

Matter of Various Tenants of 357 Bowery

OATH Index No. 1067/14 (Oct. 22, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4350 (Jan. 15, 2015)

[Loft Bd. Dkt. No. TR-1098; 357 Bowery, New York, N.Y.]

In coverage proceeding, petitioners demonstrated that 357 Bowery is an interim multiple dwelling that had three residentially occupied units during the applicable window period and that they qualify for protection under the Loft Law. ALJ recommended that the application be granted.

Loft Board adopts finding that building is an IMD with three IMD units and that two of the applicants are the protected occupants of their units, as they are prime lessees whose tenancies began before the effective date of the amended Loft Law (June 21, 2010). The Loft Board rejected the ALJ's recommendation that the third applicant is a protected occupant pursuant to 29 RCNY 2-09(b)(2), because she shared the unit with the prime lessee, who was in occupancy on June 21, 2010, and was not a subletter or assignee of the prime lessee. The Loft Board opined that the third applicant could be covered under (b)(1) or (2), depending upon her relationship with the prime lessee.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
VARIOUS TENANTS OF 357 BOWERY
Petitioners

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI *Administrative Law Judge*

On July 2, 2013, an application was filed with the Loft Board on behalf of Denise Langenegger, Christian Wassmann, and Louisa Gui pursuant to Article 7-C, section 281 of the Multiple Dwelling Law ("Loft Law" or "MDL") and title 29 of the Rules of the City of New York ("RCNY" or "Loft Board Rules"). Petitioners seek a finding that: (1) the building known as 357 Bowery, New York, New York, is an interim multiple dwelling ("IMD"); (2) during the applicable window period, Ms. Langenegger occupied the second floor, Mr. Wassmann and Ms. Gui occupied the third floor, and the then-owner, Ingo Swann, occupied the fourth floor as

residences; and (3) they are the protected occupants of the second and third floor units respectively (ALJ Ex. 1).

Respondent-owner, Swann Spieker Partners, filed an answer denying that there were three residentially occupied units during the window period (ALJ Ex. 2). Respondent argued that Mr. Swann, now deceased, lived in the basement, not on the fourth floor which was a guest suite for his numerous visitors. Respondent also challenged whether petitioners, who are not American citizens, legally resided in this country and whether Ms. Langenegger, who travelled extensively, occupied the second floor unit continuously for the required 12-month period.

A hearing was held on seven days between June 30 and September 29, 2014. Both parties presented extensive documentary evidence. Petitioners testified on their own behalf and presented the testimony of Mr. Nunez, a friend of Mr. Swann, and Mr. Elsener, Ms. Langenegger's former boyfriend from 1992 to 2010. Respondent presented the testimony of Elsbeth Flippen, Mr. Swann's niece, and Murleen Swann Ryder, Mr. Swann's sister and the executor of his estate (Tr. 579, 581).

For the reasons below, 357 Bowery is an IMD that had three residentially occupied units during the window period and petitioners are the protected occupants of their respective units.

ANALYSIS

In 2010, the state legislature passed amendments to the Loft Law, which added section 281(5) to the MDL. L. 2010, Ch. 135 § 1 (eff. June 21, 2010) (adding MDL § 281(5)); L. 2010, Ch. 147 § 1 (eff. June 21, 2010) (amending MDL § 281(5)). Amended section 281(5) defines an IMD as any building that: (1) at any time was occupied for manufacturing, commercial, or warehouse purposes; (2) lacks a certificate of compliance or occupancy pursuant to section 301 of this chapter; (3) is not owned by a municipality; and (4) was occupied for residential purposes as the residence or home of three or more families living independently from one another for a period of 12 consecutive months during the period commencing January 1, 2008, and ending December 31, 2009, "provided that the unit" (i) is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, (ii) has at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and (iii) is at least 550 square feet in area. MDL § 281(5) (Lexis 2014).

The following facts are not in dispute. 357 Bowery is a four-story building that was purchased by Mr. Swann and Mr. Spieker in 1979 (Pet. Ex. 4). During the window period the first floor was occupied by a commercial tenant named Mr. Lord and is currently vacant (Tr. 70, 292, 481). There is a basement unit that has a bathroom but no kitchen and there is a sub-basement that holds the mechanical equipment for the building. There are single residential units on the second, third, and fourth floors with essentially the same floor plan and layout (Pet. Exs. 6, 7, 17). Each residential unit is larger than 550 square feet in area, has windows facing the street, and is accessed through a public stairway or freight elevator that opens on every floor including into the kitchens of the three residential units (Pet. Exs. 6, 7, 17). The building is located in New York City with a population of more than one million people and qualifies as having prior commercial use under MDL section 281(1). There is a certificate of occupancy listing the first through fourth floors as factory and storage as well as an office on the second and third floors (Pet. Ex. 5). During the window period there were doorbells on the street level that listed: Swann; Langenegger/Elsener; Lord; Wassmann/Gui; and Swann. The buzzers for Swann were for the basement and the fourth floor (Pet. Ex. 37; Flippen: Tr. 551-52).

The disputed issues concern the residential occupancy of the second, third, and fourth floor units. Petitioners must present a *prima facie* case that they are entitled to relief. 29 RCNY § 1-06(i)(4) (Lexis 2014); *Matter of 180 Varick Street Corp.*, OATH Index No. 2049/04 at 6 n.1 (Oct. 29, 2004), *adopted*, Loft Bd. Order No. 2885 (Nov. 18, 2004) (“applicants in Loft Board proceedings must establish their entitlement to the relief requested by a preponderance of the credible evidence”). Petitioners have met their burden.

1. The building had three residentially occupied units in 2008 and 2009

In order for a unit to be covered by the Loft Law, “it must 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). The determination of coverage requires a case by case analysis of the indicia of residential use. *Matter of 333 PAS CoO Tenant Group*, OATH Index No. 968/08 at 7 (June 30, 2009), *adopted*, Loft Bd. Order No. 3552 (Nov. 19, 2009). As noted in *Matter of South 11th Street Tenants’ Association*, OATH Index Nos. 1242/96, 1243/96, 1244/96 at 39-42 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999), “no one factor is dispositive . . . the regulations defining a residential unit were deliberately left open-ended to

allow for a more flexible approach to coverage determination.” Although this evaluation is open ended, the regulations specify two factors to consider: whether a unit has a separate entrance accessible from a public hallway or street, and has “one or more rooms such as a kitchen area, a bathroom, a sleeping area and a living room area arranged to be occupied exclusively by the members of a family and their guests” *See* 29 RCNY § 2-08(a)(3)(i), (ii) (Lexis 2014).

To the extent resolution of the disputed issues relies on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness’s testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’s testimony comports with common sense and human experience in determining credibility. *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).

In describing the occupancy of the building in 2008 and 2009, Ms. Langenegger, Mr. Wassmann, and Ms. Gui were more credible than Ms. Flippen and Ms. Ryder. While petitioners had a motive to lie to obtain Loft Law protection, their testimony was generally consistent and corroborated by Mr. Nunez and Mr. Elsener, neither of whom had an apparent interest in the outcome of this proceeding. Moreover, petitioners’ testimony about the residential occupancy of the three upper floors comported with common sense and was corroborated by documentary evidence. Respondent’s repeated attempts to portray petitioners as liars, tax cheats, illegal foreigners, and opportunistic predators were wholly unconvincing. Indeed, many of the documents used to impeach petitioners supported petitioners’ testimony and rendered their case more credible. Any inconsistencies in petitioners’ proof were at most minor, irrelevant to the issues at bar, or of the type to be expected in a hearing.

Ms. Ryder and her daughter, Ms. Flippen, also had a motive to lie to avoid a finding of Loft Law coverage and thereby increasing the value of the building which Ms. Ryder is going to inherit (Tr. 537). Mr. Wassmann’s offer to purchase the building from Mr. Swann’s estate for \$6.5 million was rejected (Tr. 225), and respondent’s counsel acknowledged that the building would be more valuable without Loft Law coverage (Tr. 744). However, Ms. Flippen was evasive and uncomfortable when testifying that she had no idea whether the building would be more valuable without Loft Law tenants (Tr. 537-40). Similarly, Ms. Ryder’s assertions that she was speaking for her dead brother who loved the building and not out of her own interest (Tr. 616-17) were unpersuasive.

Ms. Ryder's and Ms. Flippen's claim that Mr. Swann preferred living in the basement during the window period, not on the residentially equipped fourth floor, did not comport with common sense and was contrary to the weight of the evidence. Much of the testimony offered in opposition to petitioners' testimony was self-serving, irrelevant, and incredible.

Similarly, Ms. Ryder's and Ms. Flippen's allegations that petitioners broke Mr. Swann's heart by filing a Loft Law application which caused him to abandon the basement and move to the fourth floor where he died shortly thereafter was incredible (Tr. 203-10, 482-83, 490, 553, 600-01, 614). Mr. Lord, the first floor commercial tenant, filed an application in August 2012, listing petitioners and Mr. Swann as the residential tenants of the second, third, and fourth floors (Pet. Ex. 39). That application was subsequently withdrawn. Petitioners filed their application on July 2, 2013 (ALJ Ex. 1), after Mr. Swann's death on January 31, 2013 (Tr. 419). Ms. Ryder contradicted her earlier assertion by testifying that Mr. Swann moved to the fourth floor in 2011 which was before the first application was filed (Tr. 666-68). While it is possible that Mr. Swann was upset by the application, it seems highly unlikely that it caused his death. Even though no medical evidence was presented, it is notable that Mr. Swann was a "non-stop cigar smoker" who died at age 79 (Tr. 445, 494, 659).

Moreover, the record was replete with evidence of the warm and friendly relationship that existed between Mr. Swann and petitioners. There can be little doubt that Mr. Swann was a unique and extraordinary man who meant different things to many people. His professional accomplishments included being an exhibited painter, a published writer, and a renowned psychic who worked with the United States military and intelligence communities (Pet. Exs. 36, 38; Resp. Ex. JJ; Tr. 12, 25).¹ Mr. Swann also had many friends, colleagues, admirers, and family members who visited him regularly. The record also has multiple examples of Mr. Swann socializing and entertaining in the basement, on the fourth floor, and on the stoop of his building (Tr. 71, 100, 170-71, 180, 202, 212, 249, 390, 474, 484, 597, 608, 613, 650-51; Pet. Ex. 35; Resp. Exs. A, Z, AA, BB, CC, GG, HH, N). While Mr. Swann was not present to testify, the record supports a finding that before, during, and after the window period, he occupied the basement and the fourth floor residentially and that the second and third floor units were residentially occupied continuously by petitioners and other people.

¹ Petitioner's exhibits 34 and 38 were admitted into evidence after the hearing following review of the record.

Petitioners demonstrated that the second and third floor units were residentially occupied

Petitioners provided testimony and documentary evidence to support their claim that during the window period, Ms. Langenegger occupied the second floor and that Mr. Zingg and then Mr. Wassmann and Ms. Gui occupied the third floor. Respondent was unable to offer any evidence to the contrary. Instead, respondent focused on petitioners' legal status in this country and Ms. Langenegger's extensive travels and numerous roommates who paid her rent. However, none of these factors are relevant to the question of residential occupancy under the Loft Law.

Petitioners gave credible, unrebutted testimony that before, during, and after the window period the second and third floor apartments had all the indicia of a residential unit including: a sleeping area; a living room/dining area; a bathroom with a tub, sink, and shower; and a kitchen with a refrigerator, stove, sink and various kitchen appliances. Both units had residential furniture, televisions, clothing, and other personal items (Wassmann: Tr. 60-62, 65-67, 69, 163-64; Gui: Tr. 236, 242, 256; Langenegger: Tr. 290, 293; Pet. Exs. 6, 7).

Ms. Langenegger testified that she moved to the second floor of 357 Bowery in 2000 (Tr. 288) and had residential leases with Mr. Swann between 2000 and 2006 (Pet. Ex. 25A-E).

Petitioners testified that in 2008, Mr. Zingg was living on the third floor. He took occupancy in the fall of 2007 and stayed until two days before Mr. Wassmann moved in on August 15, 2008. Ms. Gui arrived in September 2008 (Langenegger: Tr. 291-92; Wassmann: Tr. 57-59, 71, 137-38; Gui: Tr. 234). Mr. Wassmann signed a residential lease with Mr. Swann and listed Ms. Gui as an emergency contact (Pet. Ex. 8; Wassmann: Tr. 72; Gui: Tr. 259). Respondent points to the fact that Ms. Gui was not listed on the lease as a resident and suggests that she was there without Mr. Swann's knowledge or consent (Tr. 161, 259). Whether Ms. Gui was on the lease and present with Mr. Swann's consent is of no moment. *Korn v. Batista*, 131 Misc. 2d 196, 200 (Sup. Ct. N.Y. Co. 1986), *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."). In any event, Mr. Wassmann's assertion that he told Mr. Swann that Ms. Gui would be living with him (Tr. 58, 71) was credible and corroborated by her name appearing on the outside buzzer (Pet. Ex. 37).

Prior to August 2008, Mr. Wassmann was living in Chelsea and Ms. Gui was living in an

apartment that she owned with her parents (Wassmann: Tr. 62; Gui: Tr. 235; Pet. Ex. 19). Mr. Wassmann sublet his Chelsea apartment to a friend until another friend obtained a lease in her own name (Tr. 62, 155, 183-84). Ms. Gui rented her apartment under short-term leases (Tr. 236-41; Pet. Ex. 20). Contrary to respondent's assertions (Tr. 155-56, 160), whether petitioners profited from these other properties has no relevance to the issues at bar.

To support their claims that they occupied the second and third floors residentially during the window period, petitioners submitted documents from 2008, 2009, and 2010 listing 357 Bowery as their address. These documents included: Mr. Wassmann's New York State driver's license, car insurance, a homeowner's insurance policy, and a social security statement (Pet. Exs. 9, 10, 11, 12, 16); Mr. Wassmann's and Ms. Gui's tax returns (Pet. Exs. 13, 21); cell phone and bank records for petitioners (Pet. Exs. 14, 15, 22, 23, 26, 28, 29); Ms. Gui's dry cleaning receipts (Pet. Ex. 24); and Ms. Langenegger's bills for various subscriptions (Pet. Ex. 27).

Ms. Langenegger testified that in 2008 and 2009 she travelled extensively for her work as a Swiss television correspondent and to visit family and friends during her vacations. She stated that during the window period she maintained her apartment at 357 Bowery (Tr. 306-12; Resp. Exs. Q, R, U). During this period she had ten different roommates who paid her rent. They slept on the extra bed or in her bedroom if she was away (Tr. 312-25; Pet. Ex. 30; Resp. Ex. P). Ms. Langenegger's boyfriend, Mr. Elsener would stay in the apartment but never lived there. Mr. Elsener, whose name appeared on the buzzer, got his mail at 357 Bowery (Langenegger: Tr. 322-23; Elsener: Tr. 384-85, 391, 399, 406; Flippen: Tr. 553).

Ms. Flippen and Ms. Ryder acknowledged seeing petitioners in the building during the window period and that they were tenants on the second and third floors (Flippen: Tr. 484-87, 552; Ryder: Tr. 607-08, 612-14, 649-50; Langenegger: Tr. 687).

The un rebutted, credible testimony from petitioners as corroborated by voluminous documentation supports a finding that the second and third floors were residentially occupied for 12 consecutive months between January 1, 2008 and December 31, 2009. With regard to the third floor, except for two days in August 2008, it was occupied first by Mr. Zingg and then Mr. Wassmann and Ms. Gui.

Ms. Langenegger occupied the second floor continuously during the window period. Contrary to respondent's assertion, Ms. Langenegger's extensive travelling does not require dismissal of the application. Ms. Langenegger, who has lived on the second floor since 2000,

kept her personal belongings in the unit, maintained the residential nature of the space, and always returned to the unit. *Matter of Pels*, OATH Index No. 2481/11 at 9-11 (June 20, 2012), *adopted*, Loft Bd. Order No. 4161 (June 20, 2013), *reconsideration denied*, Loft Bd. Order No. 4208 (Dec. 12, 2013) (tenant who created a residential occupancy in her unit prior to the window period but lived there only intermittently during the window period, found to be a protected occupant under MDL section 281(5)); *see also Coronet Properties Co. v. Brychova*, 122 Misc. 2d 212, 213-14 (Civ. Ct. N.Y. Co. 1983), *aff'd*, 126 Misc. 2d 946 (App. Term, 1st Dep't 1984) (Individuals "engaged in itinerant occupations do not lose their domicile by virtue of their constant travel.").

Respondent failed to provide any support that Ms. Langenegger's financial arrangements with various roommates somehow disqualified the unit from coverage. Indeed, during her absences the unit continued to be residentially occupied by her roommates.

Finally, whether petitioners are American citizens or permanent residents has no bearing on this proceeding. *Matter of Cohen*, OATH Index No. 2015/12 at 3-5 (Aug. 23, 2013), *adopted*, Loft Bd. Order No. 4261 (Mar. 20, 2014) (ALJ denied motion to dismiss coverage application because petitioner was neither a permanent resident nor a citizen of the United States). Moreover, there was no evidence that petitioners maintained any other residences during the window period. Even if they did, a unit need not be the sole residence of the occupant during the window period in order for it to count as a residentially occupied unit. *Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769, 770 (1987) ("[T]here is no requirement for Loft Law coverage that residentially occupied units be the primary residences of their tenants."); *see also Kaufman v. American Electrofax Corp.*, 102 A.D.2d 140, 142 (1st Dep't 1984) (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 (Civ. Ct. N.Y. Co. 2008) ("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.").

Petitioners demonstrated that the fourth floor unit was residentially occupied

Petitioners provided testimony and documentary evidence that during the window period, Mr. Swann lived on the fourth floor and used the basement as his office. Respondent provided contrary evidence that Mr. Swann lived in the basement and used the fourth floor as a museum

for his collections and for his guests who came to visit. The record supports a finding that during the window period, Mr. Swann used the fourth floor as his residence and also used the basement office for sleeping and entertaining. Even if respondent's version was credited, the fourth floor would still qualify as a residential unit as it was maintained and occupied as a residence and used by Mr. Swann's guests for that purpose.

It was undisputed that before, during, and after the window period, the fourth floor was set up and furnished as a residential unit by Mr. Swann and was in his exclusive control. The unit had a kitchen with a sink, a refrigerator, a hot plate, pans, plates, glasses, and cooking utensils. There was a large canopy bed in the main room and a cot near the kitchen. There were tables and chairs for sitting and eating, and a telephone. There was a bathroom with a tub, a sink, a toilet, and toiletries. Throughout the unit were books, artwork, and other personal items belonging to Mr. Swann (Pet. Exs. 1, 2, 3, 17, 34; Tr. 16-17, 29-35; Nunez: Tr. 16-17, 29-35; Wassmann: Tr. 85, 89-98; Gui: Tr. 250-52; Langenegger: Tr. 295-96; Elsener: Tr. 390; Flippen: Tr. 502-07, 519-25, 535, 547-48; Ryder: Tr. 621-28).

It was also undisputed that before, during, and after the window period, the basement was set up, furnished, and used exclusively by Mr. Swann. The basement contained Mr. Swann's office and had computer equipment, work tables, books, shelves, file cabinets, and professional and personal papers belonging to him. Mr. Swann, a painter, also maintained a painting area under the stairs. Throughout the basement were paintings by Mr. Swann and other personal items belonging to him. In another area, there were worn couches and chairs and several tables, including a large one that could be used for conferences or dining. There was a buffet that held some plates and glasses. There was a bathroom with a stand-up shower, a sink, a toilet, and a washer and a dryer. In the rear of the basement, by the bathroom, was an area with a twin bed, an army cot, nightstands, a shelf with personal items, and an air conditioner in the window. The basement was open but could be separated with curtains. The basement was not finished and had hanging wires, pipes, open walls, and open electric fixtures (Pet. Ex. 18; Resp. Exs. L, X, Z, AA, BB, CC, DD, EE, FF, GG, HH; Nunez: Tr. 25; Wassmann: Tr. 48, 100-01, 104-05; Gui: Tr. 254; Langenegger: Tr. 296; Flippen: Tr. 427-61; Ryder: Tr. 641-43, 648, 653). There was no kitchen, refrigerator, stove, or television in the basement (Tr. 26, 503, 636). Mr. Swann had an old hotplate near the bed to make espresso and a shelf with cups and glasses (Flippen: Tr. 457-59;

Ryder: Tr. 640-41; Resp. Exs. X, EE).²

During the window period, Mr. Swann received Con Edison and telephone bills in his name for the fourth floor and the basement (Pet. Exs. 31, 32, 33; Resp. Ex. W). Ms. Ryder testified that since Mr. Swann's death, the amount of the bills for the fourth floor was the same as before his death even though the apartment was now empty. She called Con Edison and has received refunds for the overcharge (Tr. 582-85).

Mr. Nunez, who shared Mr. Swann's interest in the supernatural, testified that he has known Mr. Swann since the early 1990s. In 2003 or 2004, Mr. Swann broke his leg while cleaning the building sidewalk and was hospitalized. He had a pin inserted into his leg and had trouble walking ever since. Mr. Nunez testified that after Mr. Swann was released from the hospital he would go six or seven times a week to see Mr. Swann. Until Mr. Swann's death in 2013, Mr. Nunez would help him with shopping and errands. Mr. Nunez testified that from the time of his accident until his death, Mr. Swann lived on the fourth floor and would work during the day in his basement (Tr. 12-13).

Mr. Nunez testified that he would arrive at around 4:00 p.m. and would take the stairs down to the basement where Mr. Swann was working. They would smoke cigars and after Mr. Swann was done working, they would take the elevator to the fourth floor. They would smoke and Mr. Swann would have a drink while they talked or watched television. Sometimes Mr. Nunez would wash the dishes or warm up food that he had bought. Mr. Nunez would leave around 7:00 or 7:30 p.m. (Tr. 12-14, 22-24, 47). Mr. Wassmann testified that he often saw Mr. Nunez visiting and helping Mr. Swann (Tr. 109).

Ms. Ryder and Ms. Flippen acknowledged that Mr. Swann broke his leg in 2003, but claimed that he recovered fully. They denied that Mr. Swann needed Mr. Nunez's help and the little help he needed was provided by other people (Flippen: Tr. 474-77, 484-86; Ryder: Tr. 596-98, 601, 603). Respondent submitted a video from 2007 showing Mr. Swann walking without a limp (Resp. Ex. II; Tr. 479).

Mr. Nunez testified that Mr. Swann did not have air conditioning on the fourth floor and

² Many of the photographs of the fourth floor and basement were taken before, during, or after the window period. There was testimony from both parties that the photos accurately represented how these areas looked during the window period. Other photos were taken after Mr. Swann's death when the fourth floor and basement had been partially dismantled. There was testimony that the objects depicted therein were there during the window period. There were no photographs of Mr. Swann's bedroom in the basement. Ms. Flippin and Ms. Ryder testified that the reason was because Mr. Swann's bedroom was too intimate to be photographed (Tr. 453, 634).

would sometimes sleep on a bed in the basement when it was too hot upstairs (Tr. 25). Mr. Wassmann and Ms. Gui also testified that Mr. Swann's apartment was very warm and that in the summer when they visited, Mr. Swann would often be in his underwear or a towel and that he also wore shorts and a t-shirt (Wassmann: Tr. 85, 175; Gui: Tr. 253). When it was too hot on the fourth floor or if they were having a party that would keep Mr. Swann awake, he would sleep in the basement (Wassmann: Tr. 180-81; Gui: Tr. 255). Ms. Ryder denied that Mr. Swann walked around in a towel or in his underwear. She did Mr. Swann's laundry when she visited and never saw any underwear. He always wore shorts or sweatpants and a shirt with a pocket (Tr. 608-12).

Mr. Nunez testified that Mr. Swann had clothes in the basement where the washer and dryer were located but that he kept the majority of his clothing on the fourth floor in a closet in the bathroom. Mr. Swann also kept a small amount of food and liquor on the fourth floor (Tr. 26-27). He lived in a Spartan manner (Tr. 32). Ms. Flippen testified that Mr. Swann kept his clothing in an armoire in the basement (Tr. 455; Resp. Ex. DD) but agreed that he lived in a Spartan manner (Tr. 460).

Mr. Nunez testified that when Ms. Ryder visited each month, she would use the area on the fourth floor by the mirror as an office (Tr. 18). Mr. Nunez would make shorter visits to allow her and Mr. Swann to spend more time together. When she came, Ms. Ryder would sleep on one of the sofas on the fourth floor. According to Mr. Nunez, Mr. Swann's friend Mr. Bergen would come every month to see Mr. Swann and he too would sleep on one of the sofas (Tr. 21-22). Ms. Ryder denied that she visited Mr. Swann on a monthly basis but acknowledged that Mr. Bergen did (Tr. 586, 621). She also testified that it was not until she went in 2012 to live with Mr. Swann during his illness that she set up her office on the fourth floor because it was the only place Verizon could install a phone line (Tr. 603-04).

Ms. Langenegger testified that when she moved into 357 Bowery, Mr. Swann was living on the fourth floor and that he was also living there in 2008 and 2009 (Tr. 292-93). Mr. Wassmann and Ms. Gui testified that during the window period, Mr. Swann was living on the fourth floor and would use the basement as his office. Because the building was old, they could hear Mr. Swann walking above them in the mornings and evenings and would also hear the television at night until about 9:00 p.m. when Mr. Swann would go to sleep. They sometimes

heard him using the bathroom in the middle of the night (Wassmann: Tr. 82; Gui: Tr. 249).

Petitioners testified that Mr. Swann usually got up very early and would take the elevator that he operated down to the basement (Wassmann: Tr. 82, 101; Gui: Tr. 252; Langenegger: Tr. 293). Mr. Swann often left the basement door open so that air would come in. When they saw him in the basement, he was usually sitting at his desk working or was painting (Wassmann: Tr. 102; Gui: Tr. 255; Langenegger: Tr. 296-97). Ms. Langenegger stated that she sometimes got worried if she did not hear Mr. Swann taking the elevator to the basement, and that she would go to the fourth floor to check on him. This started in 2005 and continued until Mr. Swann's death (Tr. 294). Ms. Flippen testified that Mr. Swann did not have a daily pattern (Tr. 464-66, 536).

Mr. Wassmann testified that he visited Mr. Swann on the fourth floor in the evenings to bring him the monthly rent and they would chat. Mr. Swann was very talkative and they often spoke about books and art (Tr. 83-84, 86, 102, 166, 176). If it was too late, he would bring Mr. Swann the rent the next morning in the basement (Tr. 84, 179).

Petitioners testified about how they would sometimes help Mr. Swann during the window period. Mr. Wassmann would clean the gutters outside the fourth floor windows when they were clogged with leaves (Tr. 87), he climbed on the roof, and he looked at the pipes in the basement (Tr. 166). Prior to 2010, Ms. Langenegger would go to Mr. Swann's apartment frequently with Mr. Elsener because Mr. Swann was having trouble with his landline. They would check the cable and get it working again (Langenegger: Tr. 295; Elsener: Tr. 388-89). Mr. Elsener also testified that in 2008 or 2009 he went to the fourth floor to hookup Mr. Swann's DVD player for the television that he kept next to his bed (Tr. 388-90, 400-03). Ms. Flippen testified that Mr. Swann got a television on the fourth floor in 2012 (Tr. 547). However, Ms. Ryder testified that there was a television in 2008 (Tr. 635).

Mr. Wassmann testified that he saw Mr. Swann eat snacks in the basement but never saw him eat a meal there (Tr. 103). Mr. Wassmann and Ms. Gui would sometimes bring him food on the fourth floor including leftovers from Thanksgiving dinner (Wassmann: Tr. 98-100, 171-73; Gui: Tr. 250). Ms. Langenegger testified that she liked to bake cakes and would bring Mr. Swann food in his fourth floor apartment (Tr. 294). Ms. Ryder testified that she spent many Thanksgivings with her brother, most recently in 2010, 2011, and 2012. They always had dinner

in the basement (Tr. 588). She denied seeing Mr. Wassmann or Ms. Gui on Thanksgiving and testified that she never saw them bring Mr. Swann any leftovers (Tr. 612-13). Ms. Flippen testified that Mr. Swann did not cook or take regular meals. When he needed something he would go next door to the bodega (Tr. 460, 468). He liked to keep half and half by his desk and drank it from the carton (Tr. 467-68, 477, 504, 555).

It was undisputed that Mr. Swann allowed petitioners to use the washer and dryer in the basement as well as the elevator when they needed it (Tr. 26, 182, 253, 297-98, 386). Ms. Langenegger and Mr. Elsener testified that she had a key to the basement so she could use the laundry machines in the evening after Mr. Swann had gone upstairs. Mr. Swann would sometimes leave a post-it note on the door saying, "Gone to bed" (Langenegger: Tr. 298-99; Elsener: Tr. 387-88, 390). Ms. Flippen testified that she would be surprised if Mr. Swann left such a note because, having worked for the CIA, he was conscious about security and such a message could be seen from the street and could lead to a break in (Tr. 487-88).

Ms. Ryder, who lives in California, testified that Mr. Swann used the fourth floor as a guest suite for the "hundreds" of guests that visited over the years. The canopy bed was made for their parents who visited after they moved to Texas in the 1970's (Tr. 594-95). Ms. Flippen testified that in addition to the fourth floor being used for guests (Tr. 569, 572), it was also a "museum" for Mr. Swann's collections and paintings by other people (Tr. 494-95).

Ms. Ryder testified that between 2003 and 2008 she visited Mr. Swann a couple of times a year (Tr. 599-600). After he broke his leg, Mr. Swann lived on the fourth floor to recuperate (Tr. 628, 653). During the window period, Mr. Swann lived in the basement. In 2008 and 2009, she visited Mr. Swann five times for two to four days at a time. She always slept in the basement with her brother. She slept on a cot and he slept on his bed in the same room. She did not stay on the fourth floor in order to be near her brother (Tr. 586-87, 633, 659). In 2010, she visited four times (Tr. 600) and started staying on the fourth floor (Tr. 643-45). Mr. Swann would sometimes sleep up there in 2011 (Tr. 663). In 2012, she visited six times. On the last visit she moved in with Mr. Swann to care for him until his death (Tr. 600). Ms. Ryder testified that Mr. Swann moved up to the fourth floor in 2012 after Mr. Lord filed a Loft Board application (Tr. 606-07), but also testified that he moved there in 2011 before the application was filed (Tr. 666-68).

Ms. Flippen testified that she lived with Mr. Swann four times including from late

August 2009 until February 2010 (Tr. 420, 423, 717-22; Resp. Exs. NN, OO, PP). During the window period, Ms. Flippen would come home in the evening and would either bring dinner or they would go out. When they were done eating, Mr. Swann would take her to the fourth floor in the elevator and return to the basement to sleep (Tr. 465). During the day Mr. Swann would work, sleep, and paint in the basement (Tr. 467-68).

Ms. Flippen testified she also visited Mr. Swann for shorter stays between 1996 and his death in 2013 (Tr. 434). She always slept on the fourth floor and Mr. Swann slept in the basement (Tr. 425). Ms. Flippen testified that before, during, and after the window period, Mr. Swann would have Thanksgiving and other parties on both the fourth floor and in the basement (Tr. 426; Resp. Exs. Z, GG). Ms. Flippen testified that Mr. Swann moved to the fourth floor in 2012 after Mr. Lord's application was filed. Prior to that, he was living in the basement (Tr. 541-43).

Petitioners' proof that Mr. Swann lived and slept on the fourth floor and used the basement as his office and slept there occasionally was more credible than respondent's proof that Mr. Swann lived in the basement for the entire window period. While it is very likely that Mr. Swann slept in the basement on a cot when guests visited, it seems more likely than not that he would sleep in the large, comfortable bed on the residentially furnished fourth floor when no one was visiting and it was not too hot. It seems highly unlikely that Mr. Swann lived in a dirty, unfinished basement that had no kitchen and a small bathroom that housed the laundry machines used by the tenants in order to live with and "guard" his life's work, as claimed by respondent's witnesses (Flippen: Tr. 556-59, 567-68; Ryder: Tr. 629-30). Ms. Flippen acknowledged that when she was not visiting, she did not know where Mr. Swann slept, where he took his meals, or whether Mr. Nunez visited him regularly (Tr. 499-502). Mr. Nunez's credible testimony that he made shorter visits when Ms. Ryder was visiting would explain why she was unaware that he was regularly helping Mr. Swann.

Ms. Ryder's testimony that Mr. Swann lived on the fourth floor before and after the window period but lived in the basement during the window period was not credible. She was unable to state when Mr. Swann changed residences except to say that he was not living on the fourth floor during the window period (Tr. 628-29, 666-68). Ms. Ryder's further explanation that the basement was not always musty and dirty and that the fourth floor was not always pristine (Tr. 659-62) was nonsensical since both spaces were in regular use by Mr. Swann and

his visitors. Her statement was also inconsistent with the photographic evidence and with Ms. Flippen's assertion that Mr. Swann always had overflowing ashtrays and clutter around him in the basement and that the fourth floor was kept clean because it held his collections (Tr. 494-95, 569). Also incredible was Ms. Ryder's claim that when she visited in 2008 and 2009 she chose to sleep on the army cot next to her brother in the basement so that she could be near him. While it is understandable that Ms. Ryder wanted to be nearby while caring for Mr. Swann at the end of his life, this was not the case during other non-window periods when she visited and there was no logical explanation why this was necessary during the window period.

Even if respondent's version of Mr. Swann's living arrangements were credited, the fourth floor would still qualify as a residence. Under MDL section 281(5), an IMD must be "occupied for residential purposes as the residence or home of any three or more families living independently from one another for" 12 consecutive months between January 1, 2008, and December 31, 2009. According to MDL section 4(1), the word "occupied" must be construed as if followed by the words "or is intended, arranged or designed to be used or occupied;" *see also Pels*, OATH 2481/11 at 9.

Thus, even if Mr. Swann slept, worked, and ate in the basement, he also occupied the fourth floor under the MDL. The fourth floor was arranged as a residence and included typical residential features such as a bed, a kitchen, dining and living room furniture, a bathroom, and personal belongings. This space was created by Mr. Swann to be a residence before the window period and remained in that state during and after the window period. Mr. Swann had exclusive control of the unit enabling him and his guests to utilize it as a residence whenever he wanted, including Ms. Flippen who lived there for six months during the window period. Moreover, Mr. Swann occupied the fourth floor as his residence before and after the window period. The fact that Mr. Swann allowed guests to stay there while he slept in the basement during the window period, does not diminish the inherent residential character of the space. *Pels*, OATH 2481/11 at 10 (fact that tenant sublet space to other artists during window period did not diminish inherent character of the residential space).

Whether the basement and fourth floor should be considered a single residential IMD was never addressed by the parties. Thus, only the fourth floor should be a covered IMD unit.

2. Petitioners qualify for protection under the Loft Law

Unlike building coverage, a determination that an applicant is a residential occupant qualified for protection requires a showing that, “[e]xcept as otherwise provided herein . . . the residential occupant is in possession of a residential unit, covered as part of an IMD.” 29 RCNY § 2-09(b)(1).

The un rebutted testimony of Ms. Langenegger, Mr. Wassmann, and Ms. Gui, as corroborated by documentary evidence and admissions by Ms. Flippen and Ms. Ryder, established that they currently occupy their units as residences and, that they have done so since prior to the effective date of the Loft Law.

Mr. Wassmann and Ms. Langenegger are protected occupants because they are the prime lessees and are in possession of their respective units. 29 RCNY § 2-09(a) (Lexis 2014) (“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.”); *see also Matter of Gareza*, Loft Bd. Order No. 4243 at 3-4 (Feb. 20, 2014) (“Tenants are the occupants entitled to Loft Law protection pursuant to § 2-09(b)(1) because they are the prime lessees of the [sic] their respective units and are in possession of their respective units.”).

Even though Ms. Gui was not on the third floor lease, she is also a protected occupant. Loft Board Rule 2-09 provides for such protection if the occupant was in possession of the unit prior to June 21, 2010, the effective date of the Loft Law, even when the occupant does not have a written lease and occupies the unit without consent of the landlord. 29 RCNY § 2-09(b)(2) (Lexis 2014); *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 entitled to be protected occupants); *Gareza*, Loft Bd. Order No. 4243 at 4 (“Section 2-09(b)(2) provides for protected occupancy status in the case that the tenant in possession of the unit is not the prime lessee.”).

FINDINGS AND CONCLUSIONS

1. Petitioners demonstrated that 357 Bowery is an interim multiple dwelling under the Loft Law and had three residentially occupied units during the applicable window period on the second, third, and fourth floors.

2. Petitioners demonstrated that Ms. Langenegger is the protected occupant of the second floor and that Mr. Wassmann and Ms. Gui are the protected occupants of the third floor.

RECOMMENDATION

The application should be granted.

Alessandra F. Zorghiotti
Administrative Law Judge

October 22, 2014

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

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