Matter of Kuonen

OATH Index No. 685/13 (Feb. 27, 2014), *adopted*, Loft Bd. Order No. 4333 (Oct. 24, 2014)
[Loft Bd. Dkt. No. TR-0948]

Petitioners seeking coverage under Loft Law amendments are protected occupants under MDL 281(5).

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
RYAN KUONEN, JENNIFER COX, AND PATRICK STETTNER
Petitioners
-against-
140 METROPOLITAN REALTY CORP. AND MET BERRY LLC
Respondents

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This second amended application, filed on August 30, 2012, by Ryan Kuonen, Jennifer Cox, and Patrick Stettner ("applicants" or "petitioners"), first and sixth floor occupants of the building located at 140 Metropolitan Avenue, Brooklyn, seeks a finding that they are protected occupants of an interim multiple dwelling (IMD) covered under the Loft Law (ALJ Ex. 1).[1] *See* Mult. Dwell. Law (MDL) § 281(5) (Lexis 2013); 29 RCNY §§ 2-08, 2-09(b) (Lexis 2013). The corporate owner of the building, 140 Metropolitan Realty Corp., answered the original application on November 8, 2011 (ALJ Ex. 3), but maintains a neutral position in the case and did not answer subsequent amended applications. Met Berry LLC ("Met Berry"), assignee of a prime lease for the first, second, third and fifth floors, answered the second amended application on November 30, 2012, disputing that Ryan Kuonen, the first floor occupant, is entitled to coverage (ALJ Ex. 2). Met Berry does not oppose the application of Cox and Stettner for coverage of the sixth floor unit.

[1] Several other applicants, namely Gillian Fox, Rhys Loggins, Katie Cooper, Helena Zhang, Si Xie, and Michael Swarbrick, withdrew coverage applications for their occupancy of the first, fourth and fifth floors, some as the result of settlements.

The Loft Board referred the matter to this tribunal for a hearing. 29 RCNY § 1-06(j)(2)(ii). At the hearing held before me on five dates from April 29 to July 29, 2013, the parties put on nine witnesses, including a rebuttal case, and offered documentary evidence. Post-trial briefs were fully submitted on November 25, 2013, at which time the record was closed. The owner did not submit a post-trial brief. For the reasons set forth below, petitioners' coverage application should be granted.

ANALYSIS

The Loft Law was amended in 2010, creating a new qualifying window period in 2008 and 2009 and expanding into new areas. Under the amendment, an IMD is defined as any building that: (1) at any time was occupied for manufacturing, commercial, or warehouse purposes; (2) lacks a certificate of compliance or occupancy; (3) is not owned by a municipality; and (4) was occupied "as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing" January 1, 2008, and ending December 31, 2009. MDL § 281(5); 29 RCNY § 2-08(a)(4)(i). *See Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep't 2012); *Laermer v. NYC Loft Bd.*, 184 A.D.2d 339 (1st Dep't), *lv denied*, 81 N.Y.2d 701 (1992). A "family" for purposes of the Loft Law is defined as one or more persons "occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers." MDL § 4(5) (Lexis 2013).

To qualify as a covered residence, the unit (i) must not be located in a basement or cellar and must have at least one entrance that does not require passage through another residential unit to obtain access to the unit; (ii) must have 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) must be at least 400 square feet in area. MDL § 281(5); *see also* 29 RCNY § 2-08(a)(4)(iii). *See Madeline D'Anthony Enterprises*, 101 A.D.3d at 607; *Matter of Mignola*, OATH Index No. 2482/11 at 3 (May 29, 2013). None of these requirements are contested here. The unit must also "possess sufficient indicia of independent living to demonstrate its use as a family residence." *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986); 29 RCNY § 2-08(a)(3). This includes a showing that the premises have been converted, at least in part, into a dwelling (*id.*). For coverage purposes, a unit need not be the sole residence of the occupant during the window period. *See Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769, 770 (1987); *Kaufman v. American*

Electrofax Corp., 102 A.D.2d 140, 142 (1st Dep't 1984).

Interim Multiple Dwelling

There is no dispute that the building has been occupied for commercial use, it lacks a certificate of occupancy, and it is not owned by a municipality. Thus, to prove the building is an IMD, petitioners bear the burden of establishing that the building was occupied as the residence of three or more families living independently from one another for 12 consecutive months during the window period. 29 RCNY § 2-08(a)(4)(i). Petitioners have met their burden.

Although only the first and sixth floor units are seeking coverage in this case, the applicants offered evidence of residential occupancy in several other units to meet its burden. *Korn v. Batista*, 131 Misc.2d 196, 199 (Sup. Ct. N.Y. Co.), *aff'd*, 123 A.D.2d 526 (1st Dep't 1986) (without a finding of three or more residential units during the window time period, there can be no Loft Law protection, citing MDL § 281(1)).

Third floor

Noemie Lafrance is a choreographer who lived on the third floor from 2002 until sometime in 2009 under a prime lease with the owner (Tr. 507, 546). 140 Metropolitan Avenue was her only residence during the seven-year period. Lafrance also ran her not-for-profit arts organization, Sens Production Inc. ("Sens"), from the third floor where she located its office and dance rehearsal studio (Tr. 503). Sens was the prime lessee of the first, second, third, and fifth floors of the building from 2005 to 2011 (Tr. 502-03).

While Lafrance lived there, the third floor unit had a kitchen with a stove, refrigerator and sink, a bathroom with a toilet and shower, and a bedroom (Tr. 546-47). Lafrance shared the unit with roommates and when she moved out in 2009, Natalie Galaska and Aaron Bell were living there. She testified that Bell and Galaska, who worked for Lafrance's company, lived on the third floor on June 21, 2010 (Tr. 508-09). The evidence established that the third floor was residentially occupied for at least 12 consecutive months in 2008 and 2009.

Second floor

William Smolen lived in the second floor unit from February 2007 until October 2011, sharing the unit with several other occupants (Tr. 11, 568). Smolen signed an occupancy agreement with Noemie Lafrance on January 29, 2007, agreeing to pay $875 per month for a "single room" (Resp. Ex. A). He paid rent to Lafrance, who he considered to be his landlord (Tr. 14, 33). He paid his rent on the third floor where Lafrance lived and worked (Tr. 15, 33).

During Smolen's occupancy, the second floor unit had a bathroom with a shower, toilet, and sink, and a kitchen with refrigerator, stove and sink (Tr. 12). According to a plan view diagram, the second floor unit is a loft space of approximately 50 feet by 32 feet in area, with four bedrooms, a living and dining area, kitchen, bathroom and entryway (Pet. Ex. 2). Smolen offered several photographs that show the residential use of the unit (Pet. Exs. 1A-1H). The furniture in the common areas was provided by Lafrance and by current and former occupants, but Smolen supplied his own bedroom furnishings (Tr. 30-32, 49). He referenced at least nine other individuals with whom he resided during his years in the unit (Tr. 14, 32-33).

The evidence established that the second floor was residentially occupied for at least 12 consecutive months in 2008 and 2009.

Fourth floor

Katie Cooper testified that she continuously resided in the fourth floor unit from 2005 to 2012 (Tr. 90-91). She paid rent to a man named "Larry" who lived in Florida, whose legal relationship to the building was unclear to her. Cooper provided 12 months of bank statements directed to her in 2008 at 140 Metropolitan "apt 4" (Pet. Ex. 4). She also produced her driver's license and Board of Elections registration during the window period (Pet. Exs. 5, 7).

Although it had furnishings, Cooper moved into the unit with a bed, dresser, and chairs (Tr. 96). The unit had three bedrooms, a kitchen with a stove and refrigerator, a dining room, and bathroom with shower, sink and toilet (Tr. 91-92). She shared the unit with a friend named Sylvia Hartowitz and another roommate until 2007, when Hartowitz moved out (Tr. 104-05). Cooper then assumed the entire rent herself, but continued to let out the other rooms to roommates. Each roommate had exclusive use of a bedroom and shared the common areas (Tr. 106). They paid rent to Cooper and she paid the landlord. These facts were not disputed.

The evidence established that the fourth floor unit was residentially occupied by Katie Cooper for the entire window period from 2008 through 2009.

Fifth floor

Richard Meyer rented a room in the fifth floor unit from July 1, 2007, until 2011 (Tr. 345-46, 568). Meyer recalled meeting Lafrance in her third floor office when he went to look at the unit (Tr. 359).

Meyer said there were five rented bedrooms in the unit, plus a large common area with a living room and kitchen, which had a sink, stove, and two refrigerators (Tr. 346). There was a

bathroom inside the unit and one in the hallway. According to a plan view diagram, the fifth floor unit is a loft space of approximately 50 feet by 32 feet in area, with five bedrooms, a living and dining area, kitchen, bathroom and entryway (Pet. Ex. 9). Meyer had exclusive use of his bedroom and he shared the common areas of the apartment (Tr. 365-66).

He and his roommates would vote on choosing a new roommate, but Noemie Lafrance conducted the business necessary to getting a vacant room rented and had ultimate authority over the selection (Tr. 376, 380-86). Although Meyer said he could overrule Lafrance's decision on a new roommate, he acknowledged that she did not need his permission to rent out a room (Tr. 393-94). According to Lafrance, 15 to 20 people lived on the fifth floor during the 2008-2009 window period (Tr. 512).

The evidence is sufficient to establish that the fifth floor unit was residentially occupied by Richard Meyer for the entire window period from 2008 through 2009.

Sixth floor – Unit seeking coverage

Residential occupancy of the sixth floor unit by Jennifer Cox and Patrick Stettner is not contested. Although in its answer Met Berry disputed that Cox and Stettner occupied the sixth floor for 12 consecutive months during the window period (ALJ Ex. 2), Met Berry subsequently conceded that the sixth floor was residentially occupied during the window period and otherwise meets the requirements of article 7-C (E-mail from H. Shapiro to ALJ Richard, D. Frazer, and G. Proefriedt of Apr. 25, 2013). The owner has made the same concession (E-mail from G. Proefriedt to ALJ Richard, D. Frazer and H. Shapiro of Apr. 25, 2013). Met Berry's post-trial brief did not address Cox's or Stettner's residential occupancy and did not challenge it in any way.

Cox and Stettner rent directly from the owner. Stettner testified that he and Cox are married and have lived on the sixth floor continuously since 1999 (Tr. 299, 310). Cox lived there for seven years before Stettner moved in. There is no allegation that the sixth floor was shared by anyone other than Cox and Stettner at any time during their occupancy.

I find that Cox and Stettner are the protected occupants of the sixth floor unit. There is no dispute that they were in possession for 12 consecutive months during the window period and on June 21, 2010.

Petitioners have proved that the second, third, fourth, fifth and sixth floors were residentially occupied by individuals who lived there for at least 12 consecutive months during

the window period.

Met Berry disputes that the first, second, third, and fifth floors are eligible for coverage because of a "guest house" rental arrangement created by Noemie Lafrance, as discussed in greater detail below. Met Berry contends the arrangement created single room occupancies not protected under the Loft Law. I find the argument without merit, but even if it were not so, the analysis of the fourth floor would not be affected because its occupants rented directly from the owner. Met Berry's vague argument disputing fourth floor occupancy (Tr. 628-29) was unavailing. Met Berry's objection to the third floor occupancy -- that Ms. Lafrance ran it "as a hotel" and incidentally to her business (Tr. 628) -- is without merit. Ms. Lafrance leased the third floor directly from the owner and occupied it residentially during the window period, in addition to using it as an office and studio for her business; subleasing part of the space to her employees and others is entirely consistent with the Loft Law. 29 RCNY § 2-09(b)(2); *see Korn v. Batista*, 131 Misc.2d 196. Combining her residential use with income producing activity does not undermine a claim to coverage, since facilitation of the arts-based multi-purpose live/work loft space was "much of the impetus" for the passage of Article 7-C. *See Matter of Muschel*, Loft Bd. Order No. 33, 1 Loft Bd. Rptr. 27, 29 (Nov. 23, 1983).

Thus, at a minimum, applicants have proved the third, fourth and sixth floors were residentially occupied during the window period and qualify the building as an IMD. Met Berry's opposition to protected status for the first floor unit on the basis that the floor was being run as a guest house is addressed below.

First floor – Unit seeking coverage

Sens Production Inc., run by Noemie Lafrance, was the prime lessee of the first, second, third, and fifth floors of the building from 2005 to 2011, which covers the applicable window period (Tr. 502-03). Sens assigned the lease to Met Berry in 2011.[2]

Lafrance testified that she personally leased the first floor of the building in 1994, and by 2005, Sens was the prime lessee of the first, second, third and fifth floors. In 2004, she renovated the third floor by removing rooms and creating a dance studio and office for her business, and a living space for herself (Tr. 507). By 2005, she had renovated all four floors for use as a "guest house," as she characterized it. She built four rooms in the units on the first and

[2] A written assignment was not offered in evidence, but there was testimony that the lease was assigned to Met Berry in 2011 in exchange for $95,000 (Tr. 541, 544).

second floors and five rooms on the fifth floor, and rented them out (Tr. 504, 506). She entered into a 30-day written agreement with each occupant for exclusive use of a bedroom plus shared use of the kitchen, bathroom, and common areas (Tr. 505-06, 519-20). The renters had no right to exclude any other renter from using the kitchen, bathroom, or common areas, and none had the right to occupy any other bedroom besides the one for which they paid rent (Tr. 538, 577). If a renter failed to pay their rent, the roommates were not required to cover the missing portion (Tr. 68-69, 153, 367). The agreements did not specify which room was being rented but Lafrance would discuss it with the prospective renter when she showed them the room, so it was clear what they were renting (Tr. 599-600). The renter had to provide 30 days' notice before vacating.

Met Berry contends this arrangement created single room occupancies that are not protected under the Loft Law.

The rental agreement used by Lafrance, entitled "Sens Production's Guest House," is in part an application form containing the identifying information of the applicant (Resp. Ex. A). By signing, the renter agreed that "I will pay the agreed amount timely and I have read the rules and will respect them during my entire stay at the Sens Production's Guest House" (Resp. Ex. A). The rules state that occupants are not considered tenants, that only a guest house is being provided, and the space may be used only for that purpose (Resp. Ex. B; Tr. 539). Lafrance said the occupancies were intended to accommodate transients, travelers and those working on her art projects (Tr. 540-41). Although Lafrance provided some furniture for the apartments, she conceded that she allowed the renters to bring their own furniture (Tr. 598). She did not provide cleaning or linen services for her renters (Tr. 33-34, 349, 588). With respect to maintenance, she recalled painting the first floor bedrooms once and the fifth floor bedrooms twice during the period 2002 to 2011 (Tr. 583). She never painted the second floor but she did reorganize furniture, which she said she did "many times" on the first floor. She also said that she cleaned and organized the units and had someone come in to clean the first floor before a new renter moved in (Tr. 531). Although the rental agreement was for 30 days, Lafrance told renters that they could stay as long as they wanted as long as they paid their rent (Tr. 519, 575). Some of the renters stayed for many years.

Ryan Kuonen has lived in the first floor unit continuously since 2003 (Tr. 405). She signed the application form and agreement on May 10, 2003 (Pet. Ex. 29). Ms. Kuonen offered

proof of her window period occupancy (which is not disputed) with copies of her driver's license, voter registration, tax forms and bank statements (Tr. 414-17; Pet. Exs. 30-33).

She testified that a Craigslist ad led her in 2003 to Ms. Lafrance, with whom she interviewed and contracted for the rental (Tr. 406-07). She understood that Ms. Lafrance had a prime lease with the owner and that she rented out rooms. Kuonen moved into the third floor unit (where there was a kitchen, bathroom, two bedrooms and a room with a couch) in February 2003. She shared the third floor unit with Ms. Lafrance and a couple from Ireland, who stayed for only a month. When Ms. Lafrance decided in October 2003 to start Sens Productions, she had Kuonen fill out a rental agreement and Kuonen moved onto the first floor (Tr. 410, 447). According to a plan view diagram, the first floor unit is a loft space of approximately 50 feet by 32 feet in area, with bedrooms, a living and dining area, kitchen, bathroom and entryway (Pet. Ex. 8). Kuonen had one of the four bedrooms in the unit and the other three rooms were occupied when she moved in (Tr. 412). She paid Lafrance $875 per month for a small room and, years later, paid $900 per month when she moved into a larger room (Tr. 475). Lafrance paid for gas, electricity and internet service (Tr. 476-77).

Kuonen testified that she had five different roommates in 2008, seven in 2009, and six in 2010 (Tr. 469-72). There was regular turnover and, when a vacancy opened, the roommates would try to fill it through friends of friends, or Kuonen would post an ad (Tr. 422-24). According to Kuonen, the roommates would meet with the candidate and interview them, after which the candidate would meet with Lafrance. Roommate input was meant to ensure compatibility among those who would be sharing the space, according to Kuonen. Lafrance said she placed the ads, conducted candidate interviews and made the selection herself, although she gave consideration to the opinions of Kuonen and the other roommates (Tr. 517, 590-91).

In 2009, Lafrance had a baby and reduced her participation in the rental process (Tr. 424). She gave Kuonen a formal role in renting out the first floor rooms and paid her $100 for each renter she found (Tr. 515). During this time, Kuonen placed the ads, scheduled the interviews, and provided the candidate with the agreement and rules; sometimes Kuonen even collected the deposit and put it into Lafrance's account (Tr. 516-17). Lafrance conceded under cross examination, that there were times during the window period when Kuonen presented her with a new prospective roommate and Lafrance's only input was to meet with them to collect the deposit before they moved in (Tr. 590, 594-96). Lafrance could not recall an instance during the

window period when she signed up a new roommate that Kuonen and the others opposed (Tr. 518, 590-92). Kuonen said there was only one occasion when Lafrance approved a new renter that they had never met; when the roommates objected, Lafrance relented but, by that time, the renter did not want to move in with them (Tr. 425-26).

Met Berry asserts that Lafrance maintained dominion and control of the unit, and that Kuonen and the others are lodgers with non-exclusive occupancies over which the owner never "surrender[ed] dominion" (Resp. Br. at 1), citing *Ashton v. Margolies*, 72 Misc. 70 (Sup. Ct. App. Term 1911) and *Schreiber v. Goldsmith*, 35 Misc. 45 (Sup. Ct. App. Term 1901). To demonstrate, Lafrance testified that she regularly entered the first floor without the renters' consent (Tr. 523). She said "I would go in to say hi, I would go in to pick up rent, I would go in to clean up the space when it needed to be cleaned and I would go in to reorganize the rooms and the furniture before I rented them out. I would go in to go and show the rooms. I would go in to go swing on the swing, whatever" (Tr. 523). In 2008, 2009 and 2010, she went into the first floor unit "[m]any, many times," perhaps as many as 10 times per month. Met Berry cites evidence that Lafrance ran the guest house for transients looking for short term stays in furnished rooms, that she maintained the premises, and she entered the apartments without consent of the renters. In addition, the guest house "rules" that Lafrance disseminated with the application form and agreement put each renter on notice that she should not consider herself a "tenant," because only a guest house was being provided (Resp. Ex. B).

Despite the mantel of "guest house," many renters, including Ms. Kuonen, lived in these lofts for many years. Kuonen has lived in the first floor unit for over 10 years. The renters often brought their own furniture and mixed it in with furniture provided by Lafrance. None of them indicated that Lafrance had a regular presence in the units, and all reported relatively little interaction with her, mostly limited to paying the monthly rent. Kuonen disputed that Lafrance regularly cleaned the first floor. She testified in rebuttal that Lafrance was on tour during the window period and was rarely in their unit, and that she never cleaned it or rearranged furnishings there during that time (Tr. 612-13). I found it difficult to believe that Lafrance conducted any regular cleaning of the unit.[3] Her estimation of 10 visits a month seemed an exaggeration intended to bolster the claim of "dominion and control" over the unit.

[3] Mr. Meyer testified that Lafrance did not clean the fifth floor unit. She recommended a cleaner they might want to use, but the roommates created a schedule for chores and did the cleaning themselves (Tr. 349, 387). There was no evidence that Lafrance did regular cleaning of any of the units she leased.

Met Berry argues that Kuonen rented only a single room for which she paid $900 per month, that she had no right to, or possession of, any of the other bedrooms rented in the first floor unit, and thus had "a typical single room occupancy 'SRO' arrangement" that is not protected under the Loft Law (Resp. Br. at 2-3). The SRO label is an inapt legal description. The Multiple Dwelling Law defines an SRO as "the occupancy by one or two persons of a single room . . . separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment." MDL § 4(16); Admin. Code § 27-2004(a)(17). These occupants did not "reside separately and independently" of one another. Rather, they lived interdependently as roommates who had their own bedrooms and shared a kitchen, bathroom and living and dining areas, not as SRO occupants who must travel a public hallway to access a bathroom (shower room or water closet) often made accessible by key. *See* MDL § 248 (setting forth SRO requirements for occupancy, egress, ventilation, fireproofing, cooking, heating, etc.). Notably, this argument was rejected by the tribunal in *Matter of Mignola*, OATH 2482/11 at 7.

While it is true that Kuonen had no possessory right to the other rented bedrooms in the loft unit, that is not a distinction recognized in the Loft Law. She was not the prime lessee but the Loft Law does not require her to be, nor does the law require the prime lessee's occupancy of the unit in conjunction with Kuonen's occupancy. *See* 29 RCNY § 2-09(a) ("Prime lessee means the party with whom the landlord entered into a lease or rental agreement for use and occupancy of a portion of an IMD, which is being used residentially, regardless of whether the lessee is currently in occupancy or whether the lease remains in effect."); *Matter of Mignola*, OATH 2482/11 at 14 (finding as protected, an occupant who rented bedroom and shared kitchen, bathroom, and living space from prime lessee who did not occupy the unit, where the occupant resided in the unit prior to June 21, 2010). Protected residential occupancy is determined by Loft Board rule 2-09(b)(2), which states that:

> If the residential occupant in possession of a covered residential unit is not the prime lessee, the lack of consent of the landlord to a sublet, assignment or subdivision establishing such occupancy does not affect the rights of such occupant to protection under Article 7-C, provided that such occupant was in possession of such unit prior to . . . June 21, 2010, for an IMD unit covered by MDL §281(5) that became subject to Article 7-C pursuant to Chapter 135 or 147 of the Laws of 2010, and these rules.

29 RCNY § 2-09(b)(2); *see 545 Eighth Ave. Assocs. v. NYC Loft Bd.*, 232 A.D.2d 153, 154 (1st Dep't 1996) (applicants who occupied their units prior to May 1, 1987, were entitled to protection, even though they held no lease and occupied without landlord consent); *Kaufman v. American Electrofax Corp.*, 102 A.D.2d 140, 142 (1st Dep't 1984) (rejecting owner argument that protected occupancy must be "open" and with the landlord's knowledge and acquiescence and declining to read into the statute "a meaning and purport that is not expressed therein").

Thus, I find that the plain language of the Loft Law, and the rules promulgated thereunder, is consistent with and not exclusive of Kuonen's occupancy, and that the common law principles cited by Met Berry do not apply here to rights duly asserted under the Loft Law. *See* Pet. Reply Br. at 1, citing *First Hudson Capital LLC v. Seaborn*, 54 A.D.3d 251, 253 (1st Dep't 2008) (court should not create its own common law jurisprudence in heavily legislated and regulated area such as rent stabilization). Under the Loft Law, the operative questions are whether the building is an IMD, defined as a dwelling where the units are "occupied for residential purposes as the residence or home of any three or more families living independently from one another," and whether each unit possesses "sufficient indicia of independent living to demonstrate its use as a family residence" (*Anthony*, 122 A.D.2d at 727; 29 RCNY § 2-08(a)(3)). Both questions are answered here in the affirmative.

140 Metropolitan is an IMD because, during the window period, three or more families were living independently from one another in the building, including on the first, second, third, fourth, fifth and sixth floors. The loft units on the first through sixth floors all meet the definition of family, which leaves room for the allowance of lodgers and roommate situations. *Matter of Mignola*, OATH 2482/11 at 8; *Tenants of 13-15 Thames St.*, Loft Bd. Order No. 4225 at 4 (Jan. 16, 2014) (legal occupancy of an IMD unit consists of one person (or two or more related persons) plus not more than four boarders, roomers or lodgers). A family may be one or more persons in occupancy with "not more than four boarders, roomers or lodgers" (which is "a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein."). MDL § 4(5). All of the families met this legal requirement.

In addition, the evidence proved sufficient indicia of independent living in each of the units, as attested by Kuonen and Swarbrick (first floor), Smolen (second floor), Lafrance (third floor), Cooper (fourth floor), and Meyer (fifth floor). With respect to the first, second, third and

fifth floors, the evidence shows that Lafrance made physical improvements to the units, creating functional residences, one of which also contained a dance rehearsal studio and office work space. There was ample testimony as to the residential nature of the living quarters which had bedrooms, bathrooms, kitchens and common living areas, all the things one would expect to have in a residential apartment. The physical characteristics of the units reflect their residential use as well as "sufficient indicia of independent living." *Compare Matter of South 11th Street Tenants Ass'n*, OATH Index Nos. 1242/96, 1243/96, 1244/96 at 47 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999) (residential use established where the tenant made a physical conversion of the unit that established living and working spaces, enclosed the living area, and installed a bathtub, mail slot and shelves, thereby changing the character of the space from commercial to residential), *with Loft Realty Co. v. Aky Hat Corp.*, 123 Misc.2d 440, 445 (Civ. Ct. N.Y. Co.), *aff'd*, 131 Misc.2d 541 (App. Term, 1st Dep't 1984) (setting aside a "very small space" for an employee to live in does not bring the employee within Loft Law protection).

Met Berry contends that the issue is whether Ryan Kuonen ("who rented a single bedroom") (Resp. Br. at 15) has a right to possession of the entire ground floor unit, when she never held a right to the other bedrooms (Tr. 631, 633). Were it not for the legislative scheme enacted in the Loft Law, that might be the issue under a common law theory. However, the Loft Law bestows rights according to occupancy. Thus, the issue before the tribunal is coverage. As the Appellate Division has stated, "Article 7-C, being remedial legislation, should be liberally construed to spread its beneficial effects as widely as possible. 'Given the choice of two interpretations of the Loft Law, one restricting coverage and one broadening it, the remedial nature of the legislation forcefully argues for the adoption of the latter course.'" *Ass'n of Commercial Property Owners, Inc. v. NYC Loft Bd.*, 118 A.D.2d 312, 318 (1st Dep't 1986), *aff'd*, 71 N.Y.2d 915 (1988), quoting *Ancona v. Metcalf*, 120 Misc.2d 51, 55-56 (Civ. Ct. N.Y. Co. 1983). I find that Ms. Kuonen is a protected occupant of the first floor unit.

The applicants have established that 140 Metropolitan Avenue is an IMD in which three or more units were residentially occupied during 12 consecutive months of the 2008-2009 window period. And I find that Ms. Kuonen has proved her entitlement to protected occupancy of the first floor unit. Cox and Stettner's entitlement to protected occupancy of the sixth floor was not contested (Tr. 628).

FINDINGS AND CONCLUSIONS

1. 140 Metropolitan Avenue is an IMD under MDL 281(5).

2. The first floor is a covered unit and Kuonen is the protected occupant of the unit having proven that she resided in the unit during the entire window period and on June 21, 2010.

3. The sixth floor is a covered unit and Cox and Stettner are the uncontested protected occupants of the unit.

RECOMMENDATION

I recommend that the Loft Board grant applicants' coverage application.

Tynia D. Richard
Administrative Law Judge

February 27, 2014

SUBMITTED TO:

THOMAS FARIELLO, R.A.
Acting Chair

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