

Matter of Tenants of 979-987 Dean Street, Brooklyn

OATH Index No. 1714/14 (Apr. 30, 2015)

[Loft Bd. Dkt. No. TR-1148]

Loft tenants sought coverage of multi-structure Brooklyn address. After a default hearing in which the owner did not appear, application granted and two buildings held to constitute both a horizontal multiple dwelling and an IMD with three residential units. The four current occupants held to be protected occupants of their respective units.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TENANTS OF 979-987 DEAN STREET, BROOKLYN,
Petitioners

AMENDED REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This case concerns a coverage application filed with the Loft Board on December 10, 2013, by four residential tenants of the premises 979-987 Dean Street, Brooklyn, New York, pursuant to section 281(5) of the Multiple Dwelling Law (MDL) and title 29 of the Rules of the City of New York (RCNY). The application alleges that 979-987 Dean Street in Brooklyn should be covered as an interim multiple dwelling (IMD) under the Loft Law with four residential units occupied by Nicola Lopez (979B, 2nd floor), Gandolf Riecks (979), Kellam Clark (981), and Elmore “Richmonoff” Richmond (983A). The owner is listed as BYG Realty Corporation (BYG Realty), with a mailing address of Sunlight Linen at 985 Dean Street. An amended application was filed on April 24, 2014, adding Nathan Randal Weeks as an applicant and occupant of 983A. No answers were filed.

After the owner failed to appear at an April 2014 conference, the tenants’ attorney indicated that he understood the owner was to be represented by attorney Gerard Proefriedt. However, after numerous attempts to confirm this representation and set up another conference, this tribunal was ultimately informed by Mr. Proefriedt that he had not been retained. The

tenants and the owner were then mailed a notice on October 14, 2014, that a hearing on the application would be held on December 15, 2014.

At the hearing, the tenants appeared but the owner did not. Based upon the notice of trial and proof of mailing, the hearing went forward in the form of an inquest. The tenants presented four witnesses and 25 exhibits in support of their coverage and protected occupant claims. Following the hearing, this tribunal wrote to the tenants' attorney, with a copy to the owner, providing an opportunity to present further evidence on whether the premises constitute a horizontal multiple dwelling. On January 30, 2015, the tenants submitted an affidavit from Mr. Peachy, an architect, providing a description of the property and generally addressing the horizontal multiple dwelling issue. On February 12, 2015, this tribunal gave petitioners an opportunity to address issues of protected occupancy raised by three recent Loft Board orders. On March 16, 2015, petitioner's attorney submitted a letter and an affidavit of Mr. Richmond as to these issues.

For the reasons provided below, I find that two of the buildings at the premises constitute a horizontal multiple dwelling containing three residential units. I further find that the current occupants in possession of those three units should be held to be protected occupants.¹

ANALYSIS

The premises, identified in the application as 979-987 Dean Street, is located on the north side of Dean Street extending to the south side of Pacific Street, between Classon Avenue and Franklin Avenue in Brooklyn, in lot 81 of block 1134, in an M1 manufacturing zone (*see* Department of Finance Tax Map, ALJ Ex. 10). Department of Buildings (DOB) records show that lot 81 is currently owned by BYG Realty (ALJ Ex. 4). There is a 1944 certificate of occupancy (Pet. Ex. 1) for "979/95 Dean Street" and "lot 80-79" for a one-story factory.

Lot 81 contains several addresses and structures, which are identified in different ways in the application and in various parts of the record. The application lists four residential units at four different addresses: 979, 979B, 981, and 983A Dean Street. In their hearing testimony, the

¹ Following the issuance of the original report and recommendation on April 28, 2015, petitioner's counsel submitted a letter noting an error in the report. The original report had concluded that the issue of whether Mr. Weeks was a protected occupant could not be reached because he was not an applicant. As accurately indicated in counsel's letter, Mr. Weeks was identified as an applicant in the amended application submitted on April 24, 2014. The instant amended report and recommendation acknowledges that Mr. Weeks is an applicant and recommends that he be found to be a protected occupant.

tenants generally used these same designations. DOB records (ALJ Ex. 6), as noted in the post-hearing submission from Mr. Peachy, refer to four different street addresses on lot 81: 969-979 Dean Street, 979-987 Dean Street, 1070-1078 Pacific Street, and 989-995 Dean Street. A Google aerial view of the lot also shows the roofs of the four buildings, as outlined and labeled in ALJ Exhibit 9. The Peachy submission confirms that these four addresses listed in the DOB records are, in fact, four physically separate buildings. The Peachy affidavit further indicates that the first three buildings contain the four residential units listed in the application, while the fourth building at 989-995 Dean Street contains no residential space. The DOB address designations used in the DOB records and in the Peachy affidavit are also used herein.

The four allegedly residentially occupied units have different street addresses and no one address contains more than two units. The premises can therefore only be covered as an IMD if the multiple buildings constitute a horizontal multiple dwelling. The proof as to the preliminary horizontal multiple dwelling issue, submitted after the hearing in an architect affidavit, will be addressed first, followed by analysis of the coverage and protected occupancy issues.

Horizontal Multiple Dwelling

The Loft Board regulations provide specific criteria for making a determination as to whether several structures can be considered a horizontal multiple dwelling for purposes of coverage under the Loft Law:

- (iii) In deciding whether a structure is a single building, as distinguished from more than one building for purposes of IMD determination, the Loft Board shall . . . consider, *inter alia*, the following factors:
 - (A) whether the structure is under common ownership;
 - (B) whether contiguous portions of the structure within the same zoning lot are separated by individual load-bearing walls, without openings for the full length of their contiguity, as distinguished from non-loadbearing partitions;
 - (C) whether the structure has been operated as a single entity, having one or more of the following:
 - (a) a common boiler;
 - (b) a common sprinkler system;
 - (c) internal passageways;
 - (d) other indicia of operation as a single entity.
 - (D) whether the owner or a predecessor has at any time represented in applications or other official papers that the structure was a single building;
 - (E) whether a single certificate of occupancy has been requested or issued for the structure; and

(F) the pattern of usage of the building during the period from April 1, 1980, to December 1, 1981.

29 RCNY § 2-08(a)(1)(iii).

City records referred to in the Peachy affidavit and reviewed by this tribunal after the hearing represent that some, but not all, of the structures as a single building.² The 1944 certificate of occupancy (Pet. Ex. 1) refers to the property as “979/95 Dean Street,” also described as “lot 80-79.” There is a June 1994 deed (ALJ Ex. 3) conveying 967-985 Dean Street (described by distances from Dean Street on the south, Classon Avenue on the west, Pacific Street on the north, and Franklin Avenue on the east) to Dean and Pacific Realty Corp. There is also a December 1994 deed (ALJ Ex. 4) conveying 967-985 Dean Street (described as block 1134, lot 81) to BYG Realty. In several 2000 financing documents (ALJ Ex. 5) filed by BYG Realty in 2000, the structures are listed as 967-985 Dean Street and “lot 81.”

Most of the evidence on the horizontal multiple dwelling issue was supplied by the post-hearing affidavit of Mr. Peachy, an architect retained by the tenants. In a report dated January 30, 2015, Mr. Peachy stated that he surveyed the buildings at Dean Street in August and September 2014. He identified four separate buildings, which he denoted as 969-975 Dean Street, 979-987 Dean Street, 989-995 Dean Street, and 1070-1078 Pacific Street.

Mr. Peachy describes the western-most structure, 969-975 Dean Street, as having a parking lot and a one-story building with a “mezzanine.” This structure contains two residential units.

According to Mr. Peachy, the next building, 979-987 Dean Street, is occupied by a commercial use on the first floor and two residential units on the second floor. The second floor can be accessed through a door on the roof and then by an interior stair.

Mr. Peachy describes the third building, 1070-1078 Pacific Street, as a two-story building just to the north of 969-975 Dean Street. This building has “no C of O and no . . . DOB

² I note that this tribunal’s authority to take judicial notice of public records is recognized by OATH rules and prior case law. See 48 RCNY § 1-48 (a) (Lexis 2014) (“In reaching a decision, the administrative law judge may take official notice, before or after submission of the case for decision, on request of a party or *sua sponte* on notice to the parties, of any fact which may be judicially noticed by the courts of this state”); *Dollas v. W. R. Grace & Co.*, 225 A.D.2d 319, 320 (1st Dep’t 1996) (official or judicial notice may be taken of matters “of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof”); *Taxi & Limousine Comm’n v. Mollah*, OATH Index No. 2469/14 at 5 (Sept. 12, 2014). The documents added to the record as ALJ exhibits did not prejudice either party, since the owner defaulted and waived any right to object and the tenants referred to most of the added records in their own submissions.

violations, EDB violations, filings and actions.” Mr. Peachy states that this building has a residential unit on the second floor.

The fourth building on lot 81 is 989-995 Dean Street. Mr. Peachy describes this as a “one story building occupied by a commercial use” and notes that there are no residential units in it.

According to Mr. Peachy, an opening exists between at least two of the buildings. There is an opening “in the west wall of the middle section (979-987 Dean St.) into the Clark apartment in 969-975 Dean St.” with a gate, now sealed with gypsum board. Mr. Peachy states that the opening “was open in 1999 and was used for access through middle section (979-987 Dean St.) to the Clark apartment in the east section (969-975 Dean St.) by Clark and others.”

According to Mr. Peachy, several of the units are accessible from adjacent buildings. There is a ladder from the west wall of the residential unit at 969-975 Dean Street for a second egress for all of the second floor units at 969-975 and 979-987 Dean Street and 1070-1078 Pacific Street. The two second floor units in 979-987 Dean Street are accessed through an interior stair in 979-987 Dean Street, with a second egress via the roof. Mr. Peachy states that the primary access for the second floor unit at 1070-1078 Pacific Street is an interior stair at 979-987 Dean Street with a door to the roof. There is also a second recently installed egress ladder from 1070-1078 Pacific Street to the north of 969-979 Dean Street. Mr. Peachy states that the two units in 969-75 Dean Street open to a common rear yard.

Mr. Peachy notes that the four structures share a sprinkler system, gas service and meters, and electrical service and meters, although he provides no details as to what observations lead him to this conclusion. He states that communications wiring is also shared by all four buildings.

Mr. Peachy indicates that the buildings “appear” to be the same age with brick exterior walls and wood joist construction. 979-987 and 989-995 Dean Street both have yellow brick with “the same bond.” Mr. Peachy observed that the buildings are all “low” and “one to two” stories in height. There are roll up steel security gates installed at street level along all the Dean Street building facades. The roofs appear to be the same age with similar skylights and equipment penetrations. According to photos available on Google maps (ALJ Ex. 8), there is a common decorative edge on the facades facing Dean Street, giving the appearance of a single building.

I found the Peachy affidavit generally credible and sufficient to demonstrate that most of the factors support a finding that the two structures at 969-975 and 979-985 Dean Street are a horizontal multiple dwelling. According to the Department of Buildings database, the two buildings lie within Block 1134, Lot 81. This is confirmed not only by Mr. Peachy's affidavit but by the DOB BIS database, which indicates that these two addresses are all within lot 81 (ALJ Ex. 6). Both buildings are currently owned by BYG Realty, as reflected by a 1994 deed for "967-985 Dean Street" (ALJ Ex. 4). The leases for the Lopez, Clark, and Weeks units were all with BYG Realty. The common ownership, the shared certificate of occupancy for 979-987 and 989-995 Dean Street, the shared sprinkler system, the shared gas and electrical service, the shared communications wiring, the deeds and financing documents referring to lot 81 and 969-985 Dean Street, and the common façade facing Dean Street are all factors weighing heavily in favor of the 969-975 and 979-985 Dean Street being used as a horizontal multiple dwelling.

It must be observed that Mr. Peachy's affidavit exhibited a number of problems. First, I note that Mr. Peachy's report is dated January 30, 2015, and his only visits to the premises occurred in August and September 2014, some four to five months earlier. Although it seems likely that Mr. Peachy took some notes at the time of his site inspection, the existence of notes is not mentioned in the report. The inaccuracies as to a number of details, discussed below, may be ascribed to either a failure of memory, inadequate notes, or both.

According to Mr. Peachy, a 1992 alteration application (*see* ALJ Ex. 7), which refers to only 979 Dean Street, "pertains to all four buildings." No explanation is offered for this conclusion. Mr. Peachy identifies a 1996 alteration application (*see* ALJ Ex. 7) for installation of two boilers, which refers only to 985 Dean Street. Mr. Peachy states that "979 Dean Street is used in this application referring to all four buildings." This statement by Mr. Peachy is inaccurate in two respects. First, the 1996 application refers only to 985, not 979, Dean Street. Second, there is no reference on the face of the application to any other addresses.

Mr. Peachy's affidavit generated confusion by identifying some of the residential units using only tenants' first names. For example, Mr. Peachy identified the ground floor unit at 969-975 Dean Street as the "Gandolf apartment," a reference to Gandolf Riecks, Ms. Lopez's deceased husband. Mr. Peachy identified one of the two second-floor units at 979-987 Dean Street as the "Kelvin" unit. The reference to "Kelvin apartment" is apparently a reference to

Calvin Hernandez who, according to Ms. Lopez, once occupied a second floor unit at 979-987 Dean Street.

The Peachy affidavit also includes remarks which suggest a fair degree of bias in favor of petitioners. Mr. Peachy indicates that he “is informed” that the tenants all pay rent to BYG Realty and that the leases are all in the name of BYG Realty. In fact, this is incorrect since the 2000 Lopez lease, is in the name of only Barry Grunfeld, who is the BYG Realty president. Mr. Peachy also “presumed” that all the water, sewer, electricity, insurance and repair bills were paid by BYG Realty without any basis offered for such a presumption. There were a number of factors that Mr. Peachy’s affidavit left unaddressed, including whether the buildings are separated by load-bearing walls or whether they share a boiler or other heating system. Given the partisan tone of Mr. Peachy’s report, it may be inferred that these factors did not support a finding that the structures were a horizontal multiple dwelling.

Nonetheless, based upon the significant number of factors of commonality convincingly established by the Peachy affidavit, I find that 979-987 and 989-995 Dean Street are a horizontal multiple dwelling.

As to 1070-1078 Pacific Street, which contains the additional loft space occupied by Ms. Lopez and Mr. Riecks during the window period, I find that the evidence provided is less convincing in establishing that this structure is also part of a horizontal multiple dwelling with the other two buildings. No photographs were provided to illustrate the position of this structure with relation to the other structure, although Google maps aerial photos (ALJ Ex. 9) indicate that this building is close to and just north of 969-975 and 979-987 Dean Street. Mr. Peachy made no observations as to openings between this structure and the other two buildings. Mr. Peachy’s conclusory statements that sprinkler and electrical systems were shared by all four buildings, without specifying what observations led him to these conclusions, are deserving of limited weight. It is true that Ms. Lopez testified credibly at the hearing, as summarized below, that she and her husband resided together at both the ground floor at 969-975 Dean Street and the second floor of 1070-1078 Pacific Street from 2001 to 2014. At the same time, the two units are identified as separate and independent units in the coverage application, are located in different buildings, and each has its own kitchen and bathroom, further indications of independence.

I recommend that, prior to making a determination as to whether 1070-1078 Pacific Street is part of a horizontal multiple dwelling that includes 969-975 and 979-985 Dean Street,

the Loft Board send an inspector to the premises to inspect, analyze, and report on the buildings with regard to the factors in rule 2-08(a).

Coverage Under the Loft Law

To qualify for coverage under the 2010 amendment to the Loft Law, a building must meet a number of requirements: (1) at any time have been occupied for manufacturing, commercial, or warehouse purposes; (2) lack a certificate of occupancy or of compliance permitting residential use on the qualifying unit on June 21, 2010; (3) not be owned by a municipality; and (4) have been 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 (“window period”). MDL § 281(5) (Lexis 2014).³ The unit must also (i) not be located in a basement or cellar; (ii) have at least one window opening onto a street or lawful yard or courtyard as defined in the zoning resolution for such municipality; (iii) have at least one entrance that does not require passage through another residential unit to obtain access to the unit; and (iv) be at least 400 square feet in area. MDL § 281(5).

Tenants Lopez, Clark, and Richmond presented proof that, during 2008 and 2009, up to five units on lot 81 were residentially occupied. Ms. Lopez testified that she moved into the ground floor at 979 Dean Street in 2000 pursuant to a five-year lease (Pet. Ex. 2), ending on December 31, 2005 (Tr. 8-9). In 2001, her husband, Gandalf Riecks, leased the second floor of 979B Dean Street as a “24-hour studio” under a “commercial lease” for four years for no additional rent (Pet. Ex. 3). Ms. Lopez presented floor plans of the ground floor and the studio (Pet. Exs. 4, 5), showing the configuration of the space from 2001 to the present. On the ground floor were a kitchen, bathroom with toilet, sink, and tub, loft bed, and a large studio space, measuring approximately 1800 square feet. In the upstairs roof space were another kitchen, bathroom with toilet sink and tub, and two beds, measuring approximately 1200 square feet (Tr. 12). Ms. Lopez and Mr. Riecks installed the kitchen on the ground floor in 2001 and the kitchen in the roof studio in 2002 (Tr. 12). Both units have windows and independent entrances to the public hallway (Tr. 13).

³ The premises here does not lie within any of the designated “industrial business zones” and therefore is not disqualified from being an IMD by section 281(5)(i).

According to Ms. Lopez, she and Mr. Riecks lived, worked, and slept in both spaces in 2008 and 2009 (Tr. 13-14). Mr. Riecks died in April 2014. Ms. Lopez gave birth to a son in June 2014 (Tr. 8).

Ms. Lopez produced a number of documents showing her address as 979 Dean Street: her 2007 and 2008 federal tax returns (Pet. Ex. 6, 7); her 2005-2013 New York driver's license (Pet. Ex. 8), her 2009-2011 vehicle registration (Pet. Ex. 9), her June 2008 – June 2010 Verizon bills for cell and local telephone service (Pet. Ex. 10), and her February and August 2008 vehicle insurance bills (Pet. Ex. 11). She also offered the following documents for Mr. Riecks showing his address as 979 Dean Street: his 2008-2015 driver's license (Pet. Ex. 12), his 2009 Social Security earnings statement (Pet. Ex. 13), his January 2008 – July 2008 bank statements (Pet. Ex. 14), and his March 2008 Verizon cell phone bill (Pet. Ex. 15).

Both Mr. Clark and Mr. Richmond agreed that Ms. Lopez and Mr. Riecks resided in the ground floor unit at 979 Dean Street in 2008 and 2009 (Clark: Tr. 25; Richmond: Tr. 32).

Mr. Clark testified that he moved into two floors at 981 Dean Street in 1999. At that time, the lower portion contained a conveyer belt and metal trash containers filled with cement. Mr. Clark gutted the upstairs, installed electrical wiring and plumbing, and rebuilt the walls (Tr. 21). He produced a floor plan (Pet. Ex. 16) that showed a bathroom with toilet and shower, a kitchen, a dark room, a dining room, a parlor, and an art studio on the first floor. On the second floor, reached by a spiral staircase, is a 24-foot by 26-foot alcove with interior walls. The unit contains approximately 3700 square feet, has a window facing the street, and is accessible to the street (Tr. 23).

Mr. Clark produced the following documents showing his address as 981 Dean Street: January through December 2008, February 2009, and August 2009 bank statements (Pet. Ex. 17), August 2008, July 2009, September 2009, January 2010, February 2010, and March through July 2010 Verizon phone bills (Pet. Ex. 19), July 2009, August 2009, January 2010, and March 2010 through January 2011 AT&T cell phone bills (Pet. Ex. 18).

Ms. Lopez also testified that beginning in 2000 (Tr. 20) and in 2008 and 2009 Mr. Clark resided at 981 Dean Street. Ms. Lopez described the space as a “bilevel unit” with a large kitchen with a stove and refrigerator and bedrooms on the second floor (Tr. 18). Mr. Richmond agreed that in 2008 and 2009 Mr. Clark lived in 981 Dean Street (Tr. 32).

Mr. Richmond, whose name was misspelled as “Richmonoff” in the application, testified that he moved into 983A Dean Street in 2000, when Mr. Weeks was already living there. He found the unit on Craigslist (Tr. 26-27). On the date of the hearing, Mr. Weeks, whose full name was Nathan Ismael Randall Weeks (Pet. Ex. 25), was unavailable because he was in Peru working on an art project (Tr. 27). Petitioners presented a copy of the 2001 two-year “commercial lease” (Pet. Ex. 20) for the second floor at 985 Dean Street, between the landlord and “Nathan Ishmael Randall.” They also presented a 2008 one and one-half year “commercial lease” (Pet. Ex. 21) for “work/live” for 983A Dean Street also between the landlord and “Nathan Ishmael Randall.” Petitioners also presented a copy of a 2010 federal tax return (Pet. Ex. 25) in the name of “Nathan Ishmael Randall Weeks,” indicating his address as 983A Dean Street. Mr. Richmond presented a floor plan (Pet. Ex. 22) of the unit showing a kitchen with a stove and refrigerator, a bathroom with a toilet and tub, two bedrooms, and two bedroom/studios. He testified that the unit has approximately 2300 square feet and an independent entrance (Tr. 31). It also has a window facing Dean Street (Tr. 32).

Mr. Richmond provided the following documents showing his address as 983A Dean Street: a September 2008 GEICO claim inquiry, December 2008 Direct TV bill, a January 2009 Dish network bill, and a March 2010 DMV identification card (Pet. Ex. 23). Mr. Richmond also provided nearly all of his monthly bank statements from 2008, 2009, and 2010 (Pet. Ex. 24). In a post-hearing affidavit (Pet. Ex. 27), Mr. Richmond stated that he has paid rent directly to the landlord BYG Realty Corp. since 2009. He attached a 2008 lease for 983-A Dean Street between Mr. Randall and BYG Realty Corp, and five “sample” rent checks to BYG Realty from 2011, 2012, 2013, 2014, and 2015. Mr. Clark testified that, in 2008 and 2009, Mr. Weeks and Mr. Richmond were in 983 Dean Street (Tr. 25). Ms. Lopez stated that, beginning in 2001 or 2002 (Tr. 20) and during 2008 and 2009, Mr. Weeks and Mr. Richmond resided in a unit at 983A Dean Street. That unit contained a large kitchen and bedrooms or “working studios” (Tr. 18-19).

Ms. Quillian testified that she is a friend of Mr. Weeks, having known him for 10 years. For the last three months before the hearing, Mr. Weeks was in Peru working (Tr. 35).

Two tenants indicated that a fifth unit at the premises was also residentially occupied. Ms. Lopez testified that, in 2008 and 2009, a rooftop unit at 979-987 Dean Street was occupied by Calvin Hernandez and his girlfriend Erica. While Ms. Lopez was never in this unit, she

observed that Mr. Hernandez was there “at all hours” including late at night (Tr. 19). Mr. Richmond also testified that in 2008 and 2009 “Erica and Calvin” lived in 983B (Tr. 32).

The evidence offered was sufficient to establish that, during 2008 and 2009, there were at least three residentially occupied units at the premises. First, the testimony and documentation supplied by Ms. Lopez established that the ground floor at 969-975 Dean Street (and perhaps the second floor space at 1070-1078 Pacific Street) was occupied as a residential unit during 2008 and 2009 by Ms. Lopez and her late husband Mr. Riecks. Second, the testimony and documents of Mr. Clark established that the first and second floor at 969-975 Dean Street were residentially occupied by Mr. Clark during 2008 and 2009. Finally, the testimony and documents from Mr. Richmond established that the second floor at 979-987 Dean Street was residentially occupied by Mr. Richmond and Mr. Weeks during 2008 and 2009.

I find that the extremely vague testimony of Ms. Lopez and Mr. Richmond, uncorroborated by any documents, was insufficient to establish that another second floor unit at 979-987 Dean Street was residentially occupied for twelve consecutive months during 2008 and 2009.

Protected Occupancy

The final issue concerns determining the residential occupants qualified for protection in the covered IMD units. The evidence of residential occupancy by former prime lessees Lopez, Clark, and Weeks is sufficient to find that they are the protected occupants of their respective units.

The protected rights of Mr. Richmond, who has resided in his second floor unit at 979-987 Dean Street for some ten years but has never been on the lease, are less certain. Mr. Richmond has been in possession of the second floor unit at 979-987 Dean Street, having resided in the unit continuously since 2005, after responding to an ad on Craigslist. His documentation in the form of bank statements for 2008, 2009 and 2010, as well as utility bills for 2008 and 2009, adequately establish his residency at the unit during this period. When given a post-hearing opportunity to address this issue, the applicants’ attorney submitted an affidavit from Mr. Richmond (Pet. Ex. 27) in which he states that he has lived in the unit continuously since September 2005. He has paid a share of the rent and, at times, the entire rent, and has paid rent directly to the landlord “since at least 2009.” He attached five “sample” negotiated rent checks

to BYG Realty from 2011 through 2015 for amounts of \$1,040, \$1,050, \$3,000, and \$3,500. The checks indicate that they are for “work/live rent,” the purpose indicated on the 2008 Weeks lease.

The fundamental rules for identifying the residential occupant qualified for protection under the Loft Law are found in the Loft Board rules. First, under section 2-09(b)(1), the current occupant in possession of an IMD is presumptively protected. The rules further state that if the current residential occupant is not the prime lessee, then:

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: . . . (iii) June 21, 2010, for an IMD unit covered by MDL § 281(5)

29 RCNY § 2-09(b)(2). Finally, the rules provide that occupants who took possession of their unit after June 21, 2010, are qualified for protection only if they are “a prime lessee with a lease currently in effect,” “a statutory tenant” who took possession with the consent of the landlord without a lease, the assignee of a prime lessee consented to by the landlord, or prior to their occupancy the landlord was offered an opportunity to purchase the improvements. 29 RCNY § 2-09(b)(3) (Lexis 2014).

As a residential occupant who took possession prior to the effective date of the 2010 amendments to the Loft Law, Mr. Richmond would appear to be entitled to protected status under sections 2-09(b)(1) and (2) of the Loft Board Rules, even though he moved in as a roommate and without a written lease or rental agreement with either the prime lessee or the owner. In addition, the evidence here indicates that since approximately 2009, the landlord has accepted rent directly from Mr. Richmond. The proof that checks were accepted by the landlord demonstrates consent to Mr. Richmond’s occupancy of the unit under section 2-09(b)(2). *See Matter of Fogel*, Loft Bd. Order No. 3550 (Jan. 21, 2010); *Matter of McIntosh*, OATH Index No. 604/02 (Oct. 15, 2002), *adopted*, Loft Bd. Order No. 2763 (Nov. 19, 2002); *Matter of Blackman*, Loft Bd. Order No. 1214, 13 Loft Bd. Rptr. 17 (July 27, 1991). It would also make Mr. Richmond a “statutory tenant” under section 2-09(b)(3). *Fogel*, Loft Bd. Order No. 3550 at 3 (“Based on the Owner’s acceptance of rent from Tenant and its direct contact with the Tenant about building issues, the Loft Board finds that the Owner gave implied consent to the Tenant as

a statutory tenant.”); *McIntosh*, OATH 604/02 at 8-9 (consent to statutory tenancy found where applicant made direct rent payments to owner and owner dealt directly with applicant regarding the unit).

In a series of recent decisions, the Loft Board has interpreted the rules on protected occupancy as recognizing rights for prime tenants and sublessees but not for some roommates. In *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), the Board found that a residential occupant who was never a prime lessee is not “automatically” protected where a prime lessee asserts a right of protected occupancy. In *357 Bowery*, the girlfriend and life partner of the prime lessee who resided with the prime lessee for at least 12 months during the inquiry period, prior to the effective date of the 2010 amendments to the Loft Law, sought to be recognized as a protected occupant. The Loft Board noted that the girlfriend’s tenancy was not the result of a sublet, assignment or subdivision, and therefore, section 2-09(b)(2) of its rules did not apply. The Board held that, because the prime lessee was in possession, he was the sole residential occupant entitled to protection.

In *Matter of Behlke*, Loft Bd. Order No. 4348 (Jan. 15, 2015), an occupant who had lived in a loft unit since 2004 as the roommate of a tenant recognized by the landlord as a legal occupant filed an application asserting protected occupancy. The landlord stipulated that the applicant would be protected if his application, filed after the March 11, 2014, coverage deadline, were found to be timely. Agreeing with this tribunal’s holding that the application was timely, *Matter of Behlke*, OATH Index No. 153/15 (Nov. 12, 2014), the Board nonetheless held that the roommate could not be protected without a determination as to the “status” of the prime lessee and remanded the case for fact-findings as to service of the application.

Both *357 Bowery* and *Behlke* reflect a departure from prior Loft Board decisions, which have covered current occupants in possession of their IMD units prior to the effective date of the Loft Law, whether or not they were prime lessees, sublessees, or roommates. For example, in *Matter of Van Derbeek*, OATH Index No. 1972/01 (Feb. 13, 2002), *adopted*, Loft Bd. Order No. 2717 (Mar. 14, 2002), the Board held that both a prime lessee and his life partner and roommate, who was not on the lease, were both protected occupants of a unit where they were in possession of the covered unit prior to 1982. *Cf. Matter of Perry*, Loft Bd. Order No. 806, 7 Loft Bd. Rptr. 136, 139 (July 14, 1988) (“There’s no provision in Section B.3.a, or anywhere else in the

regulations, which would automatically preclude a roommate from also being a statutory tenant, and hence a protected occupant, where consent of the landlord can be demonstrated.”).

Here, Mr. Richmond’s status is parallel that of the occupant in *Van Derbeek* and other cases where the consent of the landlord has been found sufficient to establish that a current occupant is protected. For example, in the recent case of *Matter of Kuonen*, Loft Board Order No. 4333 (Oct. 24, 2014), an occupant leasing a room within an IMD unit from the net lessee of several floors in the building was held to be a protected occupant where she took occupancy prior to the effective date of the 2010 amendment pursuant to an agreement with the net lessee, who was acting as the landlord for the unit. Like the occupants in *Van Derbeek* and *Kuonen*, Mr. Richmond was in possession of his unit prior to the effective date of the Loft Law amendments and subsequently paid rent directly to the landlord. Mr. Richmond’s circumstances are thus distinguishable from the girlfriend and roommate in *357 Bowery* and *Behlke*, where there was no evidence that they were in privity with the landlord. I therefore find that Mr. Richmond is the occupant qualified for protection of the second floor unit at 989-987 Dean Street.

In sum, the buildings located at 979-987 and 969-975 Dean Street should be found to be a horizontal multiple dwelling with the following IMD units: the first floor at 969-975 Dean Street occupied by Ms. Lopez, the first and second floor at 979-987 Dean Street occupied by Mr. Clark, and the second floor at 979-987 Dean Street occupied by Mr. Richmond and Mr. Weeks. In addition, provided that an inspection by the Loft Board provides further indicia of a horizontal multiple dwelling, the second floor at 1070-1078 Pacific Street should also be part of the IMD unit occupied by Ms. Lopez at 969-975 Dean Street. Applicants Lopez, Clark, Weeks, and Richmond should be recognized as protected occupants of their respective units.

April 30, 2015

John B. Spooner
Administrative Law Judge

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

APPEARANCES:

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Attorney for Petitioners

No Appearance by Respondents