Matter of Lewis et al.

OATH Index Nos. 17-2489 and 17-2491 (Nov. 7, 2018)
[Loft Bd. Dkt. Nos. TA-0238, TA-0234
250 Moore Street, Brooklyn, N.Y.]

In an overcharge proceeding, the evidence established that the applicants took occupancy of registered IMD units after June 21, 2010, the effective date of the Loft Law, pursuant to lease agreements executed with the landlord, and were therefore the protected occupants of their respective units from that time. Respondent's primary residence challenge fails, as does its argument that the tenants became protected occupants of the unit pursuant to a stipulation agreement executed in August 2016. Respondent also failed to prove that the units became deregulated because it did not establish that there were valid sales of rights for the units. Rent overcharges should be calculated from the start of the tenants' leases based on the rent in effect on June 21, 2010, pursuant to leases for the respective units, and with a three percent upward adjustment for the landlord's filing of an alteration application in 2011. ALJ finds that tenant of unit 204 is entitled to $24,840, and the tenants of unit 206 are entitled to $35,232 in rent overcharges.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of the Applications of
JACKSON LEWIS,
and
MEGHAN FOLSOM and GARRICK AMBROSE
Petitioners

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This matter concerns rent overcharge applications filed by petitioners Jackson Lewis, Meghan Folsom and Garrick Ambrose, the tenants of Units 204 and 206, respectively, at 250 Moore Street in Brooklyn, New York ("building"), a registered interim multiple dwelling ("IMD"). Petitioner Lewis alleges that from June 2015 through February 2017, he paid a total of $27,600 in rent overcharges (inclusive of his security deposit) to MZBJ Holdings LLC,

respondent owner ("respondent" or "owner") of the building. Petitioners Meghan Folsom and Garrick Ambrose allege that from February 2013 through January 2017, they paid respondent a total of $41,150 in rent overcharges (inclusive of security deposit) (ALJ Exs. 1, 2**,** 3). *See* Mult. Dwell. Law ("MDL") § 286(2) (Lexis 2018); 29 RCNY § 2-06.2 (Lexis 2018).

Respondent filed answers asserting general denials to both claims. But as to the Lewis application, respondent also raised as an affirmative defense that "[p]ursuant to the agreement between the landlord and the 2011 tenant of Unit 204, dated November 4, 2011, the rent for this unit has been deregulated."

The Loft Board ("LB" or "Board") transferred the matter to this tribunal. Settlement conferences were held before Administrative Law Judge John B. Spooner and after the parties failed to reach an agreement, a trial commenced before me on June 18, 2018. At the trial, the applicants testified and presented documentary evidence. Respondent submitted documentary evidence and presented the testimony of Anthony Nunziata, the current property manager for the building.

The record closed on October 16, 2018, following the parties' submissions of closing briefs.

For the following reasons, I find that the applicants were protected occupants from the inception of their leases, not by virtue of a stipulation agreement which they executed with the landlord in August 2016. The landlord failed to establish that the units were not the primary residences of the applicants. The landlord also failed to establish that there were valid sales of rights for the units in question which operated to deregulate the units. Rent overcharges should be calculated based on the rent in effect on June 21, 2010, pursuant to leases for the respective units, with a three percent upward adjustment for the landlord's filing of an alteration application in 2011.

Accordingly, the tenant of unit 204 is entitled to $24,840 in overcharges, and the tenants of unit 206 are entitled to $35,232 in overcharges.

BACKGROUND

In an IMD registration application filed with the Board on January 31, 2011, pursuant to MDL § 281(5), respondent identified the protected occupants of units 204 and 206 as Peter

Duncan and Monica LoCascio, respectively (Pet. Ex. 2). The application listed the monthly rents for the units on June 21, 2010, the effective date of MDL § 281(5), as: $2,000 (unit 204) and $2,225 (unit 206). Respondent renewed its IMD registration for the building with the Loft Board in 2011, 2012, 2013, 2014, 2015 and 2016 (Pet. Ex. 3). In each renewal application, units 204 and 206 were identified as rent regulated units.

On December 30, 2015, petitioners were among a group of tenants in the building who filed a joint application seeking to be recognized as the protected occupants of their respective units. After respondent filed an answer, the Board transferred the matter to this tribunal for conference and possible adjudication. The parties executed a stipulation of settlement which was filed with the Board on August 30, 2016, in which the owner agreed to recognize the tenant applicants as the protected occupants of their respective units, and the petitioners agreed to withdraw their application with prejudice. In relevant part, the stipulation agreement, which identified units 204 and 206 individually, noted that "[t]he following units are subject to rent regulation pursuant to MDL 281(5) and the Tenants named in this Paragraph are the protected tenants in their respective units as follows:" On November 17, 2016, the Board issued Order ("LBO") Number 4589, accepting the stipulation agreement and noting that it had updated its records (Pet. Exs. 4, 5).

ANALYSIS

In spite of the August 2016 stipulation agreement in which it recognized the applicants as the protected occupants of their units, at trial, respondent challenged, *ex post facto*, the tenants' rights to protection by raising the specter that the units were not their primary residence.

Section 2-09(b)(3) of the Board's rules applies to residential occupants who took possession of a covered IMD unit after the effective date of the law (which the applicants in this case did), including a prime tenant with a current lease in effect. However, as will be discussed below, the applicants' leases have expired. Thus, section 2-09(b)(4) of the Board's rules governs.

Section 2-09(b)(4) provides that the prime lessee of a residential unit covered as part of an IMD qualifies for protection under Article 7-C (of the MDL) if the prime lessee can prove

that the unit is his/her primary residence.[1] Thus, the Board has undertaken primary residence inquiries to determine eligibility for protected occupancy status, not for a retrospective review of tenants who are already recognized as protected occupants. Here, the landlord's recourse[2] may lie in section 2-08.1(a)(1) of the Board's rules, which provides that landlords of IMDs registered with the Board may bring eviction proceedings against the residential occupants of units "in a court of competent jurisdiction" on grounds that, among other things, the unit is not their primary residence. 29 RCNY § 2-08.1(a)(1) (Lexis 2018); *see Lower Manhattan Loft Tenants v. NYC Loft Bd.,* 66 N.Y.2d 298 (1985). The landlord chose not to avail itself of this means of recourse, and the applicants addressed respondent's primary residence challenge with their testimony and documentary evidence.

Primary Residence

Jackson Lewis (Unit 204)

On May 26, 2015, Jackson Lewis and Henry Hodges executed a one-year lease with respondent for unit 204, at a monthly rent of $3,200, with a security deposit of $6,400. Mr. Lewis testified that he has resided in the unit from around June 1, 2015, but the residency of Mr. Hodges, who was not part of the overcharge application, has been sporadic. Mr. Hodges submitted a notarized affidavit that he is aware of the proceeding, is declining to participate in it and waiving his right to do so (Tr. 78-81, 92-95; Pet. Exs. 24-26, 35; Resp. Ex. A).

Mr. Lewis submitted: (1) certified account statements in his name from National Grid, for gas services provided to unit 204, from 2015 to 2018 (Pet. Ex. 34); (2) Time Warner Cable and Spectrum bills in his name, for services supplied to unit 204, from May 31, 2015 through December 21, 2017 (Pet. Ex. 28); (3) His 2016 tax return, which displayed his address at the building and his employer's payroll company address in California (Pet. Ex. 29); (4) His 2016

[1] In recent years, the Board has determined qualification for protected occupancy status through the prism of a primary residence inquiry. *See Matter of Tenants of 58 Grand Street*, Loft Board Order No. 4702 at 3 (Oct. 26, 2017) (the primary residence requirement is found in the "plain language" of section 2-09(b)(4)); *Matter of Gallo,* Loft Bd. Order No. 4349 (Jan 15, 2015) (proof of primary residence applies whether or not the prime lessee is in possession of the unit); *Matter of Pak,* Loft Bd. Order No. 4334 (Nov. 20, 2014) ("in determining protected occupancy status, the issue is not whether [the prime lessee] lived there during the window period . . . the issue is whether the Unit is her primary residence"). Loft Bd. Order No. 4334 at 2.

[2] Under the Board's rule 2-05, an owner, occupant or prime lessee, has 45 calendar days after service of the registration application or after the filing date with the Board, whichever is later, to contest the registration application. 29 RCNY § 2-05(b)(4) (Lexis 2018). But for respondent, this time has long expired.

W-2 and Earnings Summary Form along with a 1099-MISC filing (Pet. Ex. 30). One form showed his father's California address. Mr. Lewis stated that his father had claimed him as a dependent in 2015. But he insisted that he had not resided in California since 2010; (5) JPMorgan Chase Bank statements from May 2015 through August 2016 for an account which Mr. Lewis stated was his college debit account. They bore his, his father's and his mother's names, and his father's business address in Tulsa, Oklahoma (Pet. Ex. 31). The statements showed transactions in and around New York City, and also in Texas and Oklahama; (6) American Express statements in his father's name for July 2015 through July 2016, with two different card numbers - one for his father and one for Mr. Lewis (Pet. Ex. 32). The transactions for the different cards were listed separately. Those for Mr. Lewis were made in and around New York City (Tr. 81-90). Mr. Lewis also submitted a certified Con Edison statement in his father's name, of bills for unit 204 from April 2016 through June 2018 (Pet. Ex. 22).

Meghan Folsom and Garrick Ambrose (Unit 206)

On January 15, 2013, Ms. Folsom and Mr. Ambrose, who wed in 2016, executed a one-year lease with respondent for unit 206, commencing on February 1, 2013. The monthly rent was $3,000, and a security deposit of $6,000 or two months' rent was required (Ambrose: Tr. 18; Folsom: Tr. 41; Pet. Ex. 6). By the time they moved in, the landlord had converted what was initially a three-bedroom apartment with a kitchen, bathroom, refrigerator, stove, sink and two windows into a one-bedroom apartment (Ambrose: Tr. 19-20; Folsom: Tr. 41).

After moving in, Mr. Ambrose changed his subscriber's address with the New York Times newspaper to his current apartment (Tr. 19-20; Pet. Ex. 9). His Citibank credit card statements for 2013, 2014, 2015 and for the first five months of 2016, display the subject premises as his address (Tr. 22-26; Pet. Ex. 11). Con Edison electricity bills in Mr. Ambrose's name for April 2016 through June 2018, and Time Warner Cable bills from March 2013 through July 2016, also display his address at the building (Tr. 27-34; Pet. Exs. 13, 33). However, his tax returns for 2013, 2014 and 2015, display his mother's address on Avenue C in Brooklyn, where he had resided for about six months after completing graduate school in 2009, and which he had not changed (Tr. 33-35). Roberta Nelson, Mr. Ambrose's mother, corroborated that her son had resided with her for a few months after graduate school, and maintained that since then, he has only overnighted with her once, on a Christmas Eve (Tr. 37-39).

Ms. Folsom testified that before moving to the subject building, she lived at an address on Montrose Avenue in Brooklyn with roommates. An e-mail which she sent to those roommates on December 19, 2012, provided them with contact information regarding the management of that building and on how they could obtain a lease to remain in her previous apartment (Tr. 41-42; Pet. Ex. 14). She also produced various documents to confirm her and her husband's residency at the subject building from 2013, including food orders made through her Google account in 2013, 2014, 2015 and 2016, emails to the building's management regarding backyard light problems and a bill from a home cleaning service (Tr. 45-47; Pet. Exs. 17-19). Ms. Folsom's Federal and New York State Income Tax Returns for 2015 showed her address at the building (Tr. 48-49; Pet. Ex. 20). She testified that her previous year's returns were erroneously filed with an inaccurate address (Tr. 48). EZ Pass statements from April 2015 through August 2016 were sent to Ms. Folsom at unit 206 of the subject premises. Ms. Folsom explained that she did not have EZ Pass when she first moved into the apartment (Tr. 51-52; Pet. Ex. 21). Her JPMorgan Chase Bank statements from February 2013 through January 2017, display her address at the subject premises (Tr. 53-54; Pet. Ex. 22).

Respondent produced certified documents from the New York City Board of Elections ("Board") to show that: 1) Mr. Ambrose only changed his address with the Board to reflect the subject premises in 2018; and 2) A search of the Board's records produced nothing for Ms. Folsom or Mr. Lewis (Resp. Ex. F). Respondent also produced a copy of Ms. Folsom's New York State Driver's License which was issued on March 21, 2017, showing an address in Ghent, New York, and copies of her 2013 and 2014 tax returns which showed her address prior to moving to the subject premises (Resp. Exs. G, H, I). Respondent submitted a copy of Mr. Ambrose's W-2 (Wages and Tax Statement) for 2014, and his tax returns for 2015 and 2017, which displayed Mr. Ambrose's mother's address at Avenue C in Brooklyn (Resp. Exs. J, K, L).

I found the testimony and documentary evidence of the applicants firmly support that unit 206 was the primary residence of Ms. Folsom and Mr. Ambrose from the execution of their lease. That Ms. Folsom's tax returns for 2013 and 2014 showed her previous address, her driver's permit showed an out-of-state address and that she was not a registered voter in New York City, did not persuade me that the current premises was and is not her primary residence. Her documentation of preparation to move into the premises, online food orders for delivery to

her unit which were made on multiple dates during different months over a three-year period and her complaints about the backyard lights at the premises sufficiently established a continued presence at the premises. Significantly, her JPMorgan Chase Bank statements reflected her current address from as early as February 2013. It would make no sense to have bank statements sent to an address that was not one's primary abode, given the sensitive nature of the information in those statements. The same holds true for Mr. Ambrose, whose credit card statements reflected the current premises from as early as 2013. The cable bills in his name were also changed to reflect the current address from 2013. It is not clear why his tax preparer never changed the address on Mr. Ambrose's tax return, but his mother's testimony that he only resided with her for a few months after graduate school was credible, making me confident that, like his wife, the premises was his primary residence.

I found Mr. Lewis's evidence sufficient to overcome respondent's sole challenge that he was not a registered voter in New York City. While bank statements for an account which he shared with both parents and an American Express account which he shared with his father did not reflect Mr. Lewis' address at the premises, he offered a reasonable explanation for that. Most importantly, Mr. Lewis presented utility bills for the unit, in his name, from the inception of his residency. I therefore find that unit 204 was his primary residence when he executed the stipulation agreement with respondent and it continues to be so.

Thus, even if respondent's primary residence challenge had been timely, it would have failed.

Buyouts[3]

Respondent claimed that units 204 and 206 were the subject of buyouts. It argued that the stipulation agreement into which it entered with the applicants was erroneous because the agreement could not create rent regulation for the units in question, since those units were removed from rent regulation by operation of law through a sale of rights. Resp. Brief at 2. Citing to rule 1-07(2)(iv), respondent rues that the Board's rules only permit a party aggrieved by the Board's determination (in this case, the order adopting the 2016 stipulation agreement) 30 calendar days to file an application for reconsideration. Resp. Brief at 15.

[3] This term refers to the landlord's purchase and will be used interchangeably with the tenant's "Sale of Rights."

The Loft Law permits a covered IMD occupant to sell any improvements that the occupant made to the unit, so long as they are first offered to the landlord/owner. Mult. Dwell. Law § 286(6) (Lexis 2018). A landlord/owner may also purchase the rights to a covered unit from a tenant, pursuant to MDL section 286(12). A voluntary sale of rights or improvements may result in the deregulation of the unit. MDL §§ 286(6), 286(12).[4] The Board's Rules provide that if the unit remains residential after the sale of rights, "the owner remains subject to all the requirements of Article 7-C, and these rules and orders of the Board … except that the unit is no longer subject to rent regulation where coverage under Article 7-C was the sole basis for such rent regulation." 29 RCNY § 2-10(d)(2) (Lexis 2018).

Respondent's claim that it purchased the rights and improvements to units 204 and 206 is an affirmative one which it must plead and prove. *See Matter of Brandman,* OATH Index No. 1681/15 at 7 (Mar. 2, 2017); *Matter of Bradfield LLC*, OATH Index No. 1345/03 at 13-14 (Nov. 18, 2003), *adopted in part, modified in part*, Loft Bd. Order No. 2845 (Feb. 19, 2004) (granting overcharge application where tenants proved that they were protected occupants of an IMD unit and owner failed to prove that unit had been deregulated as a result of sale of rights or improvements). A purported waiver by sale of rights or fixtures warrants close scrutiny because it may be contrary to public policy. *See Matter of Hall*, OATH Index No. 1082/02 (Sept. 6, 2002), *modified*, Loft Bd. Order No. 2760 (Nov. 19, 2002); *Matter of McIntosh*, OATH Index No. 604/02 at 16-17 (Oct. 15, 2002), *adopted*, Loft Bd. Order No. 2763 (Nov. 19, 2002). To support its claim, respondent presented documentary evidence and the testimony of Anthony Nunziata.

Mr. Nunziata started working at the building in 2011 and is its current property manager. He testified that when he started working at the building Mr. Toh and Mr. Duncan were the tenants of units 206 and 204, respectively. The landlord's registration application which it filed with the Board in 2011, named Monica Lo Cascio as the tenant of record in unit 206, but Mr.

[4] *See also Bennett v. Hawthorne Village, LLC,* 56 A.D.3d 706, 709 (2d Dep't 2008) ("The former owner's purchase of the rights and improvements in Bennett's loft unit exempted the unit from the provisions of the Loft Law providing for rent regulation"); *Swing v. NYC Loft Bd.*, 180 A.D.2d 529, 530 (1st Dep't 1992) (finding sale of fixtures pursuant to MDL § 286(6) "entitl[ed] the landlord to decontrol"); *Walsh v. Salva Realty Corp*., 2009 N.Y. Slip Op 31573U at *12 (Sup. Ct. N.Y. Co. July 13, 2009) ("the effect of the sale of both the fixtures and rights pursuant to Multiple Dwelling Law § 286(6) and (12) of apartment 5B, freed the loft from rent regulation and allowed the owner to rent the loft at a monthly rent that was at or above the level of vacancy rental decontrol"); *19 W. 36th Holding Corp. v. Parker*, 193 Misc. 2d 519, 522 (Civ. Ct. N.Y. Co. 2002) ("Concerning the effect of a sale of rights pursuant to Multiple Dwelling Law § 286(12) of a unit that was at one time an IMD, both the Loft Board and the DHCR have found that such an event is a deregulating event and the unit after such sale is no longer subject to rent regulation").

Nunziata did not know Ms. LoCascio (Tr. 121-23; Pet. Ex. 2). Mr. Nunziata maintained that after receiving notice of the rent overcharge applications, the landlord recalled that there had been sales of rights for the units. Mr. Nunziata located the pertinent documents and contacted counsel who advised him that they had to be filed with the Board, so he forwarded them to counsel in January 2017 (Tr. 124-25, 132; Resp. Exs. B, C). He added that the owner had assumed that so long as he possessed sales of rights forms and could prove the sales, the units were deregulated (Tr. 138). But Mr. Nunziata admitted that respondent's registration renewal invoices from 2014 going forward, showed buyouts for two other units which had previously been listed as regulated units (Tr. 139-40; Pet. Ex. 3).

Respondent presented MDL Section 286(12) Sales Record forms for units 204 and 206, which it purportedly filed with the Board in 2017, but which were unstamped and lacked any indicia of receipt by the Board.

The Sales Record form for unit 206 identified Peter R. Toh as the tenant whose rights were purchased. The form contained Mr. Nunziata's signature but not Mr. Toh's. It referenced an attached agreement (Resp. Ex. B). That agreement was a hand-written surrender agreement dated November 8, 2012. It identified the original lease start and end dates as December 31, 2010 and December 31, 2012. It also identified the leased premises as "Apt # 206." Mr. Toh and David Denis, the landlord's representative and Mr. Nunziata's current supervisor, signed the surrender agreement. Mr. Denis still works for respondent but was not present to testify (Tr. 109-10, 115-16). A separate notarized agreement ("addendum") between the landlord and Peter R. Toh on November 8, 2012, was also submitted as part of the sales record package. The subject unit was not identified on this addendum, and on both, the financial consideration was redacted (Resp. Ex. B). An isolated page (numbered "page 2 of 2") bore a notary stamp and signature of one of the landlord's workers, but it was unclear what was being notarized since there were no other signatures on the page. Mr. Nunziata stated that the page was a continuation of the previous page, but the previous page displayed that it was page 1 of 1 (Tr. 133-34).

As with the documents for unit 206, the Sales Record form for unit 204 was signed by only Mr. Nunziata, in January 2017. The surrender agreement, dated November 4, 2011, was primarily typewritten, and identified the tenant as Peter Duncan (Resp. Ex. C). Mr. Duncan signed the document and dated it "11/4/10." This appeared to be an error as the date next to the

landlord's signature was "11/04/11" and the lease surrender date on the document was November 30, 2011. Also, there was an addendum to the surrender agreement for unit 204, which Mr. Denis and Mr. Duncan signed and on which financial consideration was redacted. Neither the surrender agreement nor this addendum was notarized.

Both Mr. Toh's and Mr. Duncan's surrender agreements reflected that consideration was exchanged for the surrender of the original lease. Mr. Nunziata stated that he was present when both Toh and Duncan signed the documents (Tr. 140-41). In both cases, the addendum agreement contained the following clause: "Owner agrees to purchase and Tenant agrees to sell any and all of Tenant's Improvements pursuant to Multiple Dwelling Law § 286(6)."

Respondent submitted copies of two handwritten receipts from what Mr. Nunziata claimed to be over-the-counter receipt books. Mr. Nunziata did not have the original carbon copies of the documents. Each receipt was for $10. One, dated November 7, 2011, indicated that the money was received "from" Peter Duncan. At the bottom of the same document was written "Buyout 10" from "MZBJ holdings llc" to "Peter Duncan" (Resp. Ex. D).

A similar document dated November 8, 2012, was presented with Peter Toh's name (Resp. Ex. E). Mr. Nunziata testified that the documents were photocopies of a store-bought receipt book which he failed to produce. He claimed that the original receipt had been thrown away after it was scanned and placed in the file, and that the receipt book had been discarded since it did not contain a third carbon copy and because the company wanted to formalize operations. He confirmed that the tenants had been paid ten dollars each (Tr. 118-20, 129-34).

The tenants, Messrs. Toh and Duncan, who were the subject of the alleged sale of rights were not present to testify. Respondent asked that I draw a negative inference against the applicants for failing to call Messrs. Toh and Duncan as witnesses because the two were named on the applicants' witness list. In support of its request, respondent cited to this tribunal's report in *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). In *Zhao,* the applicant sought a finding that she had residentially occupied the first floor of her building since 2007 and was the protected occupant of the unit. At trial, Ms. Zhao testified that she got married in 2006, had lived elsewhere with her husband, but had moved into the building's first floor in 2007, after she and her husband decided to separate. There were apparent inconsistencies in Ms. Zhao's trial testimony and prior

deposition testimony which respondent had taken in 2014, regarding Ms. Zhao's husband's residency. While those inconsistencies may have been resolved had she called her husband as a witness, Ms. Zhao failed to do so, and respondent requested that an adverse inference be drawn for such failure. Granting respondent's request, Administrative Law Judge Alessandra Zorgniotti noted that 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.

Zhao, OATH 2225/15 at 10.

I find *Zhao* to be inapposite. As previously stated, it is respondent's burden to establish that a unit has been deregulated through a valid sale of rights and improvements. Thus, it was respondent's responsibility, not the applicants, to call as witnesses, the tenants from whom it allegedly purchased rights. Hence, if anything, a negative inference may be more appropriately drawn against respondent for its failure to call Messrs. Toh and Duncan. But I decline to do so.

Turning to the testimony and the evidence presented, Mr. Nunziata's explanation as to why the purported buyouts for the two particular units at issue were not timely filed, was not convincing given that the same landlord had filed buyouts for units 106 and 205 in 2015, as demonstrated by its registration renewal notice filed in 2015. In its brief, respondent relied on *Thorgeirsdottir v. NYC Loft Bd.*, 161 A.D.2d 337 (1st Dep't 1990), to support the proposition that a delayed filing of sales of rights documents, regardless of reason, is not detrimental to the its claim that the units were deregulated. Resp. Brief at 9-10. Respondent is correct. In *Thorgeirsdottir,* the First Department articulated that "purchase is the definitive event for deregulation," rather than when such sale is registered with the Board. Thus, respondent's lamentation over the limited time within which a party aggrieved by a Board's determination may seek reconsideration is irrelevant. The issue here is not whether the documents were belatedly filed, but whether the exceptionally small consideration given for surrender of the units was sufficient to support that there were valid sales of rights for the units in question.

As an initial matter, respondent failed to establish that Mr. Toh was ever a tenant of unit 206, so it was unclear what rights he had to sell. Respondent's registration application filed with

the Board in January 2011, and which listed the current residential tenants in the building, named Monica LoCascio as the tenant of unit 206 at the time of its filing. Yet the surrender agreement for that unit, which Mr. Toh signed, indicated that his lease began on December 31, 2010. Respondent provided no explanation and presented no lease to establish that Mr. Toh was Ms. LoCascio's roommate or ever lived at the premises.

Further, respondent only filed the Sales Record forms after the tenants of unit 206 filed their rent overcharge application. That the Sales Record form for unit 204 was filed in advance of Mr. Lewis's overcharge application to the Board does not quell the questions over the purported sale of rights and improvements.

Regarding the payments made to Mr. Duncan and Mr. Toh (assuming that Mr. Toh was the tenant of unit 206), respondent argues that the $10 payments constitute valid consideration and are not a lawful basis for challenging the enforceability of the sales, because the sufficiency of consideration is determined by the parties. Resp. Brief at 10-11. Respondent's argument is without merit. It is respondent's burden to establish that a *bona fide* sale of rights and improvements occurred, which would have deregulated the units and operated to thwart the applicants' overcharge applications. Respondent offered absolutely nothing to show how the money amount for the purported sales was determined. There was nothing to indicate what improvements the tenants had made and their value, and what respondent was buying. And respondent did not call Mr. Toh and Mr. Duncan, to establish that they knowingly executed a contract.

In its brief, respondent cited to *Matter of 99 Sutton*, Loft Bd. Order No. 4656 (Mar. 16, 2017), in which the Board invalidated a purported sale of rights because the consideration equated with the tenants' security deposit which the landlord was obligated to return. Resp. Brief at 11. Respondent correctly argued that this case was not analogous to *Sutton.* But respondent ignored that for one of the other units in the building, the Board deemed the sum of one dollar as consideration for a buyout of that unit, insufficient to find said buyout a *bona fide* transaction. While the buyout was rejected on other grounds, the Board's concern over the appropriateness of the consideration given is telling. Here, respondent submitted nothing to satisfy me that $10 was sufficient consideration to deem the purported buyouts of units 204 and

206, *bona fide* transactions. This leads me to conclude that they were not and that collaterally, the units have not been deregulated.

Rent Overcharges

In their application filed on January 25, 2017, Ms. Folsom and Mr. Ambrose, asserted that the maximum legal rent for their unit (unit 206) is $2,225, and that from February 2013 through January 2017, they paid a total of $41,150 in rent overcharges. In his application filed on March 30, 2017, Mr. Lewis, asserted that the maximum legal rent for his unit (unit 204) is $2,000 per month, and that from June 2015 through February 2017, he paid a total of $27,600 in rent overcharges.

Respondent argued that if it is deemed that the units were not deregulated by virtue of a sale of rights, the applicants cannot claim rent overcharges prior to the owner's consent to them as protected occupants. Resp. Brief at 2-3, 16-18.

In an overcharge case, ". . . the relevant inquiry is whether petitioner [is] a protected occupant and whether [he/she] paid more than the lawfully authorized rent to respondent." *Matter of Brandman*, OATH Index No. 1681/15 at 6 (Mar. 2, 2017).

There is no dispute that the applicants are the protected occupants of their unit. But respondent's claim that they cannot seek overcharges prior to its recognition of them as protected occupants is erroneous. The applicants moved into the premises pursuant to a lease with respondent, and were thus entitled to protection from the time that they moved in. *See Rader v. Grand Morgan Realty Corp*., OATH Index Nos. 207/08 & 208/08 at 4 (Jan. 4, 2008), *adopted in part, modified in part,* Loft Bd. Order No. 3513 (June 18, 2009), *reconsideration denied*, Loft Bd. Order No. 3567 (Apr. 15, 2010) (noting that petitioners became protected occupants of their IMD unit at the point at which they "assumed residential occupancy of the unit, with the owner's knowledge and consent."). The stipulation agreement between the applicants and the landlord served only to avoid protracted litigation. It cannot be seen as a waiver of rights to which they are entitled and therefore cannot operate to deprive them of their rights. *See In re Jo-Fra Properties,* 27 A.D.3d 298, 299 (1st Dep't 2006).

The Loft Law and the Board's rules set forth guidance for the calculation of legal rent in an IMD unit. Pursuant to MDL section 286(2)(i), the rent for an IMD unit covered by the 2010

law are frozen as of the effective date of the law, that is, June 21, 2010. Mult. Dwell. Law § 286(2)(i). Under section 2-06.2(b)(4) of the Board's Rules, the total rent for such a unit is "the rent, including escalators, specified in the lease or rental agreement in effect on June 21, 2010, paid by the tenant pursuant to said lease or rental agreement." 29 RCNY § 2-06.2(b)(4)(i). Respondent's registration application which it filed with the Board in 2011, listed the rental amount for the lease in effect on June 21, 2010 as $2,000 for unit 204, and $2,225 for unit 206 (Pet. Ex. 2).

At trial, the parties represented, without proof, that respondent had filed an alteration application in 2011.[5] And without reference to any section of the law, they stipulated that based on the filing of the alteration application, respondent was entitled to a six percent increase. However, MDL section 286(2)(ii)(A) provides that upon the owner's filing of an alteration application, the rent at the time of such filing may be adjusted upward by three percent. Accordingly, I find that for unit 204, respondent was legally entitled to a monthly rent of $2,060, and for unit 206, it was legally entitled to a monthly rent of $2,291. These figures represent a three percent increase of the rent amount for the leases in effect for both units on June 21, 2010, as shown on the landlord's 2011 registration application.

The applicants provided a transaction listing (to which respondent stipulated) of rents paid for the period that they are claiming overcharges (Pet. Exs. 7, 8, 25). The tenant of unit 204 paid a monthly rent of $3,200 for 12 months from June 2015 through May 2016, and $3,300 for nine months from June 2016 through February 2017 (Pet. Ex. 25). The tenants of unit 206 paid a monthly rent of $3,000 for 36 months from February 2013 to January 2016, and $3,100 for 12 months from February 2016 through January 2017 (Pet. Ex. 7).

Based on the foregoing, the rent overcharge for unit 204 is $24,840, calculated as follows:

($3,200 - $2,060) x 12 = $13,680 plus

($3,300 - $2,060) x 9 = $11,160

The rent overcharge for unit 206 is $35,232, calculated as follows:

($3,000 - $2,291) x 36 = $25,524 plus

($3,100 - $2,291) x 12 = $ 9,708

[5] I took official notice of such filing as reflected on the Department of Buildings website information on job filings for the subject premises.

CONCLUSION

The applicant of unit 204 was overcharged by $24,840. The applicants of unit 206 were overcharged by $35,232.

Ingrid M. Addison
Administrative Law Judge

November 7, 2018

SUBMITTED:

RICK D. CHANDLER, P.E.
Commissioner

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