exam, and the graduate school entrance exam ("GRE"), Mr. Gonzalez and Koji met a couple of times in Manhattan, as they were constrained by time. But when Mr. Gonzalez visited the subject premises Koji's mother was usually present (Tr. 162-64).

Mr. Gonzalez recalled the layout of unit 5C from memory. His description matched petitioners' floor plan as well as the photos of the unit (Tr. 165-69; Pet. Exs. 1, 2A-F). He testified that Koji slept in the elevated loft area in the unit, as did he when he visited, because it was outfitted with two mattresses (Gonzalez: Tr. 165, 181, 183; Kay: Tr. 116). He further testified that the loft held plastic bins for storage and a small clothes rack, and that Koji also kept his computer, books, and baseball and fitness gear in that area (Tr. 174-76, 184).

Mr. Gonzalez went to the Ukais' home in Warwick on one occasion, to assist Koji's father in repairing gutters on the roof. He recalled sleeping on the couch in the living room but remembered little about the house (Tr. 152, 172, 182).

Steven Seagrest has been a resident of the premises since 1996, when he sublet space at the subject premises from Ms. Ukai and her husband. After the owner renovated the premises, Mr. Seagrest's space became unit 5B (Tr. 43-45). Without visual aids, his description of Unit 5C matched the layout depicted on the floor plan which Mr. Ukai had sketched (Tr. 59; Pet. Ex. 1). He testified that about one month preceding this trial, he had visited the premises to repair the stairs to the loft, a task which Koji had been unable to complete before going off to graduate school. Mr. Seagrest maintained that the unit looked exactly the same then as it did in petitioners' photographs which were taken in June 2014 (Seagrest: Tr. 66-67, 72-73; Koji: Tr. 303-04, 427-28; Pet. Ex. 2A).

Mr. Seagrest testified that he saw Koji grow up at the premises, but clarified that "[he] saw Koji as a teenager through the process being a grown man, a grown man" (Tr. 46). He

claimed that from 2008 through 2010, he knew that Ms. Ukai, her husband and Koji lived in unit 5C, because they were good neighbors who knocked on each other's doors once in a while (Tr. 46, 72). Mr. Seagrest knew about K2 Dance because about 10 to 15 years prior, he had helped Ms. Ukai with a set design on Broadway. But he did not know if unit 5C had been used for business purposes. Nor could he say whether there were ever dancers in the unit. Mr. Seagrest also knew of the Ukais' home in Warwick (Tr. 80-81).

Mr. Seagrest's testimony was not entirely credible. First, he claimed that he did little jobs for Ms. Ukai, which later turned out to be his single job of repairing the stairs to the loft (Tr. 47, 73, 81-82). Then he testified that he knew where Koji was attending school in 2008 and 2009, but later admitted that he was unsure (Tr. 74). Further, contrary to Ms. Ukai's and Koji's testimony, he claimed that Kiyoshi Ukai, Ms. Ukai's husband, lived at the premises from 2008 through 2010. In addition, when asked to clarify his claim that Koji was raised at the premises, Mr. Seagrest was less than forthright. Further, he stated that he had only been asked to testify about one week prior to the trial, even though he was identified as a witness (not a potential witness) from as early as February 4, 2015 (Tr. 76-78; Resp. Ex. A).

Gregory Jones and his brother are the two the principals of 57 Jay Street, LLC, corporate owner of the premises (Tr. 656-57). Mr. Jones acknowledged that when he and his brother purchased the subject building, there was a security concern, in that the entry door had no lock on it. But he testified that there were locks on the individual apartment doors on each floor. Nonetheless, he replaced the front door and installed a new lock. He also learned of the problems with the mailboxes at a narrative conference before the Loft Board. He stated that tenants were concerned that the mailman was unable to get access to the mailboxes to deposit their mail. In response, he installed a "Keykeeper" at the side of the front door. Mr. Jones coordinated with the Post Office and now, only the mailman has a key for the Keykeeper, which permits him entry to the building and thus, to the mailboxes. Since then, he has heard of no problems with the mailboxes (Tr. 657-59, 667-68).

In its closing brief, respondent argued that the doctrine of quasi-estoppel should operate to preclude Ms. Ukai from claiming that unit 5C was residentially occupied during the window period and on or before June 21, 2010, the effective date of the Loft Law (Resp. brief at 1-4). Respondent's argument is predicated on the fact that K2 Dance is a 501(c)(3) not-for-profit

corporation,[4] the income of which is exempt from federal income tax, so long as it is not diverted from the corporation's not-for-profit purpose. Respondent contended that pursuant to 26 U.S.C. § 6033(b)(2), which provides filing instructions for tax exempt organizations, a not-for-profit organization may only deduct rent as a business expense where the premises for which the rent deductions were taken, was used in connection with the charitable purpose of the not-for-profit organization. Respondent noted that on the K2 Dance tax returns which were presented at trial, Ms. Ukai stated that her address is the Warwick address, and made no claim for fringe benefits on her Form 990-EZ filing for K2 Dance. Respondent further asserted that the filing instructions defined fringe benefits to include "any shareholder's personal use of assets owned or **leased** by the not-for-profit for housing or residential purposes." (emphasis added). Respondent posits that since Ms. Ukai, under the penalty of perjury, declared on the K2 Dance returns that she never used any part of unit 5C as a home or residence, and that 100 percent of the unit was used exclusively for a charitable purpose, her claim that she used the premises residentially is contradictory to her tax declaration, and she should therefore be precluded from making such a claim (Resp. brief at 6-7). Respondent relies on *Ansonia Assocs. v. Unwin*,[5] 130 A.D.3d 453 (1st Dep't 2015), and this tribunal's recommendation in *Matter of Boyers*, OATH Index Nos. 1338/12, 1381/12 and 1403/13 (Feb. 10, 2014).

In July 2015, the First Department, in *Ansonia,* reversed the Appellate Term's affirmation of an order of the Civil Court which denied petitioner landlord's summary judgment motion. The matter concerned a non-primary residence holdover proceeding which the landlord brought against the lessee of a rent-stabilized apartment in Manhattan. In awarding the landlord possession of the apartment, the First Department held that the landlord had established *prima facie* that the apartment was not the tenant's primary residence, through the submission of the tenant's federal income tax returns for the years 2009, 2010, and 2011, on which the tenant had deducted the entire rent for the apartment as an expense of her S corporation. The Court noted that since the instructions for the federal income tax return for an S corporation disallowed the

[4] Section 501(c)(3) of the US Internal Revenue Code allows for federal tax exemption of nonprofit organizations, specifically those that are considered public charities, private foundations or private operating foundations. 26 USC § 501 (Lexis 2015).

[5] In September 2015, the *Ansonia* decision was followed by the Appellate Term, First Department, in *Goldman v. Davis*, 2015 N.Y. Misc. LEXIS 3285 (N.Y. App. Term, 1st Dep't 2015).

deduction of rent for a dwelling unit occupied by any shareholder for personal use, the tenant's argument that the apartment was her primary residence was "contrary to declarations made under the penalty of perjury on income tax returns," that is, that she does not occupy the apartment for personal use."

Under a similar scenario in *Matter of Boyers*, two applicants sought coverage of their unit as an IMD, and recognition as the protected occupants of the unit. One of the tenants, who held 100 percent of the shares in her business, had taken 100 percent of their rent of the unit as a business deduction on the income tax returns for the business, for 2008, 2009 and 2010, thereby affirming under penalty of perjury that the unit for which they sought coverage, had been used entirely for commercial purposes. The business' website informed that the co-tenant, who testified that he worked for the business, had started same with his wife, the sole shareholder. Administrative Law Judge Kara J. Miller noted that, "[n]ot only did [the applicants] make contradictory statements on their taxes, [one] actually claimed rent as a business deduction in 2009, despite not paying any rent." *Matter of Boyers*, OATH 1338/12, 1381/12 and 1403/13 at 24. Moreover, after a visit to the unit, the judge also found that the residential use of the loft appeared to be incidental to its commercial uses and was insufficient to warrant Loft Law coverage. *Id* at 26.

While respondent's argument appears to be supported by case law, at least in the context of rent-stabilized apartments, which the subject premises is not, I find that preclusion here is not warranted for the following reason. At trial, respondent relied on the K2 Dance filings for 2005 and 2006. Even though Ms. Ukai testified that her filings for K2 Dance were current, none beyond her 2006 filing was produced. Ms. Ukai further insisted that the returns were prepared by an accountant, whose advice she had followed. When asked whether the accountant would have listed her address as Warwick on the more recent returns, Ms. Ukai's reply in itself was contradictory. She stated, "He just did by mistake. This there that he filled out is accurate" (Tr. 599). It was therefore unclear to me whether or not she considered the inclusion of her Warwick address to be accurate or not. In any event, unlike *Matter of Boyers*, respondent did not present the K2 Dance 2008 and 2009 tax returns, and is therefore unable to establish what deductions, if any, were taken for rent of the subject premises during the window period, and if so, whether Ms. Ukai declared under penalty of perjury that the subject premises was used solely for K2

Dance's charitable purpose. Absent those returns, which cover the window period, respondent's proof that Ms. Ukai's claim of residential use of the premises is contradictory to statements made on her K2 Dance returns under penalty of perjury, applies only to her filings for 2005 and 2006, which is outside the window period.

Notwithstanding, I did not find either Ms. Ukai or her son to be particularly credible. In assessing credibility, this tribunal has considered factors such as: "witness demeanor, consistency of a 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); *Matter of Grant,* OATH Index No. 1864/10 at 9 (Nov. 17, 2010), *adopted,* Loft Bd. Order No. 4155 (June 20, 2013). Here, not only did I find Ms. Ukai's and her son's testimony to be inconsistent and extremely evasive, but when called upon to explain inconsistencies in the documentary evidence vis-a-vis their testimony, both either feigned ignorance, or claimed the inconsistency to be a mistake.

I turn now to the question whether the evidence supports coverage of the unit as an IMD.

Coverage

For unit 5C to qualify for coverage as an IMD unit, petitioners must demonstrate that it possesses "sufficient indicia of independent living." *See Madeline D'Anthony Enterprises Inc. v. Sokolowsky,* 101 A.D.3d 606, 607 (1st Dep't 2012) ("In order for a unit to qualify as a covered residence, 'it must possess sufficient indicia of independent living to demonstrate its use as a family residence.' This includes a showing that the premises have been converted, at least in part, into a dwelling" (citation omitted)); *Anthony v. NYC Loft Bd*., 122 A.D.2d 725, 727 (1st Dep't 1986) ("For a unit to qualify as a residence under Multiple Dwelling Law § 281 it must possess sufficient indicia of independent living to demonstrate its use as a family residence. . . . The showing of residential use must be accompanied by a showing that the formerly commercial premises, the domestic use of which is claimed, physically reflect that use, i.e., that the premises have been converted, at least in part, into a dwelling.") (citation omitted). The attributes of independent living have also been spelled out in the Loft Board rules. 29 RCNY § 2-08(a)(3)

(Lexis 2015). The residential use of the unit for which coverage is sought may not be incidental to a commercial use. *See Franmar Infants Wear, Inc. v. Rios*, 143 Misc. 2d 562 (App. Term 1st Dep't 1989).[6]

In determining whether a unit qualifies for coverage, this tribunal has applied a case by case analysis of the indicia of residential use. *See 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 Index No. 968/08 at 16 (June 30, 2009), *adopted,* Loft Bd. Order No. 3552 (Nov. 19, 2009) (finding refrigerator, stove, bedroom with built-in closets, and a bathroom with mirrors to be "sufficient proof of conversion to residential use").

While no photographs of the unit during the window period were presented, Mr. Gonzalez' description of the premises in advance of being shown the rough sketch of its layout or the recent photographs, indicated at a minimum, that when he visited it during the window period, parts of the unit had been converted to a dwelling, with an elevated bedroom, a bedroom just off the large main room, and with a kitchen and bathroom. When presented with the photographs which were taken by Mr. Ukai in preparation for trial, Mr. Gonzalez was unperturbed. This suggested to me that what he saw in the photos did not depart from the layout of the unit as he knew it during his visits (Tr. 155-69, 177-78). Because I found Mr. Gonzalez to be very credible, there appears to be no doubt that the subject unit possessed some indicia of residential use during the window period, which it continues to possess.

In its closing brief, respondent further challenged Ms. Ukai's claimed residential occupancy of the premises for the past 20 years, inclusive of the window period, finding much of it to be contradictory to the documentary evidence (Resp. brief at 7-12). Respondent pointed to: 1) Ms. Ukai's driver's license and her 2008 and 2009 federal income tax returns, which display the Warwick address; 2) her STAR exemption applications on which she stated under penalty of

[6] In *Franmar*, the subject premises was a 625-square foot artist's studio that was divided into a main room which the tenant used for painting and a smaller corner space used for living purposes. There was no bathroom or kitchen. The appellate term found that the space lacked "the essential amenities appurtenant to units configured for dwelling purposes" and since the character of the space in question remained primarily commercial, the tenant was not entitled to coverage and the landlord was entitled to judgment on the holdover proceeding. *Id.*at 564.

perjury that her address is in Warwick, and it was owner-occupied for all relevant periods; 3) the certified deed to the house in Warwick, which was purchased in 1998; 4) K2 Dance's tax returns for 2005 and 2006, on which she took deductions for rent, identified herself as a principal of the corporation, and listed her address as Warwick; 5) the second mortgage for the house in Warwick, which she listed as her address, and the mortgage application which showed her address as Warwick; and 6) the Orange and Rockland Utilities document showing that Ms. Ukai had opened an account in 1998, which to date, remains in her name, and on which she listed her home as Warwick.

The K2 Dance tax returns have already been addressed and discounted as being outside the window period. The same reasoning is applicable to the STAR exemption documents which were dated 2005 and 2014, and outside the window period, and which therefore cannot be considered in the determination of whether or not Ms. Ukai occupied the premises residentially during the window period.

Notwithstanding, this tribunal and the Loft Board have considered circumstantial evidence of a tenant's intent to make his/her unit a residence, such as the receipt of mail at the unit, whether the unit's address is used for voter registration, driver's license, and other official documents, and whether the tenant has maintained another residence. *See, e.g., Matter of Gareza*, OATH Index Nos. 2061/12 & 760/13 at 8 (Dec. 12, 2012), *adopted in relevant part*, Loft Bd. Order No. 4243 (Feb. 20, 2014) (receiving mail and tax documents at the address, using the address on a bank account, and being registered to vote at the address was evidence of residential use); *Matter of the Tenants of 141-155 S. Fifth Street*, Loft Bd. Order No. 1739, 15 Loft Bd. Rptr. 199, 212 (Jan. 19, 1995) (tenant's listing the loft address as his home address on tax returns and marriage certificate, and his home owner's insurance policy on the unit, evinced an intent to build himself a home); *Matter of Muschel*, Loft Bd. Order No. 33, 1 Loft Bd. Rptr. 27, 29-30 (Nov. 23, 1983) (documents such as tax returns, checks, and a passport, indicating the loft was applicant's residence was persuasive because "the Board considers where one holds oneself out as residing as probative of where one resides in fact."); *Matter of Mussman*, Loft Bd. Order No. 905, 9 Loft Bd. Rptr. 50, 59 (May 25, 1989) (finding that tenant did not residentially occupy the unit based in part on automobile registration, automobile insurance, and voter

registration reflecting another address plus the tenant's inability to explain why his wife resided at that address without him).

There is no doubt that since 1998, Ms. Ukai has maintained, and continues to maintain, a residence in Warwick, New York. In fact, many of her significant documents list the Warwick address as her address. These include her driver's license, a document from her utilities company, and her tax returns. For coverage purposes, however, a unit need not be the sole residence of the occupant during the window period. *See Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769, 770 (1987); *Kaufman v. American Electrofax Corp.*, 102 A.D.2d 140, 142 (1st Dep't 1984). Notably, on her New York State tax return for 2009, which she filed separately from her husband's, Ms. Ukai indicated that she resided in New York City for 12 months, and she paid New York City resident tax (Pet. Ex. 43). The 2009 return was filed more than two months in advance of the amendment to the Loft Law.

By themselves, tax returns may not be dispositive of where one resides. *Matter of Boyers,* OATH Index Nos. 1338/12, 1381/12 and 1403/13 at 23 (Feb. 10, 2014); *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"). However, attachments to the 2009 return included a Form 1099-INT Interest Income statement from Chase Bank, and a Combined Tax Statement for Year 2009 from Bank of America. Both were addressed to Ms. Ukai at the subject premises. In fact, Ms. Ukai presented Bank of America bank statements covering the period December 2007 through December 2009, for an account which she held jointly with her husband. The statements listed the subject premises as their address. Thus, in spite of other contradictory documents, and my skepticism as to the number of days that Ms. Ukai actually spent on a weekly basis at the unit, I find that cumulatively, payment of New York City resident tax, as well as bank statements reflecting the address of the subject premises during the window period, to be persuasive indicators that she resided at the subject premises for at least 12 consecutive months during the window period.

Even though it was not addressed at trial or in the closing briefs, I note that based on the testimony, the unit has been used for both residential, and non-residential purposes in the form of dance rehearsals associated with K2 Dance, at some point. It therefore comprised a mixed-use

unit. A unit which is being used for residential and non-residential purposes is not precluded from coverage as an IMD so long as it satisfies the criteria set forth in section 2-08(l) of the Loft Board rules. *See* 29 RCNY § 2-08(l) (Lexis 2015). There was no evidence that the unit was used primarily for dance rehearsals during the window period, and nothing to otherwise convince me that the criteria set forth in section 2-08(l) of the Loft Boards rules were not being met.

With respect to Mr. Ukai's claim that he resided at the premises during the window period, respondent argued that at best, Mr. Ukai used unit 5C as nothing more than a convenience. It noted that electricity usage was consistently low at the premises, and did not change even during the summers when Mr. Ukai claimed to reside there (Resp. brief at 22-23). In essence, respondent's argument raised the specter of a "primary residence" challenge. However, as we have previously noted, to establish coverage, an applicant need not prove that the unit is his or her "primary residence." *Vlachos v. NYC Loft Bd.,* 70 N.Y.2d 769, 770 (1987); *BOR Realty Corp. v. NYC Loft Bd.,* 129 A.D.2d 496 (1st Dep't), *aff'd,* 70 N.Y.2d 720 (1987); *Matter of Cohen,* OATH Index No. 2015/12 at 4-5 (Aug. 23, 2013), *adopted,* Loft Bd. Order No. 4261 (Mar. 20, 2014); *Matter of Pels,* OATH Index No. 2481/11 at 11-12 (June 20, 2012), *adopted,* Loft Bd. Order No. 4161 (June 20, 2013). Rather, petitioners here must prove that the criteria for coverage set forth in section 281(5) of the Loft Law have been satisfied. Those criteria do not require that the unit at issue be the primary residence of the applicant. Moreover, I am not convinced by respondent's argument regarding utility usage because it did not contemplate that while in Brooklyn, Mr. Ukai was more likely to socialize with friends, and therefore, more unlikely to be at home very often, which would result in discernable changes to the utility bills for the premises.

That being said, I find the evidence sufficient to conclude that Mr. Ukai used the subject premises as his base once he became a student at the College of William and Mary in Virginia, and throughout the time that he was there, which is inclusive of the window period. First, Mr. Ukai's W-2 statements for 2008 and 2009 displayed the subject premises as his address, as did his federal income tax return for 2008. He filed a New York State resident income tax return for 2008, which reflected the subject premises as his address. On it, he declared that he lived in New York City for 12 months in 2008, and he filed New York City resident tax for that year (Pet. Ex. 19 at ln 47). In spite of his testimony that he may have voted in Virginia in 2008,

certified records from the Board of Elections in New York City show that Mr. Ukai registered to vote on February 19, 2008, and listed the subject premises as his address. The statements for his Chase Bank college checking account, which he opened on June 18, 2008, list the subject premises as his address. In addition, the money amounts on check payments that he received from his summer job at the restaurant on Water Street in Brooklyn during the summer of 2009, matched deposits that he made into his Chase Bank college checking account on or around the dates reflected on the checks. His BoA statements showed purchases in Brooklyn at times that coincided with vacation from college in 2008 to 2009. And Mr. Gonzalez credibly testified that during the summer of 2009, he visited Koji once or twice per month at the subject premises, and that he and other school friends celebrated Koji's 21st birthday with him at the premises.

Thus, in spite of other evidence to the contrary, such as Mr. Ukai's BoA checking and savings accounts' statements which display the Warwick address, I find the testimony of Mr. Ukai which was corroborated by Mr. Gonzalez, plus the documentary evidence, sufficient to support that during the window period, Mr. Ukai resided at the subject premises.

In sum, I find that, at the very least, Ms. Ukai resided at the unit for the 12 months of 2009 (which is within the window period), as evidenced by her payment of New York City resident tax. I further find that Mr. Ukai evinced an intent to have the premises be considered his home during the entire window period. Given that the other criteria for coverage went unchallenged, Ms. Ukai's and her son's occupancy of the unit for 12 consecutive months during the window period qualifies the unit for coverage as an IMD. Therefore, the only question remaining is whether they are protected occupants.

Protected occupancy

The MDL contains specific criteria for a building and units to qualify as an IMD. However, the law does not define who should enjoy protected occupancy status. On the other hand, section 2-09(b) of the Loft Board rules provides that:

> (1) Except 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).
>
> (2) If the residential occupant in possession of a covered residential unit is not the prime lessee, 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 covered under MDL § 281(5) . . . . 29 RCNY § 2-09(b)(2).
>
> (3) When a residential occupant took possession of a residential unit covered as part of an IMD, on or after . . . (iii) June 21, 2010, for an IMD unit covered by MDL § 281(5) . . . , such occupant is qualified for the protection of Article 7-C if [among other criteria]:
>
> i. The occupant is a prime lessee with a lease currently in effect or, if the occupant took possession of the IMD unit with the consent of the landlord, as a statutory tenant pursuant to Article 7-C, without the issuance of a new lease . . . .
>
> (4) The prime lessee . . . is deemed to be the residential occupant qualified for protection under Article 7-C, if the prime lessee or sublessor can prove that the residential unit covered as part of an IMD is his or her primary residence, even if another person is in possession. If the prime lessee or sublessor fails to prove that such unit is his or her primary residence, any rights of such person to recover the unit are extinguished. 29 RCNY § 2-09(b)(4).

A finding that an applicant is a residential occupant in possession of a unit pursuant to section 2-09(b)(1) does not end the inquiry for protected occupancy. The other sections of Rule 2-09(b) distinguish between a residential occupant who is the prime lessee and one who is not, and when the residential occupant took possession of the unit.

Here, K2 Dance is the prime lessee. Petitioners asserted that a commercial lessee does not preclude Loft Law protection for the real individuals in occupancy. That is correct. "Protected occupancy flows from the status of the parties and of the unit rented and not from the label placed on the lease or rental agreement." *Matter of Law*, Loft Bd. Order No. 1319, 13 Loft Bd. Rptr. 313, 333 (Mar. 26, 1992). "The fact that a lease is commercial is insufficient, by itself, to lead to a conclusion that a tenant waived Loft Law protection." *Matter of White,* Loft Bd. Order No. 2194, 17 Loft Bd. Rptr. 386, 391 n. 3 (Dec. 18, 1997). Thus, K2 Dance as the named lessee of the unit, is not a bar to Loft Law protection for Ms. Ukai, who, in effect, comprises K2 Dance. As such, I find that sections 2-09(b)(2) and (3) inapplicable to Ms. Ukai.

Based on Prior Loft Board Precedent, Ms. Ukai is a Protected Occupant. Mr. Ukai is not.

Respondent challenged that neither applicant is entitled to protected occupancy. In the case of Ms. Ukai, respondent raised the same challenges that it did for finding the unit to be an IMD, including its argument that she has not resided primarily at the subject premises for 20 years (Resp. Brief at 8). As for Koji Ukai, respondent claimed that he does not pay rent under an agreement with the landlord or prime lessee, and he was not a residential occupant in possession of the unit on or before the effective date of the Loft Law.

Petitioners maintain that in spite of having dual residences between which she shuttles, the issue of primary residence is not relevant to Ms. Ukai's application for protected occupancy status for the following reasons. First, they noted that the Loft Law is remedial in nature and it is well-established that the law must be construed liberally so as to spread its beneficial effects as widely as possible. Next, petitioners argued that the requirement of proof of primary residency was deliberately omitted from Article 7-C of the MDL, as it has no place in a determination of protected occupancy status. Moreover, petitioners posited that the Legislature provided for a determination of primary residence only after an occupant is deemed to be protected. In support, petitioners argued that the only reference which the MDL makes to the phrase "protected occupant" may be found in section 286(2).[7] Petitioners maintained that section 286(2) of the MDL makes prospective an inquiry into primary residence. Petitioners opined that such an interpretation is consistent with rent stabilization, where primary residence is not a qualifying factor for rent stabilization, but is a factor for continued entitlement to rent stabilization (Pet. Brief at 28-32).

Turning its attention to the Loft Board rules, petitioners argued that the Loft Board had consistently analyzed protected occupancy under sections 2-09(b)(1), (2) and (3) of its rules. They insisted that section 2-09(b)(4) had always been applied to cases in which the prime lessee is out of possession of the unit and is seeking to recover possession from the current occupant. Petitioners cited to cases in which the Loft Board held that primary residence was not a requirement for protected occupancy status. *See Matter of Tenants of 141-151 South Fifth Street,*

[7] In relevant part, section 286(2)(i) of the MDL provides that:

> Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, provided that the unit is their primary residence . . . . (Lexis 2015).

Loft Bd. Order No. 1300, 13 LBR 234A, 249 (Jan. 30, 1992) ("It is well-established . . . that Cipriani need not establish that the loft was her primary residence in order to obtain IMD coverage or a finding of protected occupancy."); *Matter of Singer*, Loft Bd. Order No. 1146, 12 LBR 191, 202 (Jan. 31, 1991) ("To the extent that the owner's evidence went to the issue of primary residence, the Loft Board does not have jurisdiction to determine that issue.").

Accordingly, petitioners found inconsistent with the remedial purposes of the Loft Law, and indeed with Loft Board precedent, the Loft Board's decisions in two recent cases. *See Matter of Gallo,* OATH Index No. 2401/13 (Oct. 10, 2014), *adopted in part, rejected in part,* Loft Bd. Order No. 4349 (Jan 15, 2015); *Matter of Pak,* OATH Index No. 2447/13 (Oct. 9, 2014), *adopted in part, rejected in part,* Loft Bd. Order No. 4334 (Nov. 20, 2014). In *Pak*, the prime lessee and her family moved to Maine in 2009, where they had a business and home. They continued to pay rent and retained some furniture and clothing at the premises, which they periodically visited, but which, upon the effective date of the Loft Law, was occupied by their niece. Rejecting the administrative law judge's ("ALJ") recommendation that protection be accorded the prime lessee, the Board articulated that, "in determining protected occupancy status, the issue is not whether [the prime lessee] lived there during the window period . . . the issue is whether the Unit is her primary residence." Loft Bd. Order No. 4334 at 2 (Nov. 20, 2014). Accordingly, it remanded the case for a determination on whether the unit was the primary residence of the prime lessee, citing to section 2-09(b)(4) of its rules.

In *Gallo,* the prime lessee, who had a home on Long Island, New York, sought to be recognized as the protected occupant of a unit, a portion of which she sublet, and a portion of which she intermittently occupied during the window period, while paying rent on the unit and maintaining personal belongings in it. The Loft Board rejected the ALJ's recommendation that the prime lessee was a protected occupant. It also rejected the ALJ's finding that section 2-09(b)(4) of its rules was applicable solely to an out-of-possession prime lessee who was seeking to recover his or her unit in the face of a challenge by a subtenant. The Board deemed that the language of its rule did not require such a narrow interpretation, and that the requirement of proof of primary residence applies whether or not the prime lessee is in possession of the unit.

Petitioners correctly posit that until *Pak* and *Gallo,* the Loft Board did not make primary residence a condition for according protected occupancy status to the occupant of an IMD.

Petitioners are also correct in their observation that section 286(2) of the MDL contains the only reference to primary residence as it relates to protected occupants, and makes primary residence a condition for continued occupancy, only subsequent to a determination of protected occupancy. The First Department has articulated that the Loft Law was "not intended to protect from eviction tenants who did not occupy residential premises as their primary residence." *BOR Realty Corp. v. NYC Loft Bd.*, 129 A.D.2d 496, 498 (1st Dep't), *aff'd,* 70 N.Y.2d 720 (1987). Loft Board rule 2-08.1(a) remedies such a situation by provinding that "[t]he landlord of an IMD registered with the Loft Board may bring eviction proceedings against the residential occupant of a unit **in a court of competent jurisdiction**" (emphasis added), if, among other stated grounds, "the unit is not the primary residence of such residential occupant." 29 RCNY § 2-08.1(a)(1) (Lexis 2015). This rule (originally codified as Regulation J(1)(a)), has been tested and upheld by the Court of Appeals as a valid exercise of the Loft Board's authority. *Lower Manhattan Loft Tenants v. NYC Loft Bd.,* 66 N.Y.2d 298 (1985). Thus, it was clearly never within the ambit of this tribunal's authority to make a primary residence finding for either a coverage or protected occupancy determination. That authority always rested with the courts.

Accordingly, relying on prior Loft Board precedent, Ms. Ukai, who signed the lease for the premises, continues to pay the rent, and was in possession of the premises on the effective date of the law, is the lessee of the unit who should be accorded protected occupancy status.

As far as Mr. Ukai is concerned, I find controlling, Judge Spooner's recommendation in *Matter of Malis*, OATH Index No. 209/08 (Aug. 26, 2008), *adopted*, Loft Bd. Order No. 3507 (May 21, 2009). In *Malis*, a son who lived with his mother, the protected occupant, prior to the effective date of the Loft Law, was denied protected occupancy status. Judge Spooner found it unlikely that when the initial Loft Law was enacted in 1982, the legislature intended to grant family members of the tenant of record a right to force the landlord to add them to a lease just by virtue of their residence in the loft as of the effective date of the statute. Rather, Judge Spooner found it more reasonable to conclude that Article 7-C was intended to be harmonious with other rent regulatory schemes where minors and other family members could be accorded successor rights to a renewal lease upon the demise or departure of the tenant of record. OATH 209/08 at 11. Thus, Ms. Ukai's status as a protected occupant would not automatically flow to Mr. Ukai,

as her son, simply because he resided at the premises on the effective date of the law. Accordingly, Mr. Ukai is not entitled to protected occupancy status.

Alternatively, Based on a Primary Residence Analysis, Mr. Ukai is a Protected Occupant. Ms. Ukai is not.

As previously discussed, the Loft Board's recent imposition of a primary residence inquiry pursuant to rule 2-09(b)(4) seems to run afoul of its own rule 2-08.1(a). However, given the Board's more recent posture, and in an effort to avoid the matter being remanded to this tribunal, I find it time-effective to undertake a "primary residence" analysis in the alternative. Notably, the Board's rules do not delineate specific factors to consider in determining primary residence. But a recent court decision, albeit in the context of a rent-stabilized apartment, provides some guidance.

In *Kalikow Family Partnership, LP v. Seidemann*, 48 Misc.3d 134(A), 2015 N.Y. Misc. LEXIS 2478 (App. Term, 2d Dep't 2015), the Appellate Term upheld the lower court's award of possession to the landlord of a rent-stabilized apartment in Brooklyn, which the landlord asserted, was not occupied by the tenant as his primary residence. The tenant, a college professor, leased the apartment in 1975. Prior to getting married in 1993, he purchased a house in Connecticut where his wife and children resided and where he was registered to vote. He taught classes in Brooklyn two or three days per week, went to Connecticut on Fridays, and returned on Tuesday or Wednesday. The landlord's evidence established that the tenant spent 25 percent of his time teaching, 60 percent of his time doing research, which was undertaken from his home in Connecticut, and 15 percent of his time engaged in committee work. In an attempt to rebut the landlord's proof, the tenant testified that he spent 20 to 25 hours per week doing research in Connecticut, and between 120 and 160 days in Brooklyn each year. He did not have a driver's license, he did his banking in Brooklyn, and all of his health care providers were located in Brooklyn. The court noted that under the Rent Stabilization Code, it could consider several factors when determining whether a premises is being occupied as a primary residence, but "no single factor was solely determinative" *Kalikow*, 2015 N.Y. Misc. LEXIS 2478 at 1,

quoting from section 2520.6(u) of the Rent Stabilization Code (9 NYCRR § 2520.6(u)[8] (Lexis 2015).

Kalikow was a stark contrast to *Glenbriar Co. v. Lipsman,* 11 A.D.3d 352 (1st Dep't 2004), *aff'd on other grounds,* 5 N.Y.3d 388 (2005), which involved another rent-stabilized apartment. In *Glenbriar,* the First Department upheld the Appellate Term's reversal of the Civil Court's decision to grant the landlord possession of the apartment, where the defendants had resided in a Bronx apartment for 45 years (since 1959), and had raised their two children there. In 1995, because the defendant husband had emphysema which was exacerbated by the cold, they purchased a condominium in West Palm Beach, Florida, where they spent their winters. On their tax returns, the husband sought a homestead tax exemption and declared the Florida residence as his primary residence. His wife, who was listed as co-applicant, did not sign the form. But on it, her husband listed her as a resident of New York. Meanwhile, the wife maintained her primary residence in New York City, where she kept ongoing relationships with her doctors, was registered with Social Security in New York, and had at least three active bank accounts. She also continued to vote in New York elections. The majority found that the wife sufficiently established that she resided in the New York apartment for six months per year, and maintained an ongoing "substantial physical nexus" with her New York apartment for "actual living purposes." *Id* at 353. Accordingly, the court held that her husband's declaration on his joint tax returns listing the Florida address as the couple's primary residence should not be considered fatal to her claim of primary residency in New York, as her address on the tax return was not a controlling factor in determining primary residence. *Id* at 353. Acknowledging the existence of "snowbird" situations, where a couple may retain a home in New York, and scuttle to Florida during the winter months, the court articulated that a husband and wife may establish two separate primary residences without penalty, even in light of what may be referred to as a "conventional" marriage. *Id* at 353-54.

In a strongly-worded opinion, the dissent expressed concern that the Appellate Term, which reversed the Civil Court's determination, had not had the opportunity to assess each

[8] The Code provides that the evidence to be considered in determining whether a rent-stabilized unit is the primary residence shall include: (1) specification by an occupant of another address as a place of residence on any tax return, motor vehicle registration, driver's license, or other document filed with a public agency; (2) use by an occupant of another address as a voting address; (3) occupancy of the rent-stabilized apartment for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation; and (4) subletting of the rent-stabilized unit. 9 NYCRR § 2520.6(u) (Lexis 2015).

witness's credibility, based on observation of the witness's trial testimony. The dissent found that the Civil Court's determination to award the landlord possession was fully supported by the record, and noted that at trial, both the probative documentary evidence and crucial admissions of the tenants themselves, supported the landlord's position. *Id* at 354.

In *Goldman v. Davis*, 2015 N.Y. Misc. LEXIS 3285 (N.Y. App. Term, 1st Dep't 2015), which was decided in September 2015, the Appellate Term, while noting that prior First Department case law, including *Glenbriar* and its progeny, permitted a finding that declarations in a tenant's tax returns are not dispositive as to primary residence, articulated that it was constrained by the First Department's holding in *Ansonia* (which was previously discussed, and which reversed the appellate term), that tax returns are indeed dispositive as a matter of law as to primary residence.

Here, Ms. Ukai's circumstances seem to be a hybrid of *Kalikow* and *Glenbriar*. There is no doubt that she occasionally resides at the subject premises. Her own testimony supported that she spends about four days in Brooklyn, and the remainder of her time in Warwick. The evidence also established that she took deductions on her tax returns for the home in Warwick. I find that while the subject premises may have been Ms. Ukai's primary residence at one time, the overwhelming evidence supports an inference that that is no longer the case. For instance, many of her significant documents list the Warwick address as her address. These include her current driver's license which was issued in 2012, her utilities company documents, and her tax returns. Her Brooklyn gym membership documents, which reflect the subject premises as her address, expired in 2010, and there is nothing to show that she still attends a gym in Brooklyn. Nor did she provide any pay stubs to show that she is currently employed in New York City. While the statements for Ms. Ukai's joint bank account with her husband during the window period display the subject premises and were an appropriate consideration for residential use of the premises for the period that they covered, no recent statements (since 2009) were produced. Most compelling however, is her STAR Exemption Application which she signed on July 21, 2014, certifying that the Warwick address was her primary residence.[9] In addition, K2 Dance's performances have whittled down to an average of about two per year since 2010, providing less of an incentive for Ms. Ukai to spend time in New York City. Thus, even absent a finding that her tax returns are

[9] While this document was not taken into consideration in determining coverage, as it fell outside the window period, I find it relevant towards a determination of protected occupancy.

dispositive of her primary residence, I find that there is nothing to establish that Ms. Ukai continues to maintain an ongoing "substantial physical nexus' with the subject premises, for actual living purposes.

In sum, I find that cumulatively, the evidence weighs against a finding that the subject premises is Ms. Ukai's primary residence. Therefore, applying the Loft Board's recent interpretation of section 2-09(b)(4) of its rules, that in order to be deemed a protected occupant, the prime lessee must establish that the residence is his/her primary residence, Ms. Ukai should not be accorded protected occupancy status.

With respect to Mr. Ukai, respondent argued against a finding of protected occupancy. Relying on this tribunal's report in *Matter of Stone*, OATH Index No. 1945/14 (June 4, 2015), and sections 2-09(b)(2) and (3) of the Loft Board rules, respondent posited that Mr. Ukai is not entitled to protected occupancy status because he took possession of the premises after June 21, 2010 (the effective date of the Loft Law), and is not a prime lessee. I find neither section to be applicable to Mr. Ukai. First, he was not a subtenant or assignee of the premises. Nor did I find that he took possession of the premises after June 21, 2010. As previously indicated, I found the evidence sufficient to conclude that Mr. Ukai used the subject premises as his home once he became a student at the College of William and Mary in Virginia, and throughout the time that he was there, which is inclusive of the window period. His voter registration card issued in 2008, lists the subject premises as his address. His Chase Bank account also lists the subject premises. While he maintained other accounts which list the Warwick address, the statements on those accounts show numerous purchases in Brooklyn, sufficient to support that he indeed resides at the premises, and that his occupancy preceded the effective date of the law. In sum, a preponderance of the documentary evidence, including documents from Harvard, which list the subject premises as Mr. Ukai's address, as well as Mr. Gonzalez's and Mr. Ukai's testimony, support that Mr. Ukai continues to use the premises as his residence, even as he attends Harvard.

Because he is not a prime lessee, I need not engage in a primary residence analysis pursuant to section 2-09(b)(4) of the Loft Board's rules. However, applying sections 2-09(b)(1) and (2) of the Board's rules, Mr. Ukai, was the occupant in possession of the subject premises as of the effective date of the Loft Law, and is therefore entitled to protection. *Malis* is inapplicable

here since Ms. Ukai is not entitled to protection under a primary residence analysis, which would thereby trigger his succession rights.

FINDINGS AND CONCLUSIONS

1. Petitioner Kay Ukai occupied unit 5C of the subject premises since the late 1980s, when she executed a lease with the previous owner of the premises.

2. There is no dispute as to the other criteria under section 281(5) of the Loft Law for designation unit 5C as an IMD unit.

3. The evidence supports that Ms. Ukai resided at the subject premises for at least 12 months during the window period.

4. The evidence also supports that during the window period, Mr. Ukai resided at unit 5C for 12 consecutive months.

5. Unit 5C of the premises is therefore entitled to coverage under the Loft Law as an IMD unit.

6. Pursuant to prior Loft Board precedent, Ms. Ukai, who holds the lease to the premises and currently pays the rent, is entitled to protected occupancy status.

7. Alternatively, applying the Loft Board's more recent focus on primary residence, the evidence does not support that unit 5C is Ms. Ukai's primary residence, thereby excluding her from Loft Law protection.

8. Applying prior Loft Board precedent, Mr. Ukai, who is not a lessee, is not entitled to protected occupancy status. Even though he resided at the premises for 12 consecutive months during the window period, he may only be entitled to succession rights, if Ms. Ukai is found to be a protected occupant.

9. Alternatively, even though he is not a prime lessee, Mr. Ukai was the residential occupant in possession of the subject premises at the effective date of the Loft Law. Therefore, pursuant to sections 2-09(b)(1) and (2) of the Loft Board's rules, he is entitled to protected occupancy status.

RECOMMENDATION

Applying precedent, Ms. Ukai's application for protected occupancy status should be granted and Mr. Ukai's application should be denied. In the alternative, applying a primary residence analysis, Ms. Ukai's application should be denied, and Mr. Ukai's application should be granted because he was the residential occupant in possession of the subject premises at the effective date of the Loft Law.

Ingrid M. Addison
Administrative Law Judge

November 2, 2015

SUBMITTED TO:

RICK E. CHANDLER, P.E.
Chairperson

APPEARANCES:

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ORDER

NEW YORK CITY LOFT BOARD

In the Matter of the Application of **KAY NISHIKAWA UKAI AND ALLEN KOJI UKAI**	**Loft Board Order No. 4686** **Docket No. TR-1131** **LC-0166** **RE: 57 Jay Street** **Brooklyn, New York** **IMD No. 30083**

ORDER

The New York City Loft Board accepts in part and rejects in part the Report and Recommendation of Administrative Law Judge Ingrid M. Addison dated November 2, 2015 ("Report").

BACKGROUND

On January 29, 2013, Haim Joseph ("Former Owner"), then-owner of the building located at 57 Jay Street, Brooklyn, New York ("Building"), registered the Building as an interim multiple dwelling ("IMD") pursuant to § 281(5) of the Multiple Dwelling Law ("MDL"). Former Owner did not list Unit 5C ("Unit") as an IMD unit. Instead, Former Owner listed the Unit as a manufacturing/commercial unit.

On October 24, 2013, Kay Nishikawa Ukai ("Ms. Ukai") and Allen Koji Ukai ("Mr. Ukai") (collectively "Tenants"), occupants of the Unit, filed an application seeking Article 7-C coverage pursuant to MDL § 281(5). Loft Board staff docketed this application as TR-1131. On October 30, 2013, Former Owner filed an answer alleging that Tenants did not residentially occupy the Unit during the period commencing January first, two thousand eight, and ending December thirty-first, two thousand nine ("Window Period") and that the Unit was not converted to residential use.

The Loft Board transferred the coverage application to the Office of Administrative Trials and Hearings ("OATH"), which assigned the matter to Administrative Law Judge Ingrid M. Addison for adjudication. Tenants raised their protected occupancy claims before Judge Addison.

On August 13, 2014, 57 Jay Street LLC ("Owner") acquired title to the Building. On August 22, 2014, Owner filed a second amended registration application listing the Unit as an IMD unit and Tenants as protected occupants, without prejudice.

On September 25, 2014, Owner filed an application for de-coverage of the Unit ("De-coverage Application") pursuant to Title 29 of the Rules of the City of New York ("29 RCNY") § 2-05(b)(5). Loft Board staff docketed this application as LC-0166. On October 16, 2014, David Hocs, the residential tenant of unit 3C, Mark Cooper, the residential tenant of unit 2C and Andrew Lee, the residential tenant of unit 2A, each filed an answer to the De-coverage Application requesting to be kept informed of the developments in the case.

The Loft Board transferred the De-coverage Application to OATH, which assigned the case to Judge Addison.

In the Report, Judge Addison made several findings and recommendations regarding the De-coverage, coverage and protected occupant claims:

- Tenants resided in the Unit for twelve (12) consecutive months during the Window Period;

- Because the Unit satisfies the other criteria pursuant to MDL § 281(5) for coverage as an IMD unit, the De-coverage Application should be denied;
- Ms. Ukai is entitled to protected occupant status because she is the prime lessee who continued to pay rent and was in possession of the Unit on the effective date of the law;
- Alternatively, if a primary residence analysis is used, Ms. Ukai, as the prime lessee, is not entitled to protected occupant status because the Unit is not her primary residence;
- If Ms. Ukai is found to be the protected occupant, then Mr. Ukai is not entitled to protected occupant status, but may be entitled to succession rights; and
- Alternatively, if a primary residence analysis is used, Mr. Ukai, who is not a prime lessee, but who was the residential occupant in possession of the Unit on the effective date of the law, is entitled to protected occupant status pursuant to 29 RCNY §§ 2-09(b)(1) and (2).

After the Report was issued, in a letter dated January 28, 2016, Ms. Ukai withdrew her claims with prejudice.

We accept Judge Addison's findings that Tenants residentially occupied the Unit for twelve (12) consecutive months during the Window Period and that the Unit is an IMD. We also agree that the De-coverage application should be denied. However, we reject Judge Addison's recommendations and analysis regarding Tenants' protected occupancy claims.

A. <u>The Unit is as an IMD Unit</u>.

The Building is an IMD. In order for the Unit to qualify for coverage pursuant to MDL § 281(5), Tenants must prove that the Unit was occupied for residential purposes for a period of twelve (12) consecutive months during the Window Period. In addition, to be eligible for coverage, a unit must: 1) not be located in a basement or cellar; 2) have at least one entrance that does not require passage through another residential unit to obtain access to the unit; 3) have at least one window opening onto a street or a lawful yard or court; and 4) be at least four hundred (400) square feet in area. The unit must also possess sufficient indicia of residential conversion to qualify for coverage. *See*, *Anthony vs. New York City Loft Bd.*, 122 A.D.2d 725 (1st Dep't 1986).

Based on the record, Owner does not dispute that the Unit has a window, is not located in a basement or cellar, is at least 400 square feet and can be accessed without requiring passage through another residential unit. The only disputed coverage issues are whether the Unit had sufficient indicia of residential conversion and whether Tenants residentially occupied the Unit for twelve (12) consecutive months during the Window Period.

I. ***The Unit Possessed Indicia of Residential Conversion.***

In the Report, Judge Addison found that the Unit possessed indicia of residential conversion. We agree.

Tenants submitted into evidence a floor plan of the Unit, drawn by Mr. Ukai, as well as pictures of the Unit taken by Mr. Ukai in June 2014, which shows a bathroom, kitchen and bedrooms. *See*, 5C Floor Plan; Pictures of 5C. Mr. Ukai testified that these conditions reflect what the Unit looked like as of 2008. *See*, Transcript ("Tr.") at 287-297. During trial, Julian Gonzalez, a longtime friend and school mate of Mr. Ukai, corroborated Mr. Ukai's testimony. Mr. Gonzalez testified to the layout of the Unit as he remembered it from his visits. *See*, Tr. at 164-166. Prior to being shown the floor plan and the pictures of the Unit, Mr. Gonzalez testified that the Unit has a bathroom with a stand-up shower, sink and toilet, a kitchen with a stove, a living room with a window facing Water Street, an elevated bedroom and another enclosed bedroom. The pictures of the Unit introduced after Mr. Gonzalez's testimony corroborated his testimony. *See*, Tr. at 166-169.

In Owner's post-trial memorandum of law, Owner cites to *Matter of Boyers*, Loft Board Order No. 4302 (Sept. 18, 2014) to support its argument that Tenants failed to demonstrate sufficient indicia of

residential conversion of the Unit during the Window Period. However, the facts in *Boyers* are easily distinguishable from this case. In *Boyers,* the Loft Board denied coverage to a unit where the only indicia of conversion to residential use during the window period consisted of placing a mattress on the floor. The subject unit contained no stove, no plumbing or gas. Unlike *Boyers*, the Unit in this case contains bedrooms, a kitchen with a stove, a living room and a bathroom with a stand-up shower, sink and toilet.

II. ***The Unit was Residentially Occupied for Twelve Consecutive Months during the Window Period.***

Judge Addison found that Tenants residentially occupied the Unit for twelve (12) consecutive months during the Window Period. We agree.

1. *Ms. Ukai's Residential Occupancy of the Unit during the Window Period.*

Tenants submitted a substantial amount of documentary evidence listing the Unit as their address during the Window Period. Ms. Ukai submitted a copy of the contract that she entered into with Ross Global Academy, located in lower Manhattan, on April 3, 2008, where Ms. Ukai was hired as a full-time faculty member. *See*, Tr. at 93-95; Ross Global Academy Contract. Ms. Ukai also submitted a decision by the Unemployment Insurance Appeal Board dated December 4, 2009, which was mailed to the Unit, denying Ms. Ukai's claim for unemployment benefits. *See*, Unemployment Insurance Appeal Board Decision. Ms. Ukai also submitted the following documents into evidence, which list her address as the Unit during the Window Period: 2008 earnings statements; 2008 and 2009 W-2 forms; Con Edison bills; Verizon bills; and her 2009 New York State resident income tax return, in which she paid a New York City resident tax. Ms. Ukai also submitted bank statements addressed to her at the Unit, which demonstrate the time she spent in New York City by the substantial amount of deposits, withdrawals and purchases made throughout New York City. *See*, Bank of America Statements. These bank statements undermine Owner's assertion that Ms. Ukai lived primarily in Warwick, New York. Together with the undisputed fact that Ms. Ukai worked Monday through Friday in New York City, the bank statements establish that Ms. Ukai was physically present in New York City during the Window Period.

It has long been settled that to establish coverage for a unit under Article 7-C, an applicant need not prove that the unit is his or her primary residence. *See*, *Matter of BOR Realty Corp. v. New York City Loft Bd.*, 70 N.Y.2d 720 (1987) (primary residence during the statutory window period was not required for Article 7-C coverage of a building); *See also*, *Matter of Vlachos v. New York City Loft Board*, 70 N.Y.2d 769 (1987) (no requirement in § 281 for Loft Law coverage that residentially occupied units be the primary residences of their tenants); *Little West 12st Street Realty L.P. v. Inconiglios,* 854 N.Y.S.2d. 632 (Civ. Ct 2008) *affd.,* 878 N.Y.S.2d. 542 (1st Dep't 2009) (the initial determination regarding Loft Law coverage depends on whether three or more units were occupied for residential purposes during the window period, not on whether they were occupied as the primary residences of their tenants). For coverage of the Unit, the issue is not primary residence, but residential occupancy of the space.

Owner argues that Ms. Ukai is estopped from claiming that the Unit was residentially occupied during the Window Period. In support, Owner cites to the tax returns filed for K2 Dance, a § 501(c)(3) not-for-profit corporation and prime lessee of the Unit, of which Ms. Ukai is the principal. On those tax returns, Ms. Ukai declared her address as the Warwick property and stated that she used the Unit exclusively for a charitable purpose. In the Report, Judge Addison rejected Owner's argument because Owner relied on K2 Dance's tax returns for the years 2005 and 2006, and failed to produce any Window Period tax returns. However, even if the Loft Board were to accept Owner's argument that Ms. Ukai's primary residence is somewhere other than the Unit, it does not bar coverage of the Unit because Tenants have shown that they residentially occupied the Unit during the Window Period.

2. *Mr. Ukai's Residential Occupancy of the Unit during the Window Period.*

Mr. Ukai submitted into evidence his bank statements dated within the Window Period, which show a considerable amount of ATM deposits and withdrawals, and purchases made in New York City.

The statements from Chase Bank list the Unit as Mr. Ukai's address. Other documents in evidence also listing the Unit as Mr. Ukai's address during the Window Period include: 2008 and 2009 W-2 forms; his 2008 federal income tax return and New York State resident income tax return, in which he paid New York City resident tax; a certificate from United Healthcare; and a certified document from the Board of Elections in New York City.

Mr. Gonzalez testified that during the 2008-2010 period, he visited Mr. Ukai at the Unit for New Year's Eve to watch the fireworks on the roof. *See*, Tr. at 153-155, 240-241. During the summer of 2008, Mr. Gonzalez and Mr. Ukai did marketing work together for Verizon in New York City. *See*, Tr. at 158-159, 173-174, 183-184. During the summer of 2009, Mr. Gonzalez testified that he came to the city once or twice per month and stayed at the Unit. *See*, Tr. at 177-178. Mr. Gonzalez also remembered celebrating Mr. Ukai's 21st birthday at the Unit. *See*, Tr. at 156-158. Tenants submitted into evidence a picture of Mr. Ukai's 21st birthday party showing Mr. Ukai, Mr. Gonzalez and a few other friends at the Unit. *See*, Photo of Ukai's 21st Birthday.

B. Mr. Ukai is the Protected Occupant of the Unit.

Having found the Unit to be an IMD unit, Judge Addison made two alternative recommendations regarding who is the protected occupant of the Unit. The Loft Board rejects Judge Addison's recommendations and analysis regarding protected occupancy status.

Section 2-09(b) of 29 RCNY guides the Loft Board in making determinations about protected occupancy. Section 2-09(b)(1) provides that, except as otherwise provided in the rule, the occupant in possession of a covered IMD unit is the protected occupant of the unit. However, before the Board can make a determination under (b)(1), the Board must first consider the rule as a whole, including the provisions in subsections (b)(2), (b)(3) and (b)(4). This means that where there is a prime lessee or a sublessor seeking protected occupant status, any analysis of the rule must include consideration of the provisions in § 2-09(b)(4). According to the plain language of § 2-09(b)(4), the prime lessee is the residential occupant entitled to Article 7-C protection, if the residential unit is his or her primary residence. This is the only subsection of § 2-09(b) where primary residence is a factor. Where there is no prime lessee or sublessor seeking protected occupant status, and the occupant seeking protected occupant status has been in possession of the unit since before the effective date of the applicable law, subsections (b)(1) and (b)(2) of § 2-09 apply to determine protected occupant status.

Here, after the issuance of the Report, Ms. Ukai, as the principal of K2 Dance and the prime lessee of the Unit, withdrew her claim for Loft Law protection with prejudice. As there is no prime lessee seeking protected occupant status, and Mr. Ukai's residential occupancy of the Unit pre-dates June 21, 2010, subsections (b)(3) and (b)(4) of § 2-09 do not apply. Subsections (b)(1) and (2) of § 2-09 apply.

Mr. Ukai has residentially occupied the Unit since his birth in 1988. *See*, Tr. at 14, 186-188. Mr. Gonzalez testified credibly that during the years 2002-2006 while they attended a boarding school together in New Jersey, Mr. Ukai's home was the "Jay Street Building in Brooklyn". *See*, Tr. at 150. Mr. Gonzalez testified that during their time together at boarding school, he visited Mr. Ukai at the Unit during holidays and summer breaks. *See*, Tr. at 149-151. While attending the College of William and Mary in Virginia from 2006-2010, Mr. Ukai continued to residentially occupy the Unit by returning to the Unit during holidays and school breaks. *See*, Tr. at 208-209. This is evidenced by the transactions listed on Mr. Ukai's bank statements, as well as the testimony given by Mr. Gonzalez.

After graduating college in May 2010, Mr. Ukai went to Ghana from July to August 2010. *See*, Mr. Ukai's passport. Prior to leaving for Ghana, Mr. Ukai lived at the Unit. *See*, Tr. at 252. After returning from Ghana, Mr. Ukai joined the Peace Corps in January 2011. *See*, Peace Corps certification. Mr. Gonzalez testified that during the time Mr. Ukai was employed by the Peace Corps, Mr. Ukai returned to the Unit. They celebrated New Years in the Unit and watched the fireworks. Mr. Gonzalez stayed in the Unit with Mr. Ukai. *See*, Tr. at 161-162. After returning from the Peace Corps in March or April 2013, Mr. Ukai testified that he returned to the Unit. *See*, Tr. at 253-255. Mr. Gonzalez testified that from May 2013 through September 2014, he visited Mr. Ukai at the Unit. *See*, Tr. at 164.

The credible and unrebutted testimony of Mr. Gonzalez and the overwhelming documentary evidence shows that Mr. Ukai residentially occupied the Unit prior to June 21, 2010. The record shows that Mr. Ukai residentially occupied the Unit when he was not pursuing his out-of-state academic and charitable ventures. An occupant's itinerant physical occupation of a unit due to employment during the Window Period does not defeat a protected occupant claim. *See*, *Matter of Pels*, Loft Board Order No. 4161 (Jun. 20, 2013). The same reasoning applies to absences due to charitable or educational work. Mr. Ukai's absence due to his work in the Peace Corps or his time attending school will not bar a finding of protected occupant status.

Owner argues that Mr. Ukai is not a residential occupant entitled to protection because he does not pay rent under an agreement with the landlord or prime lessee. Owner relies on an OATH decision, *Matter of Stone*, OATH Index No. 1945/14 (Jun. 4, 2015), in which Judge Spooner relied on MDL § 286(2)(i) to require proof of a lease or rental agreement in protected occupancy determinations for a tenant who was in occupancy prior to the effective date of the law. However, in *Matter of Stone*, Loft Board Order No. 4522 (May 19, 2016), the Loft Board specifically rejected this argument. The Loft Board found that MDL § 286(2)(i) is not relevant to the analysis of protected occupant status under 29 RCNY §§ 2-09(b)(1) and (2). The lack of a rent payment to Owner does not affect Mr. Ukai's right to be the protected occupant because Mr. Ukai was in possession of the unit prior to June 21, 2010. *See*, 29 RCNY § 2-09(b)(2).

Here, there is no prime lessee seeking protected occupant status of the Unit. As Mr. Ukai's possession of the Unit began prior to the effective date of the law and he has continued in possession of the Unit, Mr. Ukai need not demonstrate that Owner consented to his occupancy or that the Unit is his primary residence. Pursuant to 29 RCNY §§ 2-09(b)(1) and (2), Mr. Ukai is the protected occupant of the Unit.

CONCLUSION

For the reasons stated above, the Loft Board grants the application to the extent that the Unit is an IMD and Mr. Ukai is the protected occupant of the Unit.

The claims of Ms. Ukai are deemed withdrawn with prejudice.

Owner's De-coverage application is denied.

DATED: September 21, 2017

[redacted]

Renaldo Hylton
Chairperson

Board Members Concurring: Carver, Barowitz, Roche, Hernandez, Hylton

Board Members Dissenting: De Laney

Board Members Absent: Schachter, Shelton

DATE LOFT BOARD ORDER MAILED:

Opinions from the September 21, 2017 Loft Board meeting

#15: Ukai, 57 Jay Street, TR-1131, LC-0166

Opinion of Chuck DeLaney

As the Tenant Representative on the Loft Board, I voted against this proposed order, and provide this dissenting opinion.

This is a very interesting case because it's the first time an OATH administrative law judge has attempted to follow the "evolved" policy that the Loft Board has applied to modify a slew of OATH Reports and Recommendations in recent years in coverage cases involving the determination of who is a protected occupant of an IMD unit as part of the case.

Judge Addison applies the Board's approach and comes up with an "either or" scenario. Either Kay Nishikawa Ukai is the protected occupant because she is the prime tenant who once had a lease for the space with the landlord, or, if she's found not to use the space as her primary residence as alleged, then her son, who has essentially lived in the space all his life, is the protected occupant. The OATH judge's Report and Recommendation was sent to the Loft Board in November of 2015 and has just been decided in September 2017. In the interim, Ms. Ukai decided to withdraw her coverage application, clearing the way for her son to be named the protected occupant.

In my view, this is an overly divisive approach to determining coverage. It would have been more appropriate to find both individuals to be protected occupants, and then allow the landlord to bring a primary residence case against Ms. Ukai if the owner felt that was warranted. There should not be a "primary residence test" applied during the determination of coverage for an IMD unit.

The question of the status of an individual who used a loft unit residentially - either before, during, or after the applicable window period – but did not use it as a primary residence was settled in the 1980s. The Board adopted a regulation that set forth as one of the grounds for eviction for a residential occupant qualified for protection "that the unit is not the primary residence of such residential occupant" (29 RCNY 2-08.1(a)(1). That regulation was challenged in court and was upheld by the Appellate Division. However, the sequence is clear. If the unit is used residentially, the unit must be registered, and then the owner can commence a proceeding to evict someone who lives in the unit but does not use it as a primary residence in a separate proceeding. Making the issue of whether or not a tenant who lives in an IMD unit uses the unit as his or her primary residence part of coverage applications is premature. Particularly in cases where multiple units are seeking coverage and the primary residence issue

applies to only some of the units, this adds time and cost to the determination of coverage. If a protected occupant does not use the unit as a primary residence, then that issue should be taken up as a separate matter only after coverage is decided and the unit is registered.

Over the past few years the Board has struggled to limit the number of protected occupants in IMD units by invoking sections of RCNY 2-09 and restricting coverage to individuals who have or had a lease with the owner. If such a lease exists, then the current or former leaseholder is the prime tenant and, in the Board's view, the only protected occupant, regardless of how long other residents of the unit may have lived there and regardless of what contributions, such as sweat equity or financial investment, those tenants made. This goes against the way the Board addressed such cases for nearly thirty years. It also puts too much weight on the lease. There were many leases written by landlords that sought to evade the actual residential use of the space by demanding that tenants state that the space would be used only as an artist's studio, and sometimes listing another residential address claiming that was where the tenant "lived." Back in the 1970s and 1980s, New York City and New York State courts rejected the notion that these leases established the fact that the tenant did not live in the space or was doing so illegally. The concept of the "de facto multiple dwelling" was based on the notion that if the tenant had lived in the space openly for a period of time, the landlord knew or should have known that the space was being used residentially. The reason that the Loft Law coverage sections all cite a "window period" is to make clear that if the tenant can prove residential use during that period, then leases that make different representations as to use should be disregarded.

Now, to determine protected occupancy, the Loft Board looks to leases that both the courts and the legislature have viewed with skepticism at best and in many cases rejected outright. In this case, it is also noteworthy that the original lease was not between the owner and Ms. Ukai as an individual, but apparently with her non-profit dance company.

NOTICE

A party aggrieved by a determination of the Loft Board may file an application for reconsideration of the determination. Under 29 RCNY § 1-07(b), an aggrieved party must serve the reconsideration application on the affected parties to the prior proceeding. Service of the application shall be completed in accordance with 29 RCNY § 1-06. The aggrieved party must then file the application at the Loft Board's office along with proof of service and the required application fee. Under section 1-07(b), "(t)o be considered timely, a complete reconsideration application must be received by the Loft Board within 30 calendar days after the mailing date of the determination sought to be reconsidered."

Pursuant to 29 RCNY §1-07(d):

> A Loft Board determination pursuant to section 1-06 if these rules shall be the final agency determination for the purpose of judicial review, unless a timely application for reconsideration of the determination has been filed. In such case, (i) if the Loft Board modifies or revokes the underlying order, such revocation or modification shall be deemed the final agency determination from which judicial review may be sought; (ii) if the Loft Board denies the reconsideration application, the underlying order shall be deemed the final agency determination; and (iii) if the Loft Board decided the reconsideration application by remanding the matter to the hearing officer for further proceeding, neither the underlying order nor the remand order shall constitute a final agency determination, and no judicial review may be sought until such time as the Loft Board issues a final agency determination following the remand.