Matter of Doris

OATH Index Nos. 2542/14 & 2543/14 (July 10, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4511 (Apr. 21, 2016), **appended,** *reconsideration granted,* Loft Bd. Order No. 4555 (Oct. 20, 2016), **appended**
[Loft Bd. Dkt. Nos. TR-1196 & TR-1240
19 Hope Street, Brooklyn, N.Y.]

Petitioners proved that they are protected occupants of interim multiple dwelling units entitled to coverage under the Loft Law.

Loft Board adopts ALJs findings that the units have qualifying windows and they qualify for coverage. The Loft Board rejected ALJ's finding that the applicants are protected occupants because they did not raise a protected occupant status claim in their coverage applications.

Loft Board grants reconsideration and rules that the applicants status was fully litigated and that they are protected occupants.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
KYLE DORIS AND MONICA HERNANDEZ
Petitioners
-against-
REDSKY JZ ROEBLING, LLC
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioners, occupants of units 4 and 1-8 of a building located at 1-19 Hope Street, also known as 143-155 Roebling Street and 314-330 Metropolitan Avenue, Brooklyn, New York, applied to the Loft Board for findings that they are each a protected occupant of an interim multiple dwelling ("IMD") unit. Mult. Dwell. Law ("MDL") § 281(5) (Lexis 2015); 29 RCNY §§ 2-08, 2-09(b) (Lexis 2014). Respondent, the owner of the building, previously owned by Metroeb Realty Corporation, opposed the applications and the Loft Board referred the matter to this tribunal for a hearing. 29 RCNY § 1-06(j)(2)(ii).

After conferencing the case, the parties agreed that the only contested issue is whether each applicant's unit has a window that opens onto a lawful yard or court. MDL § 281(5). By stipulation, the parties agreed that the building and applicants meet all of the other requirements for coverage under the Loft Law (Tr. 6, 9, 18, 165-66).

The parties also agreed that no hearing was required for Ms. Hernandez's application, which could be decided on the stipulated record, supplemented by memoranda of law (Stipulation, on the record, February 5, 2015). For Mr. Doris's application, the parties presented documentary evidence and testimony on January 9 and March 3, 2015. After the parties submitted memoranda of law, the record was closed on June 4, 2015. For the reasons below, petitioners' coverage applications should be granted.

ANALYSIS

Background

The five-story building is located at 143-155 Roebling Street, Brooklyn, Block 2368, Lot 1, also known as 1-19 Hope Street, and 314-330 Metropolitan Avenue. *See Matter of Mignola*, OATH Index Nos. 2482/11, 2483/11, 2484/11, 240/12, 808/12, 809/12, 810/12, & 1616/12 (May 29, 2013) (recommending that the building be deemed an interim multiple dwelling and that the coverage applications for a dozen applicants be granted).

To be covered by the Loft Law, a building must: (1) have once been occupied for manufacturing, commercial, or warehouse use; (2) lack a certificate of compliance or occupancy; (3) not be owned by a municipality; and (4) have been occupied as the residence or home of any three or more families living independently from one another for twelve consecutive months during the "window period," from January 1, 2008 to December 31, 2009. MDL § 281(5). A residential IMD unit entitled to coverage 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 lawful yard or court as defined in the zoning resolution for such municipality; and (4) be at least 400 square feet in area. *Id.*; *see also* 29 RCNY § 2-08(a)(4)(iii).

The "general intent of the Loft Law [is] to be liberally construed in favor of coverage." *Matter of Gurkin*, OATH Index No. 489/12 at 21 (Dec. 14. 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17. 2013); *see also Ass'n of Commercial Property Owners, Inc. v. NYC Loft Bd.*, 118

A.D.2d 312, 318 (1st Dep't 1986), *aff'd*, 71 N.Y.2d 915 (1988) ("Given the choice of two interpretations of the Loft Law, one restricting coverage and one broadening it, the remedial nature of the legislation forcefully argues for the adoption of the latter course. . . . To the extent the Loft Law is restricted in its coverage, the purpose of the law is defeated."). Moreover, the issue of coverage under the Loft Law is separate from issues of legalization. *Gurkin*, OATH 489/12 at 21 ("legalization issues are not to be used by owners to avoid Loft Law coverage."); *see also Katz v. NYC Loft Board*, 163 A.D.2d 207, 209 (1st Dep't 1990), *aff'd*, 78 N.Y.2d 1018 (1991) (the fact that the units contain less than the mandated minimum square footage required by the applicable zoning resolution does not preclude coverage since that issue is deferred until the subsequent legalization proceeding).

A recent Loft Board decision is instructive. In *Matter of Schuss*, OATH Index No. 2066/12 (Mar. 25, 2013), *adopted in part, rejected in part*, Loft Bd. Order No. 4393 (May 21, 2015), this tribunal found that a transom window located above an exterior door qualified as a window under section 281(5) of the MDL. Rejecting the argument that the window provided inadequate light and air to the unit, this tribunal noted that there was nothing in the Loft Law which mandated how much light the window should provide or what room it must open into, and legalization issues were separate from coverage issues. *Schuss*, OATH 2066/12 at 11. Upholding the finding that the transom window satisfied section 281(5) of the MDL, the Board held that two other windows, which did not open, also qualified as windows for the purpose of a coverage application. *Schuss*, LBO No. 4393 at 2-3. The Board stressed that courts have liberally construed the Loft Law to enhance its beneficial effects. *Id*. at 2 (citations omitted).

Here, there is no dispute that the building is an IMD. And there is no dispute that Mr. Doris and Ms. Hernandez resided in their respective units during the relevant window period and the units are not located in a basement or cellar, have at least one entrance that does not require passage through another residential unit for access, and are at least 400 square feet in area. The only contested issue is whether petitioners' units have "at least one window opening onto a street or lawful yard or court as defined in the Zoning Resolution for such municipality."

In relevant part, section 12-10 of the Zoning Resolution ("ZR") includes the following definitions:

> A "yard" is that portion of a zoning lot extending open and unobstructed from the lowest level to the sky along the entire length of the lot line, and from

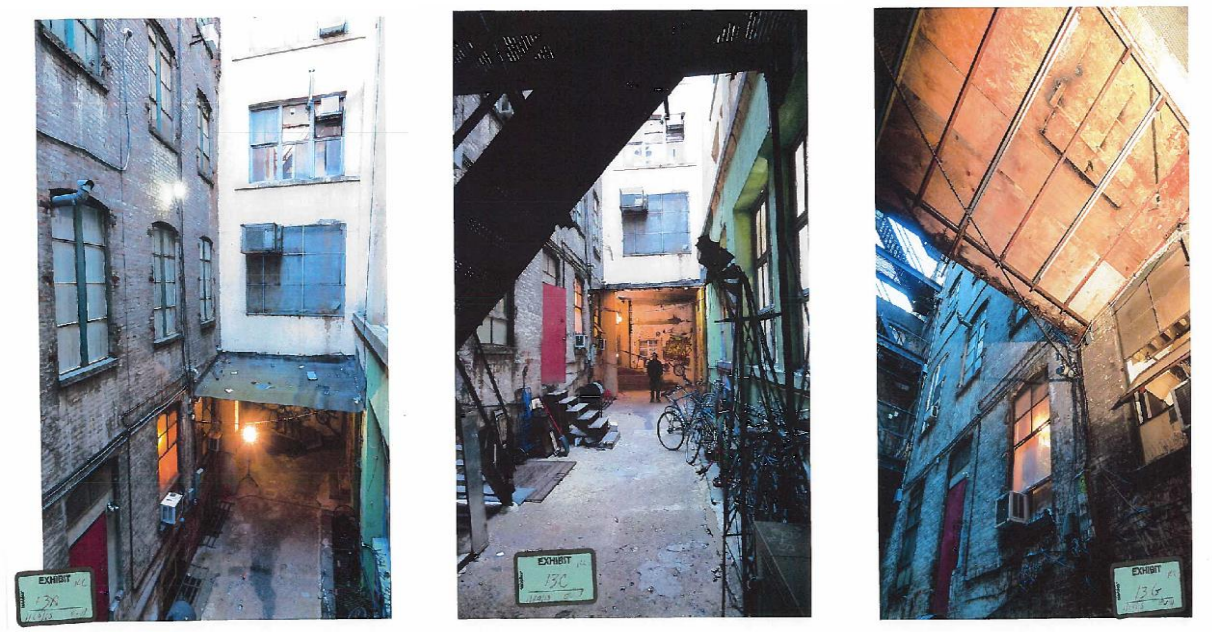
> the lot line for a depth or width set forth in the applicable district yard regulations . . . .
>
> A "rear yard" is a yard extending the full length of a rear lot line.
>
> An "inner court" is any open area, other than a yard or portion thereof, which is unobstructed from its lowest level to the sky and which is bounded by either: (a) building walls; or (b) building walls and one or more lot lines other than a front lot line; or (c) building walls, except for one opening on any open area along a side lot line or rear lot line which has a width of less than 30 feet at any point.

Based on the evidence presented, the relevant provisions of the Loft Law, and the intent of the Loft Law, petitioners proved that each of their units has a window facing a lawful yard or court.

The Doris Unit

Mr. Doris lives on the ground floor of 19 Hope Street. His unit has a window facing an open, inner court. There is a structure over the area directly outside the window. The parties offered competing expert testimony concerning the nature of that structure. Mr. Doris's architect, Mr. Tan, testified that the structure is a first-floor "awning" which is deemed a permissible obstruction in the R6 residential district where 19 Hope Street is located (Tr. 144; Pet. Mem. at 7-8). ZR § 23-87(b) (in R6 residential districts, "awnings and other sun control devices" are "permitted obstructions in courts" on the first floor and subject to maximum size restrictions on higher floors). Respondent's architect, Mr. Meltzer, contends that the structure is a "roof" and, thus, the window does not face an area that is "open to the sky" (Resp. Mem. at 3).

Photographs and testimony showed that the "structure" outside Mr. Doris's window is nothing more than a few pieces of plywood, covered by tar paper, supported by thin metal poles attached to three sides of the building (Tr. 139-40; Pet. Ex. 13).



The structure's apparent purpose is to protect an open corridor from the rain or sun (Tr. 139-41, 185-86). Mr. Doris's architect offered unrebutted testimony that the structure does not support anything and is not an element of the building (Tr. 141).

For the purpose of Mr. Doris's coverage application, the precise nature of the structure outside his window is not important. Contrary to respondent's argument, the Loft Law does not require Mr. Doris's unit to have a window that "opens to the sky" (Resp. Mem. at 3). The Loft Law merely requires that the unit have a window "opening onto a street or lawful yard or court as defined in the zoning resolution." MDL § 281(5). The Zoning Resolution defines an "inner court" as an open area, unobstructed from its lowest level to the sky, bounded by building walls. ZR § 12-10.

Based on the testimony presented, as confirmed by the photographs, Mr. Doris's window faces an "inner court." The presence of a small plywood and tar paper structure does not alter the fundamental nature of the area; it is still an inner court. Because Mr. Doris's window opens onto an inner court, his unit qualifies for coverage under the Loft Law.

Even assuming that the precise identity of the structure was relevant, Mr. Doris proved that it is an awning rather than a roof. Section 202 of New York City's Building Code ("BC") defines an "awning" as "An architectural projection that provides weather protection, identity or decoration and is wholly supported by the building to which it is attached. An awning is comprised of a lightweight frame structure over which a covering is attached." The structure

outside Mr. Doris's window is wholly supported by the building, it provides weather protection, and it is a lightweight frame structure with a cover attached. Thus, as Mr. Doris contends, it is an awning in form and function.

In support of his opinion that the structure is not an awning, respondent's architect cited three factors. Awnings are usually placed over windows rather than solid walls, the "flashing" around the perimeter of the structure is typically used on roofs, and the current building code requires awnings to be made of non-combustible material (Tr. 171-72). Two of those three factors – awnings are usually in front of windows and flashing is typically used on roofs – are not requirements of the Building Code or Zoning Resolution. And the photographic evidence shows that the structure is in front of an open area of the building.

As for the third factor, Local Law 28 of 2012 has a section addressing the "design and construction" of awnings, which states that awnings must have noncombustible frames and the covering must be "flame-resistant" fabric or plastic, sheet metal, or other equivalent material. BC § 3105.3. The structure outside Mr. Doris's window has a metal, noncombustible frame but there was no evidence that the covering was flame resistant. However, that is a legalization issue and not a reason to deny coverage under the Loft Law.

Mr. Doris's counsel, noting that one of the Loft Law's goals is to bring buildings up to code, compared the awning to other items that may need to be upgraded (Tr. 194). An exterior door is still a "door" even though it may need to be replaced with a fireproof metal door. Likewise, a lightweight structure with a cover that protects from the weather is an "awning" even though it may need to be upgraded and covered with a flame-resistant material. To hold otherwise, would deny coverage to residentially occupied units whenever a few flimsy pieces of metal, plywood, and tar paper were put up outside a window. That would be inconsistent with the letter and spirit of the Loft Law.

Furthermore, the evidence does not support respondent's architect's testimony that the structure is a roof. Respondent's architect did not refer to a specific definition of "roof" in the Zoning Resolution or the current Building Code. Section 2-232 of the 1968 Building Code defined "roof" as "The topmost slab or deck of a building, either flat or sloping with its supporting members, not including vertical supports." That comports with the ordinary understanding of the word. A "roof" is an "external upper covering of a house or other

building." Oxford English Dictionary (Online ed. 2015); *see also* Merriam-Webster Dictionary (Online ed. 2015) ("the covering of a building").

In short, Mr. Doris's unit meets all the requirements for coverage under the Loft Law. It has a window that opens onto an inner court. Despite the structure outside the window, the area is still an inner court. And, in any event, the structure is an awning rather than a roof.

The Hernandez Unit

Ms. Hernandez lives in Unit 1-8, which has only one window. The window faces an open area on an adjacent lot, different from the inner court where Mr. Doris's unit faces. Ms. Hernandez argues that the lot is a lawful "rear yard" and the fact that the window is on a lot line is an issue for legalization but not a bar to coverage under the Loft Law (Pet. Mem. at 4, 7). Respondent argues that the unit is ineligible for coverage because the window overlooks a separate zoning lot that is not owned by respondent, the space is not a "lawful yard" because it does not extend for the entire lot line between respondent's property and the adjacent property, and the space is not accessible or usable by Ms. Hernandez or respondent (Resp. Mem. at 3-4).

As Ms. Hernandez correctly notes, the Loft Law does not require a window to open on to a yard that is on the same zoning lot where the IMD is located. Instead, the law simply requires the window to open on to "a lawful yard" as defined in the Zoning Resolution. MDL § 281(5). Because the yard that Ms. Hernandez's window faces is lawful, the unit meets the minimum requirements for coverage as an IMD.

Ms. Hernandez presented undisputed evidence that the yard behind 21 Hope Street is a lawful rear yard under the Zoning Resolution. Department of Finance records and a zoning map show that there is residential building at that address, which is located in a mixed use zoning district, which is designated MX-8, a mix of M1-2 and R6A zoning districts (Resp. Exs. C, D). The building at 21 Hope Street is 25 x 50 feet on a lot that is at least 25 x 87 feet (Resp. Exs. C, D). A diagram and photographs confirm that the rear lot, is an open unobstructed area that extends along the full length of the rear lot line, and it is 25 feet wide and more than 30 feet deep, which is consistent with the Zoning Resolution (Resp. Exs. D, E, G). *See* ZR § 12-10 (defining a "rear yard" as a yard that extends "the full length of a rear lot line"); ZR §23-47 (in R6 zoning districts, "a rear yard with a depth of not less than 30 feet shall be provided at every rear lot line on any zoning lot").

Respondent cites the Zoning Resolution and a prior decision of this tribunal in support of its argument that the rear yard of 21 Hope Street is not a lawful yard because it is not accessible or usable by Ms. Hernandez (Resp. Mem. at 4). *See* ZR § 12-10 ("open space" is "that part of a zoning lot, including courts or yards, which is open and unobstructed from its lowest level to the sky and accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot"); *Matter of Gallagher*, OATH Index Nos. 2594/11 & 2596/11 at 28 (Aug. 16, 2012) (finding that a 12-inch space separating the window of one building from an adjacent building was not accessible or usable by residential occupants of the building).

This case is much different than *Gallagher*. There, ALJ Addison carefully reviewed the relevant provisions of the Zoning Resolution and found that an inaccessible and unusable "sliver" of space between two buildings was not an "inner court." *Id.* Here, the issue is whether a window must face a yard or court on the same lot as the IMD and whether the IMD occupant must have access to that yard. There is nothing in section 281(5) of the MDL that imposes such requirements. Indeed, accepting respondent's argument, a unit with a window facing a large open area, such as a city park, would not qualify for coverage under the Loft Law because the open area was not on the same lot as the IMD unit.

The rear yard of 21 Hope Street is a lawful yard as defined by the Zoning Resolution. Ms. Hernandez's window faces that rear yard. Thus, Ms. Hernandez's unit satisfies section 281(5) of the MDL's requirement that the unit must have a window that "opens onto a lawful yard or court."

Respondent also notes that Ms. Hernandez's window is on a lot line (Resp. Mem. at 2). But respondent does not cite any authority to suggest that fact bars coverage under the Loft Law. Ms. Hernandez acknowledges that a lot line window may present a legalization issue (Pet. Mem. at 7); *see* MDL § 277(7) (dwelling units must have "one or more windows . . . [w]hich open onto a street, a court with a dimension of fifteen feet perpendicular to the windows and one hundred square feet minimum area above a set back or a thirty foot rear yard . . . . In no event shall the distance between such windows and the rear lot line be less than five feet . . . ."). However, Ms. Hernandez emphasizes that a potential legalization issue is not a bar to coverage under the Loft Law. *See Matter of 902 Assocs.*, Loft Board Order No. 1555 (May 4, 1994), *aff'd*, 229 A.D.2d 351 (1st Dep't 1996) (upholding denial of a de-coverage application and Loft Board's authority to order building owner to file a lot line declaration to permit legalization of a unit, where a

unit's lone window was on a lot line); *see also Schuss*, OATH 2066/12 (finding that Loft Law, unlike the Building Code, does not impose minimum light requirements for windows, and concerns regarding the adequacy of windows was a legalization rather than a coverage issue).

Ms. Hernandez's window faces a lawful rear yard. Thus, it satisfies the minimum requirements of the Loft Law. If there is a potential legalization issue because the window is located on a lot line, that is not a basis for denying Ms. Hernandez's coverage application.

FINDINGS AND CONCLUSIONS

1. Mr. Doris proved that he is the protected occupant of an IMD unit.

2. Ms. Hernandez proved that she is the protected occupant of an IMD unit.

RECOMMENDATION

Petitioners' applications should be granted.

Kevin F. Casey
Administrative Law Judge

July 13, 2015

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

APPEARANCES:

HARTMAN, ULE, ROSE, & RATNER, LLP
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Attorneys for Respondent
BY: GERARD PROEFRIEDT, ESQ

ORDER

NEW YORK CITY LOFT BOARD

In the Matter of the Application of
KYLE DORIS

Loft Board Order No.: 4555
Docket No.: R-0348
RE: 143-155 Roebling Street
a.k.a. 1-19 Hope Street
a.k.a. 314-330 Metropolitan Avenue
Brooklyn, New York

IMD No. 30062

Challenged Order No. 4511
(Docket No. TR-1196)

ORDER

The New York City Loft Board ("Loft Board") accepts the Report and Recommendation of Executive Director, Helaine Balsam dated October 6, 2016 ("Report").

This application filed on May 11, 2016, by Kyle Doris ("Tenant"), occupant of unit 1-4 ("Unit") in the building located at 19 Hope Street, Brooklyn, New York ("Building"), seeks reconsideration of Loft Board Order No. 4511, to the extent that the determination rejected the recommendation of Administrative Law Judge Kevin F. Casey, that Tenant be declared the protected occupant of the Unit in the Building.

For the reasons stated in the attached Report, the instant reconsideration application is granted. The Loft Board directs Owner to amend the Building's registration to reflect the units as IMD units and tenants as protected occupants in accordance with this order and Loft Board Order No. 4511 including registering Tenant as the protected occupant of the Unit and to pay the applicable registration fees within 30 days of the mailing date of this order. If Owner fails to amend the Building's registration within 30 days of the mailing, the Loft Board directs the staff to:

- register the above mentioned units as IMD units and tenants as protected occupants; and
- collect applicable registration fees and late fees.

DATED: October 20, 2016

Renaldo Hylton
Chairperson

Board Members Concurring: Carver, Barowitz, Roche, Delaney, Bolden-Rivera, Schachter, Shelton, Hylton
DATE LOFT BOARD ORDER MAILED: OCT 28, 2016

NEW YORK CITY LOFT BOARD

In the Matter of *the Application* of
RECOMMENDATION
KYLE DORIS

REPORT AND

Docket No.: R-0348

RE: 143-155 Roebling Street
a.k.a. 1-19 Hope Street
a.k.a. 314-330 Metropolitan Avenue
Brooklyn, New York

IMD No. 30062

Challenged Order No. 4511
(Docket No. TR-1196)

Helaine Balsam, Executive Director

On May 11, 2016, Kyle Doris ("Tenant"), occupant of unit 1-4 ("Unit") in the building located at 19 Hope Street, Brooklyn, New York ("Building"), filed the instant application seeking reconsideration of Loft Board Order No. 4511, to the extent that the order rejected the recommendation of Administrative Law Judge Kevin F. Casey, that Tenant be declared the protected occupant of the Unit in the Building.

On May 16, 2016, Vanessa Liberati, over-tenant of applicant filed an answer. On May 24, 2016, Vanessa Liberati filed an amended answer.

BACKGROUND

On February 19, 2012, the Loft Board received a building registration for the Building listing eleven (11) units. Tenant's Unit was not listed on the registration.

On March 10, 2014, Tenant filed an application seeking Article 7-C coverage of his Unit pursuant to Multiple Dwelling Law ("MDL") § 281 (5). The Loft Board docketed the application as TR-1196.

In its April 21, 2016 order, the Loft Board: 1) found that Tenant's Unit is a covered interim multiple dwelling ("IMD") unit; and 2) rejected Judge Casey's finding that Tenant is entitled to protected occupant status because the coverage application did not raise a protected occupant status claim and the claim was not an issue in the submissions to Judge Casey.

Tenant now seeks reconsideration of the Loft Board's denial of his protected occupant status claim.

STANDARD FOR RECONSIDERATION

Under the Loft Board's Rules, Title 29 of the Rules of the City of New York ("29 RCNY") § 1-07(a)(2), there are four circumstances under which an application for reconsideration may be granted:

1. Allegations of denial of due process or material fraud in the prior proceedings;
2. An error of law;
3. An erroneous determination based on a ground that was not argued by the parties at the time of the prior proceedings and that the parties could not have reasonably anticipated would be the basis for a determination; and
4. Discovery of probative, relevant evidence which could not have been discovered at the time of the hearing despite the exercise of due diligence.

Tenant asserts that the Loft Board's denial of his protected occupant status claim is an erroneous determination based on a ground that was not argued by the parties at the time of the prior proceedings and that the parties could not have reasonably anticipated would be the basis for a determination. Specifically, Tenant argues that the record shows that the issue of protected occupant status was raised, Judge Casey understood the protected occupant status claim to be a subject of the hearing and that the parties stipulated on the record that Tenant met all the criteria for protected occupancy status.

ANALYSIS

On March 3, 2015, counsel for both parties stipulated on the record that, in the event Tenant's apartment was found to be a covered unit, Tenant would be entitled to protected occupant status. See, Tr. p. 165-166. Therefore, because Tenant properly raised his protected occupant status claim during the course of the hearing, the Loft Board should accept the finding Judge Casey's July 10, 2015 Report and Recommendation finding that Tenant is entitled to protected occupant status.

RECOMMENDATION

I recommend that the instant application docketed as R-0348, challenging the April 21, 2016 Loft Board Order No. 4511, be granted.

DATED: October 6, 2016

Helaine Balsam
Executive Director