Matter of Behlke

OATH Index No. 153/15 (Nov. 12, 2014), *adopted in part and remanded*, Loft Bd. Order No. 4348 (Jan. 15, 2015), *reconsideration denied*, Loft Bd. Order No. 4425 (Sept. 17, 2015)
[Loft Bd. Dkt. No. PO-0001]

Application for protected occupancy finding by occupant of previously registered IMD unit challenged by owner as untimely. Owner relies upon Multiple Dwelling Law section 282-a, requiring that applications for "coverage of residential units" and for "coverage under this article" be filed no later than March 11, 2014. ALJ held that the filing deadline of March 11, 2014, was not intended to include applications for findings of protected occupancy and recommended that the application be granted.

Loft Board agreed with ALJ that section 282-a deadline does not apply applications for protected occupancy status. Loft Board remands for further fact finding necessary to determine the protected occupant of the unit. The Loft Board opined that the status of the applicant, who was a roommate of a relative of one of three prime lessees, is dependent whether his roommate is protected.

Loft Board denied tenant's application for reconsideration and remands matter to OATH for further development of the record.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
BRENDAN BEHLKE
Petitioner

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This case concerns an application filed with the Loft Board by petitioner, Brendan Behlke, involving the building located at 80 Varick Street, New York, New York. The application, filed with the Loft Board on April 24, 2014, alleges that petitioner has resided in interim multiple dwelling (IMD) unit 2E since 2004 and that he wishes "to be added as a tenant of record." The owner, 80 Varick Street, L. P., filed an answer on June 9, 2014, asserting that the application was barred by virtue of Multiple Dwelling Law section 282-a, requiring that

applications for "coverage" be filed no later than six months from the Loft Board's promulgation of a rule, or by March 11, 2014.

After a conference, the attorneys for the two parties agreed to submit the protected occupancy issue for adjudication based upon a set of stipulated facts and without a hearing. Both parties then submitted memoranda of law, and reply memoranda. The stipulation of facts was submitted on October 20, 2014, and the record closed.

For the reasons provided below, I find that the owner's challenge to coverage should be rejected and that petitioner's application for a finding of protected occupancy should be granted.

FACTUAL BACKGROUND

The parties' stipulated facts and other papers indicate that the premises is a ten-story building built around 1920 with factory uses on most of the upper floors, storage and shipping on the second floor, and storage on the first floor. The building's last certificate of occupancy was issued in 1981 for commercial uses on floors one through three and for class A apartments on floors four through ten. On November 29, 2010, the owner registered the building with the Loft Board with some 12 interim multiple dwelling (IMD) units, including unit 2E. On the 2010 registration, unit 2E was listed as occupied by Mr. Redniss (Owner's Motion for Summary Judgment, Ex. E). The building registration was renewed on June 24, 2014.

It was stipulated that petitioner has been in possession of and has residentially occupied unit 2E from July or August 2004 to date and has never paid rent directly to the owner. In petitioner's motion papers, petitioner offered a large number of documents to establish his residential occupancy of the premises, including 2007-2013 tax returns, 2005-2009 bank statements, 2013-2014 rent checks to Mr. Redniss, 2006-2011 management letters, 2008 DMV records, 2004-2014 medical records, and 2004-2009 financial documents. According to the owner, Mr. Redniss has also occupied and paid rent for unit 2E since 2005 (Owner's Motion for Summary Judgment, Saperstein Affidavit, para. 8). Prior to the filing of the instant application, the owner had not communicated with and was not aware of Mr. Behlke's occupancy of unit 2E (Owner's Motion for Summary Judgment, Saperstein Affidavit, para. 9).

Soon after the March 11, 2014, deadline, and prior to petitioner's filing of his application, the Loft Board staff adopted a policy of declining to accept new applications for coverage of new buildings. At the same time, however, the staff adopted an interpretation of Multiple Dwelling Law section 282-a that new applications for findings of protected occupancy were not included

within the statute's deadline. In accordance with this interpretation, the staff created a new category of applications for protected occupancy, or "PO," and, at a March 20, 2014, meeting of the Loft Board, the Executive Director made the following announcement regarding applications for protected occupancy:

> In light of the March 11th filing deadline, the coverage application form has been removed from the Loft Board website. However, the staff has created a new category of applications with the docket prefix of "PO," for "protected occupant," for those tenants who are occupants of covered units who wish to apply for protected occupant status. . . [The staff] does not believe that the statute of limitations limits those applications.

Petitioner's Motion for Summary Judgment, Ex. X, Mar. 20, 2014, Loft Board Minutes. The Loft Board docketed the instant application as "PO-001."

ANALYSIS

A motion for summary judgment will be granted where there are no disputed issues of material fact and the moving party is entitled to relief as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Tankard v. Abate*, 213 A.D.2d 320 (1st Dep't 1995). Without a material factual dispute, there is no need for an evidentiary hearing. *Matter of Chin*, OATH Index No. 1142/97 at 1 (Apr. 18, 1997), supp. report and recommendation (June 24, 1997), *adopted*, Loft Bd. Order No. 2154 (Oct. 10, 1997), *reconsideration granted in part*, Loft Bd. Order No. 2918 (Apr. 21, 2005) ("Where the parties are in agreement about the facts that are material to a case, and disposition of the case turns entirely on the application of the law to those undisputed facts, there is little value in holding an evidentiary hearing."). *See Matter of Saladino*, OATH Index No. 2412/13, mem. dec. (Jan. 10, 2014).

In the instant case, the parties agreed that, under the stipulated facts, petitioner has satisfied the basic requirements of being a protected occupant in that he has resided in unit 2E since 2004. The Loft Board rules provide that tenants who took occupancy prior to the effective date of the 2010 amendments to the Loft Law are presumptively entitled to protection:

> 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 unit covered by MDL §281(5) that became subject to Article 7-C pursuant to Chapter 135 or 147 of the Laws of 2010, and these rules.

29 RCNY § 2-09(b)(2). Under this definition, petitioner would qualify as the protected occupant of unit 2E.

The sole disputed legal issue raised by the parties is whether petitioner's application to be recognized as the protected occupant of a registered IMD unit is time-barred because it was filed after the deadline contained in the 2010 amendment to the Loft Law and the Loft Board rules.

Section 282-a of Article 7-C of the Multiple Dwelling Law provided that "[a]ll applications for registration as an interim multiple dwelling or for coverage of residential units under this article shall be filed with the loft board within six months after the date the loft board shall have adopted all rules or regulations necessary in order to implement the provisions of chapter 147 of the laws of 2010 which added this section." Following the enactment of section 282-1, and as required by that section, the Loft Board adopted a rule that "coverage applications" must be filed on or before March 11, 2014. 29 RCNY § 1-06.1(a). It is undisputed that petitioner's application to be recognized as a protected occupant was filed on April 24, 2014, some three weeks after the deadline.

The parties vigorously dispute whether applications for a finding of protected occupancy were intended by the State legislature to be included under the deadline imposed by section 282-a, as well as whether the Loft Board's policy of accepting such applications was lawful. Section 282-a provides as follows:

> All applications for registration as an interim multiple dwelling or for coverage of residential units under this article shall be filed with the loft board within six months after the date the loft board shall have adopted all rules or regulations necessary in order to implement the provisions of chapter 147 of the laws of 2010 which added this section. . . . Notwithstanding any other provision of this article, after such date no further applications for registration or coverage as an interim multiple dwelling or for coverage under this article shall be accepted for owners or occupants of buildings that would otherwise qualify as interim multiple dwellings or for coverage pursuant to this article.

Petitioner points to the first sentence of section 282-a, referring to applications for "coverage of residential units under this article," and contends that only new applications for

coverage of units, but not other applications such as for a finding of protected occupant status, were included within the ambit of the statutory deadline. The owner's attorney points to the last sentence, referring to applications "for coverage under this article," and insists that this language was intended to include protected occupancy applications as well as applications for registration and coverage of units.

For a number of reasons, I find that section 282-a was not intended to apply to applications for protected occupancy. First, as pointed out by petitioner's attorney, the plain language of the first sentence indicate that the deadline was for applications "for coverage of residential units," and not for applications for protected occupancy. It has been generally held that "where the statutory language is clear and unambiguous," it should be construed "to give effect to the plain meaning of the words used." *Amorosi v. South Colonie Independent Central School District,* 93 N.Y.3d 367, 372 (2007).

The owner's contention that the reference in the last sentence of the provision to "coverage under this article" refers to protected occupancy applications must be rejected. It is true that, instead of repeating the language of "coverage of residential units," this last sentence refers in the disjunctive to "coverage as an interim multiple dwelling or for coverage under this article." There is no indication, however, that the phrase "coverage under this article" was intended to expand the scope of the deadline to include applications that did not entail coverage of new units. The end of the sentence indicates that all of the applications being referred to are those for "buildings that would otherwise qualify as interim multiple dwellings or for coverage pursuant to this article." A guiding principle of statutory construction is that "a statute or legislative act is to be construed as a whole and all parts of an act are to be read and construed together to determine that its various sections must be considered together to determine the legislative intent." *People v. Heaney,* 48 N.Y.2d 192, 199 (1979); *see also Levine v. Bornstein,* 4 N.Y.2d 241, 244 (1958) ("all parts of an act are to be read and construed together to determine the legislative intent"). The reference to "buildings" indicates that the time bar was intended to apply to applications for covering new buildings or units, and not to other applications such as those seeking a finding of protected occupancy.

There are other indications to support this interpretation. First, the words "coverage" or "covered" are more commonly used in the Loft Law and the Loft Board rules to refer to units and buildings included under the law, while the term "residential occupant qualified for

protection" is used to identify individuals entitled to rights under the law. Section 282 refers to the Loft Board as having the duty of "determination of interim multiple dwelling status and other issues of coverage pursuant to this article." Section 286 uses the term "residential occupant qualified for protection" with reference to invalidating certain eviction actions, identifying those with a right to continued occupancy and the same rent, the right to sell improvements, rights under the real property law, and waiver of rights. The Loft Board rules defining "residential occupant qualified for protection" are found, not under the subsection of "coverage," but under the subsection titled "subletting." *See* 29 RCNY § 2-09(b)(2).

Second, as pointed out by petitioner's counsel, precluding all applications for protected occupancy findings filed after the statutory deadline would have unfair and illogical consequences. IMD tenants taking occupancy after March 11, 2014, would be without legal recourse should the owner refuse to recognize them as possessing protected rights. As pointed out by petitioner's attorney, this could be used by owners to circumvent the other portions of the Loft Law requiring that IMD units be rent-regulated.

Third, as the Appellate Division has stated, "Article 7-C, being remedial legislation, should be liberally construed to spread its beneficial effects as widely as possible. '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.'" *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), *quoting Ancona v. Metcalf*, 120 Misc.2d 51, 55-56 (Civ. Ct. N.Y. Co. 1983). To adopt a March 11, 2014 cut-off for all applications for a protected occupancy finding would be to severely curtail the protections of Article 7-C for post-2014 occupants.

Finally, as noted above, the Loft Board, the agency delegated with enforcement of the Loft Law, has interpreted the language of section 282-a to refer to coverage of new units or buildings but not to protected occupancy. While it has declined to accept new applications for building coverage, it has accepted and docketed new applications for findings of protected occupancy. The Loft Board's interpretation of the statute is entitled to deference. *See Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971) ("It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld."); *Matter of Schuss*, OATH Index No. 2066/12 at 14 (Mar. 25, 2013) ("An

agency's interpretation of a statute which it is charged with enforcing is entitled to deference, so long as it is neither irrational or unreasonable.").

The owner also argues that the decision of the Loft Board staff to docket protected occupancy applications is *ultra vires* and unlawful rulemaking under the City Administrative Procedure Act (CAPA). Because I find that the Loft Board staff's interpretation of the statute is the most reasonable construction to be applied to the language of the statute, this issue is largely moot. Even in the absence of the articulation of the policy by Loft Board staff, there are sound reasons, as explained above, to support petitioner's arguments that section 282-a does not apply to his application. The decision to accept applications for protected occupancy is well within the Board's authority to enforce the law.

Furthermore, the Loft Board has adopted a rule incorporating its interpretation of applications included in the section 282-a filing deadline:

> Filing deadline: In accordance with the terms and provisions of §282-a of the MDL, a coverage application or an initial registration application form for coverage pursuant to Article 7-C must be filed with the Loft Board on or before March 11, 2014, which is 6 months following the effective date of this subdivision (a).

29 RCNY § 1-06.1(a). As explained in the March 20, 2014, Loft Board minutes, the Board interprets "coverage application" to refer to applications for new units and not to applications for findings of protected occupancy. This is a reasonable construction of the statutory language and further supports petitioner's contention that his application for a protected occupancy finding is not time-barred.

In sum, based upon the stipulated facts that petitioner has been in occupancy of unit 2E since 2004, petitioner's application should be granted and petitioner should be held to be an occupant qualified for protection of unit 2E of the premises.

John B. Spooner
Administrative Law Judge

November 12, 2014

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

APPEARANCES:

WEEN & KOZEK, LLP
Attorneys for Petitioner
BY: MICHAEL P. KOZEK, ESQ.

BELKIN BURDEN WENIG & GOLDMAN, LLP
Attorneys for Respondent
BY: LISA GALLAUDET, ESQ.