

Matter of Zhao

OATH Index No. 2225/14 (Aug. 12, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4445 (Nov. 19, 2015).

[Loft Bd. Dkt. No. TR-1161; 816 Broadway, New York, N.Y.]

In coverage proceeding, petitioner demonstrated that first floor rear unit was residentially occupied during the window period but not that the entire floor was residentially occupied. Moreover, petitioner failed to show that rear unit was at least 400 square feet in area and had a window facing a lawful yard. Even if rear unit was covered, petitioner is not entitled to protected occupancy because she was living there rent free with her husband, the net lessee, without a valid lease. The application should be denied.

The Loft Board adopted the ALJ's recommended finding that the entire first floor is not eligible for coverage. The Loft Board found that the ALJ should not have considered whether the rear portion of the first floor qualified as an IMD because the applicant had not claimed that it was in her applications or at trial. The Loft Board noted that the applicant could file a coverage application for the first floor rear, if she wishes to do so. The Loft Board also found that the ALJ's recommended finding regarding protected occupancy was premature because there has not been a finding that the first floor is an IMD.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
XIUHONG ZHAO
Petitioner

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

Petitioner Xiuhong “Shirley” Zhao a/k/a Zhau filed five applications starting in October 2013 pursuant to article 7-C, section 281 of the Multiple Dwelling Law (“Loft Law” or “MDL”) and title 29 of the Rules of the City of New York (“RCNY”) (ALJ Ex. 1). In her most recent amended application received on June 6, 2014, petitioner seeks a finding that she has residentially occupied the entire first floor in the building known as 816 Broadway, New York, New York (“Building”) since 2007 and that she is the protected occupant of that unit. Respondent, the owner of 816 Broadway, filed an answer in opposition (ALJ Ex. 2). Respondent

argued petitioner failed to show that the first floor qualifies for coverage and that she is not entitled to protected occupancy of any portion of the first floor.

A trial was held on four days between March 24 and June 12, 2015. Both parties submitted documentary evidence. Ms. Zhao testified on her own behalf and called two former employees who worked in her husband's antique store on the ground floor of the Building. Respondent called three residential tenants, Brion Bonkowski and Marc and Harriette De Swaan Arons, as well as an architect and the current Building manager. The record was held open until July 31, 2015, for the filing of post-trial submissions.

Petitioner failed to demonstrate that she has residentially occupied the entire first floor since 2007. Instead, the residential tenants' testimony, as supported by documentary evidence, supports a finding that in 2008 and 2009 the rear of the first floor was residentially occupied by the Building's superintendent and that the front was connected to and occupied by the ground floor antique store. Moreover, petitioner failed to show that the residentially occupied rear unit was at least 400 square feet in area and had a window facing a lawful yard as defined in the applicable zoning resolution. Finally, petitioner, who is the wife of the former net lessee, does not qualify for protected occupancy because she has lived on the first floor since 2011 without paying rent and without a lease. Accordingly, the application should be denied.

ANALYSIS

Background

In 2010, the legislature passed amendments to the Loft Law, which added section 281(5) to the MDL. L. 2010, Ch. 135 § 1 (eff. June 21, 2010) (adding MDL § 281(5)); L. 2010, Ch. 147 § 1 (eff. June 21, 2010) (amending MDL § 281(5)). Amended section 281 defines an interim multiple dwelling ("IMD") as any building that: (1) at any time was occupied for manufacturing, commercial, or warehouse purposes; (2) lacks a certificate of compliance or occupancy pursuant to section 301 of 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 ("window period"), "provided that the unit" (i) is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, (ii) has at least one window opening

onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and (iii) is at least 400 square feet in area. MDL § 281 (Lexis 2015).

The following facts are not in dispute. The five-story Building is located in New York City with a population of more than one million people and qualifies as having prior commercial use under MDL section 281(1). There is no certificate of occupancy on file for the Building. Throughout 2008 and 2009, and until 2013 or 2014, the Building was leased to Ivan Pavicic who has been married to Ms. Zhao since 2006.

It was also undisputed that during 2008 and 2009 the second, third, and fourth floor units were residentially occupied.¹ The ground floor was occupied by an antique store called Place Des Voges that had a separate entrance on the street. The first floor is a two-story space (Tr. 225). During the window period, the only access to the first floor from the public hallway was through a door located towards the back of the Building. There was also an internal stair from the antique store to the front part of the first floor. In 2013, Mr. Pavicic removed the internal staircase from the antique store and added a second door from the public hallway to the first floor near the front of the Building (Resp. Ex. J-3; Tr. 16-17, 94, 171-75, 196-204, 223). Mr. Pavicic operated the antique store until it closed and the net lease expired in 2013 or 2014 (Tr. 27, 128-29). The ground floor is currently a coffee shop (Tr. 200).

Since 2013, Ms. Zhao has filed five coverage applications, four for the first floor and one for the second floor. On October 22, 2013, the Loft Board received an application for the first floor that was docketed under TR-1134 and was rejected for procedural reasons. On October 23, 2013, the Loft Board received a second application for the first floor that attached a poor quality photocopy of a handwritten document on a "Sales Order" from Place De Voges. The document is dated November 16, 2008, and says it is a "support document lease from 2008 Ivan Pavicic." Much of the text is illegible but it appears to contain a signed agreement that Mr. Pavicic rented the first floor to Ms. Zhao for \$550 a month. By letter dated November 26, 2013, the Loft Board rejected the second application for procedural reasons. On December 3, 2013, the Loft Board received a third application that included a standard form lease for the first floor dated February 28, 2008, for an annual rent of \$6,600. The applications filed under TR-1134 are part of the record as ALJ Exhibit 3 A-C.

¹ An application filed under OATH Index No. 2225/14 (TR-1261) on behalf of Mr. and Mrs. De Swaan Arons and Mr. Bonkowski was settled by providing coverage for the second, third, and fourth floor units (Tr. 4, 44-45).

Ms. Zhao also filed an application for the second floor that was received by the Loft Board on February 13, 2014, that was docketed under TR-1161. In this application, Ms. Zhao wrote: “During Jan. 1, 2008 – Dec. 31, 2009 Xiuhong Zhou & Ivan Pavicic was living in Apt. 2” (Resp. Ex. A; Tr. 98).

On June 6, 2014, the Loft Board received an amended application from Ms. Zhao’s counsel seeking to amend her “June 2013 application” for the first floor. Counsel stated that the amendment was necessary because English is not the first language of Mr. Pavicic and Ms. Zhao and “minor errors based on [Ms. Zhao’s] mistaken belief of what information needed to be provided.” The amended application included a narrative of Ms. Zhao’s occupancy of the first floor since 2007 and attached several documents including the 2008 standard form lease (ALJ Ex. 1). Petitioner withdrew the first three applications for the first floor filed under TR-1134 and proceeded under TR-1161 as amended (Tr. 4-7).

The disputed issues concern the residential occupancy of the first floor during the window period and whether Ms. Zhao is entitled to protected occupancy of that unit.

At trial, Ms. Zhao testified that she married Mr. Pavicic in February 2006 (Tr. 67; Resp. Exs. B, C at 8). Ms. Zhao stated that she lived with him for a few months on First Avenue. Ms. Zhao maintained that she moved into the Building’s first floor in 2007 without her husband and has lived there alone since. However, the record contains a number of documents and statements by Ms. Zhao that raise doubts as to this assertion.

First, Ms. Zhao claimed that she moved to the first floor in 2007 because she and Mr. Pavicic decided to separate (Tr. 67). However, Ms. Zhao also stated that she moved because it was easier for her to get to the antique store where she worked and because the First Avenue apartment was too noisy and very small (Tr. 92-93). Ms. Zhao further alleged that she always lived alone on the first floor except for a few months in 2007 when her husband stayed with her (Tr. 58-59, 70). In her deposition from October 20, 2014, Ms. Zhao could not recall if Mr. Pavicic moved to the first floor with her (Resp. Ex. C at 11) and also claimed that he moved to the second floor before she moved into the first floor in 2007 (*id.* at 13).

With regard to Mr. Pavicic’s living arrangements, Ms. Zhao testified that in 2008 he moved to the second floor of the Building and lived there until 2011. She also testified that he had a place to sleep with a kitchen and bathroom behind a curtain in the antique store that no one in the store ever saw and that he lived there between 2011 and 2013 (Tr. 68-70, 103, 128-29).

Ms. Zhao also claimed that Mr. Pavicic moved to Clifton, New Jersey in 2011 and lived there until 2014. In support, Ms. Zhao tried to offer an unsigned lease for the period of 2011 to 2016 for a commercial property in Clifton, New Jersey that was not admitted into evidence (Tr. 228-38). She also stated that she does not know where Mr. Pavicic currently lives even though they speak frequently (Tr. 91, 121-22).

In support of her claim that she has lived on the first floor since 2007, Ms. Zhao submitted a six-year standard form lease dated February 28, 2008, for the first floor for an annual rent of \$6,600 a year that contained undated signatures of Mr. Pavicic and Ms. Zhao (Tr. 76; Pet. Exs. 4, 5). Ms. Zhao explained that because she and her husband fought so much and Mr. Pavicic was always telling her to get out, they agreed that he would give her a lease in exchange for her helping in the store. She admitted that she never paid any rent and stated it was because Mr. Pavicic was too busy and never asked for it (Tr. 84-85, 124-27, 130-31). Mr. Pavicic also paid all of her expenses even after they were separated (Tr. 131-32, 135-36).

Ms. Zhao also submitted 2008 and 2009 bank records showing that she and Mr. Pavicic had a joint account that identified the Building's address (Pet. Ex. 1) and nine Chase Bank statements from 2008 in her name showing the Building's address and "Apt. 1" (Pet. Ex. 2). Finally, Ms. Zhao submitted dog vaccination records from 2011, 2012, and 2014 showing the dog's owner was Mr. Pavicic and that he was living in the Building (Pet. Ex. 3).

Ms. Zhao contended that when she moved into the entire first floor in 2007 it looked the same as it does today except that now there are two entrances to the unit (Tr. 94). She testified that the entire unit is approximately 900 square feet in area with a large living room, a small kitchen, a bathroom, and a loft bedroom. It has windows facing the street and a rear yard (Tr. 15-17, 89-90). Ms. Zhao did not describe how the first floor was furnished during the window period and did not provide any photographs of the space.

In further support of her claim that she has lived alone on the entire first floor since 2007, Ms. Zhao called Mr. Albino and Mr. Larson who worked part-time in the antique store during the window period (Tr. 27, 36). According to Mr. Albino, Mr. Pavicic was an antique dealer and Ms. Zhao worked in the store cleaning the floor, polishing the furniture, helping customers, and taking photographs and e-mailing them to customers (Tr. 20, 30). Mr. Larson testified that Ms. Zhao was the proprietor and his boss and that Mr. Pavicic worked in the store (Tr. 36, 38, 40-41).

According to Mr. Albino, Ms. Zhao started living in the first floor in 2007 or 2008 while

her husband, Mr. Pavicic, lived on the second floor. Mr. Albino had this belief because when he forgot his key to the store, he would call Ms. Zhao and she would come out of the first floor. Also, Ms. Zhao would sometimes go upstairs for a break and Mr. Albino would hear her walking above the store (Tr. 21-22, 25). Mr. Larson testified that Ms. Zhao lived above the store on the first floor and that her husband lived above her. Mr. Larson stated that he was in Ms. Zhao's apartment several times to bring her furniture or messages and also visited her husband's apartment on the second floor (Tr. 36-39, 42).

On the other hand, respondent offered the testimony of three longtime residential tenants in the Building who all stated that in 2008 and 2009 Ms. Zhao lived on the second floor with Mr. Pavicic, that the rear portion of the first floor was occupied by the Building superintendent, and that the front portion of the first floor was occupied by the antique store.

Mr. and Mrs. De Swaan Arons testified that they moved to the second floor in 1996 and moved to the fourth floor in 2001. Mr. Pavicic was the landlord. They have known Mr. Pavicic's wife, Ms. Zhao, for 15 years (Tr. 185-86, 211-12). Mr. Bonkowski testified that he moved to the second floor in 2004 and moved to the third floor in 2008.

The tenants testified that, when Mr. Bonkowski moved to the third floor in 2008, Ms. Zhao and Mr. Pavicic moved to the second floor. Henry, the superintendent, lived in the rear part of the first floor between 2008 and 2011. Before Henry, Roman, the prior superintendent, lived in the same unit for a number of years (Tr. 164-66, 172-75, 191-99, 212-13). Access to the superintendent's unit was through a door at the back of the Building (Tr. 172, 196-203). Mr. Bonkowski and Mr. De Swaan Arons testified they were in the superintendent's unit and that it had a kitchen, bathroom, and a loft sleeping area. They were also in the separate front area that was occupied by the antique shop below. It had a loft that was used for storage and the window facing the street was used to show antiques (Tr. 171-73, 195-200; Resp. Ex. I).

Mr. Bonkowski testified that during the window period he could hear Ms. Zhao on the second floor complaining incessantly about the noise from the third floor where he was living. She would bang on the ceiling with a piece of wood and would sometimes call the police or climb up the fire escape to yell at him (Tr. 166-67). Mr. De Swaan Arons testified that he saw Ms. Zhao many times inside the second floor apartment including once when he was taking pictures for Mr. Pavicic (Tr. 191-94, 205-06).

Mr. and Mrs. De Swaan Arons testified that in 2011 Mr. Pavicic offered them the second floor apartment to renovate and rent out as a bed and breakfast (Tr. 187-90, 210-11; Resp. Ex. K). The tenants testified that when Mr. and Mrs. De Swaan Arons took over the second floor, Mr. Pavicic and Ms. Zhao moved to the first floor (Tr. 168, 212-13). According to Mr. De Swaan Arons, Henry was upset that he was “kicked out” (Tr. 195).

Mr. and Mrs. De Swaan Arons testified that Ms. Zhao would occasionally collect the rent and would sometimes knock on their door asking for it (Tr. 191-92, 211-14, 216-17). Mr. Bonkowski testified that he made the rent checks out to Mr. Pavicic but usually dealt with Ms. Zhao about rent. She would ask for it if he was late and he would give her the check or slip it under her door. Mr. Pavicic did the repairs in the Building and Ms. Zhao would sometimes sweep the stairs (Tr. 169-70).

Mr. Malanga, the Building manager, presented photographs taken in 2013 showing that the front entrance to the Building is on the street level. Outside the front door are four intercom buzzers labeled: “1 Super”; “2”; “Bonkowski”; and “4 Marc Harriette” (Resp. Ex. J-1; Tr. 159). Inside the front door are stairs to a secure door leading to the first floor hallway and stairs to the upper floors (Resp. Ex. J-3; Tr. 15-17). Also inside the front door is a buzzer with the same names and a key operated mailbox unit for the second, third, and fourth floors. Next to the mailbox is a large box labeled “Apt-1” with a slot on top and a padlock latch (Resp. Ex. J-2; Tr. 160-61). Mr. Malanga testified that the buzzers have been labeled the same way since he became the Building manager in 2011 (Tr. 161). Ms. Zhao claimed she never saw that the buzzer for the first floor said “Super” on it (Tr. 243).

Mr. Kurkowski, an architect, prepared drawings of the Building including the first floor (Resp. Ex. I). Mr. Kurkowski testified that the drawings show where the wall was removed on the first floor between the rear unit (where the kitchen and bathroom are located) and the larger area in the front. There is a mezzanine above the middle of the first floor which ends where the wall between the two spaces existed. Mr. Kurkowski testified that he took measurements in the Building but he did not provide any regarding the first floor (Tr. 221-25).

Petitioner failed to demonstrate that the entire first floor was residentially occupied during the window period.

In order for a unit to qualify as a covered residence under the Loft Law, “it must possess sufficient indicia of independent living to demonstrate its use as a family residence.” *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep’t 1986). The determination of coverage requires 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). This tribunal and the Loft Board have considered evidence of indicia of residential living such as furniture, personal effects, and photographs of the unit being used residentially. *Matter of Gurkin*, OATH Index No. 489/12 (Dec. 14, 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17, 2013) (petitioners provided evidence of residential occupancy in the nature of residential furniture, receipts, personal effects, and photographs). Also considered is circumstantial evidence of a tenant’s intent to make a unit a residence, such as the receipt of mail at the unit, and whether the unit’s address is used for voter registration, driver’s license, and other official documents. *See Matter of Gareza*, OATH Index Nos. 2061/12 & 760/13 at 8 (Dec. 12, 2012), *adopted in part, rejected in part*, Loft Bd. Order No. 4243 (Feb. 20, 2014) (receiving mail at address, using the address on a bank account, and being registered to vote at address was evidence of residential use).

In order to prevail on a coverage application, petitioner must prove her case by a preponderance of the evidence. 29 RCNY § 1-06(i)(4) (Lexis 2014). Preponderance has been defined as “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.” *Richardson on Evidence* § 3-206 (Lexis 2008) (citation omitted). Ms. Zhao failed to meet her burden of showing that the entire first floor was residentially occupied and also failed to establish that the residentially occupied superintendent’s unit was at least 400 square feet in area and had a window opening onto a lawful yard as defined in the zoning resolution.

To the extent resolution of the disputed issues relies on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness’s testimony, supporting or corroborating evidence, witness motivation, bias, or prejudice, and the degree to which a witness’s testimony comports with common sense and human experience in determining credibility. *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).

Ms. Zhao was an incredible witness. She had a compelling financial motive to lie about living on the first floor in 2008 and 2009: to obtain Loft Law protection for a rent regulated unit in a prime location in Manhattan.

First, Ms. Zhao filed a Loft Board application alleging that she lived on the second floor with Mr. Pavicic in 2008 and 2009. Ms. Zhao's testimony that this was a mistake, that she was confused by the application, and that she called the Loft Board who told her to file for both the first and the second floors (Tr. 98-102, 104-07) was not credible.

Ms. Zhao also gave vague and inconsistent testimony about her and her husband's living arrangements since 2007, was argumentative, and would give non-responsive answers (Tr. 77-80, 91-93, 98-101, 104-07, 111-12, 125-29, 132-38, 143, 186, 192, 228-29, 237-38, 242-45). Even though English is not her first language, there were a number of indications that Ms. Zhao understood the import of the questions. Discussions were held on and off the record and Ms. Zhao's counsel consistently maintained that Ms. Zhao fully understood the proceedings and did not need an interpreter. After Ms. Zhao asked for an interpreter for her testimony, a Mandarin interpreter was provided. However, the interpreter was not used because Ms. Zhao claimed that the interpreter was "not translating 100% correct" (Tr. 62). Ms. Zhao opted to go forward without the interpreter but the interpreter remained in the courtroom in the event she was needed (Tr. 17-18, 48-49, 54-55, 62-65). The interpreter was subsequently excused and Ms. Zhao was given the option of using an interpreter by telephone but chose not to do so. Notably, Ms. Zhao answered questions and remembered details helpful to her case, but claimed that she did not understand questions or remember facts that challenged her proof (Tr. 231-34, 239-40). Ms. Zhao also used an interpreter in her deposition but asserted that the translator "was not perfect" (Tr. 111).

Ms. Zhao's claim that Mr. Pavicic did not want her involved in his business (Tr. 67-68, 86, 91-94, 114-15) was also not credible. Ms. Zhao admitted that she "prepared all" the paperwork for her husband's lawsuit against the Building's owner (Tr. 115), she went to court with Mr. Pavicic and knew his lawyer (Tr. 95-96), she knew how much each of the tenants paid in rent (Tr. 102), she worked in Mr. Pavicic's store from at least 2007 until it closed (Tr. 14, 84, 137), and she admitted that she collected rent once from a tenant (Tr. 85-86, 128, 227-28). Moreover, it was undisputed that when Mr. Pavicic wanted the De Swaan Arons to pay \$6,000 a month rent for the second floor, Ms. Zhao insisted that it be \$6,500 (Tr. 214-15).

Except for Ms. Zhao's self-serving claims and the testimony of Mr. Albino that she and Mr. Pavicic fought frequently (Tr. 24), there was nothing to support a finding that she and Mr. Pavicic separated in 2007 (Tr. 67-68, 86, 91-94, 114-15). In her deposition, Ms. Zhao testified that Mr. Pavicic would visit her on the first floor, that in 2009 she lived "a portion of the time" on the second floor with him, that they lived and slept together in both apartments, and that the reason they had two apartments was because she went to sleep early and Mr. Pavicic worked late (Resp. Ex. C at 16-17, 37-38). Moreover, when asked whether she ever did any cleaning in the Building, Ms. Zhao declared: "No, I'm the wife. I'm not supposed to do that" (Tr. 85).

While the tenants admitted that Ms. Zhao was difficult to deal with (Tr. 166-67, 206-08, 218-20), none of them indicated that she was separated from Mr. Pavicic. On the contrary, Mrs. De Swaan Arons testified that she sees Mr. Pavicic regularly walking his and Ms. Zhao's dog and coming in and out of the Building (Tr. 215). As Mr. Pavicic is no longer the net lessee and closed the antique store, he has no apparent reason to come to the Building except to see Ms. Zhao. It seems highly unlikely that Mr. Pavicic would continue to pay all of Ms. Zhao's expenses and would have invested his own time and money in 2013 to make improvements to the first floor if he was estranged from her.

Respondent's request for an adverse inference for Ms. Zhao's failure to call Mr. Pavicic is appropriate. An adverse inference is proper when: (1) the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; (2) the witness would naturally be expected to provide non-cumulative testimony favorable to the party who has not called him; and (3) the witness is available to such party. *People v. Gonzalez*, 68 N.Y.2d 424, 427 (1986); *Follett v. Thompson*, 171 A.D.2d 777 (2d Dep't 1991); *Matter of Lerner*, OATH Index No. 1121/14 at 11-12 (Feb. 19, 2015).

Mr. Pavicic, as the net lessee of the Building, allegedly provided Ms. Zhao in 2008 with a lease for the entire first floor and was in the best position to know how the Building was used during the window period. As Ms. Zhao's husband who helped prepare her Loft Board application for the second floor (Tr. 103; Resp. Ex. C at 23), it is reasonable to expect that Mr. Pavicic would provide relevant, non-cumulative testimony favorable to her. There was no evidence that he was unavailable or not within Ms. Zhao's control. Ms. Zhao acknowledged that she speaks to him frequently (Tr. 90, 121-22). In addition to listing Mr. Pavicic as a witness in Ms. Zhao's February 2014 Loft Board application (Resp. Ex. A), representations were made

during the proceedings that Mr. Pavicic would be testifying. Ms. Zhao later claimed that he would not appear because this “was not very interesting for him” (Tr. 238-39). Under the circumstances, one may infer that the testimony of Mr. Pavicic would not support petitioner’s version or would not contradict respondent’s evidence. *Noce v. Kaufman*, 2 N.Y.2d 347, 353 (1957) (“Where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits.”) (citations omitted).

It is notable that Mr. Pavicic would have difficulty relying on his residential occupancy of the first floor during the term of the net lease while he was the landlord to assert rights under the Loft Law. As a net lessee, Mr. Pavicic stood in the shoes of the owner. The MDL broadly defines “owner” to include “a . . . lessee . . . or any other person . . . directly or indirectly in control of a dwelling.” MDL § 4(44) (Lexis 2015); *see also* 29 RCNY § 2-05(a) (Lexis 2014) (landlord of an IMD includes “lessee of a whole building”). Typically, owners are not entitled to Loft Law protection. *See e.g. Tri-Land Properties, Inc. v. 115 West 28th St. Corp.*, 267 A.D.2d 142 (1st Dep’t 1999) (owner who would not vacate building purchased in foreclosure not entitled to article 7-C protection); *First Edition Composite, Inc. v. Wilkson*, 177 A.D.2d 297, 298 (1st Dep’t 1991) (tenants who sold building to new owner and did not vacate the premises as agreed, were “essentially owner-occupants” and could not use the Loft Law to prevent new owner from collecting rent); *Matter of Wyman*, Loft Bd. Order No. 4170 at 2 (Sept. 19, 2013) (part-owner of building not entitled to protection under article 7-C); *Matter of Brimberg*, Loft Bd. Order No. 2320 (Oct. 27, 1998) (in determining owner’s final rent adjustment and legal regulated rents, owner-occupied unit is not subject to rent regulation).

Mr. Pavicic’s legal impediment to asserting Loft Law rights, his failure to testify, his signatures on both 2008 leases, his assistance to Ms. Zhao in preparing the Loft Board applications, and his continued presence in the Building strongly suggest that he is collaborating with his wife to obtain Loft Law protection so that they can live in a large loft in downtown Manhattan at a below market rent-regulated rate of \$550 a month.

Ms. Zhao’s witnesses, who were part-time workers in the antique store, were also unable to provide convincing corroboration that she resided on the first floor in 2008 and 2009. Mr. Albino acknowledged that he was never in Ms. Zhao’s first floor unit (Tr. 28). It is likely that Ms. Zhao was in the commercial part of the first floor when Mr. Albino heard her walking above

the store. Mr. Albino's claim that Ms. Zhao came from the first floor when he called her because he forgot his keys does not preclude the possibility that she walked down from the second floor, not the first. Mr. Larson never heard Ms. Zhao walking on the first floor above the store (Tr. 41). His claim that he went to Ms. Zhao's apartment on the first floor in 2009 was either mistaken or untruthful. Mr. Larson testified that he entered her unit through the first door on the right (Tr. 38) which did not exist until 2013. Moreover, his claim that Ms. Zhao and not Mr. Pavicic was the proprietor of the antique store was incorrect according to Ms. Zhao herself.

On the other hand, the tenants called by respondent had no apparent motive to lie and gave credible, consistent testimony that was corroborated by documentary evidence. Ms. Zhao's argument that the De Swaan Arons were biased against her because they were operating an illegal hotel made no sense since she and Mr. Pavicic rented them the space for that purpose. The tenants' assertion that Ms. Zhao lived on the second floor with her husband during the window period until 2011 was also consistent with Ms. Zhao's February 2014 Loft Board application stating that she lived with Mr. Pavicic on the second floor in 2008 and 2009. In fact, Ms. Zhao listed Mr. Bonkowski on the application as someone who could testify that she lived on the second floor during the window period (Resp. Ex. A).

Moreover, the tenants' testimony that only the rear portion of the first floor was residentially occupied by the Building's superintendent during the window period until 2011 was credible. The superintendent's departure from the Building in 2011 coincided with Mr. Malanga being hired as the Building manager. Their testimony that the front area was a separate storage space for the antique shop was also corroborated by Ms. Zhao who admitted that for "a very short time" Henry lived in the back of the first floor and that the front was a separate space for the antique store (Tr. 240; Resp. C at 9). In fact, Ms. Zhao listed the two superintendents as the tenants of record for "Apt. 1" in all three of her applications filed under TR-1134 (ALJ Ex. 3). Moreover, the narrative in Ms. Zhao's 2014 amended Loft Board application indicates that the front part of the first floor was occupied by the antique store until 2013 and that she moved into the superintendent's unit in 2011: "Apartment 1 . . . was totally separated from the store one year ago when Tenant closed the commercial space. In the beginning of 2011, Tenant moved exclusively to Apartment 1 and has been living there until present" (ALJ Ex. 1).

There was also a paucity of documentary evidence supporting Ms. Zhao's claim that she lived alone on the entire first floor in 2008 and 2009. The few documents presented were

unreliable and inconsistent with Ms. Zhao's testimony and other documents, most notably the February 2014 Loft Board application wherein, Ms. Zhao sought coverage for the second floor (Resp. Ex. A). Ms. Zhao also signed joint tax returns with Mr. Pavicic in 2008 and 2009 (Resp. Exs. F, G) reporting the rental income for the Building and stating that no one in their family used it for personal purposes. Ms. Zhao's claim that she never saw the documents and never discussed them with her husband (Tr. 118-22) was not credible. The joint bank statements with Mr. Pavicic listing the Building's address (Pet. Ex. 1) have little probative value as they do not list an apartment number.

The only unequivocal documentary evidence showing Ms. Zhao's window period address as the first floor was her 2008 bank records and the 2008 lease (Pet. Exs. 2, 5). For various reasons, these documents were unpersuasive that she has lived on the first floor since 2007.

Ms. Zhao testified that most of her and her husband's mail was sent to the antique store where they worked (ALJ Ex. 1; Tr. 10, 66) and that the store did not have a mailbox (Tr. 95). It seems more likely than not that the large, separate "Apt-1" mailbox (Resp. Ex. J-2) was used by the antique store, the superintendent, Mr. Pavicic, and Ms. Zhao to collect their personal and business mail. This would explain why Ms. Zhao listed "Apt. 1" on her 2008 bank records. Indeed, Mr. Pavicic also used the "Apt. 1" designation on documents even though he never claimed to have lived there. In a verified complaint filed by Mr. Pavicic in 2013, he listed his address as 816 Broadway, Apartment 1 (Resp. Ex. E). Ms. Zhao testified that this was the lawyer's mistake (Tr. 115-17, 143-44). Moreover, the 2011 dog vaccination record prepared by Ms. Zhao lists the first floor as Mr. Pavicic's unit (Pet. Ex. 3). Ms. Zhao's testimony that the dog lives with her and that she listed her unit by mistake and did not intend to say that Mr. Pavicic lived there (Tr. 71-72, 117) was also not credible.

With regard to the February 28, 2008 lease for the first floor, Ms. Zhao asserted that the lease was given to her by Mr. Pavicic in exchange for her helping him in the store since they fought so much (Tr. 76; Pet. Exs. 4, 5). However, in her deposition Ms. Zhao claimed that she got the lease because:

This building my husband does not own it and I feel like - - I'm not own - - like at that time I do not have an entitlement. So I had to have one - - something in writing. . . . With a document it will prove who I am, why I was living in the apartment. Just in case something happen to my husband I can actually show who I am and why I was living in that apartment.

(Resp. Ex. C at 17-18). When asked why her deposition testimony differed from her trial testimony, Ms. Zhao claimed she did not understand that she had to give all of the reasons for getting the lease (Tr. 126).

There is no logical reason for the existence of a lease in 2008 since Mr. Pavicic was the landlord and never asked his wife to pay any rent. It seems unlikely that Mr. Pavicic would have given Ms. Zhao a six-year lease in 2008, particularly if they were having marital difficulties as claimed by Ms. Zhao. Rather, it seems likely that Ms. Zhao and Mr. Pavicic first created the document dated November 16, 2008, titled “support document lease from 2008 Ivan Pavicic” on a Place De Voges sales order form when she filed her Loft Board application on October 23, 2013. After that application was rejected, Ms. Zhao and Mr. Pavicic created the standard form lease dated February 28, 2008, and filed it with the December 2013 application so that Ms. Zhao would have an authentic looking lease to support her claim to the first floor. There would have been no need to submit the first document had the standard form lease already existed.

Given the inconsistencies in Ms. Zhao’s proof and the credible testimony from the Building tenants that she lived on the second floor during the window period, the 2008 bank records and lease are insufficient to carry her burden. *See 23 Jones Street Assocs. v. Keebler-Beretta*, 284 A.D.2d 109, 109 (1st Dep’t 2001) (while documentary evidence can be significant in determining residence, it is not necessarily preponderate over inconsistent testimony); *300 East 34th Street Co. v. Habeeb*, 248 A.D.2d 50 (1st Dep’t 1997) (traditional indicia of residence, such as driver’s license, voter’s registration, tax returns, telephone and bank records not dispositive in the light of credible testimony to the contrary); *West 157th Street Assocs. v. Sassoonian*, 156 A.D.2d 137 (1st Dep’t 1989) (although tenant’s traditional indicia of residence showed one address, credible testimony that tenant lived at a different address precluded summary judgment).

Based on the credible, consistent testimony of the tenants as corroborated by Ms. Zhao’s Loft Board applications and the adverse inference for Mr. Pavicic’s failure to testify, the following findings of fact are made.

Ms. Zhao moved into the Building with Mr. Pavicic in 2007 or 2008 and lived on the second floor until 2011. During this period, the rear portion of the first floor was occupied by the Building’s superintendents, Roman and then Henry, while the front portion was

commercially occupied by the antique store for storage. In 2011, Ms. Zhao and Mr. Pavicic moved from the second floor into the superintendent's unit in order to rent the second floor for \$6,500 a month. From 2011, Mr. Pavicic lived with Ms. Zhao in the first floor rear unit and may have occasionally slept in the antique store where he had a bed (Tr. 176). From 2011 until the antique store closed in 2013 or 2014, the front part of the first floor continued to be used for the storage of antiques. When the store closed, Mr. Pavicic combined the rear and front portions of the first floor for his and his wife's occupancy, sealed the access to the commercial space below, and added a front door to the first floor unit.

The evidence failed to demonstrate that the entire first floor was residentially occupied by Ms. Zhao since 2007. Moreover, Ms. Zhao failed to show that the rear portion of the first floor occupied by the superintendent during the window period would qualify for coverage in that it was at least 400 square feet in area. Based on the architect's drawings (Resp. Ex. I) and Ms. Zhao's testimony that the entire first floor unit is approximately 900 square feet. It appears that the residentially occupied space was roughly a third of the entire space, or less than 400 square feet. Similarly, there was no proof that the window in the rear portion of the first floor opens onto a lawful yard as defined in the applicable zoning resolution.

Accordingly, the application should be denied. In the alternative, the Loft Board could send an inspector to the Building to measure the rear portion of the first floor and inspect the window to determine whether that part of the first floor should be a covered unit.

In any event, petitioner is not entitled to protected occupancy of any portion of the first floor.

Under section 2-09(b)(1) of the Loft Board rules, the current occupant in possession of a residential unit in an IMD is presumptively protected: "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." There is no dispute that Ms. Zhao is the current residential occupant of the first floor.

The next question is whether Ms. Zhao is otherwise precluded from protected occupancy because she does not qualify for Article 7-C protection under any other applicable section of rule 2-09(b). According to the credible trial evidence, Ms. Zhao took possession of the rear portion of the first floor in 2011.

Loft Board rule 2-09(b)(3) provides in relevant part that an occupant who took possession of an IMD unit after June 21, 2010 is qualified for protection if the occupant is “a prime lessee with a lease currently in effect” or if the occupant took possession “with the consent of the landlord, as a statutory tenant pursuant to article 7-C, without the issuance of a new lease.” 29 RCNY § 2-09(b)(3)(i) (Lexis 2014). Ms. Zhao is not a prime lessee with a lease currently in effect. Thus, to qualify for protected occupancy, she must have taken possession of the first floor “with the consent of the landlord, as a statutory tenant pursuant to Article 7-C.”

While Ms. Zhao took possession with the consent of the then-landlord, Mr. Pavicic, she was not a statutory tenant pursuant to article 7-C. A “statutory tenant pursuant to Article 7-C” is not defined in the MDL. However, section 286(2)(i) of the MDL, which provides for the rent protection rights of IMD occupants, suggests that “residential occupants qualified for protection” do not include occupants who have not paid or agreed to pay rent. The statute provides that:

“residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy . . . and shall pay the same rent, including escalations, *specified in their lease or rental agreement* to the extent to which such lease or rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by the owner. . . .” (emphasis added).

This language referring to the existence of a “lease or rental agreement” implies that, in order to be a “residential occupant qualified for protection,” the occupant must be residing in the IMD unit pursuant to some type of rental agreement with the landlord. *Matter of Stone*, OATH Index No. 1945/14 at 15 (June 4, 2015).

As shown above, Ms. Zhao and Mr. Pavicic moved into the rear part of the first floor in 2011 and, around 2013, created the six-year lease dated February 28, 2008, for the entire first floor so that Ms. Zhao would have a lease to support her Loft Board application. Since Ms. Zhao’s document was found to be an illusory lease, it is void. *Matter of Wyman*, OATH Index No. 2653/11 at 11 (June 22, 2012), *adopted*, Loft Bd. Order No. 4170 (Sept. 19, 2013); *see also Grimm v. NYS Division of Housing & Community Renewal*, 68 A.D.3d 29, 33 (1st Dep’t 2009) (“Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void.”) (citation omitted).

It was also undisputed that Ms. Zhao never paid Mr. Pavicic, the landlord, any rent for use of the first floor. Ms. Zhao’s claim that she worked in Mr. Pavicic’s antique store in

exchange for rent was not credible. Nor was there any evidence that since Mr. Pavicic's net lease expired, Ms. Zhao has paid rent that would establish privity with the respondent-owner. *See Matter of Zabari*, OATH Index No. 419/96 (Oct. 16, 1995), *aff'd*, Loft Bd. Order No. 1899 (Jan. 4, 1996), *adopted*, Index No. 107964/96 (Sup. Ct. N.Y. Co. Feb. 11, 1997), *aff'd in part, rev'd in part*, 245 A.D.2d 200 (1st Dep't 1997) (brother of tenant not protected occupant where he took occupancy without landlord's consent and was not a prime lessee).

Ms. Zhao has been apparently living on the first floor rent free as the former landlord's spouse whose net lease has expired. At most, she is an occupant, not a tenant. Under Real Property Law section 235-f(1)(b), an "occupant," is defined as "a person, other than a tenant or a member of a tenant's immediate family, occupying a premises with the consent of the tenant or tenants."

Since Ms. Zhao did not take possession with the consent of the landlord as a statutory tenant pursuant to article 7-C, she is not a protected occupant. *Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06 at 8 (May 18, 2007), *adopted in part, modified in part*, Loft Bd. Order No. 3457 (Sept. 18, 2008), *application for reconsideration granted in part and denied in part*, Loft Bd. Order No. 3496 (Apr. 23, 2009) (prime lessee's wife was not a protected occupant where there was no evidence that she made any rental payments, accepted by the owner, that would imply his consent to her tenancy); *but see Wyman*, OATH No. 2653/11 at 4-9 (mother of co-owner's child who was estranged, was a prime lessee, and made rent payments directly to landlord found to be a protected occupant).

FINDINGS AND CONCLUSIONS

1. Petitioner failed to demonstrate that the entire first floor was residentially occupied during the window period.
2. Petitioner failed to demonstrate that the residentially occupied rear portion of the first floor was at least 400 square feet in area and had a window opening onto a lawful yard as defined in the applicable zoning resolution.
3. Petitioner failed to demonstrate that she is entitled to protected occupancy to any portion of the first floor.

RECOMMENDATION

While the Loft Law is to be liberally construed in favor of coverage, *Association of Commercial Property Owners v. New York City Board*, 118 A.D.2d 312, 318 (1st Dep't 1986), it cannot create rights where none exist. Since petitioner failed to demonstrate that the entire first floor was residentially occupied in 2008 and 2009, or that the residentially occupied rear portion of the first floor was at least 400 square feet in area and had a window that faces a lawful yard as defined in the applicable zoning resolution, or that she is entitled to protected occupancy for any portion of the first floor, the application should be denied in its entirety.

Alessandra F. Zorziotti
Administrative Law Judge

August 12, 2015

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

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