

Matter of Lindbaek

OATH Index No. 2566/14 (May 14, 2015), *adopted*,
Loft Bd. Order No. 4762 (Apr. 19, 2018), **appended**
[Loft Bd. Dkt. No. TR-1172]

Application for coverage and protected occupancy findings by occupants of two units in a registered IMD building. Owner's motion to dismiss application as to unit which was previously deregulated by virtue of an abandonment finding granted and application as to deregulated unit denied.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
SVEND LINDBAEK AND GRAHAM MOSLEY
Petitioners

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This case concerns a coverage application filed with the Loft Board by petitioners, Sven Lindbaek and Graham Mosley, involving the building located at the premises 736 Broadway, New York, New York. The application, filed with the Loft Board on February 19, 2014, alleges that petitioners reside in the ninth and tenth floor units at the premises, which were residentially occupied in 2008 and 2009 and therefore qualify for coverage under Multiple Dwelling Law section 281(5). The owner, UD 736 Broadway, LLC, filed an answer on March 18, 2014, asserting that the building was adjudicated as an IMD in 1983 with units on the second, fourth, sixth, eighth, tenth, and eleventh floors, that Mr. Lindbaek did not occupy the ninth floor residentially, and that the tenth floor was adjudicated as abandoned and removed from coverage in 1995, making it ineligible to be covered by the 2010 amendment. The case was referred to this tribunal in May 2014.

After several conferences, the parties' mutual requests to submit cross motions for summary judgment were granted on January 7, 2015. On March 9, 2015, the owner filed a motion to dismiss raising the legal issues addressed in the answer. Petitioners submitted a reply on April 9, 2015. On April 10, 2015, after reviewing both sets of papers, this tribunal granted

the motion to dismiss the application as to the tenth floor but denied the motion as to the ninth floor. After the commencement of the trial on April 14, 2015, concerning the ninth floor coverage question, the parties indicated that they had reached a settlement as to the ninth floor unit. By a stipulation dated April 30, 2015, the parties stipulated that the application as to Mr. Lindbaek, the ninth floor occupant, was withdrawn with prejudice.

For the reasons provided below, I find that the coverage application as to the ninth floor should be marked withdrawn with prejudice pursuant to Mr. Lindbaek's request and that the coverage application as to the tenth floor unit, which was adjudicated abandoned in 1995, should be denied.

ANALYSIS

As discussed in the previous Loft Board decisions, the premises is an eleven-story building in lower Manhattan. It was adjudicated to be covered as an IMD with units on the second, fourth, sixth, eighth, tenth, and eleventh floors by Loft Board Orders and a landmark court decision in 1983. *Matter of Muschel*, Loft Bd. Order No. 33 (Nov. 23, 1983), *on remand*, *Matter of Muschel*, Loft Bd. Order No. 96 (June 13, 1984), *aff'd*, *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986). The tenth floor unit was then declared abandoned in 1995 by another Board decision. *Matter of Muschel*, Loft Bd. Order No. 1884 (Nov. 30, 1995).

The legal issue raised in this case is whether the current occupant of the tenth floor, which is apparently a covered IMD unit registered with the Loft Board, is entitled to rent protections pursuant to the 2010 amendment to the Loft Law. This issue has been decided by the Loft Board and the courts, which have held that a unit in an IMD which has been declared abandoned and removed from rent regulation cannot have rent regulation re-imposed under the 2010 amendment to the Loft Law, Multiple Dwelling Law section 281(5). *Matter of Grundon*, OATH Index Nos. 2445/11 & 2446/11 (Nov. 16, 2011), *adopted in part, rejected in part*, Loft Bd. Order No. 4227 (Jan. 16, 2014), *aff'd*, *Fievet v. NYC Loft Bd.*, Index No. 00494/2014 (Sup. Ct. N.Y. Co. 2014). Notably, in his reply memorandum, counsel for petitioners offers no argument in opposition to dismissal other than that *Grundon* and *Fievet* were "wrongly decided" and contrary to the remedial purposes of the law.

Based upon prior precedent, I find that application as to the tenth floor at the premises must be denied because the unit was removed from rent regulation by the abandonment adjudication in 1995 and this status was not altered by the 2010 Loft Law amendments.

In sum, based upon the withdrawal of the application of Mr. Lindbaek and the removal of the tenth floor from rent regulation in 1995, I recommend that Mr. Lindbaek's application be withdrawn with prejudice and that Mr. Mosley's application be denied.

John B. Spooner
Administrative Law Judge

May 14, 2015

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

APPEARANCES:

DAVID E. FRAZER, ESQ.
Attorney for Petitioners

COZEN O'CONNOR
Attorneys for Owner

BY: MENACHEM J. KASTNER, ESQ.
AMANDA NELSON, ESQ.

ORDER

NEW YORK CITY LOFT BOARD

In the Matter of the Application of

SVEND LINDBAEK AND GRAHAM MOSLEY

Loft Board Order No. 4762

Docket No. TR-1172

**RE: 736 Broadway
New York, New York**

IMD No. 10010

ORDER

The New York City Loft Board ("Loft Board") accepts the Report and Recommendation of Administrative Law Judge John B. Spooner dated May 14, 2015 ("Report").

BACKGROUND

1. Relevant History of Building

There has been extensive and protracted litigation regarding 736 Broadway, New York, New York ("Building"). Only a brief description of the most relevant details will be included here.

On December 10, 1982, William Muschel, then-owner of the Building, registered the Building as an interim multiple dwelling ("IMD") containing seven (7) IMD units: the second, fourth, sixth, seventh, eighth, tenth and eleventh floors. Mr. Muschel then filed an application for decoverage of the Building pursuant to Title 29 of the Rules of the City of New York ("29 RCNY") § 2-05(b)(5).

In *Matter of Muschel*, Loft Board Order No. 33 (Nov. 23, 1983), the Loft Board denied Mr. Muschel's decoverage application to the extent that the Building is an interim multiple dwelling ("IMD") containing six (6) IMD units: the second, fourth, sixth, eighth, tenth and eleventh floors, pursuant to § 281(1) of the Multiple Dwelling Law ("MDL"). The Loft Board remanded the coverage claims of the seventh floor unit for further findings. There was further litigation regarding the seventh floor unit, but none of it is relevant here.

In *Matter of Muschel*, Loft Board Order No. 1884 (Nov. 30, 1995) ("Abandonment Order"), the Loft Board found the tenth floor unit to be abandoned pursuant to 29 RCNY § 2-10(f).¹

2. Current Application for Coverage Pursuant to MDL § 281(5)

In June 2010, the New York State Legislature amended Article 7-C of the MDL to, among other things, add MDL § 281(5). The 2010 Amendments expanded the definition of an IMD in MDL § 281 to include, among other things, buildings that were residentially occupied for twelve consecutive months during the period commencing January 1, 2008 and ending December 31, 2009 ("Window Period").

On February 19, 2014, Svend Lindbaek, occupant of the ninth floor unit and Graham Mosley (collectively "Tenants"), occupant of the tenth floor unit filed a joint application seeking Article 7-C coverage for their respective units pursuant to MDL § 281(5).

¹The version of the abandonment rule applicable to Loft Board Order No. 1884 is the version that existed prior to October 8, 2006. The current rule only applies to abandonment applications filed after April 8, 2007. See, 29 RCNY § 2-10(f)(9).

On March 18, 2014, UD 736 Broadway, LLC ("Owner"), the owner of the Building filed an answer. Owner argued, among other things, that:

1. The Building is an IMD pursuant to MDL § 281(1) with covered units on the second, fourth, sixth, eighth, tenth and eleventh floors; therefore the tenth floor unit could not be subject to MDL § 281(5);
2. The Abandonment Order precludes rent regulation for the tenth floor unit under MDL § 281(5); and
3. The ninth floor unit is not eligible for coverage because it was not used for residential purposes for twelve (12) consecutive months during the Window Period.

The Loft Board transferred the application to the Office of Administrative Trials and Hearings, which assigned the matter to Administrative Law Judge John B. Spooner for adjudication.

On March 6, 2015, Owner filed a motion to dismiss the coverage application ("Motion") based on the defenses raised in its answer. Specifically, Owner argued that:

1. The tenth floor unit is subject to Article 7-C pursuant to MDL § 281(1) and was determined to be abandoned pursuant to the Abandonment Order, which resulted in the deregulation of the tenth floor unit; therefore, the tenth floor unit cannot be subject to rent regulation under MDL § 281(5); and
2. The ninth floor unit is not eligible for coverage because Mr. Lindbaek acknowledged in a sworn affidavit that he used half of the ninth floor for commercial purposes and that he moved out of his ninth floor unit in 2011.

On April 9, 2015, Tenants submitted a Memorandum of Law in response to the Motion.

In an email dated April 10, 2015, Judge Spooner granted the Motion with respect to the coverage claims for the tenth floor unit based on the Loft Board's previous abandonment finding in the Abandonment Order. Judge Spooner denied the Motion with respect to the coverage claims for the ninth floor unit, which was not registered as part of the original registration in 1983. Judge Spooner found that the coverage claims for the ninth floor unit would require a hearing and scheduled it for April 14, 2015.

In a stipulation dated April 30, 2015 ("Stipulation"), Mr. Lindbaek agreed to withdraw his coverage claims for the ninth floor unit with prejudice.

In the Report, Judge Spooner recommended that Mr. Lindbaek's coverage claims for the ninth floor unit be withdrawn with prejudice pursuant to the Stipulation and Mr. Mosley's coverage claims for the tenth floor unit be denied because the tenth floor unit is already an IMD unit pursuant to MDL § 281(1) and was previously found abandoned pursuant to 29 RCNY § 2-10(f); therefore, it is not subject to rent regulation. We agree.

ANALYSIS

The issue here is whether the tenth floor unit, which is an IMD pursuant to MDL § 281(1), is entitled to coverage and rent regulation under MDL § 281(5). The Loft Board and the courts have decided this issue in the negative. Where a unit has Article 7-C coverage pursuant to MDL § 281(1) or (4), the unit will not be subject to coverage or rent regulation pursuant to MDL § 281(5). See, *Matter of Grundon*, Loft Board Order No. 4227 (Jan. 16, 2014) *aff'd*, *Fievet v. New York City Loft Bd*, 150 A.D.3d 402 (1st Dep't 2017). The tenant-applicants in *Grundon* sought coverage and rent regulation under MDL § 281(5) because their units were deregulated by a prior a sale of rights pursuant to MDL § 286(12).

Here, although the deregulation of the tenth floor unit involves an abandonment finding, not a fully executed sale of rights, the distinction has no consequence. Pursuant to 29 RCNY § 2-10(f)(7)(i) and (ii), the legal effect of the Loft Board's determination of abandonment is the same as that of a sale of rights. There is no reason to reach a different result here.

CONCLUSION

Mr. Lindbaek's coverage claim for the ninth floor unit is deemed withdrawn with prejudice.

As the tenth floor unit is an IMD unit covered under MDL § 281(1) since 1983, Mr. Mosley is not entitled to Article 7-C coverage or rent regulation pursuant to MDL § 281(5). The coverage claim for the tenth floor unit is denied.

DATED: April 19, 2018



Renaldo Hylton
Chairperson

Board Members Concurring: Carver, Hernandez, Schachter, Hylton

Board Members Dissenting: Barowitz, DeLaney,

Board Members Absent: Roche

DATE LOFT BOARD ORDER MAILED: **APR 27 2018**

Opinions from the April 19, 2018 Loft Board Meeting

#7, Lindbaek and Mosley, 736 Broadway

Opinion of Chuck DeLaney:

As the Loft Board tenant representative, I voted against adopting this order.

It remains my conviction that units in IMD buildings that were originally registered under MDL 281.1 but which had not legalized and left the Loft Board's jurisdiction at the time MDL 281.5 was added to the Loft Law, should be covered under 281.5, despite a sale of rights having taken place. That's the case in the 10th floor unit in this building. There's nothing in section 281.5, which includes a great deal of exclusionary provisions (windows, basements, etc.), that speaks to excluding units such as this. Allowing owners to purchase rights under MDL 286.12 and then not legalize for many years sets the wrong policy.