

Matter of Wyman

OATH Index No. 2653/11 (June 22, 2012)

[Loft Bd. Dkt. No. TR-0802; 167 North 9th Street, Brooklyn, N.Y.]

Evidence established that petitioner is a protected occupant of an IMD unit and that lawful monthly rent is \$1,000.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ANGELA WYMAN

Petitioner

-against-

**PERRY HOBERMAN AND
167 NORTH NINTH STREET CORPORATION**

Respondents

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioners Angela Wyman applied under section 281(5) of the Multiple Dwelling Law for a determination that she is a protected occupant of an interim multiple dwelling unit at 167 North 9th Street, Brooklyn, New York. Respondents Perry Hoberman and 167 North Ninth Street Corporation (the Corporation) opposed the application and argued, in the alternative, that if Wyman is a protected occupant, the rent should be set at \$3,200 per month. The Loft Board referred the matter to this tribunal. 29 RCNY § 1-06(j)(2)(ii) (Lexis 2012).

At a three-day hearing, petitioner testified and offered documentary evidence. Respondents called four witnesses and also offered documentary evidence. Following submission of post-hearing memoranda of law, the record was closed on May 2, 2012. For the reasons below, petitioner's application should be granted.

BACKGROUND

The Corporation, which owns the building, has three shareholders: David Winter (building manager and 25% owner), Arthur Heiserman (50% owner), and Hoberman (25% owner) (Tr. 302). On May 26, 2011, the Corporation registered the building as an IMD (Resp.

Ex. U). The three-story building has commercial space on the first floor and ten residential units on the upper floors (Tr. 152, 154). Six of those units, including Unit 9, are registered as IMDs (Resp. Ex. U). According to the registration application, “owner Perry Hoberman” was the current residential tenant of Unit 9 and he occupied that unit continuously from January 1, 2008 to December 31, 2009 (Resp. Ex. U).

Winter, Heiserman, and Hoberman are college friends who purchased the building in 1979 and renovated it (Tr. 156). In 1980, Hoberman moved into a third-floor space that is now referred to as Unit 9 (Tr. 159). The unit is approximately 1600 square feet (Tr. 158; Pet. Ex. 1).

Wyman moved in with Hoberman in 1992 and she gave birth to their son in 1998 (Tr. 159). In 2003, Wyman, Hoberman, and their son moved to California when Hoberman obtained a teaching position at the University of Southern California (USC) (Tr. 24). Before leaving for California, they converted 25% of their unit to a separate storage space for their personal belongings and sublet the remaining 75% of the unit (Tr. 21, 34, 164, 166, 285, 305; Pet. Ex. 1).

In August 2007, Wyman and her son returned to New York and moved back into the unit (Tr. 24, 95). Hoberman stayed in Los Angeles and he divided his time between New York and California (Tr. 25-26, 98, 185). In December 2007, the relationship between Hoberman and Wyman ended (Tr. 27-28, 107, 189-90). Wyman and her son continued to live in the unit (Tr. 14-18). Hoberman spent most of his time in California (Tr. 174). When he visited New York, he stayed with friends and relatives (Tr. 200, 251).

From August 2007 through February 2009, no rent was paid for the unit (Tr. 332-33). In March 2009, Wyman began paying the Corporation, by check, monthly rent of \$900 (Tr. 54; Pet. Ex. 17). In March 2010, the rent increased to \$1,000 per month (Tr. 58; Pet. Ex. 17). The last two checks tendered by Wyman and accepted by the Corporation were for \$1,000 each, deposited in April 2010 (Wyman Tr. 17; Winter Tr. 313; Pet. Ex. 6 at 30). According to the memo items on those checks, they were rent payments for March and April, respectively (Pet. Ex. 18 at 12-13). Hoberman conceded that he eventually told Winter not to accept any more rent checks from Wyman because “we were basically at war” and acceptance of rent from Wyman could be used as evidence against Hoberman and the Corporation (Tr. 288, 297).

In August 2010, Winter slipped a note under Wyman’s door which stated that the rent had been increased to \$2,000 per month, effective February 2010 (Tr. 61, 288; Pet. Ex. 19). In September 2010, respondent changed the locks on the unit and filed a coverage application (Tr.

107-08; Resp. Ex. G). Other than opposing the coverage application, neither the Corporation nor Hoberman took any steps to remove her from Unit 9 (Tr. 256). Hoberman, who recently got married, continues to teach at USC and he lives with his wife in California (Tr. 245-46).

Wyman contends that she is a protected residential occupant because she became a prime tenant after she established a month-to-month tenancy by making regular rent payments (Wyman Mem. at 11). Alternatively, she argues that she is a residential occupant because she has exclusively occupied the unit since December 2007, before and after the 2010 amendment that extended the Loft Law's protection to the building. Wyman Mem. at 15-16. Wyman contends that a lease signed by Hoberman in May 2010 is an unenforceable "sham" because the Corporation lacked authority to lease the unit to Hoberman and he did not have the ability or intent to pay the rent specified in the lease (Tr. 8). Wyman Mem at 3.

Hoberman claims that he is the protected occupant because he converted the unit to residential use, Wyman did not occupy the unit during the relevant period, Wyman is a licensee and "gold digger" who wrongfully ousted him from the unit, and he intends to relocate to New York to resume occupancy of the unit. Hoberman Mem. at 2-3. He also contends that he is the prime lessee because he signed a lease in May 2010. Hoberman Mem. at 13. Alternatively, Hoberman claims that the unit is not a covered IMD and there is no protected occupant, because it is an owner-occupied unit. Hoberman Mem. at 15.

The Corporation agrees with Hoberman that he is a protected occupant because he signed a lease. Corporation Mem. at 9. According to the Corporation, "Hoberman has always been responsible to the Owner for the payment of the rent." Corporation Mem. at 19. Alternatively, the Corporation argues that, if Wyman is a residential occupant, the legal monthly rent should be \$3,200. Corporation Mem. at 2, 20.

Responding to the Corporation's claim regarding the lawful rent, Wyman counters that it should be, at most, \$1,000 because that was the most recent amount paid by her and accepted by the owner. Mem. at 2, 18. She further argues that the rent should be pro rated to \$750, to reflect that she only occupies 75% of the unit and does not occupy the separate storage space, where Hoberman's belongings are kept. Wyman Mem. at 18.

ANALYSIS

In general, I found Wyman's evidence more credible and persuasive than the respondents' evidence. Based on the evidence presented, Wyman demonstrated that she is the protected occupant of Unit 9.

The Corporation registered the building as an IMD under section 281(5) of the Multiple Dwelling Law, which extended the Loft Law (Article 7-C of the Multiple Dwelling Law) to parts of Queens and Brooklyn, effective June 21, 2010. Section 2-09(b) of the Loft Board Rules identifies occupants entitled to protection of the Loft Law. In relevant part, the rules state:

(1) Except as otherwise provided herein, the occupant qualified for protection under Article 7-C shall be the residential occupant in possession of a residential unit, covered as part of an IMD.

(2) If the residential occupant in possession of a covered residential unit is not the prime lessee, the lack of consent of the landlord to a sublet, assignment or subdivision establishing such occupancy shall not affect the rights of such occupant to the protections of Article 7-C, provided that such occupant was in possession of such unit prior to June 21, 1982, or prior to July 27, 1987 for an IMD unit subject to Article 7-C solely by reason of MDL §281(4) and the rules issued pursuant thereto.

29 RCNY §§ 2-09(b)(1),(2) (Lexis 2012).

Wyman is a prime lessee.

Wyman and her son have been the exclusive occupants of Unit 9, where they have lived continuously since August 2007. Beginning in March 2009, Wyman entered into a month-to-month tenancy with the landlord, who accepted monthly rent checks from her until April 2010. Thus, Wyman was a prime lessee. *See* 29 RCNY § 2-09(a) (the prime lessee is the “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 such lessee is currently in occupancy or whether such lease remains in effect”). A “lease or rental agreement in effect” includes “an oral agreement for a rental period of one year or less” where “there has been a change from the previous rent, confirmed by rent checks tendered by the residential occupant and accepted by the landlord ...” 29 RCNY § 2-06(a)(2) (Lexis 2012); *see also Jaroslow v. Lehigh Valley Railroad Co.*, 23 N.Y.2d 991 (1969) (acceptance of rent creates month-to-month tenancy); *Mahon v. Neely*, 193 A.D.2d 879, 880 (3d Dep’t 1993) (month-to-

month tenancy created where owners accepted rent from prospective purchasers); *Weiden v. 926 Park Ave. Corp.*, 154 A.D.2d 308 (1st Dep't 1989) (a month-to-month tenancy was created when the landlord accepted rent from the son of a rent stabilized tenant who had passed away, though the son was not entitled to a renewal lease as a successor); *Walker v. Cox*, 1997 U.S. Dist. LEXIS 21656 at *10 (E.D.N.Y. 1997) (under New York Law, when there is no written lease agreement, a month-to-month tenancy is created). Because Wyman is a prime lessee and she has resided in Unit 9 since August 2007, she is a protected occupant under section 2-09(b)(1) of the Loft Board's rules.

Wyman occupied Unit 9 when MDL § 281(5) went into effect.

If Wyman was not a prime lessee, she is a protected occupant because she resided in Unit 9 prior to June 21, 2010, the effective date of section 281(5) of the Multiple Dwelling Law. *See* 29 RCNY § 2-09 (b) (2) (Lexis 2012); *See also* Proposed Changes to Section 2-09 of the Loft Board's rules at http://www.nyc.gov/html/loft/downloads/pdf/2-09_as_of_5.3.12.pdf.

The Loft Board rules provide for coverage of residential occupants even when they are not prime tenants, do not have written leases, and occupy their units without consent of the landlord. *See 545 Eighth Ave. Assocs. v. NYC Loft Bd.*, 232 A.D.2d 153, 154 (1st Dep't 1996); *see also 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) ("Under the Loft Law we are not constrained by the word 'tenant', but are instead given the more elastic term 'residential occupant, a term whose intention was clearly to free triers of fact from the strictures of more traditional and stable housing arrangements.'). The rules have not been updated to reflect the 2010 amendment embodied in section 281(5) of the Multiple Dwelling Law. Granting protection to Wyman, who lived in the unit before and after the effective date of that 2010 amendment, would be consistent with purpose of the amendment, prior amendments, and the proposed rules. To hold otherwise would lead to an absurd result.

Granting Wyman protected occupancy is consistent with the purpose of the 2010 amendment of the Loft Law. The intent of the Loft Law is to spread its beneficial effects as widely as possible. *See Ass'n of Commercial Property Owners, Inc. v. NYC Loft Bd.*, 118 A.D.2d 312, 318 (1st Dep't 1986) ("Given the choice of two interpretations of the Loft Law, one

restricting coverage and one broadening it, the remedial nature of the legislation forcefully argues for the adoption of the latter course To the extent the Loft Law is restricted in its coverage, the purpose of the law is defeated”) (citation omitted). As the Court of Appeals has stated:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.

N.Y.S. Bankers Ass’n v. Albright, 38 N.Y.2d 430, 437 (1975) (citation omitted); *see also Lower Manhattan Loft Tenants v. NYC Loft Bd.*, 66 N.Y.2d 298, 304-05 (1985) (effectuating the purpose of the Loft Law should be the “primary guide”).

This tribunal has noted that the legislative intent of the 2010 amendment to the Loft Law was to cover units that were converted after 1987. *Matter of Taylor*, OATH Index No. 2051/11 at 7 (Sept. 9, 2011); *see* Annotated Calendar, June 8, 2010, Bill Jacket, L. 2010, Ch. 135 (“This bill would extend *tenant* protections and other provisions under the current loft law to many units that were converted *after 1987* This legislation expands the current Loft Law to include approximately 200-400 buildings or about 3600 additional units that were left out of the original Loft Law”)(emphasis added); Loft Law Expansion and Extended Talking Points, Bill Jacket, L. 2010, Ch. 135 (“[This bill] will protect thousands of *tenants* by extending Loft Law coverage to many units which were converted *after 1987* for residential purposes.”) (emphasis added).

Hoberman claims that Wyman does not qualify for protection under the Loft Law because she did live in Unit 9 prior to 1987. Hoberman Mem. at 13; Hoberman Reply at 3. In his view, the Loft Law was intended to benefit “pioneers” like himself who converted the unit to residential use and not “opportunists” like Wyman. Hoberman Mem. at 2, 11. Hoberman is mistaken. The Loft Law protects tenants even if they had no part in converting a unit from commercial to residential use. *See Rader v. Grand Morgan Realty Corp.*, OATH Index Nos. 207/08 & 208/08 at 5 (Jan. 4, 2008), *adopted in part, modified in part*, Loft Bd. Order No. 3513 (June 18, 2009) (petitioners became protected occupants when they moved into a covered unit

and started paying rent); *Matter of Jemison*, OATH Index No. 618/96 at 5 (Feb. 23, 1996), *adopted*, Loft Bd. Order No. 1942, 16 Loft Bd. Rptr. 146A (Mar. 28, 1996) (same). When determining protected occupancy, the relevant period is when the statute went into effect. Hence, Wyman is a protected occupant.

Hoberman's argument ignores the plain wording and intent of section 281(5) of the Multiple Dwelling Law. Under this 2010 amendment to the Loft Law, certain buildings qualified for IMD status if there were twelve consecutive months of residential occupancy by three or more families living independently from one other between January 1, 2008 and December 31, 2009. Thus, to determine IMD status of the building, section 281(5) looks to residential use in the two years preceding the 2010 amendment. That is consistent with the legislative purpose to extend the Loft Law to cover certain buildings that were more recently converted to residential use. Although Hoberman agrees that the building is an IMD under the 2010 amendment, he looks back to 1987 to determine who is a protected occupant. There is no basis in the text of the amended statute or its legislative history for such a strained result.

When the Loft Law was amended in 1987, Loft Board rules provided coverage for residential occupants, who were not prime lessees, if they were in possession of covered units prior to July 27, 1987, the effective date of the amendment, even without the landlord's consent. 29 RCNY 2-09 (b)(2); *see 545 Eighth Avenue Assoc. v. NYC Loft Bd.*, 232 A.D.2d 153, 154 (1st Dep't 1996) (where residential occupants were in possession of covered units prior to July 27, 1987, "the window date" of section 281(4) of the Multiple Dwelling Law § 281(4), "There is no basis for petitioner's insistence that applicable regulations make covered occupancy dependent on the landlord's knowledge or consent"). As Wyman correctly notes, it is logical to conclude that, once the Loft Board's rules are updated to reflect the 2010 amendment, the relevant date will be June 21, 2010, when the amendment went into effect. Wyman Mem. at 15, n. 5. The Corporation also acknowledges that the protected occupant is the tenant of record on June 21, 2010, the effective day of the 2010 Loft Law amendment. Corporation Mem. at 3, 18. The proposed amendments to the Loft Board's rules are consistent with Wyman's position and would extend coverage to her because she took occupancy prior to the effective date of the amendment. Proposed Changes to Section 2-09 of the Loft Board's rules at http://www.nyc.gov/html/loft/downloads/pdf/2-09_as_of_5.3.12.pdf.

Because Wyman was in possession of the covered unit prior to June 21, 2010, she is a protected occupant without regard to the landlord's knowledge or consent. However, it should be noted that Wyman has continuously resided in the unit with the landlord's full knowledge and consent. Hoberman, one of three corporate shareholders, was aware of Wyman's occupancy of the unit and he made no effort to evict her. Winter, another shareholder who also served as the building manager, lived on the same floor as Wyman (Tr. 310). He knew that Wyman occupied Unit 9 and he repeatedly deposited rent checks that she gave him.

Wyman is not a mere licensee.

Similarly without merit is Hoberman's claim that Wyman is merely a roommate or licensee. Hoberman Mem. at 7. In support of this argument, Hoberman relies on *Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06 at 8 (May 18, 2007), *adopted in part, modified in part*, Loft Bd. Order No. 3457 (Sept. 18, 2008), *application for reconsideration granted in part and denied in part*, Loft Bd. Order No. 3496 (Apr. 23, 2009). There, a lessee's wife was not a protected occupant where there was no evidence that she made any rental payments, accepted by the owner, that would imply his consent to her tenancy.

This case is much different. Wyman lived in the unit with Hoberman for more than ten years. They raised a child together in the apartment. After Wyman's relationship with Hoberman ended in December 2007, she continued to occupy the unit exclusively with her son and she began making regular monthly rent payments, accepted by the landlord. Wyman's continued long-term occupancy and direct rent payments established privity with the landlord. Thus, her situation is closer to *Matter of Lagmon*, OATH Index No. 539/00 at 4 (Dec. 8, 1999), *adopted*, Loft Bd. Order No. 2473 (Jan. 25, 2000) (long-term unmarried partner who resided in apartment, but was not named in the lease, deemed a protected occupant as a member of a non-traditional family, especially where owner repeatedly accepted rent checks from applicant).

Hoberman argued that his earnings may have been the source of the money that Wyman used to pay rent. Hoberman Mem. at 18. That does not change the analysis. Wyman transferred money from a joint account that she shared with Hoberman to her own individual account from which she paid the rent (Tr. 77-78, 118). There was no evidence of wrongdoing by Wyman. She had lawful access to the joint account. Wyman also had other sources of funds, including her

earnings from some freelance work and money from her family which she used to pay living expenses and her son's educational expenses (Tr. 66-68, 118-19, 418-19, 427-28; Pet. Ex. 26).

Furthermore, I did not credit Hoberman's testimony that he first "discovered" in April 2010 that Wyman had been withdrawing tens of thousands of dollars from their joint account in 2008 and 2009 (Tr. 202). It is more likely that Hoberman knew that Wyman had transferred the money, he recognized that the funds covered living expenses for Wyman and their son, and he agreed to that financial arrangement to avoid the risk and expense of litigating his child support obligations. Hoberman conceded that he had a moral obligation to provide for his son (Tr. 395). That became a formal obligation in February 2011, when a court ordered Hoberman to pay Wyman \$1,840 a month for child support (Tr. 395; Resp. Ex. O).

To accept Hoberman's argument, that he is the protected occupant because he made more money than Wyman, would mean that any non-custodial parent who pays child support would be deemed a protected occupant of the child's residence. There is no lawful basis for such a claim.

Hoberman's lease is void and illusory

Hoberman and the Corporation contend that Hoberman is the protected occupant because he signed a lease on May 1, 2010. Hoberman Mem. at 13; Corporation Mem. at 9, 19; Resp. Ex. R). That argument is mistaken because the Hoberman's lease is void and illusory.

As noted, in December 2007, when Wyman began living in the unit without Hoberman, there was no lease in effect. And, in March 2009, when the landlord began accepting monthly rent checks from Wyman, a month-to-month tenancy was created. Because Wyman was a month-to-month tenant of Unit 9, the landlord could not lease that unit to Hoberman. *See Ian v. Wassberg*, 79 A.D.2d 919 (1st Dep't), *aff'd*, 55 N.Y.2d 706 (1981) (landlord who entered into lease with a tenant "divested itself of all power to convey all or part of the same estate to another," and later purported lease to another for the same period could not oust the initial tenant of his right to immediate possession); *Amyell Development Corp. v. Ikon*, 18 Misc.3d 1126A at 4 (Sup. Ct. Monroe Co. 2006) ("the lessor cannot legally execute a second lease of the same premises during the term of a first lease").

Even if the landlord could lawfully lease the unit, Hoberman's lease is illusory and should be disregarded. The circumstances under which the lease was created were highly suspect. On April 15, 2010, two weeks before the lease was signed, Winter received an email

from the Corporation's mortgage broker advising him of the need for "fully executed leases" before the building could be appraised for a loan (Pet. Ex. 23; Tr. 341, 349). On April 26, Winter asked Wyman to sign a fake lease to rent Unit 6, which she did not occupy, for \$3,200 per month (Tr. 350, 362; Pet. Ex. 20). Winter conceded that Unit 6 was occupied by two other tenants and he asked Wyman to sign the fake lease "as a favor" because he was applying for a loan and "it would have been helpful" to have a signed lease for every unit (Tr. 350, 362-63). As Winter said, "we needed to get the rent rolls up" (Tr. 322). Wyman never signed the fake lease and it was not submitted to a bank, but this evidence supported her claim that the Hoberman lease for Unit 9, signed five days after the fake lease was submitted to Wyman, was also a sham.

Other evidence demonstrated the willingness of Hoberman or Winter to draft fictitious documents. For example, in August 2010 Hoberman wrote to another banker and asserted that, although he was a co-owner of the building, he had "no operational control," he had "no involvement in the operation for many years, nor will I in the future," and was "strictly" a passive investor (Pet. Ex. 24). The letter was designed to reassure the bank that, despite Hoberman's poor credit, the Corporation was creditworthy (Tr. 276, 364-65). Despite his assurances that he was a passive investor, Hoberman continued to participate in important strategic decisions about the building (Tr. 364, 384-86). The IMD registration signed by Winter also contained a questionable assertion. Winter reported that Heiserman occupied Unit 7 for two years beginning January 1, 2008 (Resp. Ex. U). At the hearing, however, Winter conceded that Heiserman had not lived there for ten years (Tr. 341, 366; 372, 383; Pet. Ex. 25).

Hoberman insisted that his \$3,200 lease was a bona fide debt that he intended to pay (Tr. 233, 28-81). That claim was unpersuasive. When he signed the lease, Hoberman lived and worked in California. He owed tens of thousands of dollars to the Internal Revenue Service and admittedly "had no realistic ability to pay" \$3,200 per month for Unit 9 (Tr. 273-74). He never paid the \$3,200 security deposit and he has never paid \$3,200 for any month after signing the lease (Tr. 274). Hoberman said that he paid the Corporation \$1,000 a month before and after he signed the lease, but there was no independent, reliable proof, such as a check or bank statement, to show that he paid the Corporation anything in 2010 (Tr. 272-73, 280).

Acknowledging that Hoberman had no ability to pay \$3,200 a month rent for Unit 9, Winter testified that he made some loans to cover Hoberman's rent obligation (Tr. 312, 323). According to Winter, Hoberman knew nothing about those loans (Tr. 328). Heiserman also

made some other loans on Hoberman's behalf and, for other months, Winter kept a running tally of amounts that Hoberman owed the Corporation (Tr. 326-27, 332; Resp. Ex. Y). There was no promissory note, forbearance agreement, shareholder agreement, or corporate authorization for the loans, which appear to be interest-free (Tr. 291, 302, 328). The Corporation has made no effort to collect \$3,200 per month from Hoberman (Tr. 291, 328).

Winter's handwritten rent records also contradicted his claim that the monthly rent beginning in May 2010 was \$3,200. According to a bill that Winter slipped under the door to Unit 9 in August 2010, the monthly rent was \$2,000 (Pet. Ex. 19). An email that Hoberman sent to Wyman in August 2010 also made reference to a monthly rent of \$2,000 (Pet. Ex. 22).

In an effort to demonstrate that Hoberman's lease was legitimate, the Corporation noted that it had needed to raise rents to market levels in April 2010 because it had incurred substantial debt in connection with the legalization process. That argument did not withstand scrutiny. In 2008, the Corporation first incurred multi-million renovation loans and the building had a mortgage of \$16,000 per month (Tr. 339). Despite the significant incentive to raise income, none of the three owners were paying rent at that time (Tr. 339). In May 2010, it appears that Heiserman and Winter also signed one-year leases and began making monthly payments to the Corporation for \$3,200 (Tr. 306-07, 321, Res. Exs. V, X, AA, BB). Yet that did not continue for the entire term of the lease. According to the Corporation's rent records, as of March 2011 Heiserman and Winter only paid \$2,000 per month (Resp. Ex. Y). This suggests that the owners did not really consider any of those leases to be legitimate \$3,200 per month obligations.

The credible evidence established that the lease signed by Hoberman in April 2010 was illusory. Whether it was designed to mislead a mortgage lender or to deprive Wyman of her rights, it was not a bona fide lease that Hoberman had the ability or the intention of honoring. *See Hutchins v. Conciliation & Appeals Bd.*, 125 Misc.2d 809, 811 n. 1 (Sup. Ct. N.Y. Co. 1984) (illusory tenancy "implies a fraudulent or otherwise improper scheme or conveyance. It indicates that the 'tenant' is in fact something other than that which he purports to be."); *Grimm v. NYS Division of Housing & Community Renewal*, 68 A.D.3d 29, 33 (1st Dep't 2009) ("any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void.") (citation omitted); *Matter of Granet*, Loft Bd. Order No. 705, 6 Loft Bd. Rptr. 118, 121 (Dec. 17, 1987) ("a prime tenancy is illusory where a person rents an apartment

which he never intends to occupy but rather leases for the purpose of subleasing for profit or otherwise depriving a subtenant of rights.”).

Hoberman is not a protected occupant and Unit 9 is not owner-occupied

The Corporation argues that Hoberman is a protected occupant but Hoberman claims that Unit 9 is owner-occupied and, therefore, not a covered IMD. They are both mistaken. Hoberman relies on Loft Board precedent which emphasize that owners and residential occupants are mutually exclusive terms. Hoberman Mem. at 16-18. See, *Matter of Brimberg*, Loft Bd. Order No. 2320 (Oct. 27, 1998) (IMD unit occupied by part of owner of the building cannot be rent-regulated).

Matter of Brimberg undercuts the Corporation’s position because it established that the terms “owner” and “residential occupant” are mutually exclusive. *Id.* at 16-18. As co-owner of the building, Hoberman cannot be a protected occupant. See also *Matter of 7-C Tenant Owners*, Loft Bd. Order No. 2132 (Aug. 28, 1997). However, *Matter of Brimberg* does not create a per se rule that, if a unit was once occupied by an owner, the unit can never be an IMD and a long-term resident of the unit could never be a protected occupant.

The Loft Board settled that issue in *Matter of 79 Warren Associates, LLC*, OATH Index Nos. 749/03, 1523/03 (Jan. 13, 2004), *adopted*, Loft Bd. Order No. 2852 at 2 (Mar. 18, 2004). There, the Loft Board held that a protected occupant did not forfeit her rights to the protection of the Loft Law because she had cohabitated with someone who later became the co-owner of the building. The Loft Board reached that conclusion even though there was some evidence that the co-owner continued to reside in the contested unit. *Matter of 79 Warrant Associates, LLC*, OATH Nos. 749/03, 1523/03 at 15. Here, too, Wyman should not be penalized because she once cohabitated with a co-owner of the building. She has been the exclusive residential occupant of Unit 9 for nearly five years and she lived in the unit when the Loft Law was amended and the owners registered the building.

Although Hoberman does not actually occupy Unit 9, he claims that he wanted to move back to New York and occupy the unit but he was prevented from doing so because Wyman kicked him out and changed the locks (Tr. 233); Hoberman Mem. at 2, 14. I did not credit that claim. Hoberman has not spent a night in Unit 9 since December 2007. He did not show any real interest in moving back to New York. Other than a single email from November 2011

expressing interest in a teaching job in Brooklyn, there is no credible evidence that Hoberman intended to move back to New York or that he intended to live in Unit 9 (Tr. 236; Resp. Ex. T). On the contrary, the evidence showed that Hoberman is now married and he lives with his wife in California (Tr. 245-46, 251-52). He has not applied for any other job in New York (Tr. 259). He continues to teach at USC. As recently as August 2010, he conceded that it was not “really an option” for him to move back to New York (Tr. 286).

There is also no credible evidence to support the claim that Wyman prevented Hoberman from occupying Unit 9. For all of 2008 and 2009, Hoberman made no effort to remove Wyman from the unit. Wyman did not change the locks until September 2010, when she filed a coverage application. If Hoberman wanted to occupy the unit, he could have taken lawful steps to do so.

The lawful monthly rent is \$1,000.

The Corporation argued that, if Wyman is a protected occupant, the lawful rent should be set at \$3,200. Corporation Mem. at 16.

As a threshold matter, it is questionable whether this claim has been properly raised. The Loft Board rules state:

The applicant may only have one claim per application. The application shall contain facts and arguments relevant to the claim raised in the application. The applicable application fee stated in § 2-11 of the Loft Board rules is due upon submission of the application. The application will not be considered filed, or be processed, until the application fee is received.

29 RCNY § 1-06(a)(3) (Lexis 2012). The Loft Board’s rules provide for separate fees for coverage applications and rent dispute applications. 29 RCNY § 2-11(b)(3), 29 RCNY § 2-11(b)(4). *See Matter of Tenants of 325 West 37th St.*, Loft Bd. Order No. 3457 at 1 n.1 (Sept. 18, 2008), *adopting in part, modifying in part*, OATH Index No. 692/06 (May 18, 2007) (“The Loft Board no longer accepts applications with multiple causes of action. We ask that applicants file one application for each cause of action with its requisite fee, if applicable. Failure to do so *may* result in the rejection of the application.”) (emphasis added).

Here, the only application filed was by Wyman, who seeks to be declared a protected occupant. The Corporation raised the issue of setting the lawful rent in its answer. It could be argued that the Corporation’s contention regarding the rent is inextricably intertwined with the coverage dispute. Moreover, because the parties fully litigated this issue, the Loft Board may

conclude that, upon payment of the required filing fee, the matter should be resolved without further delay. In that event, the lawful monthly rent should be \$1,000.

When a residential occupant is in privity with the landlord, the lawful rent is the amount established by a “lease or written rental agreement.” 29 RCNY § 2-09(c)(6)(B). As noted, a “lease or written rental agreement” may be an oral agreement of one year or less where there is a change in rent confirmed by rent checks tendered by the residential occupant and accepted by the landlord. 2-06(a)(2)(ii)(A). If there is no lease or rental agreement, the tenant shall pay “the same rent most recently paid and accepted by the owner.” MDL§ 286(2)(i).

Here, there was an oral agreement in March 2010, when the landlord raised Wyman’s rent from \$900 to \$1,000 per month, Wyman tendered a check for that amount, and the landlord accepted it (Pet. Ex. 17, Resp. Ex. Y). Thus, \$1,000 is the lawful rent.

There is insufficient evidence to justify any other rent amount. The May 2010 Hoberman lease was void and illusory. Respondents also claimed that Hoberman paid \$1,000 in June, 2010 and Winter paid an additional \$2,200 on Hoberman’s behalf, for a total of \$3,200. But neither Hoberman nor the corporation offered any checks or bank statements to prove those payments. Likewise, there was no credible evidence, in the form of checks or bank statements, to support respondents’ suggestion that the rent was \$2,000. Instead, the credible evidence established that the last rent accepted by the owner for Unit 9 was \$1,000 paid by Wyman.

Wyman further claimed that the rent should be set at \$750 because she only occupies 75% of the unit. Wyman Mem. at 17. However, she failed to prove this claim. Wyman correctly notes that the part of a unit which is not used for residential purposes is not covered by the Loft Law. 29 RCNY § 2-09(c)(6)(ii)(C)(b). The evidence also established that Wyman only occupied 75% of Unit 9; the remaining 25% was a separate storage room for Hoberman’s property. However, Wyman failed to prove that her rental payments covered Hoberman’s storage space as well as her part of the unit that she occupied. Wyman’s relationship with Hoberman had ended. It is unlikely that she paid his storage expenses. It is more likely that Wyman’s rent only paid for the portion of the unit that she occupied. Indeed, when Wyman and Hoberman first went to California, they sublet the residential space for \$2,600 per month, exclusive of the storage space (Tr. 292).

Wyman emphasized that Hoberman conceded that the rent he supposedly paid under his lease covered the entire unit. Wyman Mem. at 18. But that concession is entitled to little weight

because there was no credible evidence that Hoberman had a valid lease or that he paid the rent specified in the lease. Without reliable proof that Wyman's rental payment covered the entire unit, including the storage space, there is no need to pro rate her rent.

In sum, Wyman is the protected occupant and her rent should be set at \$1,000 per month.

FINDINGS AND CONCLUSIONS

1. Petitioner Angela Wyman is the protected occupant of Unit 9 at 167 North Ninth Street, Brooklyn, New York.
2. The lawful rent for Unit 9 is \$1,000 per month.

RECOMMENDATION

Petitioners' applications should be granted and a finding made that they are protected occupants and her monthly rent is \$1,000.

Kevin F. Casey
Administrative Law Judge

June 22, 2012

SUBMITTED TO:

ROBERT D. LIMANDRI
Chair

APPEARANCES:

DAVID E. FRAZER, ESQ.
Attorney for Petitioner

LINDA RZESNIOWIECKI, ESQ.
Attorney for Respondent Hoberman

BELKIN BURDEN WENIG & GOLDMAN LLP
Attorneys for Respondent Corporation
BY: LISA GALLAUDET, ESQ.