

Matter of Fiscina

OATH Index No. 357/15, mem. dec. (Mar. 16, 2015), *remanded*, Loft Bd. Order No. 4480 (Feb. 18, 2016), *reconsideration denied*, Loft Bd. Order No. 4630 (Mar. 16, 2017), *aff'd in part, rev'd in part*, 2020 N.Y. App. Div. LEXIS 336 (1st Dep't 2020) [Loft Bd. Dkt. No. TR-1248; 430 LaFayette Street Rear, New York, N.Y.]

In a coverage application, the applicants and the owner reached an agreement to withdraw the application with prejudice. A non-applicant who had leased a unit with one of the applicants, but was out of possession, moved to file an answer. Motion denied as moot and untimely where movant did not provide a reasonable excuse for failure to timely answer or a meritorious position to be litigated.

Loft Board rejects settlement as contrary to public policy. The Loft Board agreed with ALJ's ruling that the motion to file an answer should be denied but only on the second ground, that the movant had failed to present a reasonable excuse for her failure to file an answer, but not on the first ground that the motion was untimely.

On appeal, court affirms Board's finding that the settlement violated public policy, but it annulled the Board's nullification of the tenants' withdrawal of the settlement application, noting the tenants could choose to pursue rent stabilization status rather than Loft Law protection.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
RICHARD FISCINA, LUKE WEINSTOCK, ZENIA de la CRUZ,
and MARIA THERESA TOTENGCO
Petitioners

MEMORANDUM DECISION

INGRID M. ADDISON, *Administrative Law Judge*

On March 11, 2014, Richard Fiscina, occupant of unit 4L of a building at 430 Lafayette Street Rear, New York, New York ("premises"), filed a coverage application with the Loft Board seeking findings that the premises is an interim multiple dwelling ("IMD") under section 281(5) of the Multiple Dwelling Law ("Loft Law" or "MDL"), and that he is the protected residential

occupant of unit 4L, pursuant to section 2-09(b) of title 29 of the Rules of the City of New York (“RCNY”). The application was served on affected parties on March 10, 2014. Answers were due on April 14, 2014. No answers were received.

On August 20, 2014, Mr. Fiscina filed an amended application which added Luke Weinstock of unit 5L, and Zenia de la Cruz and Maria Theresa (Tesa) Totengco, third floor occupants (collectively “petitioners”), as additional applicants seeking to be recognized as the protected occupants of their respective units. The amended application was served on the affected parties on August 19, 2014. Again, no answers were received.

On September 14, 2014, Amber Lasciak, Mr. Fiscina’s former girlfriend, filed a separate application with the Loft Board, Loft Bd. Dkt. No. PO-0006, seeking a finding that she is an additional protected occupant of unit 4L at the premises. To her application, Ms. Lasciak attached a copy of petitioners’ coverage application. Ms. Lasciak asserted that she was in possession of unit 4L on or before June 21, 2010, and that she remains in possession. In his answer opposing Ms. Lasciak’s application, Mr. Fiscina challenged that Ms. Lasciak was not in possession of unit 4L on June 21, 2010, nor is she currently in possession. The building owner also filed an answer opposing the application on the ground that it was time-barred and because Ms. Lasciak does not currently occupy unit 4L.

Two settlement conferences were conducted by Administrative Law Judge John B. Spooner. The first, held on October 3, 2014, was attended by petitioners and the building owner. Ms. Lasciak attended the second conference on November 13, 2014 (*see* attached copies of OATH sign-in sheets).

On December 15, 2014, ALJ Spooner conducted a conference call with the attorneys for petitioners, Ms. Lasciak and the owner, at which time petitioners and the owner indicated that they anticipated that they would reach an agreement whereby the building would become rent-stabilized without being covered by the Loft Law. The agreement would be finalized and submitted within 30 days or before January 16, 2015. Ms. Lasciak’s attorney indicated that settlement between his client and the other parties was unlikely and stated for the first time that he intended to move to file an answer to petitioners’ original application. ALJ Spooner directed counsel to address his motion to me, as the assigned trial judge (e-mail: Dec. 14, 2014 @11:56 a.m.).

On January 16, 2015, the deadline set for the submission of the executed agreement between petitioners and the owner, Ms. Lasciak moved to appear and file an answer to petitioners' coverage application (e-mail: Jan. 16, 2015 @ 11:31 a.m.). On January 20, 2015, petitioners and the building owner submitted responses opposing Ms. Lasciak's motion, arguing that it should be denied as untimely filed and without merit (e-mail: Jan 20, 2015 @ 5:39 p.m. with attachment; e-mail: Jan. 20, 2015 @ 5:55 p.m.). Ms. Lasciak countered that her request was not untimely because she had not been served with a copy of Mr. Fiscina's application or amended application (e-mail: Jan. 22, 2015 @ 10:49 a.m.).

On January 21, 2015, petitioners and the building owner submitted a copy of their fully executed settlement agreement in which petitioners withdrew their coverage application with prejudice, while the owner agreed to register the building and its units as rent-stabilized, pursuant to the Emergency Tenant Protection Act of 1974, the rent stabilization law, and take all necessary steps to obtain a certificate of occupancy for residential uses in the building (e-mail: Jan. 21, 2015 @ 11:48 a.m., with stipulation of settlement attached). Ms. Lasciak was not a party to the settlement agreement.

For the following reasons, Ms. Lasciak's motion to file an answer is denied. In denying her motion, I note that Ms. Lasciak is ultimately seeking to file an answer to an application which has been withdrawn by the applicants in a manner that forecloses them from re-filing. Their withdrawal is with prejudice and therefore final. Even if Ms. Lasciak were permitted to file an answer to Mr. Fiscina's application, that would not effectuate an unravelling of petitioners' stipulation of settlement with the landlord.

ANALYSIS

Ms. Lasciak's Motion is Untimely

Under Loft Board rule 1-06(b)(2), before applications are filed with the Loft Board, an applicant shall serve by hand delivery or mail upon "affected parties," a copy of the application and the instruction sheet for filing an answer. 29 RCNY § 1-06(b)(1) (Lexis 2014). Service is complete five calendar days after the date of mailing. 29 RCNY § 1-06(b)(3). "Affected parties" include owners, tenants of record in the building, and all occupants of the building. 29 RCNY § 1-06(a)(2). An affected party who has been served with a copy of a Loft Board application has 30 calendar days from the date on which service of the application is deemed

completed to file an answer. 29 RCNY § 1-06(c)(1). An affected party may file a written request for an extension of time to file an answer before the end of the applicable answer period. 29 RCNY § 1-06(i). If an affected party fails to file an answer to any application within the applicable time period in the Loft Board rules, and fails to file a timely request for an extension, the party will be in default and will be barred from filing an answer or offering any evidence in its defense. 29 RCNY § 1-06(i)(1).

Ms. Lasciak argued that at the time that Mr. Fiscina filed his original application in March 2014, she was a tenant of record as she was a leaseholder of the unit with a lease in effect. She submitted documentation that she co-leased the fifth floor unit with Mr. Fiscina from June 22, 2009 to December 31, 2009. The owner later leased the fourth floor unit to her and Mr. Fiscina from October 12, 2011 through July 30, 2014. She therefore claimed that as such, she was an affected party whom Mr. Fiscina failed to name on his application, and which he failed to serve upon her. She asserted that as a result, she had no opportunity to file an answer or seek to vacate a default (e-mail: Jan. 22, 2015 @ 10:49 a.m. with attachments).

Both the owner and Mr. Fiscina objected to Ms. Lasciak's motion based first on timeliness, and contended that it was intended to thwart petitioners' settlement with the owner. Mr. Fiscina did not deny not serving Ms. Lasciak with a copy of his application. But to establish that she had notice of his application in advance of filing her own application, Mr. Fiscina's counsel, Margaret Sandercock, submitted a copy of a cease and desist letter which she sent to Ms. Lasciak's counsel, Michael Kozek, on August 20, 2014, after Mr. Kozek contacted Mr. Fiscina by mail (attachment to e-mail: Jan. 22, 2015 @ 12:35 p.m.).

The owner argued that since at least September 15, 2014, Ms. Lasciak has had notice of Mr. Fiscina's coverage application, having attached same to her own application. Yet at the time, she neither claimed to be an affected party nor sought leave to appear and answer the application. Nor did she do so at the pre-trial conference which she attended in November 2014. The owner and Mr. Fiscina cited to section 1-34 of OATH's Rules of Practice, which requires pre-trial motions to be addressed to the administrative law judge as promptly as possible. "Delay in presenting such a motion may . . . weigh against the granting of the motion" 48 RCNY § 1-34(a) (Lexis 2014).

I am not persuaded by Ms. Lasciak's claim that she had no opportunity to file an answer or seek to vacate a default. At the least, she had timely and actual notice of Mr. Fiscina's

amended application by way of Ms. Sandercock's letter to Mr. Kozek on August 20, 2014. This was further evidenced by her appearance at the pre-trial conference on November 13, 2014. At the pre-trial conference, Ms. Laschiak never complained about defective service. But even if she had, "service of notice in the administrative context does not fulfill the same jurisdiction-acquiring function vis-a-vis the parties to the proceeding as does a summons in a court proceeding. For this reason where there is actual notice, procedural irregularities are overlooked since the object of the procedural requirement has been achieved albeit in a technically improper manner." *Drolet v. NYS Racing & Wagering Bd.*, 115 Misc.2d 7, 10 (Sup. Ct. Nassau Co. 1982) (citations omitted). See also *Matter of Lang and Bocanegra*, OATH Index No. 624/96 at 5 (Dec. 20, 1995), *adopted*, Loft Bd. Order No. 1905, 16 Loft Bd. Order No. 267C (Jan 24, 1996), *aff'd sub nom*, *Yao v. NYC Loft Bd.*, Index No. 110322/96 (Sup. Ct. N.Y. Co. Apr. 7, 1997), *appl. for recon. denied*, Loft Bd. Order No. 2128 (Aug. 28, 1997). That is because compliance with constitutional guarantees of due process is achieved when there is actual notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (service must be reasonably calculated, under all circumstances, to apprise all interested parties of the pendency of the action and afford them an opportunity to present their objections).

Thus, in a broad spectrum of cases, this tribunal has held that actual notice trumps technical defects in service. See *Dep't of Buildings v. 116 East 73rd St., Manhattan*, OATH Index No. 1807/02 at 9 (Jan 23, 2003) ("It is a well-accepted principle of administrative law that the primary purpose of pleadings in an administrative adjudication is to provide notice, not to confer jurisdiction, and that proof of actual notice of the pendency of proceedings will cure any technical defects in service."); *Bd. of Education v. Earl*, OATH Index No. 494/95 (Nov. 28, 1994); *Taxi & Limousine Comm'n v. Lucky Cab Corp.*, OATH Index No. 1181/94 (Aug. 10, 1994); *Silverite Construction Co. Inc., v. Dep't of Transportation*, OATH Index No. 486/96 (Mar. 8, 1994).

Here, I find that Ms. Laschiak had actual notice of petitioners' application in August 2014, and elected not to file an answer. She offered no reasonable explanation for her failure to do so. She attended a pre-trial conference in November 2014, and did not raise the issue of filing an answer until a conference call with ALJ Spooner in December 2014, to establish a deadline for settlement between petitioners and the owner. Therefore, her motion is untimely.

Moreover, Ms. Lasciak does not have a non-frivolous defense as required by the Loft Board rules.¹

Ms. Lasciak's Defense

Under the Loft Board rules, the deadline for the filing of coverage applications was March 11, 2014. 29 RCNY § 1-06.1(a) (Lexis 2014). Ms. Lasciak argues that had she been notified of Mr. Fiscina's timely application, she would have filed an answer joining the claim for coverage for the same unit because she was a prime lessee at the time that his application was filed. In essence, she blames Mr. Fiscina for her delinquent filing. But just as she did after the deadline, there was nothing to preclude her from independently filing an application prior thereto (e-mail: Jan. 22, 2015 @ 12:38 p.m.).

Ms. Lasciak maintains that as a prime lessee, she qualifies for protection by virtue of Loft Board rules 2-09(b)(1) and (2) (e-mail: Jan. 22, 2015 @ 12:38 p.m.).

First, rule 2-09(b)(1) provides that an occupant qualifies for protection under Article 7-C of the MDL if the occupant is the residential occupant in possession of a residential unit covered as part of an IMD. 29 RCNY § 2-09(b)(1). There is no dispute that Ms. Lasciak does not currently live in the subject unit (4L). Rule 2-09(b)(2) is inapplicable because it speaks to circumstances in which the residential occupant in possession of an IMD unit is not the prime lessee. 29 RCNY § 2-09(b)(2).

Ms. Lasciak further argues that pursuant to Loft Board rule 2-09(b)(3)(i), it is irrelevant whether or not she was in occupancy of the subject unit during the window period (e-mail: Jan. 22, 2015 @ 12:38 p.m.).²

Rule 2-09(b)(3) provides, *inter alia*, that when a residential occupant took possession of a residential unit covered as part of an IMD on or after June 21, 2010, such occupant is qualified for protection if the occupant is a prime lessee "with a lease currently in effect." 29 RCNY § 2-09(b)(3)(i). There is no doubt that Ms. Lasciak and Mr. Fiscina were named as the lessees of the fourth floor unit in an agreement with the landlord on October 11, 2011. But the term of the

¹ An affected party who has defaulted may seek relief by establishing that good cause existed for the failure to file an answer. Good cause includes a reasonable explanation for a failure to file an answer and a summary of a non-frivolous defense. 29 RCNY § 1-06(i)(2) (Lexis 2014).

² Under section 281(5) of the MDL, one of the qualifying criterion for coverage as an IMD is the occupation of the premises 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 ("inquiry period"). Mult. Dwell. Law § 281(5) (Lexis 2014).

lease expired on July 30, 2014. Thus, at the time that Ms. Lasciak filed her application, her lease was no longer in effect.

Finally, attached to petitioners' response was an affidavit from Mr. Fiscina in which he stated that Ms. Lasciak's primary residence, from 2008 to 2013, was an address on Grand Street in New York. He enclosed a certified copy of her voter registration and voting record with the Board of Elections which list a Grand Street address and indicate that the information became inactive as of March 17, 2014 (attachment to e-mail: Jan. 22, 2015 @12:35 p.m.). Thus, pursuant to recent Loft Board Orders, Ms. Lasciak may not be entitled to coverage even under rule 2-09(b)(4), because the loft may not be her primary residence. *Matter of Pak*, OATH Index No. 2447/13 (Oct. 9, 2014), *adopted in part, rejected in part and remanded*, Loft Bd. Order No. 4334 (Nov. 20, 2014); *Matter of Gallo*, OATH Index No. 2401/13 (Oct. 10, 2014), *adopted in part, rejected in part*, Loft Board Order No. 4349 (Jan. 15, 2015).

In sum, Ms. Lasciak does not have a meritorious claim. She is not a residential occupant in possession of the unit for which she is seeking protected occupancy status; she left the unit voluntarily; and she does not have a lease which is currently in effect, which would qualify her for protection under Article 7-C of the MDL.

Ingrid M. Addison
Administrative Law Judge

March 16, 2015

APPEARANCES:

GOODFARB & SANDERCOCK, LLP.

Attorneys for Petitioners

BY: MARGARET B. SANDERCOCK, ESQ.

BELKIN BURDEN WENIG & GOLDMAN, LLP

Attorneys for Owner

BY: LISA GALLAUDET, ESQ.

WEEN & KOZEK, LLP

Attorneys for Movant

BY: MICHAEL KOZEK, ESQ.