Matter of Lundahl

OATH Index Nos. 1215/20, 1218/20 (Oct. 3, 2023)
[Loft Bd. Dkt. Nos. PO-0113, TA-0264,
239 Banker Street, Brooklyn, N.Y.]

Tenant, the current occupant of a registered interim multiple dwelling unit, failed to prove that he is a protected occupant or that he is entitled to a rent adjustment.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
BRYAN LUNDAHL
Petitioner

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, Bryan Lundahl, applied to the Loft Board ("the Board") on November 21, 2019, for findings that: (1) he is a protected occupant of unit 1D in a registered interim multiple dwelling ("IMD") unit; and (2) he is entitled to a rent adjustment because the rent charged by the owner or its predecessors exceeds the lawful rent (ALJ Exs. 1, 3). Mult. Dwell. Law ("MDL") § 281(5) (Lexis 2023); 29 RCNY §§ 2-08, 2-09(b) (Lexis 2023). The building's owner, Workable 239 LLC, filed answers opposing the applications and the Board referred the matter to this tribunal for a hearing (ALJ Exs. 2, 4).

The case was first scheduled for conference in March 2020, prior to widespread closures that occurred due to the COVID pandemic (Tr. 4). In November 2022, following additional conferences, this tribunal granted a request by petitioner's counsel, David Frazer, Esq., to withdraw as counsel, due to a breakdown in communication between him and petitioner (Tr. 4-5). Petitioner later retained new counsel, Fred Seeman, Esq., who filed a notice of appearance and moved to adjourn trial, which had been scheduled for mid-April (ALJ Ex. 4, March 14, 2023, email). Over the owner's objection, trial was adjourned to June 26, 2023 (ALJ Ex. 4, March 16, 2023, email).

On April 10, 2023, this tribunal granted Mr. Seeman's motion to withdraw as counsel due to irreconcilable differences with petitioner regarding litigation tactics and Mr. Seeman's assertion that he could not fulfill his professional obligations by continuing to represent petitioner (Tr. at 5-6, 11; ALJ Ex. 5, April 10, 2023 email; Ex. 6, April 4, 2023, email). I advised petitioner of the risks of self-representation and told him that he would have two months to retain new counsel (Tr. 11-12). Petitioner was also advised that if he failed to obtain new counsel he should prepare to represent himself at trial (Tr. 11-12).

As of May 10, 2023, petitioner had not retained new counsel, but he stated that he had been in contact with and was waiting to hear back from an attorney (Tr. 20; ALJ Ex. 5, May 10, 2023, email). On June 22, 2023, however, the attorney identified by petitioner informed this tribunal that he would be unable to represent petitioner (Tr. 20-21; ALJ Ex. 7, June 22, 2023, email). Based on the age of the case and petitioner's failure to obtain new counsel, trial commenced as scheduled on June 26, 2023 (Tr. 21). *See Matter of Gatien*, OATH Index Nos. 2121/13, 1033/14, & 2233/14 at 5 (May 13, 2016), *adopted*, Loft Bd. Order No. 4553 (Sept. 15, 2016) (declining to grant additional adjournment to obtain new counsel where trial had been previously adjourned for seven weeks after respondent's counsel's motion to withdraw had been granted and respondent had failed to secure new counsel). I explained the trial process to petitioner and advised him that, although he would be expected to follow this tribunal's rules, he would be given latitude regarding discovery and procedures (Tr. 24-26).

At trial, petitioner testified on his own behalf and presented testimony from two other tenants, the owner presented testimony from one witness, and both sides offered documentary evidence. For the reasons stated below, petitioner's applications should be denied.

ANALYSIS

Protected occupancy claim

In December 2015, then-landlord Northside Lofts LLC registered the building located at 239 Banker Street, Brooklyn ("the building"), as an IMD under section 281(5) of the Multiple Dwelling Law (Resp. Ex. B).[1] Northside Lofts LLC also registered more than 70 residential units

[1] Because unit 1D is covered under section 281(5) of the MDL, the 2019 amendments to the Loft Law, which involved changes in the criteria for coverage and added a 2015-2016 window period, have no impact on petitioner's protected occupancy application. *See Matter of Hughes*, Loft Bd. Order No. 5112 at 2 (Mar. 25, 2022), *adopting*, OATH Index No. 654/20 (Jan. 29, 2021).

in the building, including unit 1D, as covered IMD units (*Id.*). The registration identified Claudia Bona Cohen as the current residential tenant of unit 1D (*Id.*). In September 2019, current owner, Workable 239 LLC, acquired the building (Resp. Exs. E, F).

On November 21, 2019, petitioner applied for protected occupancy and alleged that he is the prime tenant of Unit 1D, pursuant to a lease dated October 1, 2014 (ALJ Ex. 1 at 5). Petitioner further alleged that Ms. Cohen, the registered protected occupant, and all the other co-tenants, had permanently vacated unit 1D (*Id.*). According to petitioner, unit 1D is his primary residence and he was the protected occupant of the unit pursuant to subsection 2-09(b)(3) of the Loft Board's Rules (*Id.*).

Under the relevant subsection of the Loft Board's Rules in effect when the application was filed, a residential occupant who took possession after June 21, 2010, for a unit covered under section 281(5) of the MDL, is qualified for protection if the occupant "is a prime lessee with a lease currently in effect or, if the occupant took possession of the IMD unit with the consent of the landlord, as a statutory tenant pursuant to Article 7-C, without the issuance of a new lease." 29 RCNY § 2-09(b)(3)(i).

Petitioner's evidence

Petitioner contends that he is the prime lessee based on an October 2014 lease. Alternatively, he contends that he took possession of the unit with the landlord's consent.

The evidence, including tax records, bank statements, and credit card statements submitted by petitioner, shows that he has lived in unit 1D since 2014 (Pet. Exs. 1-9, 19, 20, 24). Petitioner testified that he has lived in unit 1D continuously since 2014, when he and three other roommates moved into the five-bedroom unit with Ms. Cohen, who already occupied one of the bedrooms (Tr. 272). From 2014 to 2016, petitioner paid his share of the electric bills via Venmo to Ms. Cohen, who paid Con Edison (Tr. 27; Pet. Ex. 13). From late 2016 to early 2017, Ms. Cohen and the other roommates moved out (Tr. 96, 272). After Ms. Cohen moved out, petitioner paid the Con Edison bills for the unit and the remaining roommates paid their share of the utility bills to petitioner via Venmo (Tr. 27-28, 96-97, 100-01, 105-07, 271; Pet. Ex. 14).

Despite the evidence that he has lived in unit 1D, petitioner offered unsupported, vague, and conflicting evidence that he is a prime lessee or that he took possession of unit 1D with the landlord's consent.

Petitioner testified that in late September 2014, when he was living in an Airbnb sublet in Williamsburg, he saw a Craigslist advertisement for an apartment in the building at issue (Tr. 58, 181-82, 208). He replied to the advertisement via an anonymous email address provided by Craigslist, and received a reply stating that there was an available room for $850 (Tr. 60, 63-64, 152; Pet. Ex. 10, September 29, 2014, emails). After a few more emails, petitioner provided his phone number and exchanged text messages with a person named Mina Owliaei (Tr. 203-04; Pet. Ex. 10, September 29, 2014, emails).

Later that evening, petitioner went to the building and met Ms. Owliaei and Ms. Cohen in unit 1D (Tr. 69-70, 204). Besides the room that Ms. Cohen already occupied, there were four other bedrooms in the unit (Tr. 192, 195, 200). Petitioner, who knew another person who lived in the building, agreed to "accept a room in the apartment" and Ms. Owliaei forwarded to him an email from "Sam" at zalmens@yahoo.com (Tr. 87, 211-12; Pet. Ex. 10, September 29, 2014, email). The email from Sam to Ms. Owliaei, dated September 11, 2014, had an application attached and included the following instructions, "Please fill out and return along with proof of income and photo ID" and "Please forward email to roommate" (Tr. 213; Pet. Ex. 10, September 29, 2014, email; Pet. Ex. 23). Petitioner completed the application and submitted it to Sam (Tr. 212-13, 218). Because petitioner was working as a freelancer, Sam sent him a text message requesting additional proof of income, which petitioner sent to Sam via email (Tr. 65-66, 213; Pet. Ex. 10, October 1, 2014, email).

On October 3, 2014, petitioner, Ms. Cohen, and three other roommates met Sam inside unit 1D (Tr. 26-27, 87-88, 205). According to petitioner, they all read and signed the lease in the presence of Sam, who also signed the lease (Tr. 88, 139, 220, 239-40). Petitioner asked who to make the checks payable to and Sam replied, "Bedford Carol" (Tr. 88). After receiving the checks from petitioner, Sam provided the tenants with keys to unit 1D (Tr. 239). Sam left with the checks and the lease (Tr. 237). Sam told petitioner that, in the future, he could leave checks in the building's mailbox (Tr. 240, 248).

According to petitioner, he never received a copy of the signed lease (Tr. 139). Petitioner claimed that he and his roommates repeatedly asked Sam for a copy but he never supplied one (Tr. 237, 240, 241, 248). Petitioner claimed that he took a photograph of the lease with his cell phone, but he could not obtain that photograph because he no longer had that phone (Tr. 151).

Four months before trial, Ms. Owliaie sent petitioner an unsigned copy of the lease via email (Tr. 334; Pet. Ex. 10, February 7, 2023, email; Pet. Ex. 22). The unsigned lease, dated October 1, 2014, identifies Northside Lofts LLC as the landlord, and petitioner, Ms. Cohen, and the three other roommates as the tenants of unit 1D (Pet. Ex. 22). The lease was for two years, the monthly rent was $4,500, and the tenants were required to pay the first and last months' rent at signing (*Id.*). According to the lease, no security deposit was required, but the tenants agreed to pay the equivalent of one month's rent to the real estate broker and the owner would reimburse that amount when the tenants vacated the unit (*Id.*). Petitioner also introduced a screenshot from the Zillow website showing that unit 1D was listed for rent for $4,500 in September 2014, and that listing was removed in November 2014 (Pet. Ex. 11).

At trial, petitioner claimed that his share of the monthly rent was $875 (Tr. 198). He introduced copies of two checks that he wrote, payable to Bedford Carol, dated September 30 and October 2, 2014, for $2,050 and $400, respectively (Tr. 94; Pet. Ex. 12). Petitioner also produced two more checks that he wrote to Bedford Carol on October 10 and 12, 2014, for $475 and $100, respectively (*Id.*). None of the checks refer to unit 1D (*Id.*).

Petitioner testified that, when he first saw unit 1D in 2014, Ms. Owliaie was a tenant in the building (Tr. 67). It was petitioner's understanding that the building's owners and management allowed Ms. Owliaie to show apartments to potential tenants (Tr. 67, 190). When asked for the basis for that understanding, petitioner initially testified that he did not know (Tr. 190). Next, he said that he "kind of put that together" because Ms. Owliaie lived in the building and showed apartments to people (*Id.*). Finally, petitioner stated that Ms. Owliaie said that she worked for the landlord, whom she identified as "Sam" (Tr. 190-91).

According to petitioner, Sam was "in charge of the building" at the time and his real name was Israel Perlmutter (Tr. 220). Petitioner stated that, although he could not prove it, Sam was "known to everyone as the landlord" and Ms. Cohen also referred to him as the landlord (Tr. 220, 225-26). Asked whether Mr. Perlmutter owned the building, petitioner replied, "No. I just know that Sam, who I believe was Israel Perlmutter, was in charge of leasing apartments" (Tr. 221). Petitioner further claimed that if there was a problem in the building, the tenants all had Sam's phone number (Tr. 246). However, petitioner could not recall any specific problem that he called Sam about (Tr. 246). Petitioner also stated that he called "Ruben," the building superintendent or manager, with routine maintenance problems (Tr. 247-48).

To support his claim that Mr. Perlmutter was "associated with the building," petitioner introduced a court decision that referred to Mr. Perlmutter and Menachem Stark as members of Meserole Factory LLC, a company that purchased the building in 2005 (Tr. 222; Pet. Ex. 16). According to petitioner, newspaper articles referred to Mr. Perlmutter as "Sam" (Tr. 223). Petitioner further claimed that he "assumed" that Sam was affiliated with Northside Lofts LLC, the company that leased the building in 2014 (Tr. 225). When asked if it was possible that Sam was just a broker, petitioner testified, "It's possible, but I don't believe that to be the case" (*Id.*).

According to petitioner, he did not recall receiving anything from the owner about registering the building with the Loft Board in 2015 (Tr. 273-75; Resp. Ex. B). Petitioner insisted that his roommate, Ms. Cohen, never told him that she had received the application or that the owner had registered her as the protected occupant of unit 1D (Tr. 276-77). Though petitioner claimed that he started looking into protected occupancy when the current owner purchased the building in 2019, he insisted that he never saw the 2015 registration application prior to trial (Tr. 275, 277-78; ALJ Ex. 1; Resp. Ex. B).

Petitioner did not call Ms. Owliaei, Ms. Cohen, or any of his former roommates to testify. Instead, petitioner presented testimony from two tenants of other units who have lived in the building since 2013. Brett Heicher testified that Sam took over the building in January 2014, petitioner moved into unit 1D in October 2014, and Ms. Cohen was one of petitioner's roommates until she moved out in 2015 (Tr. 32-33, 35-36). Mr. Heicher did not remember Ms. Owliaei (Tr. 32). Though he did not recall making payments to Bedford Carol, Mr. Heicher asserted that other tenants paid rent to different people and one of them may have paid Bedford Carol (Tr. 34, 37-38). When Mr. Heicher last paid rent, in November 2015, he paid "Northside Lofts" (Tr. 37).

Gregg Burgmeister, who has known petitioner since 2011, testified that Ms. Cohen and others were petitioner's roommates in unit 1D (Tr. 42-43, 50). After Ms. Cohen moved out, Mr. Burgmeister stayed in touch with her via text messages and social media (Tr. 43). Mr. Burgmeister said that he was no longer in touch with Ms. Cohen, but she still lives in New York (Tr. 51). He recalled that Ms. Owliaei was "around the building" and she showed apartments to potential tenants (Tr. 45, 50). Mr. Burgmeister stated that Sam is also known as Israel Perlmutter and that Sam was one of the building's owners and their company name was "Northside Lofts" (Tr. 45-47).

Owner's evidence

Adam Heller, a managing member of the building's current owner, Workable 239 LLC, offered credible testimony, supported by documentary evidence, to show that Northside Lofts LLC was the building's landlord when petitioner moved into unit 1D in 2014 (Resp. Ex. D). Northside Lofts LLC was owned and managed by Joseph Brunner and his holding company, Brunner Realty (Tr. 287-88, 305; Resp. Ex. D). Israel Perlmutter was a former owner of the building and member of Meserole Factory LLC, who transferred title to the building to JL Take Two LLC and LL Take Two LLC in April 2012 and, on the same date, Northside Lofts LLC leased the entire building (Tr. 229-30, 304-05; Resp. Exs. C, D). 239 Holdings LLC acquired the building in March 2016 and the current owner, Workable 239 LLC acquired the building in September 2019 (Resp. Exs. E, F).

After learning of the phone number for "Sam," during trial, Mr. Heller phoned that number and asked "Sam" whether he was Israel Perlmutter (Tr. 290). Sam replied "No" and said that he was Zalmen "Sam" Schwartz, a real estate broker and sole shareholder of Bedford Carol (Tr. 290). Mr. Schwartz also said that he used the email address Zalmens@yahoo.com to broker apartments, and he also worked as a broker "mainly" for Brunner Realty (Tr. 290-91, 304-05; Resp. Ex. G).

According to Mr. Heller, he first learned of petitioner's name in November 2019, when petitioner filed the protected occupancy application (Tr. 291, 300). After receiving the application, Mr. Heller spoke to the property manager and counsel, and nobody knew petitioner (Tr. 299-300). Mr. Heller searched "all of our files" and found no documents referring to petitioner (Tr. 299-300). According to Mr. Heller, Workable 239 LLC registered almost all of those who applied for protected occupancy because there was evidence of some payment to Northside Lofts LLC (Tr. 300). But there was no lease, no payment records, and no other documents referring to petitioner (Tr. 285-87, 300). Mr. Heller stated that no other tenant had made payments to Bedford Carol and the only lease he had ever seen for unit 1D was the one signed by Ms. Cohen in October 2013 (Tr. 297, 301-02; Resp. Ex. A).

Rebuttal evidence

In an effort to rebut Mr. Heller's testimony, petitioner presented a photograph of a man and two women inside unit 1D on September 16, 2019 (Tr. 381-20; Pet. Ex. 28). Petitioner initially testified that the man in the photograph identified himself as Joseph Brunner (Tr. 317-18). When pressed, however, petitioner stated that the man referred to himself as "Joseph" and the owner (Tr.

321-22). According to petitioner, there were nine other men in the unit, not depicted in the photograph, and they were there to install an air conditioner (Tr. 321-22).

In reply, Mr. Heller, who had met Mr. Brunner a dozen or more times, testified that the man in the photograph, who supposedly referred to himself as "Joseph" and the "owner," was not Joseph Brunner (Tr. 324). Mr. Heller also said that "major" work, such as replacing or installing air conditioners, did not occur in September 2019 (Tr. 325). When shown a photograph of an air conditioner in the building, which petitioner claimed was being replaced in a single unit at the end of a hallway, Mr. Heller expressed surprise and said that he had a "hard time believing" that petitioner's claim regarding the date was correct (Tr. 328).

Petitioner did not prove that he is a protected occupant

To prevail, petitioner must prove, by a preponderance of credible evidence, that he is a protected occupant. *See* Prince, Richardson on Evidence § 3-206 (Lexis 2008) (the "burden of proving a fact by a preponderance of the evidence" means "the existence of the fact is more probable than its non-existence"). In assessing credibility, relevant factors include witness demeanor; consistency of testimony; supporting evidence; witness motivation, bias, or prejudice; and the degree to which a witness's testimony comports with human experience. *See Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Petitioner failed to prove that he is a prime lessee. There is no proof that Northside Lofts LLC, the building's landlord in October 2014, ever signed a lease. The unsigned document introduced by petitioner does not establish that he is a lessee (Pet. Ex. 22). *See Walber 82 St. Assoc., LP v. Fisher*, 217 A.D.3d 469, 470-71 (1st Dep't 2023) (leasehold cannot be conveyed without delivery of a fully executed lease to lessee). Petitioner did not produce a photograph of the signed lease that he allegedly took with his cell phone, he did not produce testimony or written statements from Ms. Cohen, their other three roommates, or "Sam," who supposedly witnessed the signing of the lease and the handing over of the keys, and he did not rebut Mr. Heller's credible testimony that the only existing lease was the one signed by Ms. Cohen in 2013.

The evidence also failed to support petitioner's claim that he took possession of unit 1D with the landlord's consent. As the Board has recognized, its rules do not define "consent," but the factors that have been considered include whether: the owner accepted rent directly from the residential occupant; the owner began eviction proceedings against the residential occupant; and

the owner has had direct contact with the tenant who filed the protected occupancy application. *Matter of Fogel*, Loft Bd. Order. No. 3550 at 2-3 (Jan. 21, 2010), *accepting in part and rejecting in part*, OATH Index Nos. 2025/08 & 2026/08 (Aug. 31, 2009) (protected occupancy found where evidence showed that owner accepted tenant's portion of the rent directly from the tenant for five years and owner had direct contact with tenant regarding building issues); *see also Matter of Tenants of 79 Lorimer Street*, OATH Index No. 1020/16 at 13 (Mar. 23, 2017), *adopted in part, rejected in part*¸ Loft Bd. Order No. 4688 (Sept. 21, 2017) (single payment by tenant for a portion of the rent for a unit does not establish that owner consented to statutory tenancy).

Here, petitioner initially maintained that "Sam" was the landlord; Sam's real name was Israel Perlmutter; and Mr. Perlmutter owned or was affiliated with the building. Petitioner supported that claim with vague testimony from two friends who lived in the building. When the owner countered with credible evidence that Sam was Mr. Schwartz, a real estate broker and owner of Bedford Carol, and Mr. Perlmutter was a former owner who no longer owned the building in 2014, petitioner argued for the first time in rebuttal that Mr. Brunner knew that petitioner was a tenant based on a visit to the unit in September 2019. None of these claims withstand scrutiny.

Petitioner failed to prove that Mr. Brunner or any other owner of Northside Lofts LLC, the building landlord in 2014, knew of or consented to petitioner's occupancy of unit 1D. There was also no evidence that Northside Lofts LLC or the current owner ever received a check from petitioner. Instead, petitioner produced checks that were paid to Bedford Carol in October 2014. There was no reliable evidence that any other tenant in the building, which has more than 70 registered units, ever paid rent to Bedford Carol.

The testimony that petitioner offered regarding his rent was unclear and contradicted by his documentary evidence. He initially testified, in precise detail, that his monthly rent was $875, one roommate's rent was also $875, each of the three other roommates paid $850 per month, and they were all "on their own" in dealing with the landlord (Tr. 202, 246). When it was pointed out that the five amounts that he referred to only added up to $4,300, instead of the $4,500 monthly rent for the unit specified on the unsigned lease, petitioner said that he may have been mistaken due to the passage of time (Tr. 198-99, 202; Pet. Ex. 22).

Petitioner offered similarly confusing and unclear explanations for checks that he wrote out to Bedford Carol from September 30, 2014, to October 12, 2014 (Tr. 248-50). At first, petitioner claimed that the September 30 check for $2,050 was for the "first and last month's rent,"

even though $2,050 was more than two times $875 (Tr. 248-50, 258; Pet. Ex. 12). Though the unsigned lease states that no security deposit was required and that the broker was entitled to one month's rent at the signing of the lease, petitioner claimed that three additional checks he wrote from October 2 to October 12, 2014, payable to Bedford Carol, in the amounts of $400, $475, and $100, respectively, were all for "security" (Tr. 253, 256-57; Pet. Exs. 12, 22).

When questioned about additional rent payments, petitioner was evasive. He acknowledged that his roommates all paid their rent to Northside Lofts LLC and he claimed that he stopped paying rent "at some point," when he learned that the building lacked a certificate of occupancy (Tr. 264). At first, petitioner testified that he learned about the lack of a certificate of occupancy in February 2015 (Tr. 264). When asked whether he paid rent in January 2015, petitioner replied, "I can't say" (*Id.*). In fact, there was no evidence that petitioner ever paid any rent to Northside Lofts LLC or that he ever made any payments to Bedford Carol after October 12, 2014 (Tr. 263).

Petitioner's testimony regarding his payments to Bedford Carol was unclear and did not prove that Mr. Schwartz or Bedford Carol were agents of the landlord, Northside Lofts LLC. The evidence showed that Bedford Carol received checks from petitioner in October 2014; screenshots of Zillow postings referred to Bedford Carol as the listing agent for other units in the building; and in 2023 Mr. Schwartz told Mr. Heller that he was a real estate broker "mainly for Brunner Realty," which is owned by Mr. Brunner (Tr. 290; Pet. Ex. 11). That meager evidence, based on multiple levels of hearsay, did not prove that Mr. Schwartz or Bedford Carol had actual or apparent authority to act as an agent for Northside Lofts LLC in October 2014. There was no proof that Bedford Carol transferred petitioner's payments to Northside Lofts LLC. And there was no credible evidence that Northside Lofts LLC ever gave Mr. Schwartz or Bedford Carol power to sign a lease, accept rent, or otherwise act on its behalf in connection with unit 1D. *See Hallock v. State*, 64 N.Y.2d 224, 231 (1984) ("Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance or belief that the agent possessed authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority").

The evidence also failed to support the belated claim that Mr. Brunner knew of and consented to petitioner's occupancy of unit 1D. Petitioner's testimony on this point was misleading, unsupported, and unpersuasive. To support this claim, petitioner produced a single

photograph on rebuttal and claimed that the man depicted in the photograph "introduced himself as Joseph Brunner" (Tr. 320-21). When pressed, however, petitioner said that the man simply identified himself as "Joseph" and "the owner," and he never referred to himself as "Brunner" (Tr. 322).

Mr. Heller had many more dealings with Mr. Brunner and I credited his claim that Mr. Brunner was not the man depicted in the photograph (Tr. 316). Even if I had credited petitioner's unsupported testimony that Mr. Brunner was depicted in the photograph in September 2019, that evidence fails to prove that Mr. Brunner knew who petitioner was or that he had consented to petitioner's occupancy of unit 1D.

Effective March 31, 2023, the Board amended its rules, essentially codifying the holding in *Fogel*, and specified that acceptance of rent, contacting the occupant for access, or listing the occupant on Loft Board filings by the "Owner or Agent," or "any other factor the Board deems relevant" may be used to determine whether the occupant occupied the unit with the owner's consent. *See* 29 RCNY § 2-08(s)(4)(ii) (Lexis 2023). There is no indication that the amended rules are to be applied retroactively. *See Matter of Gleason [Michael V. Ltd.]*, 96 N.Y.2d 117, 122 (2001) ("[a]mendments are presumed to have prospective application" unless there is an explicit or clearly indicated preference for retroactivity); *cf. 100 Metropolitan Ave.*, OATH Index Nos. 2346/13, 1151/16, 1542/16, & 596/17 at 2 (July 8, 2019) (noting that 2019 amendments to the MDL were to take effect "immediately" and explicitly applied to "applications pending approval or on appeal").

Even assuming the amended rules applied to this application, filed more than three years before the effective date of the amendment, it would not change the outcome. The rules continue to require evidence of the owner's consent where an applicant for protected occupancy, who is not a prime lessee, took possession of a unit covered by section 281(5) of the MDL after June 21, 2010. *See* 29 RCNY § 2-08(s). Because the evidence failed to prove that petitioner is a prime lessee or that the building's owner knew of or consented to his occupancy of unit 1D, the protected occupancy claim should be dismissed.

Overcharge application

Petitioner alleged that he is entitled to a rent adjustment because the current and former owners of the building charged him rent in excess of the lawful amount (ALJ Ex. 3). To prevail

on this claim, petitioner has the burden of proving that he is a protected occupant and that he paid more than the lawfully authorized rent. *Matter of Brandman*, OATH Index No. 1681/15 at 6 (Mar. 2, 2017), *adopted*, Loft Bd. Order No. 4944 (Feb. 20, 2020). For a building, such as this one, registered under section 281(5) of the MDL, the lawfully authorized rent is based on the lease in effect on June 21, 2010. *See* 29 RCNY § 2-06.2(b)(4)(i).

Because petitioner failed to prove that he is a protected occupant, the rent adjustment application should be denied. Petitioner also failed to prove what the lawful rent was on June 21, 2010, or that he actually paid rent that exceeded the lawful amount. *See Rader v. Grand Morgan Realty Corp.*, Loft Bd. Order No. 3513 (June 18, 2009), *adopting in part, modifying in part*, OATH Index Nos. 207/08 & 208/08 (Jan. 4, 2008) (tenants' uncorroborated testimony was insufficient to prove rent payments without evidence of canceled checks, bank statements, owner's statements, or other prima facie evidence of payments); *Matter of Solomon*, Loft Bd. Order No. 3542(July 17, 2018) (overcharge claim denied where tenant failed to provide sufficient evidence of consistent rent payments either by canceled checks or bank statements for four years at issue); *see also Fogel*, Loft Bd. Order No. 3550 at 3.

As noted, there was no proof the landlord ever accepted the October 2014 checks that petitioner introduced at trial. Petitioner also offered conflicting and unclear evidence regarding the rent that he allegedly paid that month. Though petitioner claimed that his share of the monthly rent was $875 and the total monthly rent for the unit was $4,500, the checks that he presented in evidence did not match those amounts and there were no documents offered to show what, if anything, his four roommates paid. And there was no proof that petitioner paid any rent after that first month. Thus, petitioner has failed to show that he is entitled to a rent adjustment.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that he is a protected occupant of unit 1D, as alleged in his application.

2. Petitioner failed to prove that he is entitled to a rent adjustment.

RECOMMENDATION

Petitioner's applications should be denied.

Kevin F. Casey
Administrative Law Judge

October 3, 2023

SUBMITTED TO:

JAMES S. ODDO
Commissioner

APPEARANCES:

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