Matter of Blessing

OATH Index Nos. 2313/15, 0011/16, 0012/16, 0013/16, 0014/16, & 0015/16, mem. dec. (July 11, 2016)
[Loft Bd. Dkt. Nos. PO-0014, TA-0209, TA-0211, PO-0016, TA-0210, & PO-0018; 870 Broadway, New York, N.Y.]

Applicants moved for summary judgment on their applications for protected occupant status and rent overcharge under the Loft Law. Respondent owner filed a cross motion to dismiss. At issue is whether the building is a covered IMD and whether applicants are protected occupants pursuant to a prior settlement between owner and former tenants. ALJ finds disputed material facts on the question of protected occupancy and rent overcharge, but grants partial summary judgment on question of whether the building is an IMD.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
BRIANNE CATHERINE BLESSING, THOMAS MCKENNA, and ROBERT ROSSI
Applicants

MEMORANDUM DECISION

KARA J. MILLER, *Administrative Law Judge*

This case concerns three applications for protected occupant status and rent overcharge under the Loft Law. At issue is whether the applicants' units at 870 Broadway, New York, New York, are covered interim multiple dwelling ("IMD") units and whether applicants are the protected occupants of their units.

Applicants seek protected occupant status pursuant to section 282-a of the Multiple Dwelling Law and title 29, sections 1-06 and 2-09(b) of the Rules of the City of New York. Applicants also seek reimbursement for rental overcharges pursuant to section 286(2) of the Multiple Dwelling Law ("MDL") and title 29, sections 1-06, 1-06.1(c), and 2-06 of the Rules of the City of New York. The applicants moved for summary judgment on their applications and the respondent owner filed an answer and a cross motion to dismiss. The parties have stipulated to a number of facts with respect to the case ("Facts").

For the reasons below, applicants' motion for summary judgment is granted in part and denied in part. The owner's motion to dismiss is denied.

BACKGROUND

The parties have stipulated that the building at 870 Broadway is a four-story building with a commercial space on the first floor and residential units on the second, third, and fourth floors (Facts ¶¶1-2). The building currently lacks a certificate of occupancy under Multiple Dwelling Law section 301(1) (Facts ¶16). For the period of time at issue, the building has been owned by Momart Discount Stores, Inc., with Zohra Georgette Elkaim acting as the principal (Facts ¶¶3-4).

On or around January 29, 1993, Patrick Lilly, the occupant of the fourth floor unit, and Sally Colbert, the occupant of the third floor unit, filed a Loft Law coverage application with the Loft Board (Facts ¶5; Facts Ex. A). The Loft Board assigned the tenants' coverage application Loft Board Docket Number TR-0628 (Facts ¶5; Facts Ex. A). In May of 1993, the owner filed a letter with the Loft Board including a registration application, a coverage application contesting registration, and a lease for Patrick Lilly, Inc. for the building (Facts ¶6; Facts Ex. B). The de-coverage application was assigned Loft Board Docket Number LC-0129 (Facts ¶7). The language of the letter from the owner stated that "the purpose of this filing and registration is to enable the owner to be in compliance with the Loft Board's rules and regulations, while contesting coverage" (Facts Ex. B). The Loft Board assigned the building IMD Number 10838 (Facts ¶8).

In an affidavit from November 1993, Ms. Elkaim stated that the rent for the third floor of the building was $675 per month and that the rent for the second floor was $1,200 per month (Facts ¶9; Facts Ex. C). Mr. Lilly signed an affidavit in January of 2016 stating that his rent during his period of occupancy on the fourth floor was $850 per month (Facts ¶10; Facts Ex. D).

The parties stipulated that, following a settlement agreement between the owner and tenants during a proceeding at OATH, the Loft Board adopted the Report and Recommendation of Administrative Law Judge Charles R. Fraser on October 31, 1995, in Loft Board Order No. 1867 (Facts ¶11; Facts Ex. E). The agreement, which was placed on the record by Judge Fraser, provided that both proceedings would be withdrawn with prejudice and that the owner would pay

Ms. Colbert $3,900 and Mr. Lilly $5,200 in exchange for them vacating their units on or before November 30, 1995 (Facts Ex. E). In his letter to the Loft Board dated September 25, 1995, Judge Fraser noted that while the terms of the settlement agreement were final and binding, the parties intended to reduce the settlement to a more formal signed agreement (Facts Ex. E).

The owner contended that in the time between the settlement agreement in September 1995 and the issuance of Loft Board Order No. 1867 on October 31, 1995, the parties attempted to reduce the settlement to a final written agreement (Resp. Br. at 6-7). The owner's attorney faxed a draft of the written stipulation to the owner to review on October 23, 1995 (Resp. Br. at 6; Resp. Ex. 2). This proposed agreement provided that the tenants "withdraw their claims of coverage along with their application with prejudice and agree that had this matter proceeded to a hearing, they could not have succeeded on the merits of their claim of coverage status" and "that the owner withdraws its registration and its application concerning coverage of the subject building with prejudice" (Resp. Ex. 2, ¶¶1,2). The proposed agreement further provided that Ms. Colbert and Mr. Lilly shall withdraw all claims and surrender their units for a waiver of outstanding rent and $3,900 and $5,200, respectively (Resp. Ex. 2, ¶¶3,4).

According to the owner, the parties were still finalizing the written agreement when the Loft Board issued the order on October 31, 1995 (Resp. Br. at 7). The owner alleged that the parties were not served with the Loft Board Order until November 16, 1995. Before that date, the attorney for the petitioners wrote a letter to the owner's attorney requesting a modification to the written agreement regarding the date that funds from the owner would be placed in escrow (Resp. Br. at 7; Resp. Ex. 3). The letter notes that the written stipulation agreement would not be forwarded to the petitioners for execution until an agreement regarding escrow was countersigned (Resp. Br. at 8; Resp. Ex. 3).

The owner acknowledged that it does not have an copy of the final written stipulation between the parties nor does the Loft Board (Resp. Br. at 8). However, despite the absence of a final, executed agreement, the owner asserted that the parties have adhered to the terms of the written stipulation, specifically that Mr. Lilly confirmed that he moved out and the owner gave both applicants their buyout payments and rent waivers (Resp. Br. at 8).

The parties stipulated that the owner has executed Loft Board renewal registrations for the building from 1993 until 2015 (Facts ¶12; Facts Ex. F). In June of 1999, the Loft Board

initiated a proceeding against the owner after it failed to comply with the code compliance deadlines set out in the Loft Law and Loft Board rules (Facts ¶13). The Loft Board issued an order in April of 2000 finding the owner in violation of the Loft Law's code compliance rules, imposing a fine on the owner and ordering it to commence legalization (Facts ¶13; Facts Ex. G).

On or around April 13, 2007, the owner filed an Alteration Type 1 application ("Alt 1") to convert the building into a multiple dwelling (Facts ¶14). It received an approved work permit on this application in February 2008 (Facts ¶15).

The parties also stipulated to facts relating to the three current petitioners: Thomas McKenna, Catherine Blessing, and Robert Rossi. Mr. McKenna became the prime lessee of the second floor of the building on or around April 20, 2010, signing a lease for the period of May 1, 2010 to April 30, 2011, at a rental amount of $3,400 a month (Facts ¶17; Facts Ex. H). Each year from May 2011 to May 2014, Mr. McKenna extended his lease for one year (Facts ¶¶18-21; Facts Exs. I-L). His rent increased $200 each year, rising from $3,500 to $3,700 to $3,900, and then $4,100 in his most recent 2014 to 2015 lease (Facts ¶¶18-21; Facts Exs. I-L). After the expiration of his last lease extension in April 2015, Mr. McKenna paid the owner $4,100 a month until August 2015 (Facts ¶22). Mr. McKenna filed two applications (PO-0016 and TA-0210) with the Loft Board on or around March 27, 2015, seeking protected occupant status and a rent overcharge (Facts ¶23).

Ms. Blessing became the prime lessee of the fourth floor on or around October 15, 2010, signing a lease from November 1, 2010 to October 31, 2011 at a rental amount $3,900 a month (Facts ¶24; Facts Ex. M). Like Mr. McKenna, Ms. Blessing extended her lease with the owner in yearlong intervals from November 2011 to November 2014 (Facts ¶¶25-28; Facts Exs. N-Q). Her rent increased to $4,000 a month in 2012, $4,200 in 2013, $4,400 in 2014, and $4,600 in 2015 (Facts ¶¶25-28; Facts Exs. N-Q). Ms. Blessing paid the owner $4,600 a month until August 2015, although her lease went through October 2015 (Facts ¶28). On or around February 6, 2015, Ms. Blessing filed two applications (PO-0014 and TA-0209) with the Loft Board for protected occupant status and for a rent overcharge (Facts ¶29).

Mr. Rossi, the prime lessee of the third floor, entered into a lease with the owner from October 1, 2009 to September 30, 2010, with a monthly rent of $3,800 (Facts ¶30; Facts Ex. R). His tenancy continued on a month-to-month basis, with a monthly rent of $3,800 (Facts ¶31).

On or around October 19, 2010, Mr. Rossi extended his lease from November 1, 2010 to October 31, 2011, at a rental amount of $3,900 per month (Facts ¶32; Facts Ex. S). Mr. Rossi then extended his lease in yearlong intervals in 2011 for $4,000 per month, in 2012 for $4,300 per month, in 2013 for $4,400 per month, and in 2014 for $4,800 per month (Facts ¶33-36; Facts Exs. T-W). Mr. Rossi paid rent to the owner until August 2015 (Facts ¶36). He filed two applications (PO-0018 and TA-0211) with the Loft Board for protected occupant status and rent overcharge on or around May 13, 2015 (Facts ¶37).

The owner filed an amended answer to the consolidated applications of Mr. McKenna, Ms. Blessing, and Mr. Rossi with the Loft Board on or around September 24, 2015 (Facts ¶38).

ANALYSIS

The applicants argued that because the owner has been registering the building with the Loft Board since 1993, the building is an IMD and their units are covered (Pet. Br. at 2-3, 8). Applicants also alleged that the settlement agreement in 1995 resulted in withdrawal of Mr. Lilly and Ms. Colbert's coverage application and the owner's de-coverage application, but not the owner's registration application (Pet. Br. at 8-9). The applicants maintained that the owner is now precluded from challenging coverage of the building and premises because it withdrew its de-coverage application with prejudice (Pet. Br. at 8-9).

The applicants further asserted that, as the prime lessees of covered units, they are protected occupants (Pet. Br. at 9). Since they have been paying market rents for the duration of their lease periods, they contended that they have been overcharged. Mr. McKenna claims an overcharge of $129,390.72 for 53 months, Ms. Blessing claims an overcharge of $175,853.68 for 54 months, and Mr. Rossi claims an overcharge of $180,490.26 for 52 months (Pet. Br. at 18-21).

In response, the owner argued that the building could not be considered a registered IMD because of the 1995 settlement agreement. The owner contended that its 1993 coverage application and de-coverage application were one proceeding. Therefore, the settlement agreement that "both proceedings" would be withdrawn with prejudice included the tenants' application for coverage, the owner's de-coverage application, and the owner's registration application (Resp. Br. at 10). According to the owner, since the registration application was

withdrawn with prejudice, the building was not at that time and is not now a covered IMD (Resp. Br. at 2, 10-11).

The owner argued that the draft of the written stipulation, though not fully executed or filed with the Loft Board, provides clarification of the settlement terms (Resp. Br. at 8, 13). This draft stipulation indicated that the owner would withdraw the "registration and its application concerning coverage of the building with prejudice" (Resp. Br. at 13; Resp. Ex. 2).

In response to applicants' argument that the building is an IMD because of the owner's ongoing registration with the Loft Board, the owner maintained that this registration was made in error and that Loft Law coverage is a statutory right that cannot be established by mistake, waiver, or estoppel (Resp. Br. at 13-14).

The owner further argued that applicants are not protected occupants because they have failed to present sufficient evidence that they have been residentially occupying their units and that barring a finding of protected occupant status, applicants cannot prevail on their claims for rental overcharges (Resp. Br. at 16-17).

Summary judgment is appropriate where there is no triable issue of fact and the movant has established entitlement to relief as a matter of law. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In the absence of a material factual dispute, there is no need for an evidentiary hearing. *See, e.g., Matter of Klein*, OATH Index No. 300/06 at 3 (May 3, 2006); *Matter of Chin*, OATH Index No. 1142/97 at 2-4 (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").

Here, there are issues of material fact that warrant an evidentiary hearing on the question of whether applicants are protected occupants and whether they have been overcharged rent. Summary judgment is therefore denied in part. However, the evidence is sufficient to grant summary judgment on the question of whether the building is an IMD.

IMD Registration

After reviewing the stipulated facts and supporting evidence, I find that the prior settlement agreement in 1995 did not withdraw the owner's registration of the building. The building is an IMD with three covered units pursuant to the owner's continual registration renewal of the building with the Loft Board for 22 years.

The 1995 settlement agreement between the parties on the record before Judge Fraser provides that "both proceedings" would be withdrawn with prejudice (Facts Ex. E). In its order adopting this agreement, the Loft Board explicitly referenced TR-0628, the tenants' coverage application, and LC-0129, the owner's de-coverage application (Facts Ex. E). It therefore appears that the two proceedings referenced in the oral agreement to be withdrawn were the tenants' coverage application and the owner's de-coverage application, not the owner's registration of the building.

In fact, under the Loft Board Rules and the MDL, the owner's registration application could not have been part of the settlement before Judge Fraser because this tribunal does not adjudicate registration applications. Pursuant to MDL section 284(2) and section 2-05 of the Loft Board Rules, an owner of an IMD must give notice to the Loft Board by filing a registration application. 29 RCNY § 2-05(b)(2). Once the Loft Board reviews and accepts the application, it assigns the building an IMD number. 29 RCNY §§ 2-05(b)(8),(9). If an application is denied, the owner may appeal within the Loft Board, which then issues a final determination. 29 RCNY §§ 1-07.1, 2-05(b)(4). Thus, at no point is the denial of a registration application adjudicated at or appealed to OATH.

Once a building has been registered with the Loft Board, the owner has a limited time frame during which to contest the registration. Rule 2-05(b)(4) provides as follows:

> Completion and submission of a registration application form does not constitute a waiver of the applicant's right to contest before the Loft Board the coverage of the premises described therein as an IMD building under Article 7-C of the MDL, nor shall the act of filing the registration application form constitute evidence before the Loft Board that the building described therein is an IMD building. Notwithstanding the foregoing, *the failure of an owner, a building occupant or prime lessee to contest the registration application within 45 calendar days after service of the registration application or 45 calendar days after the filing date with the Loft Board, whichever is later, shall constitute a "waiver" to contest coverage of the units registered, and shall preclude the landlord from contesting such coverage status* (emphasis added). 29 RCNY § 2-05(b)(4).

Likewise, Loft Board Rule 2-05(b)(5) provides: "Any and all applications filed by a landlord . . . to contest coverage of a building or individual unit under Article 7-C must be received by the Loft Board within 45 calendar days after service of the registration application form on the building occupants and prime lessee(s) or within 45 calendar days after filing of the registration application form with the Loft Board, whichever is later." 29 RCNY § 2-05(b)(5).

Here, the owner voluntarily registered the building in May of 1993 "to be in compliance with the Loft Board's rules and regulations," while simultaneously submitting a separate Loft Board de-coverage application contesting coverage (Facts Ex. B). It therefore appears that the owner did contest coverage of the building within the requisite time period. However, the owner and tenants then settled the dispute over the owner's de-coverage application and tenants' coverage application in 1995. Pursuant to their settlement agreement, the two former tenants vacated their units in exchange for a waiver of their outstanding rent and $3,900 and $5,200 respectively. The settlement also withdrew the owner's de-coverage application with prejudice (Facts Ex. E). Accordingly, the owner can no longer contest coverage of the building.

The owner's reliance on the draft stipulation to argue that it withdrew its registration application is unconvincing. The owner admits that it does not possess a final copy of the written stipulation and furthermore that a copy of the stipulation was never filed with the Loft Board (Resp. Br. at 8). The draft stipulation offered as evidence is not dated and the handwritten edits of the text show that it was clearly in the process of being revised (Resp. Ex. 2). Therefore, without any finalized written stipulation filed with the Loft Board, the outcome of the 1995 matter is controlled by the settlement agreement on the record at OATH along with the Loft Board Order adopting Judge Fraser's written recommendation, both of which indicate that only the tenants' coverage application and the owner's de-coverage application were withdrawn (Facts Ex. E).

Even if I were to consider the draft stipulation, the conduct of the owner and its interactions with the Loft Board over the past 22 years indicate that it has been purposefully registering the building as an IMD. While the owner argues that the registration was made in error, the facts here strongly suggest otherwise. In their stipulation of facts, the parties noted that the owner has executed registration renewal applications with the Loft Board from 1993 to 2015, paying the annual fee of $150 for the three units in the building by check (Facts ¶12; Facts Ex.

F). These registration renewals identify covered units on the second, third, and fourth floors (Facts Ex. F). Furthermore, as of 1993, the building was assigned IMD number 10838 by the Loft Board (Facts Ex. F). In April of 2000, the owner received a $6,000 fine from the Loft Board for failure to comply with the code compliance deadlines set forth in the Loft Board Rules, which the owner paid by check dated November 21, 2000 (Facts ¶13; Facts Exs. G, F). In the Report and Recommendation about this violation, the Loft Board's Prosecuting Counsel noted that the owner had hired an architect some time in 1995 to legalize the building (Facts Ex. G at 2). Finally, in April 2007, the owner filed an Alteration Type-1 application to convert the building into a multiple dwelling and received an approved work permit on this application in February 2008 (Facts ¶¶14, 15).

These facts, taken together, demonstrate that the owner has been engaging with the Loft Board in many ways over the years, consistently renewing the registration application, paying annual fees and fines, and attempting to comply with the Loft Board code compliance rules. This on-going interaction since 1993 supports the conclusion that the owner has been intentionally, not erroneously, registering the building as an IMD.

The Loft Board has repeatedly held that voluntary registration of an IMD building is the equivalent of a Loft Board finding of coverage. *See Matter of Loback*, OATH Index Nos. 1680/15 & 2190/15 at 6 (Feb. 4, 2016); *Matter of Klein*, OATH Index No. 300/06 at 5 (May 3, 2006), *adopted*, Loft Bd. Order No. 3460 (Oct. 16, 2008); *Matter of Katz*, OATH Index No. 1648/96 at 4 (Sept. 10, 1996), *adopted*, Loft Bd. Order No. 2037 (Nov. 21, 1996). Because the owner here has voluntarily registered the building and units on the second, third, and fourth floor since 1993, the building is an IMD and petitioner's units are covered.

Protected Occupancy and Rent Overcharge

Notwithstanding my finding that the building is an IMD with three covered units, there are remaining issues of material fact on the questions of whether petitioners are protected occupants and whether they have been overcharged rent.

Accordingly, petitioners' motion for summary judgment is denied in part. A trial will be scheduled to address these two issues. The parties should contact the tribunal's Calendar Unit by Friday, July 15, 2016, to schedule trial dates.

Kara J. Miller
Administrative Law Judge

July 11, 2016

APPEARANCES:

WEEN & KOZEK, LLC
Attorney for the Applicants
BY: MICHAEL P. KOZEK, ESQ.

BORAH, GOLDSTEIN, ALTSCHULER, NAHINS & GOIDEL
Attorneys for the Respondent
BY: DAVID R. BRODY, ESQ.