Matter of Mignola

OATH Index Nos. 2482/11, 2483/11, 2484/11, 240/12, 808/12, 809/12, 810/12 & 1616/12 (May 29, 2013)
[Loft Bd. Dkt. Nos. TR-797, 822, 828, 851, 960, 963, 964, & 1001, 143-153 Roebling Street, Brooklyn, N.Y.]

Petitioners proved that they are protected occupants of interim multiple dwelling units entitled to coverage under the Loft Law.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
PETER MIGNOLA, JOHN REINECK, DANIEL AYCOCK, PATRICK WEDER, SARAH McMILLAN, TIVONA BIEGEN, KEITH McCULLOCH, DANIEL GORMAN, MIYUKI GORMAN, ISABEL WILSON, TIMOTHY ROSENTHAL, JEREMY SLATER, AND TAMIKA RIVERA
Petitioners
-against-
METROEB REALTY CORPORATION
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioners applied to the Loft Board, under section 281(5) of the Multiple Dwelling Law (MDL) for findings that they are protected occupants of an interim multiple dwelling (IMD) located at 143-155 Roebling Street, also known as 1-19 Hope Street, and 314-330 Metropolitan Avenue, Brooklyn, New York. *See* Mult. Dwell. Law Art. 7-C (the Loft Law); 29 RCNY §§ 2-08, 2-09(b) (Lexis 2012).[1] Respondent, the corporate owner of the building, opposed the applications and the Loft Board referred the matter to this tribunal for a hearing. 29 RCNY § 1-06(j)(2)(ii).

At the nine-day hearing, which ended on September 21, 2012, petitioners presented twenty witnesses and respondent called three witnesses. The parties also offered documentary

[1] Another petitioner, Katrina Vonnegut, withdrew her application after the hearing.

evidence and, following post-hearing submissions, the record was closed on April 2, 2013. For the reasons below, petitioners' coverage applications should be granted.

ANALYSIS

The five-story building is located at 143-155 Roebling Street, Brooklyn, Block 2368, Lot 1, also known as 1-19 Hope Street, and 314-330 Metropolitan Avenue (Pet. Exs. 1, 18). Petitioners seek findings that the building is covered by the MDL § 281(5) and that they are protected occupants of qualifying units within the building. Respondent contends that petitioners are not covered by MDL § 281(5) because they are commercial tenants or roommates.

Preliminary Issue

This matter concerns six consolidated coverage applications; it does not address a building registration and de-coverage application submitted by respondent after this consolidated hearing had commenced.

On February 9, 2012, while this matter was pending, respondent registered the building and listed all of the petitioners -- except Rosenthal, Slater, Rivera, Biegen, and Miyuki Gordan -- as protected occupants under MDL § 281(5). Respondent also registered as protected occupants Lincoln Schnur-Fishman and Emily Abate, who were not parties to this consolidated coverage application, and Vonnegut, who withdrew her coverage application.

On March 27, 2012, the Loft Board received a decoverage application from respondent. Respondent argued that the building, units, and occupants were not covered by the Loft Law because the building did not contain three residential units for twelve consecutive months during the window period; the units did not have required windows, area size, and separate entrances; and roommates or subtenants were ineligible for coverage.

All of the tenants who are petitioners in this consolidated coverage application submitted answers in opposition to the landlord's decoverage application. Other tenants also submitted answers opposing decoverage, but those tenants -- Steven Fishman, Troy Fuller, Elizabeth Fuller, Lincoln Fishman, Brooke Lovell, Vanessa Liberati, and Vonnegut -- are not parties in this consolidated coverage application. The Loft Board referred the decoverage application to this tribunal, which received the referral on May 11, 2012.

Many of the issues raised in the decoverage application are discussed in this report and recommendation. However, this report does not directly address the decoverage application because it was not received by this tribunal until after the petitioners had presented their evidence, none of the parties referred to it during the hearing, and it was not mentioned in the post-hearing memoranda. Moreover, none of the parties moved to consolidate the decoverage and coverage applications and, although the decoverage and coverage applications overlap, the parties are not identical.

The coverage applications for each unit are discussed below.

Multiple Dwelling Law § 281(5)

To be covered by the Loft Law, the building must: (1) have once been occupied for manufacturing, commercial, or warehouse use; (2) lack a certificate of compliance or occupancy; (3) not be owned by a municipality; and (4) have been occupied as the residence or home of any three or more families living independently from one another for twelve consecutive months during the "window period," from January 1, 2008 to December 31, 2009. Mult. Dwell. Law § 281(5).

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 (Tr. 81-82, 86-88; Pet. Exs. 1, 18). The credible evidence also showed that the building was occupied as the residence of three or more families living independently from each other for twelve consecutive months during the window period. Thus, the building is an IMD covered by the Loft Law.

A residential IMD unit entitled to coverage must: (1) not be located in a basement or cellar: (2) have at least one entrance that does not require passage through another residential unit to obtain access to the unit; (3) have at least one window opening onto a street or lawful yard or court as defined in the zoning resolution for such municipality; and (4) be at least 400 square feet in area. *Id.*; *see also* 29 RCNY § 2-08(a)(4)(iii). To qualify for coverage, a unit must possess "sufficient indicia of independent living to demonstrate its use as a family residence." *Madeline D'Anthony Enterprises, Inc. & ZCAM LLC v. Sokolowksy*, 101 A.D.3d 606, 607 (1st Dep't 2012). An applicant must show that the unit has "been converted, at least in part, into a dwelling." *Id.* The unit is not covered if "only a small portion of the space is devoted to residential use, and residential amenities are lacking." *Id.; see also* 29 RCNY § 2-08(a)(3). No

one factor is controlling. *See Matter of South 11th Street Tenants Association*, OATH Index Nos. 1242/96, 1243/96, 1244/96 at 39-40 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999) ("regulations defining a residential unit were deliberately left open-ended to allow for a more flexible approach to coverage determination").

None of the petitioners' units are located in a basement or cellar and all of the units have at least one entrance that do not require going through another residential unit to obtain access. Respondent argued that some of the petitioners had windowless bedrooms with less than 400 square feet of area (Memorandum of Harry Shapiro at 7, February 7, 2013). But petitioners never argued that a bedroom was a qualifying unit. Instead, each petitioner argued that his or her bedroom was part of a larger unit with residential amenities, including a kitchen, bathroom, and living room (Memorandum of Margaret Sandercock at 11, April 2, 2013). Each unit had windows facing the street and at least 400 square feet of area (Tr. 77, 287, 394, 726, 757, 818, 902, 922). Thus, petitioners' units were eligible for coverage.

An applicant qualified for protection under MDL 281(5) is a "residential occupant" in possession of a covered residential unit prior to June 21, 2010. *See* 29 RCNY § 2-09(b)(1); *see also Matter of Gurkin*, OATH Index No. 489/12 at 23 (Dec. 14, 2012); *Wyman v. Hoberman*, OATH Index No. 2653/11 at 5 (June 22, 2012). A residential occupant who took occupancy prior to June 21, 2010, is entitled to coverage even if the occupant does not have a written lease or occupied the unit without the landlord's consent. 29 RCNY § 2-09(b)(2); *see also 545 Eighth Ave. Assocs. v. NYC Loft Bd*., 232 A.D.2d 153, 154 (1st Dep't 1996) (residential occupants in possession on the requisite dates are protected occupants); *Korn v. Batista*, 131 Misc. 2d 196, 200 (Sup. Ct. N.Y. Co.), *aff'd*, 123 A.D.2d 526 (1st Dep't 1986) ("The Loft Law was designed to protect all residential occupants whether or not they are in privity of contract with the landlord."); *Dworkin v. Duncan*, 116 Misc. 2d 853, 862 (N.Y. Civ. Ct. 1982) (the Loft Law's use of the more elastic term "residential occupant" rather than "tenant" was designed to relieve fact-finders "from the strictures of more traditional and stable housing arrangements.").

The credible evidence established that each petitioner was the residential occupant of a covered unit prior to June 21, 2010, the effective date of MDL § 281(5). Thus, the petitioners' are protected occupants and their coverage applications should be granted.

Daniel Aycock, Thomas Rosenthal, and Jeremy Slater (Ground Floor Unit)

Daniel Aycock testified that he has lived in the ground floor unit at 147 Roebling Street since 1998 (Tr. 53). Jeremy Slater testified that he has lived there since 2000 and Tom Rosenthal testified that he moved in 2003 (Slater: Tr. 147; Rosenthal: Tr. 90). Another roommate lived in the space during the window period, but he longer lives there and did not file a coverage application (Tr. 52).

According to respondent's diagram, the area of the unit is more than 3200 square feet (Resp. Ex. B). The unit has two sections, referred to by the parties as the "front" and the "back," separated by a door without a lock (Tr. 114). The front has an entrance from Roebling Street (Tr. 1002; Resp. Ex. B). In the back, a fire door leads to a gated alley (Tr. 1248-51).

The area of the front section is approximately 1460 square feet. It includes 767 square feet of open space, a 156 square-foot office, and 537 square feet of storage space (Tr. 71-73, 201; Resp. Ex. B). Petitioners claim that the open space is used as an art gallery from 1:00 to 5:00 p.m. on Fridays, Saturdays, and Sundays (Tr. 102, 145-46; 155, 159, 1200). The roommates use that space to relax and socialize the rest of the week (Tr. 71-73, 255-56, 270). Aycock operated the art gallery, worked in the office, and used most of the storage space (Tr. 85, 195, 253).

To get to the back section, people enter from Roebling Street and walk through the front section (Tr. 232). The back section, with an area of more than 1770 square feet, has four bedrooms, a living room, a kitchen, and a bathroom (Tr. 86; Pet. Ex. 16; Resp. Ex. B). The area of each bedroom is from 178 to 200 square feet; the living room is approximately 500 square feet; the kitchen, equipped with an oven, range, and microwave, is more than 350 square feet; and the bathroom, equipped with a tub, toilet, and sink, is about 150 square feet (Tr. 74-75; Pet. Ex. B). Aycock, Rosenthal, and Slater and the fourth roommate each had their own bedroom and they shared the common areas of the back section (Tr. 74, 147, 230-32).

Aycock signed a lease extension in 2007 (Tr. 200). During the window period, he paid the landlord approximately $5,800 per month to rent the entire unit (Tr. 59, 222, 232). He contributed $2,000 a month towards the monthly rent and collected the remainder from his three roommates, charging each of them $954 per month (Tr. 107, 122, 149, 168, 222).

Respondent's witness claimed that the entire space was commercial and they questioned whether petitioners lived there. For example, respondent's assistant manager Zalmen Labin testified that the space which the petitioners referred to as Aycock's bedroom, was an office (Tr.

993, 1046-47). Labin claimed that Aycock worked at the ground floor unit during the day and left at night (Tr. 1042). Though Labin conceded that the unit had bedrooms, he said that he did not know who lived there (Tr. 1100). Labin had heard the names Slater and Rosenthal, but he did not know them (Tr. 1047, 1095, 1104).

Vice president and general manager Jacob Weber testified that the ground floor unit was "absolutely" commercial (Tr. 1130, 1188). When he saw people in the unit, he assumed that they were "off the street" visitors to the gallery (Tr. 1147, 1148). Corporation president Aaron Berger testified that all of the building's tenants rented for commercial purposes (Tr. 1188). He said that "most of the time" the art gallery was open all day and he only found out last year that Aycock had been living in the building (Tr. 1160-61, 1172).

I found petitioners' witnesses more credible than respondent's witnesses. Petitioners' witnesses offered detailed testimony supported by ample documentary evidence, including government records, bank statements, utility bills, and photographs (Pet. Exs. 6, 8, 10, 11-14, 19-21, 23-27). Rosenthal's tax return listed a Westchester address, but he credibly testified that it was his parents' address where he only stayed a few nights per year (Tr. 110, 124). *See Matter of Gurkin*, OATH 489/12 at 16 (because a person may reside at more than one address, proof that witness listed one address on a tax return is not inconsistent with testimony that witness also resided at a different address). The rest of petitioners' evidence showed that Aycock, Rosenthal, and Slater lived in the ground floor unit of respondent's building during the window period.

In contrast, respondent's evidence was unpersuasive. Respondent's witnesses portrayed themselves as hands-on managers who were intimately familiar with the building. Remarkably, none of them seemed to know who occupied the ground floor unit.

Respondent argued that Slater and Rosenthal are not protected occupants because they had no dealings with the landlord. That argument lacks merit. The relevant inquiry is whether Slater and Rosenthal residentially occupied the unit during twelve consecutive months of the window period. 29 RCNY § 2-05(a). They are protected occupants even if they had no dealings with the landlord. *See 545 Eighth Avenue Assoc.,* 232 A.D.2d at 154 (residential occupant entitled to coverage "even if the occupant is not a prime tenant and even if the landlord did not consent to a sublet, assignment or subdivision, as long as the occupant was in possession prior to" effective date of statute); *Kaufman*, 102 A.D.2d at 142-43 (same).

Respondent's claim that the ground floor unit was a Single Room Occupancy (SRO) unit or a rooming house (Resp. Mem. at 7) is also mistaken. The Multiple Dwelling Law defines "single room occupancy" as "occupancy by one or two persons of a single room, or of two or more rooms which are joined together, 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). That is not the situation here. The ground floor unit is a residential dwelling where four roommates each have their own bedroom but they share a kitchen, bathroom, living room, and other common space. *See* 29 RCNY § 2-08(a)(3); *Madeline D'Anthony Enterprises, Inc.*, 101 A.D.3d at 607.

Although there was some commercial activity, the unit is mostly residential. The credible evidence showed that less than one-half of the space is used less than one-half of the time for commercial activity. Aycock, an illustrator and graphic designer, worked in a small office in the front section (Tr. 249-250). He has no paid employees (Tr. 203, 213, 248). The large open space is an art gallery 15 hours per week, from Friday through Sunday, 1:00 p.m. to 6:00 p.m. (Tr. 73, 238; Pet. Ex. 16). The rest of the time it serves as a living room. Though the storage area was usually locked, the key was next to the door, accessible to all the occupants (Tr. 203, 247, 264). Because the unit was primarily residential and the occasional commercial use occurred in an area that was accessible to all of the occupants, the entire unit is an IMD. *Cf. Dalo v. NYC Loft Bd.*, 157 A.D.2d 461, 463 (1st Dep't 1990) (where 2000 square feet of tenant's 2800 square foot loft was used exclusively for physically separate woodworking business with multiple employees, portion of spaced devoted to woodworking business, with separate entrances and keys, not covered by Loft Law).

Aycock, Rosenthal, and Slater are protected occupants because they lived in the ground floor unit prior to June 21, 2010. Respondent suggested that Aycock may have moved out shortly before June 21, 2010, but petitioner proved otherwise. Aycock married Kathleen Vance in May 2010 and Vance had her own apartment elsewhere in Brooklyn, but petitioners' witnesses credibly testified that Aycock spent most of May and June 2010 living in the ground floor unit at Roebling Street (Aycock: Tr. 87-88; Slater: Tr. 144). After the wedding, respondent served Aycock with an eviction notice (Tr. 87, 257, 1198). To avoid the risk of losing the space where he had lived and worked for more than a decade, Aycock stayed in his Roebling Street apartment (Tr. 87).

Sarah McMillan (2nd Floor Unit)

McMillan, a movie and television set director, testified that she has lived in a second floor unit at 147 Roebling Street since 2004 (Tr. 275-76, 279). Documentary evidence, including a driver's license, phone bills, and photographs, supported her testimony (Tr. 292-93; Pet. Exs. 29, 31-32, 35, 45). The unit has five bedrooms, two living rooms, a kitchen, and a bathroom (Tr. 285-86). The space is approximately 1,800 square feet and the area of each bedroom is from 105 to 178 square feet (Tr. 286, 313).

In 2008, the rent was $3,250 per month (Pet. Ex. 28). McMillan and four roommates each paid a proportionate share of the rent based on the size of their own bedrooms (Tr. 281, 285; Pet. Ex. 30). McMillan co-signed a lease for the unit in 2006, she collected each roommate's share, and she paid the monthly rent to the landlord (Tr. 290; Pet. Ex. 28). During the window period, there were always five people living in the unit (Tr. 312). Roommates moved in and out, including McMillan who temporarily moved out for two months in 2009 (Tr. 323-24, 327-28). Emily Abate, a roommate who has lived in the unit since 2008 but was not seeking coverage, corroborated McMillan's testimony (Tr. 379).

Respondent conceded that McMillan was the prime tenant (Labin: Tr. 1052-53, 1114-15). However, respondent argued that McMillan was not a protected occupant because she engaged in strictly commercial activity, operating a "rooming house" with four boarders (Resp. Mem. at 10-11). Petitioner countered that McMillan was not operating a business; she was living in an apartment that she leased and shared with four roommates (Pet. Mem. at 8).

McMillan did not operate a rooming house. She shared expenses with four roommates. They each had their own bedroom and they all had access to the kitchen, bathroom, and living rooms. 29 RCNY § 2-08(a)(3).

McMillan could have up to four roommates and still qualify as a protected occupant. Under the Loft Board's rules, for a residential unit to be deemed an IMD, qualifying for coverage under the Loft Law, the unit must "be the residence or home of a 'family' as defined in" MDL § 4(5). 29 RCNY § 2-08(a)(4)(i)(A). The Multiple Dwelling Law's definition of "family" includes "a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers …. A 'boarder,' 'roomer' or 'lodger' residing with a family shall mean a person living within the household who pays a consideration for such residence …."

MDL § 4(5). This statute has been long been interpreted to mean that a person who maintains a common household may "rent out rooms to not more than four other people." *Levine v. Finkelstein*, 274 A.D. 628, 634 (1st Dep't 1949). That is consistent with the plain wording of the statute which refers to a boarder, roomer, or lodger "residing with a family."

Because McMillan's unit was residentially occupied for twelve consecutive months and she lived there prior to June 21, 2010, the unit is covered by the Loft Law and McMillan is a protected occupant.

Peter Mignola (3rd Floor)

Audio engineer Peter Mignola testified that he has lived in a third floor unit at 143 Roebling Street since 1991 (Tr. 481-82). The entire space is approximately 3,000 square feet (Tr. 518; Pet. Exs. 55; Resp. Ex. K). Mignola described the unit as having four, similarly sized, connected sections with a common entrance: one-quarter of the unit is next to the elevator entrance and includes a small bedroom; one-quarter is a shared open space; one-quarter is a music recording and production studio; and one-quarter includes a larger bedroom, a full bathroom, a dining room, and kitchen equipped with a stove, sink, and refrigerator (Mignola: Tr. 482, 501, 636, 641; Labin: Tr. 998, 1067; Pet. Ex. 55; Resp. Ex. F). Documentary evidence, including utility bills and photographs of the kitchen, appliances, and bedroom, supported Mignola's testimony (Tr. 505-515; Pet. Exs. 2, 56, 57).

During the window period, Mignola paid respondent $5,000 per month rent for the unit (Tr. 661). A roommate, Kirsten Thoen, paid Mignola from $1,000 to $1,500 per month to live in the small bedroom (Tr. 661). Mignola normally worked weekday overnight shifts at a television network in Manhattan (Tr. 485, 491). On weekdays, Mignola usually returned to Roebling Street to sleep (Tr. 489-90, 492, 605). On weekends, he drove to Brookhaven, Long Island, approximately 70 miles from Manhattan, where his wife and children live (Tr. 492-93, 605-06, 677, 709). Mignola's family occasionally spent weekends with him at Roebling Street (Tr. 608).

In his spare time, Mignola performed music and operated the recording and production studio in his Roebling Street apartment (Tr. 492). Mignola estimated that the recording and production studio generated about 5% of his annual income (Tr. 609). Aided by a personal assistant and a few unpaid interns, Mignola provided professional recording, engineering, and production services for musicians in the studio one or two days per week (Tr. 504). Teruhisa

Uchiyama, who worked in the recording studio as an unpaid intern during the window period, testified that there were approximately five to seven recording sessions per month and "a lot of the time" nothing was happening (Tr. 1258).

For most of the window period, the unit's open space was empty. Occasionally, Mignola entertained guests there and musicians rehearsed there (Tr. 615). Mignola's roommate, Thoen, also used that space for photo shoots and to entertain guests (614, 627).

Mignola's testimony was supported by his wife, Sara, and his father, Gennaro. Sara Mignola testified that, after marrying Mignola in 2000, they lived together at the Roebling Street space for four years (Tr. 784-85). Following the birth of their first child, they moved to Long Island (Tr. 785). Because the commute was from ninety minutes to three hours, depending on the traffic, her husband continued to stay at Roebling Street and returned to Long Island on weekends (Tr. 786-87). Gennaro Mignola, who helped install the plumbing, lighting, and carpentry in the Roebling Street space, confirmed that his son usually stayed there on weekdays (Tr. 531-12, 543, 538-39, 550-51).

According to respondent, Mignola's unit was commercial space (Resp. Mem. at 8-9). General manager Jacob Weber testified that, about thirty times per year, he saw Thoen arriving in the morning and leaving in the afternoon (Tr. 1155, 1158-59). It looked to Weber as if Thoen used her space as a photography studio and "every time" that Weber went to the recording studio there were musicians recording there (Tr. 1134, 1157). Weber and assistant manager Labin testified that half the unit, including the kitchen and dining areas, were for the recording studio (Tr. 1004-08, 1074, 1134, 1157; Resp. Ex. K). Berger testified that he never saw Mignola, he had "no idea" that Mignola had a job in Manhattan, and he did not learn until last year that Mignola lived in the unit (Tr. 1157, 1185, 1188-89).

I gave little weight to respondent's witnesses who offered sweeping claims based on limited observations. For example, Weber testified that he was only inside Mignola's unit on seven to nine occasions during the two years of the window period (Tr. 1151, 1156). Berger said that he could not estimate how often he had been in the unit (Tr. 1185). Similarly, Labin testified that he was inside the Mignola unit four or five times during the window period (Tr. 1064-65).

In contrast, petitioners presented compelling evidence that the Mignola unit was used mostly for residential purposes. The recording studio occupied less than one-quarter of the entire unit and it was used commercially only a few days a week. The open space, which was another quarter of the unit, was used even less frequently for commercial activity. And the other half of the unit was primarily used for residential purposes. It is a residential unit that an occupant occasionally uses for work. Under these circumstances, the whole unit is an IMD. *Cf. Dalo,* 157 A.D.2d at 463 (where most of a unit is used exclusively for a separate business, with a separate entrance, the portion of the unit devoted to separate business in not covered by Loft Law).

Respondent presented evidence that in late 2010 or early 2011, after the window period, Mignola's new roommate, Owen Black, began advertising that the open space was available for $200 to $400 per day (Labin: Tr. 1079; Weber: Tr. 1160, 1330; Resp. Ex. I). Because that activity occurred after the window period and there was no evidence how often Black actually rented the space out, that evidence was irrelevant to the coverage application.

Nor does it matter that Mignola advertised the music studio's availability for overnight stays, a full kitchen "stocked upon request," and "plenty of room to bunk down and take a nap or spend the weekend for lockout sessions by request" (Tr. 1007; Resp. Exs. C, L). Mignola credibly testified that, during the window period, no musicians stayed overnight (Tr. 612).

It is also irrelevant that Mignola has a home in Long Island, where his family lives. He is a covered occupant at Roebling Street as long as he residentially occupied a covered unit; it did not have to be his primary residence. *See Vlachos*, 70 N.Y.2d at 770 ("[t]here is no requirement for Loft Law coverage that residentially occupied units be the primary residence of their tenants"); *see also Kaufman,* 102 A.D.2d at 142 (unit covered by Loft Law even though occupant maintained a separate primary residence); *Little West 12th St. Realty L.P. v. Inconiglios*, 19 Misc. 3d 508, 516-17 (N.Y. Civ. Ct. 2008) *aff'd,* 23 Misc.3d 28 (App. Term 1st Dep't 2009) ("the initial determination regarding Loft Law coverage depends on whether three or more units were occupied for residential purposes during the window period, not on whether they were occupied as the primary residences of their tenants").

The evidence established that Mignola's unit was used primarily for residential purposes, he resided there for twelve consecutive months during the window period, and he occupied the unit prior to June 21, 2010. Thus, the unit is an IMD and Mignola is a protected occupant.

Patrick Weder and Tamika Rivera (3rd Floor)

Cabinet maker Patrick Weder and his wife Tamika Rivera have lived in a third floor unit of 153 Roebling Street for about fifteen years (Weder: Tr. 345, 413; Rivera: Tr. 460; Pet. Exs. 46-53). Weder leased approximately 3,900 square feet of space from the landlord (Tr. 413). In 2005, with respondent's consent, Weder divided the space into two sections (Tr. 392). Each of the two sections has a separate kitchen, bathroom, and locked entrance (Rivera: Tr. 1083).

Weder and Rivera live in a 1,800 square-foot section, which they referred to as the "green area" on a diagram of the unit (Tr. 354, 446; Pet. Ex. 36). The other section, referred to as the "red area," has six bedrooms that Weder rented to subtenants (Rivera: Tr. 1037). The two sections are connected by an emergency door, which Weder only uses to replace a circuit breaker or adjust the hot water (Tr. 359, 425). Once or twice a year, he also uses the freight elevator in the red area (Tr. 440).

During the window period, Weder paid respondent $7,000 per month rent for the entire space (Tr. 422, 437). To cover that amount, Weder contributed $1,300 per month for the green area and he collected $900 to $1,250 a month from each occupant of the red area (Tr. 423). Weder paid for utilities and a cleaning service for the entire space. He also paid a friend to collect rent from the red area and find replacement subtenants, if necessary (Tr. 420).

Respondent's witnesses did not dispute that Weder leased the entire space, that he lived in one section, that he used an agent to rent out bedrooms in the other section, and that both sections have separate kitchens and entrances (Labin: Tr. 1037-38, 1084, 1088-90; Resp. Mem. at 12). However, respondent argued that the "red area" is not covered by the Loft Law and Weder is responsible for the rent for the entire space (Resp. Mem. at 12).

Petitioner argued that the space leased by Weder should be considered two different units, the green area and the red area, and Weder and his wife Rivera are protected occupants of the green area (Pet. Mem. at 24).

Respondent's premise seems to be that a leased unit cannot be divided. That is mistaken. The relevant inquiry is how the space was configured and used during the window period. *See Matter of Grant*, OATH Index No. 1864/10 at 11 (Nov. 17, 2010) (one leased unit reconfigured and occupied as two units results in two IMD units); *see also Matter of Schwartz*, Loft Bd. Order No. 413 (Aug. 15, 1986) (three floors leased as one unit but occupied as three units during window period constitutes three IMD units).

Weder divided the leased space into two separately-occupied, self-contained units before the window period. They should be considered two separate units. *See S. Axelrod Co., Inc. v. Mel Dixon Studio, Inc.*, 122 Misc.2d 770, 782 (Civ. Ct. N.Y. Co. 1983) (where tenant divided leased space into two separate studios with separate locked entrances and residential amenities, each space deemed a separate unit for purposes of Loft Law coverage); *Matter of DeGraw*, OATH Index No. 625/96 at 23 (Apr. 25, 1997), *remanded*, Loft Bd. Order No. 2114 (May 22, 1997), *adopted following supplemental report and recommendation*, Loft Bd. Order 2126 (Aug. 28, 1997) (upholding finding that leased unit had been divided into two separately occupied units prior to the relevant window period).

Weder and Rivera are protected occupants of the green area that they residentially occupied for twelve consecutive months during the window period. It is a separate independent living unit. 29 RCNY § 2-08(a)(3). The red area is a separate section and its occupants did not seek coverage. On this record, there is simply too little evidence to discern whether that section should also be covered under MDL § 281(5).

Tivona Biegen (Unit 4A)

Social worker Tivona Biegen testified that she has lived in Unit 4A at 153 Roebling Street, since January 17, 2009 (Tr. 920, 937). She supported her testimony with documentary evidence, including postal records, bank statements, tax returns and photographs (Tr. 922, 934; Pet. Exs. 113, 116, 122-125). The area of unit 4A is 1,420 square feet. It has three bedrooms and a common area with a shared kitchen, bathroom, and dining room (Tr. 933-36, 957).

During the window period, at least one of Biegen's roommates, Jonathan Wellerstein, lived there for at least twelve consecutive months (Tr. 967, 971). Biegen paid $1,250 a month for use of one bedroom and the common area (Tr. 962). Her roommates, who are not seeking coverage, paid $1,150 and $900, for their bedrooms and use of the common area (Tr. 964). Rent payments were collected by Andrew Bradfield, a former tenant who leased the entire unit from respondent for $3,170 (Tr. 970-73).

Respondent's witness, assistant manager Labin, described Unit 4A as a three-bedroom apartment (Tr. 1035-36). Yet Labin claimed that he did not know Biegen's first name and he did not know what she looked like (Tr. 1080). Respondent also argued that Biegen was not a protected occupant because she is a roommate or subtenant without possessory rights to other

bedrooms in the loft, her bedroom was less than 400 square feet, and she had no contact with the landlord (Resp. Mem. at 7).

The credible evidence established that unit 4A was residentially occupied for twelve consecutive months during the window period and Biegen resided there prior to June 21, 2010. Thus, she is a protected occupant of a covered unit. Contrary to respondent's claim, it does not matter that Biegen's bedroom is smaller than 400 square feet. The entire unit, including the kitchen, bathroom, and living room, is 1,420 square feet, which is more than the minimum required for an IMD unit. MDL § 281(5). Nor does it matter that Biegen lacked privity with respondent. *See 545 Eighth Avenue Assoc.,* 232 A.D.2d at 154 (residential occupant entitled to coverage "even if the occupant is not a prime tenant and even if the landlord did not consent to a sublet, assignment or subdivision, as long as the occupant was in possession prior to" effective date of statute); *Kaufman,* 102 A.D.2d at 142-43 (same).

Keith McCulloch, Daniel Gorman, and Isabel Wilson (Units 5A, 5B, and 5C).

Keith McCulloch, a painter, testified that he has lived in a fifth floor unit at 153 Roebling Street for nearly ten years (Tr. 714). In 2003, he leased the entire space, with an area of about 3,600 square feet (Tr. 715, 744-45; Pet. Ex. 61). Beginning in 2006, he leased a smaller 900 square foot portion of the unit, referred to as 5A, for $2,800 per month and he continued to live in that space throughout the window period (Tr. 745; Pet. Ex. 63). 5A has a bathroom and a kitchen and McCulloch lives there with two roommates who are not seeking coverage (Tr. 726).

Daniel and Miyuki Gorman have lived in unit 5B for at least five years (Tr. 753-54). They initially rented the space from McCulloch, but they signed a lease with respondent in April 2009 (Tr. 754-55; Pet. Ex. 71). The unit is approximately 770 square feet and it has a toilet, bathtub, stove, refrigerator, kitchen (Tr. 756-57).

Isabel Wilson testified that she moved into 5C in September 2009 (Tr. 899). The unit has four bedrooms, a bathroom, living room, and kitchen (Tr. 901-02). At first, Wilson lived there with a roommate Katrina Vonnegut, who had a lease (Tr. 899). When Vonnegut moved out about a year ago, Wilson notified respondent and continued to pay the monthly rent by check (Tr. 899, 912). Wilson continued to live in the unit with three roommates and the four of them split the rent equally (Tr. 912-13).

Wilson also presented evidence that 5C was previously occupied by Elizabeth Seklir. Steven Seklir, Sr., an attorney, testified that his daughter lived in 5C from 2004 until she moved out in August 2009 (Tr. 888-89).

McCulloch, the Gormans, and Wilson supported their testimony with documentary evidence including driver's licenses, voting records, utility statements, tax returns, and photographs (Pet. Exs. 3, 64-89, 106-110). Respondent's witness, assistant manager Labin, knew that McCulloch and the Gormans lived in 5A and 5C, respectively, but he did not know Wilson (Tr. 1054-55).

As petitioners' counsel noted, respondent did not dispute that 5A, 5B, and 5C were residentially occupied for twelve consecutive months or that petitioners occupied those units prior to June 21, 2010 (Memorandum of David Frazer, March 5, 2013). Based on the undisputed evidence, McCulloch, the Gordans, and Wilson are protected occupants of their respective units.

John Reineck (Unit 5E*)*

Reineck testified that he has lived at 153 Roebling Street, unit 5E, for seven years (Tr. 801-02). In 2007 he signed a lease for the entire space, which is approximately 3,200 square feet (Tr. 807-08, 816; Pet. Ex. 93). This unit is similar to the Weder unit. It is divided into two sections, connected by locked doors (Tr. 871-72). The sections each have a separate entrance, kitchen, bathroom, living room, and windows facing the street (Tr. 822-23; Pet. Ex. 95).

Reineck and two roommates lived in one section, referred to on diagrams and by the parties as the "striped space," which has three bedrooms (Tr. 850, 862; Pet. Ex. 95). In the other section, there are five bedrooms, none of which is larger than 150 square feet (Tr. 1049).

According to Reineck, he does not have a key to the entrance to the other section (Tr. 822, 825). The connecting doors between the sections are locked and rarely used (Tr. 824-25). The elevator opens into Reineck's section (Tr. 864-65). On rare occasions, when people in the other section need to use the elevator, they contact Reineck to unlock the connecting doors and building management to schedule the elevator (Tr. 864-65, 873).

During the window period, Reineck paid monthly rent of $7,000 for the entire 3,200 square-foot space (Tr. 850). Reineck and his two roommates each paid $800 for their own bedroom and use of the shared space in their section (Tr. 850-51). One of Reineck's roommates

collects the remaining $4,600 per month from the people living in the other section (Tr. 829, 846, 859).

Petitioners argued that Reineck's space should be treated as the same as the Weder space (Pet. Mem. at 25). It is a leased space that was divided into two separate, independent units with separate locked entrances. Respondent does not dispute that Reineck and his roommates live in the striped area (Resp. Mem. at 13). However, respondent argues that Reineck operates the other half of the space as if it was a rooming house and, thus, none of the space is covered by the Loft Law (Resp. Mem. at 13).

As with the Weder's space, unit 5E should be considered two separate units and the section occupied by Reineck and his roommates should be considered one unit. *See S. Axelrod Co., Inc.*, 122 Misc.2d 770 at 782; *Matter of DeGraw*, OATH 625/96 at 23. The striped space was residentially occupied for twelve consecutive months during the window period and it meets all of the other requirements for coverage. And Reineck should be deemed a protected occupant of the striped space because he resided there prior to June 21, 2010. As for the other half of the space, the unstriped unit, its occupants did not seek coverage and the record is insufficient to discern whether that section met the requirements for coverage under MDL § 285(5).

FINDINGS AND CONCLUSIONS

1. Petitioners proved that the building located at 143-155 Roebling Street is an interim multiple dwelling under the Loft Law.

2. Petitioners Aycock, Rosenthal, and Slater are protected occupants of the ground floor unit, which is a covered unit.

3. Petitioner McMillan is a protected occupant of the second floor unit, which is a covered unit.

4. Petitioner Mignola is a protected occupant of the third floor unit, which is a covered unit.

5. Petitioners Weder and Rivera are protected occupants of the portion of the third floor unit referred to as the "green area," which is a covered unit.

6. Petitioner Biegen is a protected occupant of Unit 4A, which is a covered unit.

7. Petitioners McCulloch, Daniel and Miyuki Gorman, and Wilson are protected occupants of Units 5A, 5B, and 5C, respectively, which are covered units.

8. Petitioner Reineck is a protected occupant of the portion of Unit 5E referred to as the "striped space," which is a covered unit.

RECOMMENDATION

Petitioners' applications should be granted.

Kevin F. Casey
Administrative Law Judge

May 29, 2013

SUBMITTED TO:

ROBERT D. LiMANDRI
Chair

APPEARANCES:

GOODFARB & SANDERCOCK, LLP
Attorneys for Petitioners Mignola, Aycock, Rosenthal, Slater, Weder, Rivera, McMillan, Biegen, and Reineck
BY: MARGARET SANDERCOCK, ESQ.

DAVID FRAZER, ESQ.
Attorney for Petitioners McCulloch, Daniel and Miyuki Gorman, and Wilson

SMITH & SHAPIRO, LLP
Attorneys for Respondent
BY: HARRY SHAPIRO, ESQ.