

## Order

### **NEW YORK CITY LOFT BOARD**

*In the Matter of the Application of*

**ALON COHEN**

**Loft Board Order No. 4261**

**Docket No. TR-0988**

**RE: 57 Jay Street  
Brooklyn, New York**

**IMD No. 30083**

The Loft Board accepts the Report and Recommendation of Administrative Law Judge Ingrid M. Addison dated August 23, 2013 ("Report").

### **BACKGROUND**

On February 8, 2012, Alon Cohen ("Tenant"), occupant of unit 4C ("Unit"), in the building located at 57 Jay Street, Brooklyn, New York ("Building"), filed an application seeking coverage of the Unit and protected occupancy status pursuant to § 281(5) of the Multiple Dwelling Law ("MDL"). On April 24, 2012, Haim Joseph ("Owner"), the Building's owner, filed an answer.

The Loft Board transferred the application to the Office of Administrative Trials and Hearings ("OATH"), which assigned the matter to Administrative Law Judge Ingrid M. Addison for adjudication.

On January 29, 2013, Owner registered ten units in the Building. However, Owner did not register the Unit and disputes Tenant's coverage claims. OATH held a hearing on June 18, 2013. On July 23, 2013, each party submitted a post-hearing memorandum.

In the Report, Judge Addison recommends a finding of Article 7-C coverage for the Unit pursuant to MDL § 281(5) and a finding of protected occupant status for the Tenant. We agree.

### **ANALYSIS**

Section 281 of the MDL sets forth the definition of an interim multiple dwelling ("IMD") unit. In 2010 and again in 2013, the New York State Legislature amended the MDL to, among other things, expand the definition of an IMD by adding MDL § 281(5), which established a new period for residential occupancy and added several additional eligibility requirements for Article 7-C coverage.

Specifically, MDL § 281(5) requires residential occupancy during a consecutive twelve month period from January 1, 2008 through December 31, 2009. In addition, the unit: 1) may not be located in a building's basement or cellar; (2) must have at least one entrance that does not require passage through another residential unit; (3) must have at least one window opening onto a street or a lawful yard or court; and (4) must be at least 400 square feet.

When the Owner registered the Building in January 2013, he did not register Tenant's Unit. Owner argued that because Tenant entered into a stipulation in the commercial part of the Housing Court in March 2010, the use of the Unit should be considered to be commercial, and Tenant should therefore be deemed a commercial tenant.

Judge Addison disagreed, correctly finding that an IMD building is by definition a commercial or manufacturing building that was illegally converted to residential use. She also found that at the time of the holdover proceeding, the only appropriate venue was in the commercial part. Moreover, although the

stipulation was "so ordered" by the Civil Court judge, there was no final resolution of rights in the holdover proceeding and the Tenant was not precluded from applying for Article 7-C coverage.

Accordingly, the remaining issues to be determined were: 1) whether there were sufficient indicia of the Unit's conversion to residential use; and 2) whether Tenant residentially occupied the Unit during the window period.

We accept Judge Addison's finding that the Unit contained sufficient residential fixtures to indicate conversion to residential use. Judge Addison found credible Tenant's testimony that the Unit had been mostly raw space when he moved into the Unit in 1997, and that he had purchased a refrigerator, kitchen sink, shelving cabinet and mirror in order to use the Unit residentially; as well as his passing references to his bedroom and his dining room.

We also accept Judge Addison's findings that Tenant has been the residential occupant in possession of the Unit since entering into a lease with Owner in 1997. Judge Addison based her findings on Tenant's credibility and the credibility of the other witnesses, as well as the record, which was devoid of any evidence contradicting Tenant's assertion that since 1997, the Unit has been and continues to be his sole residence. She credited the testimony of Tenant's two witnesses who affirmed Tenant's continuous residential occupancy. Ms. Wruble testified that Tenant has been her neighbor since she moved into the building in 2006 and that they share custody of a dog. Mr. Gil Levy testified that he has visited Tenant at the Unit every month since 1997 and it is Tenant's only residence.

Owner claims that Tenant cannot be the protected occupant because his citizenship status precludes a finding of primary residency. Judge Addison properly rejected the Owner's argument and relies on 29 RCNY § 2-09(b)(1) to find that Tenant is the protected occupant of the Unit. Citizenship is not a factor to consider in determining protected occupant status pursuant to 29 RCNY § 2-09 of the Loft Board rules.

### **CONCLUSION**

Accordingly, the Loft Board grants Tenant's application. The Loft Board finds the Unit is covered pursuant to MDL § 281(5) and Tenant is the protected occupant of the Unit. Owner is directed to register the Unit with the Loft Board within thirty days of the mailing date of this Order identifying Tenant as the protected occupant. Failure to do so may result in enforcement proceedings and the imposition of fines.

DATE: March 20, 2014

  
Donald Ranshte  
Acting Chairperson

Board Members Concurring: Barowitz, Spadafora, Ranshte, Delaney, Bolden-Rivera, Foggin, Schachter.  
Board Members Absent: Mayer, Shelton

DATE LOFT BOARD ORDER MAILED APR 08 2014

## ***Matter of Cohen***

OATH Index No. 2015/12 (Aug. 23, 2013)

[Loft Bd. Dkt. No. TR-0988; 57 Jay Street, Brooklyn, N.Y.]

Petitioner/tenant applied for coverage under the 2010 amendments to the Loft Law. ALJ found that petitioner resided in unit 4C during the inquiry period and continues to reside there. Since there was no dispute as to the other criteria to qualify as an IMD unit, ALJ found unit 4C to be an IMD unit, and petitioner, a protected occupant of the unit, who is entitled to coverage under the Loft Law. Petitioner's application should therefore be granted.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**ALON COHEN**  
*Petitioner*

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### **REPORT AND RECOMMENDATION**

**INGRID M. ADDISON**, *Administrative Law Judge*

Petitioner Alon Cohen, current tenant of unit 4C of a building located at 57 Jay Street in Brooklyn, New York ("premises"), filed an application with the Loft Board on February 8, 2012 (Loft Board Docket No. TR-0988), for a finding that he is the protected occupant of that unit, pursuant to section 281(5) of Article 7-C of the Multiple Dwelling Law ("MDL" or "Loft Law")<sup>1</sup> (ALJ Ex. 1). Respondent Haim Joseph, the building's owner, filed an answer on or about April 19, 2012, seeking dismissal of petitioner's application (ALJ Ex. 2).

The Loft Board referred the matter to this tribunal on May 31, 2012. Following multiple conferences before Administrative Law Judge Joan Salzman, a hearing was scheduled for June 18, 2013. At the hearing, petitioner testified on his own behalf, and presented the testimony of Vanessa Wruble, a neighbor, and Gil Levy, a friend, as well as documentary evidence. Respondent testified on his own behalf and submitted documentary evidence. I held the record open until July 23, 2013, for the submission of post-hearing briefs. On August 6, I re-opened

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<sup>1</sup> The building is a six-story building with multiple tenants who filed individual applications for coverage between November 2010 and April 2012. The applications were consolidated by the Loft Board and forwarded to this tribunal. The owner subsequently registered most of the units as interim multiple dwelling ("IMD") units on January 29 and April 11, 2013.

the record for petitioner to submit copies of bank statements which I had initially rejected at trial. I marked the bank statements as petitioner's exhibit 3. The record closed on August 8, 2013.

For the following reasons, I find that petitioner resided in unit 4C of the premises from before and during the inquiry period, and continues to reside there. I further find that unit 4C is an IMD unit and petitioner is the protected occupant of that unit who is entitled to coverage under the Loft Law.

Petitioner's application should therefore be granted.

### **PRELIMINARY MATTERS**

On May 28, 2013, respondent sought dismissal of petitioner's application or, in the alternative, preclusion of documents at trial, asserting that petitioner had failed to comply with respondent's discovery demand which respondent served upon him on April 15, 2013 (ALJ Ex. 3). Petitioner, who is self-represented,<sup>2</sup> replied to respondent's motion on May 30, 2013, that due to his unfamiliarity with the legal system, he mistakenly thought that he was required to produce the documents for the trial on June 18, and that he had not willfully withheld documents.

Section 1-33(e) of our rules provides for the imposition of appropriate sanctions, which may include preclusion of witnesses or evidence, where a party fails to comply with a discovery order. 48 RCNY § 1-33(e) (Lexis 2013); *see, e.g. Matter of Seyfried*, OATH Index No. 127/97 at 12 (Jan. 3, 1997), *adopted in part*, Loft Bd. Order No. 2083 (Mar. 20, 1997), *on remand*, Loft Bd. Order No. 2107 (May 22, 1997) (as a general matter, OATH discovery rules provide for the preclusion of evidence from a party only after that party fails to comply with an ALJ's order compelling a response to a discovery request). But we have also imposed sanctions for the willful withholding of relevant material, even absent an ALJ's order. In *Department of Transportation v. Jones*, OATH Index No. 1517/07, mem. dec. (May 10, 2007), sanctions were imposed against two attorneys who withheld transcripts that they did not think relevant to the case. The ALJ relied on section 1-13(e) of OATH's rules which provides that "[w]illful failure of any person to abide by the standards of conduct [set forth in the rules of practice] . . . may, in

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<sup>2</sup> Well in advance of the trial, ALJ Salzman had advised petitioner, verbally and in writing, of his right to counsel. After the matter was assigned to me on June 5, 2013, I also apprised petitioner of his right to counsel in an e-mail dated June 6, 2013. On the day of trial, petitioner stated that he had declined counsel for financial reasons. But in the midst of trial, he requested an adjournment to retain counsel, which I denied.

the discretion of the administrative law judge, be cause for the imposition of sanctions.” 48 RCNY § 1-13(e) (Lexis 2013).

Preclusion is a drastic measure which is appropriate where there is a showing that the non-production of evidence was willful and contumacious and caused prejudice to the opposing party. *Halley v. Winnicki*, 255 A.D.2d 489 (2d Dep’t 1998); *Busse v. Clark Equipment Co.*, 182 A.D.2d 525, 526 (1st Dep’t 1992); *Uwechia v. City of New York*, 2011 N.Y. Misc. LEXIS 1301 (Sup. Ct. N.Y. Co. Mar. 25, 2011); *Einheber v. Bodenheimer*, 12 Misc. 3d 1177A (Sup. Ct. N.Y. Co. 2006); *Dep’t of Environmental Protection v. Ginty*, OATH Index No. 1627/07 at 5-6 (Aug. 10, 2007) (motion to preclude and for adverse inference denied where there was no evidence that the agency deliberately withheld unfavorable information); *Dep’t of Juvenile Justice v. Clements*, OATH Index No. 1198/06 at 25 n.7 (Apr. 24, 2006), *modified on penalty*, NYC Civ. Serv. Comm’n Item No. CD 07-44-SA (Apr. 5, 2007) (preclusion denied where there was no evidence of bad faith, only that the incident report could not be located).

Here, I had not previously been apprised of petitioner’s failure to produce documents and had never issued an order compelling discovery. Given his *pro se* status, I found his explanation reasonable and further found no prejudice to respondent. Accordingly, I denied respondent’s motion.

On June 3, 2013, respondent raised the specter of a “primary residence” challenge in another motion to dismiss petitioner’s application on grounds that petitioner had not established that he is either a permanent resident or citizen of the United States, and therefore his coverage application should be denied (ALJ Ex. 4). Respondent cited to *Katz Park Ave. Corp. v. Jagger*, 46 A.D.3d 186 (1st Dep’t 2007), in which the First Department held that an individual who is neither a citizen nor permanent resident of the United States is precluded from claiming a rent-stabilized apartment as a primary residence. In *Katz*, plaintiff landlord commenced ejectment proceedings against defendant, a British citizen, and was denied summary judgment at the trial court level. On appeal, the First Department reversed, finding that because defendant was a British citizen on a B-2 tourist visa, the apartment at issue could not constitute defendant’s primary residence within the meaning of section 2520.6(u) of the Rent Stabilization Code. 9 NYCRR § 2520.6(u) (Lexis 2013). The court noted that defendant was required to maintain a permanent residence in the United Kingdom, and that under federal law the holder of a B-2 visa had to show an intent to leave the United States at the end of his or her temporary stay.



In its closing brief, respondent raised similar arguments after petitioner revealed at trial that in 2004, he was issued an O-1 artist's visa for three years, with unlimited options for renewal (Resp. Br. at 12-14; Tr. 61-62).

Neither the Loft Law nor the Loft Board rules that respondent cited stand for the proposition that the unit for which an applicant seeks coverage must be his/her primary residence. Section 286(2)(i)<sup>3</sup> of the MDL addresses conditions for post-coverage occupancy and the effective rent. Section 2-09(b)<sup>4</sup> of the Loft Board Rules identifies occupants entitled to protection under the Loft Law, and grants a right of recovery to the prime lessee or sublessor who is not the prime lessee if he/she can prove that the residential unit covered as part of an IMD is his/her primary residence, even if another person is in possession.

To establish coverage, an applicant need not prove that the unit is his or her "primary residence." *Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769, 770 (1987) (there is no requirement that residentially occupied units be primary residences of their tenants for Loft Law coverage); *BOR Realty Corp. v. NYC Loft Bd.*, 129 A.D.2d 496 (1st Dep't 1987), *aff'd*, 70 N.Y.2d 720 (1987); *Matter of Pels*, OATH Index No. 2481/11 at 11-12 (June 20, 2012), *adopted*, Loft Bd. Order No. 4161 (June 20, 2013) (tenant who created residential occupancy in loft unit prior to the window period but lived in the unit intermittently during window period while maintaining a residence in Michigan, found to be a protected occupant under section 281(5) of the Loft Law). Rather, petitioner here must prove that the criteria for coverage set forth in section 281(5) of the Loft Law have been satisfied. Those criteria do not impose any requirement that the unit at issue be the primary residence of the coverage applicant, and therefore, such a challenge is not properly before this tribunal. Instead, section 2-08.1(a)(1) of the Loft Board rules provides recourse for a

<sup>3</sup> Section 286(2)(i) of the MDL states that:

Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, provided that the unit is their primary residence, and shall pay the same rent, including escalations, specified in their lease or rental agreement to the extent to which such lease or rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by the owner . . . .

Mult. Dwell. Law § 286(2)(i) (Lexis 2013).

<sup>4</sup> In pertinent part, section 2-09(b) of the Loft Board Rules states:

(1) Except as otherwise provided herein, the occupant qualified for protection under Article 7-C shall be the residential occupant in possession of a residential unit, covered as part of an IMD.

(4) The prime lessee . . . shall be deemed the residential occupant qualified for the protection of Article 7-C, if he/she can prove that the residential unit covered as part of an IMD is his/her primary residence . . . . If the prime lessee . . . fails to prove that such unit is his or her primary residence, the rights of such person to recover such a unit are extinguished.

29 RCNY §§ 2-09(b)(1), (4) (Lexis 2013).

landlord who challenges that a registered IMD unit is not the primary residence of its residential occupant. The rule permits landlords of IMDs registered with the Loft Board to bring eviction proceedings against the residential occupants of units “in a court of competent jurisdiction” on grounds that the unit is not their primary residence. 29 RCNY § 2-08.1(a)(1) (Lexis 2013); *see Lower Manhattan Loft Tenants v. NYC Loft Bd.*, 66 N.Y.2d 298 (1985).

Thus, respondent’s challenge, predicated on petitioner’s “primary residence” is not appropriate before this tribunal, and his motion for dismissal is denied.

### ANALYSIS

Under MDL section 281(5), an IMD is any building or portion thereof, which, among other requirements, was occupied 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”), provided that the unit (i) is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, (ii) has at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and (iii) is at least 400 square feet in area. Mult. Dwell. Law § 281(5) (Lexis 2013).

There is no dispute as to the location, size or window requirement of unit 4C. Nor is there an issue that the premises was occupied as the residence of three or more families living independently of each other for 12 consecutive months during the inquiry period. The only issue is whether petitioner resided in unit 4C for 12 consecutive months during the inquiry period and is entitled to coverage.

#### *Residential Occupancy of the Premises During the Inquiry Period*

Petitioner asserted that he residually occupied unit 4C during the window period (Tr. 24). He submitted a one-year lease that he executed with respondent in November 1997, for the rental of unit 4C as an artist studio, at a monthly rent of \$650 (Pet. Ex. 1). He testified that he moved into the premises in November 1997, after signing the lease which he had the option of extending. The issue of signing a new lease or renewing the expired lease was never raised. When petitioner moved in, the space was practically bare. There was a “structure for a bathroom

without the sink and the appliances" (Tr. 48). At the time, the landlord was renovating some of the other units, and petitioner expected that a bathroom sink and shower would be installed in approximately two to three months (Tr. 48). But it took about a year and a half before the landlord installed a heating system, and two years before the bathroom was completed. Meanwhile, petitioner used another bathroom and kitchen on the far side of the same floor. Petitioner maintained that he purchased a kitchen sink which respondent installed in 1999 or 2000. At some point, respondent's assistant installed a washer and a dryer which were paid for by the fourth-floor tenants. Later, petitioner purchased a cabinet unit with shelving for the kitchen, as well as a refrigerator (Tr. 51-53). He indicated that his unit contains a kitchen, bedroom and dining room (Tr. 43-44).

Petitioner, who is a freelance drummer, testified that over the years, he lived and worked in the unit, creating music and even recording a successful album. He does not work for a specific company, but he filed 1099 tax forms for the royalties he received. At most, he has been away from the unit for two and a half to three months. He insisted that everyone who knows him can vouch that he resides at the premises, and swore that he has no other address, and does not own property or a house anywhere else in the world (Tr. 53-54, 59). Petitioner submitted rent due notices from respondent for June 2008, March 2009, July 2010, and January 2012, and the landlord's ledger of rents received from petitioner over the period April 2008 to May 2010, as well as a record of outstanding balances (Tr. 27; Pet. Exs. 2A, 2B). In addition, petitioner tendered copies of his personal bank statements from 2006 to the present (Pet. Ex. 3). The statements showed petitioner's mailing address as 57 Jay Street in Brooklyn, but reflected unit 4R instead of unit 4C, which petitioner claimed to be a mistake on the bank's part. Petitioner testified that he does not drive, so he does not have a driver's license. Nor does he have a credit card because he ceased using credit cards in 2004 (Tr. 60-61).

Vanessa Wruble has been a residential tenant in unit 3B of the subject premises since 2006. She testified that petitioner has been her upstairs neighbor since she moved in and she and petitioner share custody of a dog which sometimes stays overnight in her unit and, at other times, in petitioner's (Tr. 16, 19).

Gil Levy, petitioner's friend, testified that he has visited petitioner at the premises at least once per month since petitioner moved in, in 1997 or 1998, and did not know of any other residential address for petitioner. Mr. Levy did not know the street address of the premises or



petitioner's unit number, but he testified that it is located at the corner of Jay and Water Streets and described how to access the unit after getting off the elevator on the fourth floor. Also, he could not recall petitioner being out of the country more than once a year (Tr. 74-77).

Respondent testified that the only time he visited unit 4C was during the first three years of petitioner's occupancy, in an attempt to mediate between petitioner and the tenants above and below him, who had complained of petitioner's loud drumming noises. Respondent described petitioner's unit as an open work space with a sink and toilet and the "form" for a bathroom. He admitted that he had converted some of the units into residential units, but was adamant that petitioner's unit was not among those. Respondent disavowed knowledge that petitioner resided in the building, and denied installing a kitchen, shower and mirror in petitioner's bathroom, or even a sink outside the bathroom (Tr. 78-80, 82, 88). Further, he claimed to have observed no bed during his visit, but speculated that petitioner might subsequently have purchased one (Tr. 86-87). Respondent also denied that petitioner sought his assistance in or around 2011, with the installation of a replacement sink (Tr. 84-85).

Respondent produced papers in a holdover action which he initiated against petitioner in March 2010, in the Commercial Part of the Civil Court of New York, Kings County. The petition listed the premises as a commercial building that was "not subject to rent regulations." Attached to the papers were copies of the tenant's (petitioner in this proceeding) bank statements for 2001, 2002, 2003 and 2006 (which all reflected unit 4R), and rent receipts issued by the landlord (respondent in this proceeding) to the tenant for the lease of unit 4C. In resolution of the holdover action against him, the tenant, who appeared *pro se*, executed a stipulation of settlement which the court "so ordered" after allocuting him. In the stipulation, the tenant agreed to pay the landlord \$1,500 per month, which included \$443 towards rent arrears of well over \$20,000 (Resp. Ex. A). The attachments to respondent's exhibit also show that petitioner's rent during the inquiry period was \$957 per month.

In his closing brief, respondent argued that petitioner is estopped from seeking coverage as a residential tenant because he had consented to the jurisdiction of the Commercial Part of the Housing Court, and executed a stipulation that his unit was commercial in nature. Respondent advanced that "so ordered" agreements have the same effect as a decision rendered by the court. Respondent further argued that the June 2010 amendments to the Loft Law did not provide for a retroactive application where rights had already been resolved (Resp. Br. at 7). In support,

respondent cited to *Metroeb Realty Corp. & Realty Management Co. v. Fuller*, 32 Misc. 3d 941 (Civ. Ct. Kings Co. 2011), *aff'd*, 37 Misc. 3d 126(A) (App. Term 2d Dep't 2012).

Respondent's argument that petitioner is estopped from asserting residential occupancy and seeking coverage under the 2010 amendments because he submitted to the jurisdiction of the court in the commercial holdover proceeding is not persuasive. By definition, an IMD is a commercial or manufacturing building that was illegally converted to residential use and, accordingly, lacks a residential certificate of occupancy. There was no dispute that the building has residential tenants and thereby satisfies the definition of an IMD building. The landlord admitted as much with his testimony that he converted some of the units to residential. Had he registered the building as an IMD building with the Loft Board and subjected himself to rent regulations, the holdover proceeding would properly have been brought in the residential housing part of the Civil Court. Otherwise, his only recourse was in the commercial housing part. Therefore, he cannot now use petitioner's submission to the jurisdiction of the commercial part to disprove residential occupancy. Besides, there was nothing in the stipulation agreement to support respondent's assertion that petitioner admitted to his unit being commercial in nature.

Respondent's reliance on *Metroeb* to support his assertion that petitioner cannot now avail himself of the amendments to the Loft Law is also misplaced. In *Metroeb*, the landlord had brought a summary nonpayment proceeding against respondent tenant Fuller, who was represented by counsel. On March 11, 2010, the parties executed a stipulation which converted the action to a holdover proceeding, and awarded Metroeb a final judgment of possession with the warrant stayed through June 30, 2011. The settlement was "so ordered" by the civil court judge. On June 21, 2010, the New York State Legislature amended the Loft Law with section 281(5), which expanded the definition of "interim multiple dwelling" and established a new window period for coverage. Tenant Fuller accordingly moved to vacate the stipulation on grounds that the premises met the expanded definition of an IMD, and thus qualified for coverage; and that his residential occupancy was now legally protected by the amended law. He further claimed that had he been aware of the amendment, he would not have executed the stipulation. The court found that the tenant failed to establish any grounds, such as "fraud, collusion, mutual mistake or accident" that would warrant vacatur of the stipulation agreement. *Metroeb Realty Corp.*, 32 Misc. 3d at 943-44. Moreover, the tenant's "hindsight regrets offer[ed] no basis for relief from the stipulation." *Id.* at 944. The court noted that the judgment

of possession for the landlord that was “so ordered” could not be disturbed by the subsequent amendment to the Loft Law, and that the language of the amended law did not direct a retroactive application. *Id.*

While the tenant in *Metroeb* was represented by counsel in the civil court proceeding, petitioner in the instant matter was not. The *Metroeb* court noted that lack of representation at the time that a party executes a stipulation is a significant factor in determining whether good cause exists to vacate the stipulation. But petitioner here is not seeking a vacatur of the stipulation agreement which, like the tenant in *Metroeb*, he executed with respondent before the effective date of the 2010 amendments to the Loft Law. He is seeking coverage under those amendments, which became effective some three months after the stipulation was executed.

As a general proposition, after a judgment becomes final, it may not be affected by subsequent legislation. *Id.* Moreover, “a statute is to be construed as prospective unless it is remedial or there is a showing of a contrary legislative intent.” *465 Greenwich St. Assocs., Inc. v. Schmidt*, 116 Misc. 2d 62, 63 (Sup. Ct. N.Y. Co. 1982) (citations omitted). While the tenant in *Metroeb* gave the landlord a final judgment of possession, petitioner’s stipulation with respondent in the commercial holdover proceeding was not final. Here, the landlord retained the right to restore the matter to the court’s calendar if the tenant defaulted, which the landlord moved the court to do in April 2013. Thus, contrary to respondent’s argument, there was no final resolution of rights in the holdover proceeding. That being the case, I find that petitioner is not precluded from availing himself of the amendments to the Loft Law, which is remedial in nature. *Id.*

#### Indicia of Independent Living

For his unit to qualify for coverage as an IMD unit, petitioner must demonstrate that it possesses “sufficient indicia of independent living.” See *Madeline D’Anthony Enterprises v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep’t 2012) (“In order for a unit to qualify as a covered residence, ‘it must possess sufficient indicia of independent living to demonstrate its use as a family residence.’ This includes a showing that the premises have been converted, at least in part, into a dwelling” (citation omitted)); *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep’t 1986) (“For a unit to qualify as a residence under Multiple Dwelling Law § 281 it must possess sufficient indicia of independent living to demonstrate its use as a family residence. . . . The showing of residential use must be accompanied by a showing that the formerly commercial

premises, the domestic use of which is claimed, physically reflect that use, i.e., that the premises have been converted, at least in part, into a dwelling.” (citation omitted)). The attributes of independent living have also been spelled out in the Loft Board rules. 29 RCNY § 2-08(a)(3) (Lexis 2013). Notably, the residential use of the unit for which coverage is sought may not be incidental to a commercial use. *See Franmar Infants Wear, Inc. v. Rios*, 143 Misc.2d 562 (App. Term 1st Dep’t 1989).<sup>5</sup> Thus, in determining whether a unit qualifies for coverage, this tribunal has applied a case by case analysis of the indicia of residential use. *See Matter of Pels*, OATH Index No. 2481/11 at 5-6 (June 20, 2012), *adopted*, Loft Bd. Order No. 4161 (June 20, 2013) (finding the installation of a kitchen, stove, refrigerator, cabinets, a desk and shelves, and the addition of walls to separate the living area and an additional doorway, were sufficient indicia of independent living and conversion); *Matter of 333 PAS CoO Tenants Group*, OATH Index No. 968/08 at 16 (June 30, 2009), *adopted*, Loft Bd. Order No. 3552 (Nov. 19, 2009) (finding refrigerator, stove, bedroom with built-in closets, and a bathroom with mirrors to be “sufficient proof of conversion to residential use”).

This tribunal and the Loft Board have also considered circumstantial evidence of a tenant’s intent to make his/her unit a residence, such as the receipt of mail at the unit, whether the unit’s address is used for voter registration, driver’s license, and other official documents, and whether the tenant has maintained another residence. *See, e.g., Matter of Gareza*, OATH Index Nos. 2061/12 & 760/13 at 8 (Dec. 12, 2012) (receiving mail and tax documents at the address, using the address on a bank account, and being registered to vote at the address was evidence of residential use); *In the Matter of the Tenants of 141-155 S. Fifth Street*, Loft Bd. Order No. 1739, 15 Loft Bd. Rptr. 199, 212 (Jan. 19, 1995) (tenant’s listing the loft address as his home address on tax returns and marriage certificate, and his home owner’s insurance policy on the unit, evinced an intent to build himself a home); *Application of Muschel*, Loft Bd. Order No. 33, 1 Loft Bd. Rptr. 27, 30 (Nov. 23, 1983) (documents such as tax returns, checks, and a

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<sup>5</sup> In *Franmar*, the appellate term reversed the trial court’s holding that the tenant’s residential use of the premises was sufficient for coverage under the Loft Law. The court articulated that “[t]he Legislature’s objective in enacting the Loft Law was to protect occupants who primarily reside in interim multiple dwellings rather than those whose use is essentially commercial and only incidentally residential . . . it is not every limited residential use of commercial loft space which will qualify for coverage.” *Id.* at 563 (citation omitted). The subject of the holdover proceeding was a 625-square foot artist’s studio that was divided into a main room which the tenant used for painting and a smaller corner space used for living purposes. There was no bathroom or kitchen. The appellate term found that the space lacked “the essential amenities appurtenant to units configured for dwelling purposes” and since the character of the space in question remained primarily commercial, the tenant was not entitled to coverage and the landlord was entitled to judgment on the holdover proceeding. *Id.*

passport, indicating the loft was applicant's residence was persuasive because "the Board considers where one holds oneself out as residing as probative of where one resides in fact."); *Application of Mussman*, Loft Bd. Order No. 905, 9 Loft Bd. Rptr. 50, 59 (May 25, 1989) (finding that tenant did not residentially occupy the unit based in part on automobile registration, automobile insurance, and voter registration reflecting another address plus the tenant's inability to explain why his wife resided at that address without him).

Here, petitioner's documentary submissions established only that he was and is a lessee of unit 4C. He presented neither photographs of the premises nor documents such as tax filings, utility bills or even an envelope addressed to him, to establish that he resided at the premises during the inquiry period and received his mail there. Nor did petitioner offer a detailed description of the unit. At a minimum, the bank statements of his personal checking account established that his address on file with the bank is 57 Jay Street, the subject premises. Thus, the determination of whether he resided in unit 4C of the subject premises during the inquiry period turns on the credibility of petitioner and his witnesses.

In assessing credibility, this tribunal has considered factors such as: "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *Matter of Romano*, OATH Index No. 1618/12 at 8 (Dec. 17, 2012); *Matter of Grant*, OATH Index No. 1864/10 at 9 (Nov. 17, 2010).

Ms. Wruble's limited testimony that petitioner has been her upstairs neighbor since she moved into the building in 2006, and that they share custody of a dog which stays overnight alternately in each of their units was indicative of petitioner's residential use of the premises, and did not appear to be contrived. Likewise, Mr. Levy's testimony that he has continuously visited petitioner at the premises since petitioner became a tenant was also sincere. Even though he was unable to recite the street address of the premises, his pinpoint location of the building went unchallenged by respondent. I also noted that he has known petitioner for over 15 years and averred that he is unaware of any other address for petitioner.

I found earnest, petitioner's testimony that he has resided at the premises since 1997, and had purchased a refrigerator, kitchen sink and a cabinet unit with shelving, and a mirror. His



passing reference to his bedroom and dining room for which he had no photos was also significant. Moreover, his genuine consternation and frustration at the landlord's denial of the installation of various residential comforts in his unit, such as a bathroom, was compelling.

Notably, at trial, respondent never affirmatively disputed that petitioner resided and continues to reside at the premises. His only claim was that he was not aware of it. The landlord's awareness or knowledge of petitioner's residential occupancy is not a legitimate basis to preclude petitioner from obtaining the benefits of the Loft Law. See *Kaufman v. American Electrofax Corp.*, 102 A.D.2d 140, 142 (1st Dep't 1984) ("To read the [Loft Law] so as to require that a residential occupancy must have been 'open' and with the landlord's knowledge and acquiescence in order to obtain the benefits of the statute, is to read into the statute a meaning and purport that is not expressed therein."). Further, even though respondent denied seeing a bed in petitioner's unit when he visited many years in advance of the inquiry period, he openly speculated that petitioner might have installed one later (Tr. 87). Also, his testimony that petitioner's unit only contained the "form" for a shower was contradicted by his disclosure on the holdover petition that the unit contained a bathroom. Besides, respondent offered no evidence that petitioner lived anywhere else, and the evidence did not invite such an inference.

The only question remaining is whether petitioner's failure to provide the kind of documentary evidence that would support his residential use of the premises was fatal to his application for coverage, or whether his and his witnesses' testimony was sufficient.

In *Gareza*, OATH 2061/12 & 760/13 at 8, petitioners testified about indicia of residential use such as receiving mail and tax documents at the address, having an account at a nearby bank and using the address on a bank account, and receiving credit card statements at the address. Administrative Law Judge Alessandra Zorngiotti found that petitioners' failure to provide documentary evidence to support most of the indicia of residential use was not fatal because their testimony was credible, and corroborated in part by respondent's submissions. *Id.* ("While petitioners did not provide documentary evidence to support most of these indicia [of residential use], this omission is not fatal.").

Here, while petitioner would no doubt have been better prepared had he retained counsel, I found his and his witnesses' testimony to be credible. He executed a lease with respondent over 15 years ago. As a free-lance drummer, petitioner does not have a fixed income. In fact, his bank balances before and during the inquiry period not only support that he has limited

resources, but suggest that he is barely making ends meet (Pet. Ex. 3). Thus, it is inconceivable that a marginally employed drummer like petitioner would pay close to \$1,000 solely for rehearsal space, and be able to afford an alternate residence.

In sum, not only was the testimony of petitioner and his witnesses sufficiently persuasive, but it comports with common sense that petitioner has resided at unit 4C of the premises since he executed the lease with respondent, and has continued to reside there to the present, including during the inquiry period. Therefore, the absence of documents to support his testimony was not fatal to his case.

Accordingly, since there is no dispute as to the other criteria listed under section 281(5) of the Loft Law for designation as an IMD unit, I find that unit 4C is an IMD unit, petitioner is the protected occupant of that unit, and as such, he is entitled to coverage under the Loft Law.

#### **FINDINGS AND CONCLUSIONS**

1. Petitioner has resided in unit 4C of the subject premises since the late 1990s, when he executed a lease with respondent.
2. There is no dispute as to the other criteria under section 281(5) of the Loft Law for designation unit 4C as an IMD unit.
3. Petitioner is therefore the protected occupant of unit 4C and is entitled to coverage under the Loft Law.

#### **RECOMMENDATION**

Petitioner's application for coverage should be granted.

Ingrid M. Addison  
Administrative Law Judge

August 23, 2013

SUBMITTED TO:

**ROBERT D. LiMANDRI**  
*Chair*

APPEARANCES:

**ALON COHEN**

*Self-Represented Petitioner*

**BORAH, GOLDSTEIN, ALTSCHULER, NAHINS & GOIDEL, P.C.**

*Attorneys for Respondents*

**BY: DAVID BRODY, ESQ.**

## NOTICE

A party aggrieved by a determination of the Loft Board may file an application for reconsideration of the determination. Under 29 RCNY § 1-07(b), an aggrieved party must serve the reconsideration application on the affected parties to the prior proceeding. Service of the application shall be completed in accordance with 29 RCNY § 1-06. The aggrieved party must then file the application at the Loft Board's office along with proof of service and the required application fee. Under section 1-07(b), "(t)o be considered timely, a reconsideration application must be received by the Loft Board within 30 days of the date of mailing by the Loft Board of the determination sought to be reconsidered."

### Pursuant to 29 RCNY §1-07(d):

A Loft Board determination pursuant to section 1-06 if these rules shall be the final agency determination for the purpose of judicial review, unless a timely application for reconsideration of the determination has been filed. In such case, (i) if the Loft Board modifies or revokes the underlying order, such revocation or modification shall be deemed the final agency determination from which judicial review may be sought; (ii) if the Loft Board denies the reconsideration application, the underlying order shall be deemed the final agency determination; and (iii) if the Loft Board decided the reconsideration application by remanding the matter to the hearing officer for further proceeding, neither the underlying order nor the remand order shall constitute a final agency determination, and no judicial review may be sought until such time as the Loft Board issues a final agency determination following the remand.