OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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ASIM REHMAN
COMMISSIONER AND
CHIEF ADMINISTRATIVE LAW JUDGE

CHRISTINE STECURA
ADMINISTRATIVE LAW JUDGE
212-933-3006

May 20, 2024

Hon. James S. Oddo
Commissioner
NYC Department of Buildings
280 Broadway, 7th Floor
New York, NY 10007

Re: Matter of Cohen
OATH Index No. 2965/22
Loft Bd. Dkt Nos. TR-1437, PO-0186
Premises: 240 Grand Street
New York, NY

Dear Commissioner Oddo:

The above-captioned application was referred to me to hear and report. Enclosed for your review and the Loft Board's final decision is my Report and Recommendation.

Please have your office send a copy of your final decision to the Office of Administrative Trials and Hearings by email to lawclerks@oath.nyc.gov so that we may complete our files.

Very truly yours,

Christine Stecura
Administrative Law Judge

CS: im

Encl.

c: Martha Cruz, Esq.
Margaret B. Sandercock, Esq.
Elizabeth Sandercock, Esq.
Michael M. Bobick, Esq.

Matter of Cohen

OATH Index No. 2965/22 (May 20, 2024)
[Loft Bd. Dkt. Nos. TR-1437, PO-0186;
240 Grand Street, New York, NY]

In a coverage and protected occupancy proceeding, petitioner did not establish that the building located at 240 Grand Street, New York, is an interim multiple dwelling, that the units at issue are covered, or that petitioner qualifies for protection under the Loft Law. ALJ recommended that the applications be denied.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
KFIR (KC) COHEN
Petitioner

REPORT AND RECOMMENDATION

CHRISTINE STECURA, *Administrative Law Judge*

This is a tenant-initiated Loft Law coverage proceeding involving a building located at 240 Grand Street, New York, New York (the "Building"), pursuant to section 281(6) of Article 7-C of the Multiple Dwelling Law ("MDL" or "Loft Law") as amended in June 2019, and Title 29 of the Rules of the City of New York.[1] Mult. Dwell. Law § 281(6) (Lexis 2024); 29 RCNY §2-09.[2] Applicant Kfir Cohen ("applicant" or "petitioner") was a lessee of the third, fourth, and fifth-floor units, and occupant of the large unit on the fourth floor and the sole unit on the fifth floor. Petitioner seeks a finding that the Building is an interim multiple dwelling ("IMD"), the large units on the third ("third-floor unit") and fourth floors ("fourth-floor unit") and the sole unit on the fifth floor ("fifth-floor unit") are covered under the Loft Law, and that he is the protected occupant of the

[1] The coverage application was filed under sections 281(5) and 281(6) of the MDL, however petitioner did not submit any evidence in support of his claim under section 281(5) of the MDL. Petitioner stated at trial and in his closing brief that the coverage application sought relief under section 281 (6) of the MDL (Tr. 8; Pet. Br. at 5). As such, the portion of the application which claims coverage under section 281 (5) of the MDL is deemed withdrawn.

[2] The Loft Board's rules were amended effective March 2023. References to the Loft Board's rules in this decision are to the version of the rules in effect when the applications were filed. *See Matter of Warnke*, Loft Bd. Order No. 5218 at 2 n.1 (May 18, 2023) (noting that while the Loft Board amended its rules effective March 31, 2023, the Loft Board's order would reference rules in effect at the time the application was filed); *Matter of Smulktis*, Loft Bd. Order No. 5237 at 3 n.2 (Sept. 21, 2023) (same).

fifth-floor unit. Petitioner filed coverage and protected occupancy applications on February 9, 2022 (ALJ Ex. 1). The owner of the Building, Tzu Tai Tsao Corp. ("owner" or "respondent"), filed an answer opposing the applications on March 14, 2022 (ALJ Ex. 2).

At a four-day trial, petitioner testified on his own behalf and presented documentary evidence and the testimony of four witnesses: his friends, Tom Genossar, Israel Oved, and Samar Zaman, who is also formerly petitioner's girlfriend and a Building tenant, and his nephew, Daniel Cohen. Respondent presented documentary evidence and the testimony of two witnesses: Tai-Ming Sturgis Moy, the agent of the owner and an architectural designer, and John Kim, a licensed architect and Mr. Moy's partner at an architecture firm, as well as the applicant of record for the Department of Buildings ("DOB") alteration filing for the Building's fifth floor. Post-trial briefs were filed on March 4, 2024, after which the record was closed.

For the reasons below, I find that there was insufficient evidence that there was residential occupancy of the fourth and fifth floor units for 12 consecutive months during the window period. As such, I recommend that the applications for coverage and protected occupancy be denied.

ANALYSIS

To qualify as an IMD under the Loft Law, a building must: (1) at any time have been occupied for manufacturing, commercial, or warehouse purposes; (2) lack a certificate of occupancy; (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, 2015, and ending December 31, 2016 ("window period"). To qualify as a covered residence, a unit must be at least 400 square feet in area; not be located in a cellar; and have a separate entrance that does not require passage through another residential unit. Mult. Dwell. Law § 281(6). Living independently means "having attributes of 'independent living,'" such as a "separate entrance providing direct access to the residential unit from a street or public area," including a hallway, elevator, or staircase, and having one or more rooms such as an independent kitchen area, bathroom, bedroom, and/or living area occupied exclusively by members of a family and their guests for residential purposes. 29 RCNY § 2-08(a)(3), (a)(4)(i)(A).

Respondents did not dispute that the Building satisfies most of the requirements for IMD coverage. The Building is privately owned (Resp. Br. at 4). Uncontested evidence established

that the first floor was commercial, the owner previously kept a medical office on the second floor, and the units in issue are located on the third, fourth and fifth floors (Tr. 156-59, 168, 340). The Building also lacks a residential certificate of occupancy (Tr. 339-40). Additionally, the unrebutted evidence established that each of the units at issue are over 400 square feet and are accessed through a public stairway or elevator that does not require passage through another residential unit (Pet. Exs. 50A, 50B, 50C).

Respondent contends that the applications must be denied because petitioner failed to prove that the Building was residentially occupied by three or more families living independently from one another for 12 consecutive months during the window period and that petitioner is not a protected occupant of the fifth-floor unit (Resp. Br. at 29).

To establish that a unit qualifies for Loft Law coverage, an applicant must show that the unit possesses "sufficient indicia of independent living" to demonstrate that it is used as a residence, as well as some physical conversion of the unit to a dwelling. *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986); *Franmar Infants Wear, Inc. v. Rios*, 143 Misc.2d 562, 563 (App. Term, 1st Dep't 1989); *see Matter of South 11th Street Tenants' Ass'n & Matter of Lid Fla Realty Corp.*, OATH Index Nos. 1242/96, 1243/96, 1244/96 at 42-43 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999); *see also* 29 RCNY § 2-08(a)(3).

In determining whether there are sufficient indicia of residential use, this tribunal has applied a case-by-case analysis, where no single factor is dispositive. *South 11th Street Tenants' Ass'n.*, OATH 1242/96 at 41; *see Matter of Boyers*, OATH Index Nos. 1338/12, 1381/12, 1403/13 at 14 (Feb. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4302 (Sept. 18, 2014); *Matter of Gareza*, OATH Index Nos. 2061/12, 760/13 at 6 (Dec. 12, 2012), *adopted in relevant part*, Loft Bd. Order No. 4243 (Feb. 20, 2014). Physical conversion of the unit to residential use may be established by "the presence of permanent improvements, such as bathrooms, bathing facilities, closets, and walls erected to separate living areas, and the presence of non-permanent items reflecting residential use such as refrigerators, stoves, and beds." *Boyers*, OATH 1338/12 at 14; *see also Matter of Kim*, OATH Index Nos. 199/18 & 279/18 at 9 (Feb. 4, 2021), *adopted*, Loft Bd. Order No. 5111 (Mar. 17, 2022), *reconsideration denied*, Loft Bd. Order No. 5262 (Jan. 18, 2024) (finding that the "description of the premises made clear that it was unsuitable for residential habitation, as the unit did not contain a kitchen, the bathroom did not have a tub or shower, and the building was rat-infested"); *Matter of Pels*, OATH Index No. 2481/11 at 5-6 (June 20, 2012)

adopted, Loft Bd. Order No. 4161 (June 20, 2013), *reconsideration denied*, Loft Bd. Order No. 4208 (Dec. 12, 2013) (finding the installation of a kitchen, stove, refrigerator, cabinets, a desk and shelves, and the addition of walls to separate the living area, were sufficient indicia of independent living and conversion); *Matter of 333 PAS CoO Tenants Group*, OATH Index No. 968/08 at 16 (June 30, 2009), *adopted*, Loft Bd. Order No. 3552 (Nov. 19, 2009) (finding a refrigerator, stove, bedroom with built-in closets, and bathroom with mirrors "sufficient proof of conversion to residential use").

In addition, documentary evidence such as receipt of mail at the subject unit and use of the unit's address on official documents such as tax returns, utility bills, voting registration cards, and bank and credit card records may be considered proof of an applicant's residential use of the unit. *See Gareza*, OATH 2061/12 at 8 (receiving mail and tax documents at the address, use of the address on a bank account, and being registered to vote at the address considered as further indicia of residential use). Residential use may also be established by "photographs of the unit being used residentially." *Matter of Zhao*, OATH Index No. 2225/14 at 7-8 (Aug. 12, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4445 (Nov. 19, 2015).

Petitioners must establish that they are entitled to the relief that they seek in their application by a preponderance of the credible evidence. 29 RCNY § 1-06(i)(4); *Matter of Gallo*, OATH Index No. 2401/13 at 4 (Oct. 10, 2014), *adopted in part*, *rejected in part*, Loft Bd. Order No. 4349 (Jan. 15, 2015), *reconsideration denied*, Loft Bd. Order No. 4426 (Sept. 17, 2015); *Gareza*, OATH 2061/12 at 4. "In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of 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." *Gallo*, OATH 2401/13 at 7; *see 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).

As discussed below, petitioner failed to establish that the Building is an IMD and the units at issue are covered under the Loft Law. Petitioner's coverage application must be dismissed, and thus petitioner's protected occupancy application also fails.

Factual Background

The Building is zoned for commercial use (Tr. 340). Petitioner has leased the third, fourth, and fifth floors of the Building since 2013, 2008, and 2014, respectively (Tr. 145, 147). He initially leased these floors from the owner at the time, Dr. Moy (Mr. Moy's father), until Dr. Moy passed away a couple years ago (Tr. 158-59, 376-77). Dr. Moy kept a medical office on the second floor, where he worked six days a week (Tr. 158-59, 169). He was the president of the Building's corporate owner and responsible for the Building's leasing and maintenance (Tr. 376-77). Petitioner testified that Dr. Moy was aware that respondent had rented the space to create residential spaces (Tr. 246-47). Following his father's death, Mr. Moy became the vice president of the Building, and his brother Ming Moy became the president (Tr. 377). Before his father died, from 2014 to 2018, Mr. Moy visited his father on the second floor about once a month or every two months but did not go to the other floors (Tr. 379).

Petitioner presented floor plans for the third, fourth, and fifth floors that he created in anticipation of this proceeding (Tr. 220-27; Pet. Exs. 50A, 50B, 50C). The third and fourth floor layouts are similar, with three self-contained apartments, including the third and fourth-floor units at issue here, which are one-bedroom apartments approximately 800 to 900 square feet in size, as well as two studio apartments (Tr. 77-78, 108, 144-47, 220-24, 303-04, 327-28; Pet. Exs. 50A, 50B). Each apartment has its own bathroom and kitchen (Tr. 108, 148, 220-24, 303-304, 327-28). Petitioner testified that the layout and residential fixtures for the third and fourth floors have been the same since 2013 and 2008, respectively (Tr. 220-24). The third and fourth floors have only been used residentially since petitioner has leased the space (Tr. 149-50, 321). The fifth floor contains only the fifth-floor unit, a two-bedroom apartment with two bathrooms and a kitchen (Pet. Ex. 50C). Petitioner testified that the fifth-floor layout and fixtures have been the same since the summer of 2016 and that the kitchen has been in place since June 2016 (Tr. 224-25; Pet. Ex. 50C).

Residents were able to receive mail and packages in the lobby area of the Building near the elevator (Tr. 37, 168-69). However, the mailboxes did not have locks and mail was frequently stolen (Tr. 89, 159, 168). The Building's front door was normally open during the day because the lobby area was rented to a vendor (Tr. 168). Petitioner receives his mail at his prior address and recommended that other Building tenants, including Zaman, do so too (Tr. 89, 159-60). Petitioner also uses his prior address as his legal address (Tr. 159-60). Petitioner does, however, receive packages at the Building because those are brought upstairs (Tr. 193).

Third-Floor Unit

Petitioner leased the Building's third floor from 2013 onward (Tr. 147). Petitioner testified that John Brevard moved into the third-floor unit sometime in 2014 or 2015 (Tr. 275). Soon after, Brendan Cass moved into the third-floor unit (Tr. 157, 276; Pet. Ex. 16). A lease between Brendan Cass Studio LLC and Easy Living Holdings Corp. states a term beginning on August 1, 2015, and ending on July 31, 2016 (Pet. Ex. 16). The lease states the premises may be used for "commercial office space only" and does not mention residential use (*Id*.). The lease was signed by Brendan Cass, dated July 27, 2015, and by Easy Living Holdings Corp., dated July 25, 2015, but it was not notarized (*Id*.).

Petitioner lived in the Building and saw Cass every day, as they used the same entrance and elevator (Tr. 158). Petitioner observed that Cass lived in the third-floor unit, used his kitchen, had a bed, and he also painted there (Tr. 157-58). He visited Cass "many, many times" to see his paintings and to address "a continuing issue" with the heat and radiators (Tr. 288-89). Petitioner presented an email he sent to Cass on August 29, 2015, offering to water Cass's plants and turn on the air conditioning while he was away (Tr. 180-81; Pet. Ex. 17).

Petitioner stated that Cass moved in at the beginning of his lease and stayed until the end of the term (Tr. 179, 278). He does not know where Cass presently resides (Tr. 289). He recalled that Abby Mohan and her husband Christian rented the unit after Cass and stayed there for two or three years (Tr. 321-22).

Oved testified that as a realtor he rented the third-floor unit to Cass on behalf of petitioner (Tr. 28). According to a text message written in Hebrew that Oved translated during his testimony, Oved texted petitioner on July 30, 2015, to notify petitioner that Cass wanted to move in that Saturday (Tr. 35-36; Pet. Ex. 2). Oved thought Cass moved in on August 1, 2015 (Tr. 35-36). He stated that Cass signed a one-year lease, which was standard for his company, but he did not know how long Cass lived in the unit (Tr. 39-40, 44). He recalled visiting Cass in the unit a few days after Cass moved in in connection with a utility issue and had the opportunity to observe Cass's "personal stuff" (Tr. 43, 45).

Zaman rented one of the third floor's studio apartments from petitioner in 2014 (Tr. 77-78). A person named John lived in the third-floor unit when Zaman moved in (*Id*.). He was a jewelry designer, and he was always hosting parties (*Id*.). After John left, an artist named Cass moved in and he kept large canvasses in the unit (Tr. 83, 111). Zaman could not recall when John

left or how much time there was between John leaving and Cass moving in (Tr. 84, 110). After Cass left, two of Zaman's friends moved into the unit and lived there for approximately two years (Tr. 84-85, 111). Zaman moved out of the Building around Christmas 2015 after she and petitioner stopped dating (Tr. 79, 167-68).

Petitioner testified that he had an account with Consolidated Edison ("Con Ed") for the third floor of the Building for which he received residential services (Tr. 176). A bill from Con Ed, dated October 20, 2014, addressed to petitioner states the service was delivered to 240 Grand Street, third floor, and the rate is noted as "EL1 Residential or Religious" (Pet. Ex. 14). In order to accrue miles on his Con Ed account, petitioner changed his utility provider to Energy Plus Customer Service and the account was changed to "commercial" (Tr. 176-78; Pet. Ex. 15).

Petitioner presented a photograph of the third-floor unit's bathroom that depicted a sink and tiled floors and walls that he testified was taken by a broker sometime in 2016 (Tr. 216, 219-20; Pet. Ex. 49E).

Respondent offered no evidence to refute petitioner's evidence of residential use of the third-floor unit during the window period. Accordingly, petitioner established that Cass was the residential occupant of the third-floor unit for at least 12 consecutive months during the window period.

Fourth-Floor Unit

Petitioner testified he lived in the fourth-floor unit from 2008 until he moved upstairs to the fifth-floor unit in January 2016 (Tr. 144). Genossar, Oved, Cohen and Zaman testified that they visited petitioner in the fourth-floor unit, and that the unit contained a kitchen, with a fridge, stove and microwave, a living room, with a piano, television, sofas and table, a bedroom, and a bathroom, as well as respondent's clothing and personal belongings (Tr. 12-13, 26-27, 49-52, 80-81). The bathroom had a shower, sink, and toilet (Tr. 52, 81). Oved testified that petitioner has lived in the Building since 2008 and he visited him in the fourth-floor unit in 2010 (Tr. 23, 41). Genossar testified that she stayed overnight as petitioner's guest in the fourth-floor unit in 2014 (Tr. 12). She thought she also visited him there in 2015, but she was unable to specify when (Tr. 16-17).

Cohen testified that he stayed with petitioner in the fourth-floor unit in April 2015 and August 2015 (Tr. 49-50, 53). Three photographs show Cohen inside of the fourth-floor unit in 2015 (Tr. 59-64; Pet. Exs. 55A, 55B, 56).

When Zaman moved into the Building in 2014, petitioner was living in the fourth-floor unit (Tr. 78-79). Zaman was in a romantic relationship with petitioner until December 2015 and she often stayed with him in the fourth-floor unit (Tr. 85-86). She recalled that on one occasion Dr. Moy walked into petitioner's bedroom while she was there (Tr. 105-06). Zaman provided a photograph and an Instagram screenshot showing a surprise birthday celebration she arranged for petitioner in December 2015, after petitioner returned from a work trip (Tr. 94-95, 102-03; Pet. Exs. 8, 12). The photograph shows petitioner appearing to blow out a candle on a cake placed on a circular table beside multiple bottles of liquor (Pet. Ex. 8). The Instagram screenshot depicts the same small circular table in the center of the picture with a large bouquet of orange balloons and several bottles of liquor on top of it (Pet. Ex. 12). There are multiple paintings in the background, as well as a table, piano, bicycle, chair, and candles (*Id*.). Zaman did not recall if there was a bathroom or kitchen (Tr. 122). Zaman testified that she and petitioner slept in the fifth-floor unit that evening however, respondent was still living on the fourth floor because he did not have approval to live on the fifth floor, and they did not regularly spend time on the fifth floor (Tr. 114-15). Petitioner sometimes let people stay in the fourth-floor unit and would stay on the fifth floor, and he had belongings, including mattresses, in both places (Tr. 114, 132). Zaman recalled that petitioner moved his belongings to the fifth floor in December, including a sofa, a bed, and artwork (Tr. 114).

Petitioner testified that upon moving to the fifth-floor unit in January 2016, he rented the fourth-floor unit out, but he could not remember to whom he had rented it to (Tr. 156-57, 259-61, 283). He presented a photograph of the fourth-floor unit that he had posted on Instagram on November 24, 2015, in which he wrote "end of an era #bowery #new york #home #movingonup #bowery kingdom #farewell" (Pet. Ex. 18). The photograph shows a sink and counter with various dishes and kitchen items on it and an empty room with windows on two sides (*Id*.). Around the same time petitioner posted this, he was preparing to leave for a work trip in China, and he cleared the living room and moved many of his belongings upstairs, including his "paintings, [] guitar, and a few of [his] desks," because friends would be staying in the unit and it would later be repainted (Tr. 182, 280). He kept one sofa and one mattress in the fourth-floor unit and moved another sofa

and mattress to the fifth-floor unit (Tr. 289-90). He also left "elementary" furniture and household items in the fourth-floor unit, including "all of the kitchen stuff" (Tr. 290, 318-19). Petitioner could not recall who stayed in his apartment while he was in China (Tr. 280).

When petitioner returned from China on December 6 or 7, 2015, his friends were staying in the fourth-floor unit and he "was crashing in places because [he] really didn't have [any]where to stay" but he stayed in the fourth-floor unit when no one else was using it and may have also stayed with Zaman (Tr. 280, 283, 319). Petitioner recalled that Zaman planned a surprise birthday celebration for him on the fifth floor in early December 2015 after he returned from China, but he did not recall if he and Zaman slept that evening on the fifth floor or in Zaman's apartment on the third floor (Tr. 172, 182, 282-83; Pet. Exs. 8, 12). Throughout December, he moved his belongings out of the fourth-floor unit because a short-term tenant was moving in on January 1, 2016 (Tr. 285-86, 318). He and Zaman broke up at the end of 2015, after which she moved to another building where he also leased space (Tr. 168). He moved to the fifth floor on January 1, 2016, or a few days after, because he had rented out the fourth-floor unit to a short-term tenant, but he could not recall what day in January he moved in (Tr. 144, 259-61, 285). Petitioner testified that anyone staying in the fourth-floor unit was using it for residential purposes (Tr. 320).

Petitioner presented a January 26, 2016 email he received from a rental agency inquiring whether the fourth-floor unit was available from April 1 to the end of the year, to which he replied, yes (Tr. 183-84; Pet. Ex. 19). Petitioner presented photographs he testified were taken in 2016 by brokers of the fourth-floor unit (Tr. 215-19; Pet. Exs. 49A, 49B, 49C, 49D). Petitioner testified that his business partner Eyal moved into the fourth-floor unit at the end of 2016 or early 2017 and he continues to reside there (Tr. 218-19, 302-03). Cohen also testified that when he lived with petitioner in the fifth-floor unit in 2017, the fourth-floor unit was occupied by petitioner's friend Eyal but he did not know when Eyal moved there (Tr. 56, 72-73).

The record supports that the fourth-floor unit was residentially occupied during the window period for 12 consecutive months in 2015. Petitioner moved to the apartment in 2008. He testified that he moved many of his belongings out of the unit in November 2015 before leaving for a trip to China, which he corroborated with a photograph posted on Instagram (Pet. Ex. 18), but left behind a mattress, sofa, and other belongings, such as kitchen equipment (Tr. 280, 284, 289-90, 319). Upon his return to the Building in December 2015, he had friends staying in the fourth-floor unit and he slept in various places, including the fourth and fifth-floor units, as well as in Zaman's

apartment on the third floor (Tr. 279-80, 283-84, 319). While petitioner may have not occupied the fourth-floor unit for a portion of the window period in November and December 2015 while he travelled and had houseguests, I found that it was more likely than not that petitioner had not given up "his right to the unit, [or] his expectation of continued residential occupancy within the unit" during this time. *333 PAS CoO Tenants Group*, OATH 968/08 at 21-22.

Accordingly, petitioner has established that the fourth-floor unit was residentially occupied by him for at least 12 consecutive months during the window period.

Fifth-Floor Unit

Petitioner testified that when he moved into the Building in 2008, the fifth floor was occupied residentially as a hostel or dormitory until a fire occurred on the third floor in 2014 (Tr. 150-51, 156). After the fire, the Fire Department evicted the fifth-floor occupants (*Id.*). DOB issued two notices of violation and hearing to the owner on May 28, 2014 (Resp. Exs. C, D). In the first notice (Violation No. 35095702R) the inspector observed the following violating conditions:

> Occupancy contrary to Department of Buildings records. Noted: Commercial space at entire 5th floor level is being occupied as [a] S.R.O. with (8) eight separate bedrooms, (2) two full bathrooms, (1) one kitchen, (1) common sitting room, and (1) one laundry room.

(Resp. Ex. C). The Commissioner's Order directed the owner to "[d]iscontinue illegal occupancy" in order to correct the violations (*Id*.). In the second notice (Violation No. 35095703Z), the inspector observed that work had been done without a permit and noted:

> [W]alls, partitions, electrical and plumbing work done [in the] 5th floor commercial space to create (S.R.O.) residential space for 8 bedrooms, 2 bathrooms, 1 kitchen, 1 sitting room and 1 laundry room, without approvals or permits.

(Resp. Ex. D). The Commissioner's Order directed the owner to "obtain approvals/permits or restore to prior legal condition" (*Id*.). DOB also issued a Peremptory Vacate Order for the Building's fifth floor on May 28, 2014 (the "vacate order") which stated:

> This order is issued because there is imminent danger to life or public safety or safety of the occupants or to property in that [f]ull height partitions erected along with plumbing and electrical work performed has created (8) rooming units with inadequate natural lighting, insufficient ventilation and

> no secondary means of egress. These conditions have therefore rendered the 5th floor unsafe to occupy.

(Resp. Ex. E). The vacate order stated that the fifth floor was to "remain vacant and unoccupied" until the illegal conditions were corrected and the vacate order was rescinded (*Id*.).

Petitioner and Dr. Moy signed a lease for the fifth floor which commenced on August 15, 2014, and ended on August 14, 2018, and granted petitioner the option to renew until December 31, 2020 (Tr. 34; Resp Ex. B). The lease states that the space is "to be used and occupied by - [petitioner] to use [an] office for whole sell [sic] and show-room [sic] for electical [sic] bicycles only" (Resp. Ex. B).

Petitioner, Mr. Moy, and Mr. Kim testified that Mr. Moy and Mr. Kim's architectural firm was engaged to lift the vacate order for the fifth floor (Tr. 161, 163, 352, 415-16). The firm created plans to return the fifth floor to commercial use and eliminate residential occupancy (Tr. 351-52, 417-18). Mr. Kim reviewed the plans, and then signed and certified them prior to them being filed with DOB (Tr. 420, 429; Resp. Ex. F). DOB approved the certified plans on October 31, 2014 (Tr. 354, Resp. Ex. F). They depict removal of all prior plumbing fixtures, including the "stall showers," except for a two-piece bathroom consisting of one toilet and sink" (Tr. 355, 419, 421-22; Resp. Ex. F). They do not depict a bedroom, kitchen, bathtub, or shower (Tr. 356-57, 421; Resp. Ex. F). For one bathroom, the certified plans state "remove shower, relocate existing toilet and sink (Resp. Ex. F). For the other bathroom, they state "remove toilet, sink, and shower" (*Id*.) The certified plans also proposed a pantry which, unlike a kitchen, does not provide for cooking appliances (Tr. 422-23; Resp. Ex. F). Petitioner acknowledged that the certified plans do not show a kitchen or a three-piece bathroom and that the work proposed returning the fifth floor to commercial use in order to lift the vacate order (Tr. 297-298).

A permit for the work issued by DOB on March 4, 2015, noted that there is "no change in egress, use or occupancy" (Tr. 358-59; Resp. Ex. G). An undated cost affidavit filed with DOB in connection with the work referenced that plumbing fixtures were to be removed (Tr. 360-62; Resp. Ex. H). Mr. Kim stated that the work was completed pursuant to the permit issued for the approved plans (Tr. 424; Resp. Exs. F, G). Mr. Moy testified that the Building was also issued a stop work order after demolition work without a permit was observed (Tr. 352). An expediter, Steven Gil, was hired to help clear the violations (Tr. 161, 352).

On August 10, 2015, petitioner sent an email to Mr. Moy, asking when the vacate order would be lifted, following up again on August 31, 2015 (Tr. 210; Pet. Ex. 44). Moy responded on September 1, 2015, writing that an inspection of the premises must occur before the vacate order could be lifted (Pet. Ex. 44). The same day, petitioner replied, "I mainly have furniture inside but will figure it out shortly. I'm away until Labor Day. Will do it when I'm back." (*Id*.). On September 15, 2015, petitioner wrote to Moy, "[a]ny update on inspection date? I'm out of town tomorrow until Tuesday. I just need 2 days notice" (*Id*.).

On September 23, 2015, petitioner wrote to Mr. Moy that he needed to move in by November 1 and "need[ed] 2 days notice to clear out the floor" (Pet. Ex. 52). The same day, Mr. Moy replied that Gil was unsure if notice would be given prior to an inspection but regardless the space should not be occupied as there was a pending vacate order (*Id*.). Petitioner stated he would have to "move many things" and would need two days' notice (*Id*.). Gil wrote that petitioner should "keep the space clear of any material that could be interpreted to indicate that additional work will be done to the space or that the space is currently occupied" (*Id*.). Gil also suggested sending photographs of the unit that might obviate the need for an inspection (*Id*.). Petitioner forwarded two photographs of the loft that were taken when he was still living in the fourth-floor unit (*Id*.; Tr. 235). One photograph shows an open space with paintings, boxes, and construction materials on the right side and a ladder towards the back wall in front of the windows (Pet. Ex. 52). In the second photograph, fewer items on the right side are in view and the ladder is gone (*Id*.).

Petitioner testified that the owner paid for the demolition which was completed at the end of October 2015 and it was "signed off in November [20]15" (Tr. 153-54). During the demolition, the bedroom walls, as well as the kitchen and the shower were removed (Tr. 262). After the demolition was complete, petitioner stated that in November 2015 Dr. Moy told petitioner he would have to start paying rent and so petitioner moved in (Tr. 153-54, 156, 271-72).[3] Petitioner stated that he moved to the fifth floor in early January 2016 and lived there for approximately six

[3] Petitioner presented multiple rent checks he wrote from his company "Easy Living Hds Corp." for rent at 240 Grand Street to Yat Ting Moy and "Tzao Tai Tzao Corp.": $11,175 dated November 10, 2016, $17,175 dated January 10, 2017, $7,725 dated July 8, 2017, $17,725 dated October 10, 2017, and $18,125 dated February 10, 2019 (Tr. 235-39; Pet. Exs. 53A, 53B, 53D, 53E, 53G). Petitioner believed he paid rent for all three floors in the Building, including the fifth floor in November 2016 but because he paid for the fifth floor renovations, he had some credit (Tr. 236). He also noted that on occasion he paid rent in cash or could have paid from his personal account (Tr. 308).

months before the orders were lifted during construction because the rent was high, and he could not afford to stay elsewhere (Tr. 144, 154, 274-75).

Between January to June 2016, petitioner denied he was living on both the fourth and fifth floors but recalled a "few times" when he would "crash [on the third or fourth floor] between vacancies" and admitted to sleeping on the fourth floor two or three times (Tr. 292-94). He complained that there was not enough space for him on the fifth floor during the day:

> Since I moved in, in January and the fourth floor was rented, I was staying on the mattress in the room. The thing is that I also needed a place to be throughout the day. And once the mattress is in, there's nowhere to move around, so the mattress kept on going in and out. And so in that picture, I wasn't staying there, so the mattress was out of there and I had other[] items.

(Tr. 272).

He explained that in early 2016 he was not comfortable in the fifth-floor unit as it "was living in a sort of construction site" and "whenever [he] was able to get out . . . [he] was getting out" (Tr. 183). He stated that if he had the opportunity to "have a proper shower," on a different floor, he would take it, but "otherwise [he] was [in the fifth-floor unit] . . . [but] it wasn't comfortable, it wasn't pleasant" (Tr. 293). He stated he may have used the kitchen fridge in the fourth-floor unit in 2016 but denied cooking there, pointing out he had to have the apartment cleaned before anyone stayed there (Tr. 294). He further stated he had no interest keeping the apartments on the third or fourth floors vacant because he had to pay the owner rent for the spaces (Tr. 292). Petitioner also traveled during this period. He went to Israel in February 2016 for a couple of weeks and possibly again in April 2016 (Tr. 182-83, 283, 294, 319-20). He may have also traveled to Europe in 2016 (Tr. 320).

Petitioner stated that the vacate order and stop work order would not have been lifted if the inspector had seen his "residential belongings" during the multiple inspections of the fifth floor (Tr. 154, 263, 273-74). Whenever there was an inspection, petitioner hid his belongings in the first room closest to the entrance, which was not inspected because it did not have any plumbing fixtures, or he moved his belongings out of the Building (Tr. 155-56, 227, 273; Pet. Ex. 50C). He recounted removing his mattress, sofa, toiletries, and toothbrush, and anything that appeared residential, but may have left behind a plant or paintings (Tr. 155, 166, 273). Petitioner thought Mr. Moy visited the fifth floor sometime in January 2016 and knew that he was using the space

residentially, and later testified that Mr. Moy had visited the fifth floor a few times but could not recall exact dates (Tr. 163, 247-48).

Petitioner was frustrated that Gil was not effectively clearing the permits to allow him to move in (Tr. 161, 164). He hired an expediter named Anju Emungania in December 2015 to help lift the vacate order (Tr. 161-62, Pet. Exs. 56, 57, 58, 59, 60, 61). Petitioner stated that Ms. Emungania visited the fifth floor in January 2016, and she was aware he was living there and would need prior notice of any inspections to move his belongings (Tr. 162-63, 246-47, 265; Pet. Ex. 61).[4]

When petitioner first occupied the fifth floor in January 2016, the original bathroom at the entrance contained a water heater, toilet, sink, and shower and was functional (Tr. 151-52, 226-27, 261). Petitioner later clarified that the shower had been removed during the demolition and only the drain remained (Tr. 262). He claimed that there was also a shower handle, but there were no retaining walls to contain the water, and he had to mop the floor when he showered, which he did every day (Tr. 263, 265). Petitioner claimed that the inspectors would have only seen a two-fixture bathroom with a service drain, which corresponded to the plans that had been submitted (Tr. 264).

> [DOB] came a few times. They always saw [the drain]. There was no issue with it because . . . I think the way the expeditors put it, it was like a service drain. You can have a drain in the middle of the room to . . . take the water, but that can be served as a shower. . . . So it was very much in use. . . . [The inspectors] don't go around with [a] magnifying glass. They look at the room and . . . they saw the drain. It was there, it's on the plans. . . . So they saw the toilet, they saw the sink. They [had not seen] a shower stall, and that was just like a two-fixture bathroom for the plans. But it was more than enough to use to shower.

(Tr. 263-64). Despite petitioner's testimony, the approved plans (Resp. Ex. F) do not appear to depict a shower drain.

Petitioner presented photographs taken by his counsel three weeks prior to trial of a drain that petitioner testified existed in the bathroom when he moved in (Tr. 229-32; Pet. Exs. 51A, 51B). The photographs depict a shower drain in a floor, situated beside various cleaning items, an umbrella, and kitty litter (Pet. Exs. 51A, 51B). Petitioner testified there was also a shower head

[4] Both parties sought to call Anju Emungania to testify at trial and she was served with a signed subpoena duces tecum but she did not appear (Tr. 408).

presently, but the photograph did not depict that, and he did not testify when the shower head was installed (Tr. 231).

As there was no kitchen until after the vacate order was lifted in June 2016, petitioner was unable to cook (Tr. 266; Resp. Ex. I). He used the bathroom sink, as well as a minifridge and counter inside his room, and either ate cold food, such as rice cakes and cottage cheese, or ordered in food (Tr. 266-67). He stated that he did not need a stove to eat, and he argued he could not recall what he ate seven or eight years ago (Tr. 267-68). There were no photographs presented that corroborated petitioner's testimony that there was a minifridge and none of the dates on the food delivery or grocery invoices petitioner presented as exhibits corresponded to the January 2016 through June 2016 period (Tr. 269; Pet. Exs. 31, 32, 33, 34, 35, 36, 37, 40, 41, 42).[5]

Mr. Moy testified that a commercial space is permitted to have a drain but not a shower or bathtub, but later conceded that sometimes commercial spaces like spas and gyms have showers (Tr. 357, 362, 394). Mr. Kim also testified that a floor drain in a commercial space is legal but, while some larger commercial spaces are permitted to have showering facilities, it was unlikely this space would be permitted to have a shower because it was a small space and had a prior violation for illegal residential use (Tr. 423).

Mr. Moy visited the fifth floor in mid-2014 after the vacate order was issued, before the demolition of the residential fixtures (Tr. 382-83). Mr. Moy testified that he did not know where petitioner was living while the vacate order was pending, and he believed petitioner would move in after the vacate order was lifted, but worried petitioner was using the fifth floor as storage (Tr. 364-65, 370; Resp. Ex. J). He visited the fifth floor again toward the end of 2015, where he observed petitioner had items stored in the unit (Tr. 359-60, 396). He believed that once the vacate order was lifted, petitioner intended to use the space for his electrical bike business, in compliance with the Building's zoning (Tr. 363, 367-68, 401-02). Mr. Moy did not think petitioner paid any

[5] Petitioner presented multiple receipts from car service providers Uber, Lyft, and Juno, dated June 14, 2015, November 17, 2015, February 24, 2016, December 15, 2017, and November 15, 2019, that show a drop off or pick up at 240 Grand Street (Tr. 184-88; Pet. Exs. 20, 21, 22, 23, 24). He presented receipts for paint purchased from Home Depot on July 9, 2015, and food delivery ordered from Eat 24 on February 14, 2015, listing the fourth floor of the Building as the shipping address (Tr. 188, 204-05; Pet. Exs. 25, 40). He also presented receipts listing the fifth floor of the Building as the shipping address for a massage chair purchased from eBay on December 9, 2018 (Pet. Ex. 27); bedding purchased on September 29, 2016, and October 17, 2016, and pillows purchased on October 27, 2016, from Overstock (Pet. Exs. 28, 29, 30); food and household items purchased on June 3, 2018, August 11, 2018, October 12, 2018, October 29, 2018, November 23, 2018, May 14, 2019, June 11, 2019, from Google Express (Pet. Exs. 31, 32, 33, 34, 35, 36, 37); shampoo purchased on May 13, 2019, from Beautyvice.com (Pet. Ex. 38); a rug purchased on March 5, 2020 (Pet. Ex. 39); and Grubhub on August 4, 2017, and 13, 2022 (Pet. Exs. 41, 42).

rent until the vacate order was lifted, however he acknowledged that the lease did not provide any build out for rent abatement and he did not know if his father asked petitioner to start paying rent before the vacate order was lifted (Tr. 402). Mr. Moy has not visited the fifth floor since his visit in 2015 (Tr. 388-89).

On April 4, 2016, petitioner sent an email to Mr. Moy, asking about the pending vacate order, writing "[a]re we ready to finalize it so I can move in?" (Resp. Ex. J). On May 25, 2016, Ms. Emungania wrote to Mr. Moy to ask whether a fine had been resolved stating, "[a]lso, I believe that, the last time I spoke with [petitioner], he expressed a desire to get back on the premises as soon as possible" (Resp. Ex. K). Petitioner replied to that email asking Mr. Moy and Mr. Kim in pertinent part, "[w]hat's to update? Pay the fine and let's get it over with already? 2 years that the place is standing empty ($140 000 in rent)" (*Id*.).

On May 6, 2016, Mr. Moy requested respondent send photographs depicting paths to the fire escapes on the third and fifth floors (Pet. Ex. 45). Petitioner responded on May 9, 2016, attaching two photographs (*Id*.). One photograph depicts a credenza against the right wall with multiple items and boxes on top of and beside it, and across from the credenza there is a bicycle, a chair and many items covered by a plastic tarp as well as two windows and a door in the background (*Id*.). There is also what appears to be a door, leaning on the back wall (*Id*.). The second photograph depicts a segment of a living area with a mirror, paintings, lamp, guitar, chair, plant, and ceiling fan or light fixture hanging from the ceiling, as well as a door in the background (*Id*.). The two photographs do not depict the same space as there is no ceiling fan or light fixture hanging from the ceiling present in the first photograph (*Id*.). Petitioner did not recall when the photographs were taken (Tr. 299). Petitioner initially testified that both photographs depicted the fifth-floor unit but later testified it is more likely that the first photograph depicted the fifth-floor unit and the second depicted the fourth-floor unit (Tr. 211-12, 301-02).

The vacate order was lifted on June 28, 2016 (Tr. 365, 425-26; Resp. Ex. I). Respondent was not sure if he was present during the June 20, 2016 DOB inspection (Tr. 298). Mr. Kim testified that a DOB inspector would not have lifted the vacate order if there was any sign of illegal residential occupancy or if the existing conditions did not conform to the approved plans, but he was not present during the actual inspection and had not been in the Building since early 2015 (Tr. 426-28). The inspector noted in the accompanying report that during the June 23, 2016 inspection: "NO [single room occupancy] observed in 5th floor at time of inspection, it[']s modified to

commercial space per [the certified plans]" (Resp. Ex. I). Mr. Moy testified that DOB would not have lifted the vacate order if the work did not comply with a commercial buildout per the certified plans (Tr. 367).

Once the vacate order was lifted on June 28, 2016, petitioner testified he built a kitchen and another bathroom in the unit (Tr. 152-53, 166-67). Petitioner presented a work proposal from Everest Mechanical Inc. dated November 17, 2014, for work on the fifth floor, including work to build new bathrooms, install plumbing fixtures, and build walls (Tr. 208-09; Pet. Ex. 43). Petitioner built a second bathroom in the unit which he uses as his main bathroom (Tr. 152-53, 265). He also installed a kitchen and room dividing walls (Tr. 153). The fifth-floor unit currently contains two bedrooms, two bathrooms, and a kitchen with a sink, fridge, and stove (Tr. 151).

Petitioner denied ever using the fifth-floor unit commercially (Tr. 274-75). He stated that there is a sign reading "Joulvert," the name of his bicycle shop, on the fifth-floor unit door but the company has its own place of business and he does not use the unit as a showroom for bicycles (Tr. 191-92). The sign is there to facilitate deliveries (*Id*.). Petitioner stated that the ConEd account for the fifth-floor unit has been under Zaman's name since 2016 continuing to this day but did not present any evidence or testimony to corroborate this account (Tr. 286-87).

Genossar, Cohen, Oved, and Zaman testified regarding petitioner's move to and occupancy of the fifth-floor unit. Genossar testified that petitioner was renovating and moving to the fifth floor at the end of 2015 or beginning of 2016, which coincided with her family's move to New York (Tr. 14). In November 2015, she and the petitioner exchanged text messages in which petitioner wrote "city didn't give me sign off yet so gonna [sic] be homeless for a few weeks. . . I can't touch it until I have sign off and it's being delayed. . . [Once] I get it I still need 2-3 weeks work on it" (Pet. Ex. 1). Petitioner attached a photograph which shows a large room with four windows on the left side and three windows at the rear (*Id*.). It also shows empty boxes, a ladder, a plant, construction materials, chairs covered in clear plastic tarps, multiple paintings leaning against the left wall, and a child's bicycle (*Id*.). Genossar testified that petitioner moved to the fifth-floor unit once the renovations were complete, but she was not sure of the actual date (Tr. 18). She was not sure when in 2016 she visited the fifth-floor unit but recalled that when she did it had a kitchen and a bathroom containing a shower, bathtub, sink, and toilet (Tr. 18-19).

Oved testified he was "almost positive" that petitioner has lived in the fifth-floor unit since January 2016, because it was around the same time as the birth of his son in February 2016 (Tr.

23, 40). Oved testified that when he visited in January 2016, the unit had a shower and a kitchen island (Tr. 41-42). He described that when you opened the door to the unit, there is a bedroom on the left, a bathroom on the right, then a hallway that leads to a kitchen on the right, and a big living area (Tr. 25). The living area is furnished with sofas, a dining table, a television with a Sony PlayStation, and at one time there was a ping pong table (*Id*.). The kitchen has a fridge, stove, countertop, and drawers, as well as a bar with stools that opened to the living room (Tr. 25-26). The bathroom contains a shower, toilet, mirror, sink, and vanity (Tr. 26). He knew that petitioner lived there because petitioner slept and kept his belongings there (Tr. 27-28).

Cohen recalled that when he visited petitioner in August 2015 petitioner told him that he planned to move to the fifth floor (Tr. 53-54). In late 2015 or early 2016, a few weeks after petitioner's birthday, Cohen had a video call with petitioner, who was in the fifth-floor unit, and petitioner discussed how happy he was that "he occupied the new space" (Tr. 54, 69-71). Cohen recalled the space was "a mess "and not "exactly arranged" and he saw furniture and open shelving (*Id*.). He did not recall whether the unit had a kitchen island (Tr. 72).

Cohen did not recall visiting petitioner in 2016 but stayed with him in 2017 (Tr. 52, 68). He described that when you exited the elevator on the fifth floor there is a "big door" on the left (Tr. 53). When you enter the big door, there is a door to a small office on one side and on the other side a door that leads to a bathroom, big living room, kitchen, bedroom, and second bedroom (*Id*.). The living room had a television, two couches, books, and other personal items (*Id*.). The kitchen contained a microwave, refrigerator, sink, stovetop, and cookware (Tr. 54-55). Petitioner's bedroom contained a closet, television, and two windows (Tr. 55). Both bathrooms contained a shower, toilet, and sink (Tr. 55). Cohen used the office as a bedroom when he stayed in the unit (Tr. 54).

Zaman recalled that petitioner "got the [fifth] floor from Dr. Moy," which had formerly been a dormitory, but it had to be cleaned up and petitioner was waiting on "approvals" and "final clearance to move" (Tr. 85-86). Zaman did not know how long the approval process took or when petitioner received final approval (Tr. 113, 128). Zaman visited the fifth floor sometime in 2015 and observed a communal bathroom but she could not recall if it had a shower or bathtub (Tr. 118-19). Petitioner moved to the fifth-floor unit in January 2016, after she and petitioner stopped dating in December 2015, and she did not recall visiting him there in 2016 (Tr. 86, 117-18).

Petitioner's evidence fell short of proving that the fifth-floor unit was residentially occupied from January 2016 to July 2016. As the intent of the Loft Law is to legalize otherwise illegal occupancies, if petitioner had established sufficient residential use of the fifth-floor unit during the window period, the vacate order would not have necessarily foreclosed petitioner's coverage claim. However, petitioner did not sufficiently demonstrate that he occupied the unit from January 1, 2016, until the vacate order was lifted, after which he made physical modifications to adopt the space to residential use. DOB had issued the vacate order on May 28, 2014, after observing that the fifth floor was being improperly used residentially (Resp. Ex. E). To lift the vacate order, certain modifications were necessary to return the fifth floor to its proper commercial use, including the removal of walls and plumbing fixtures (Resp. Exs. F, G, H, I). The vacate order was lifted on June 28, 2016, after a DOB inspector verified that the space had returned to commercial use (Resp. Ex. I).

I did not find credible petitioner's assertions that he lived in the fifth-floor unit beginning in January 2016. Petitioner's testimony that he was living in the unit is also undermined by emails he sent to Mr. Moy in April and May 2016, urging Mr. Moy to pay the fines and work to lift the vacate order so he could move in, pointing out that the owner lost $140,000 in rent while the fifth-floor unit was "standing empty" (Resp. Exs. J, K). While petitioner testified that he kept a mattress on the fifth floor and slept there, he testified that he could not be there during the day, stating "I wasn't staying there," because the belongings he was storing took up too much space (Tr. 272). Indeed, the record shows that from January to June 2016, when the vacate order was lifted and he created residential fixtures in the fifth-floor unit, petitioner was living between the fifth floor and other apartments in the Building (Tr. 265, 292, 294). Petitioner admitted he kept a mattress in the fourth-floor unit after moving out, sometimes used the refrigerator in the fourth-floor unit, and slept in other apartments on other floors when they were available and used their showers and kitchens (Tr. 289-90, 292-94).

In addition, petitioner also failed to credibly explain how he prepared food without a kitchen and provided no corroboration for his testimony that he had a minifridge and created a small pantry in the bathroom, or had food delivered during this period (Tr. 265-67). Petitioner also did not corroborate his testimony that he paid rent during this time and while that may not be indicative of residential use, it did undercut his credibility (Pet. Exs. 53A, 53B, 53D, 53E, 53G).

Moreover, the Loft Law does require a showing that the space was "adapted to residential use, and so used." *333 PAS CoO Tenants* Group, 968/08 at 16 (*citing BOR Realty Corp. v. NYC Loft Bd.*, 129 A.D.2d 496, 499 (1st Dep't), *aff'd*, 70 N.Y.2d 720 (1987)). After the vacate order was lifted, respondent did make permanent physical modifications to the unit, including creating a kitchen, with a refrigerator and stove, bathing facilities, and an additional bathroom, as well as walls to create separate living areas. However, these permanent improvements were not present for at least half of the 12 months respondent is claiming coverage under the window period. *See, e.g. Kim*, OATH 199/18 at 9; *Boyers*, OATH 1338/12 at 14; *Pels*, OATH 2481/11 at 5-6.

The credible evidence did not establish that the unit possessed sufficient residential indicia before the vacate order was lifted. Mr. Kim certified the approved plans, at risk of penalty or loss of his license, and I credited his testimony that the vacate order would not have been lifted had the inspector observed conditions, such as an extra plumbing fixture, that did not conform to the approved plans (Tr. 425-26, 429). Petitioner admitted that the bathroom's shower was removed during the demolition and did not offer any corroboration for his testimony that there was a "shower head" that he used in conjunction with the bathroom's drain to shower (Tr 261-63). The photographs of the drain taken on the eve of trial in 2023 were equally unpersuasive and did not show a showerhead (Pet. Exs 51A, 51B). Genossar testified that petitioner moved in after his renovations were complete, but she was unable to state when petitioner completed them (Tr. 18). Oved's testimony that the fifth-floor unit contained a kitchen and a bathroom with a shower in January 2016 was contradicted by petitioner's own testimony that the kitchen and bathing facilities were built after the vacate order was lifted (Tr. 41-42, 225, 261-63, 265). Zaman and Cohen both testified that they did not visit the fifth-floor unit in 2016 (Tr. 52, 68,72, 117-18).

In sum, petitioner has not established by a preponderance of the credible evidence that he was the residential occupant of the fifth-floor unit for at least 12 consecutive months during the window period. As petitioner did not establish residential occupancy of three units during the window period, petitioner's coverage application should be denied.

In addition, petitioner's coverage application must be denied because section 281(6) of the Loft Law requires as a condition for coverage that the Building must have been "occupied" during the window period "as the residence or home of any three or more families living independently from one another." Here, petitioner failed to establish that the third, fourth, and fifth floor units were occupied by three or more families living independently from one another, as required.

Petitioner established that the third-floor unit was residentially occupied by Cass for a period of 12 months in 2015 and 2016 and the fourth-floor unit was residentially occupied by petitioner during a 12-month period in 2015. However, I did not find credible petitioner's claim that he occupied the fifth-floor unit for 12 months in 2016. But even if it were credible, petitioner's claim must fail because as a matter of law, petitioner cannot count twice as a residential occupant of two different units for the purpose of coverage. By the plain language of the statute, petitioner as one person cannot be multiple separate families under the Loft Law, which considers a family to be "either a person occupying a dwelling and maintaining a household . . . or two or more persons occupying a dwelling, living together and maintaining a common household . . . ." Mult. Dwell. Law § 4(5).

Under section 2-09(b)(1) of the Loft Board rules, the current occupant in possession of an IMD is a protected occupant: "[e]xcept as otherwise provided herein, the occupant qualified for protection under Article 7-C is the residential occupant in possession of a residential unit, covered as part of an IMD." 29 RCNY § 2-09(b)(1). Here, as the credible evidence has failed to establish that the Building is an IMD and the fifth-floor unit is a covered unit, petitioner's protected petitioner application must be dismissed.

FINDINGS AND CONCLUSIONS

Petitioner failed to prove that the building located at 240 Grand Street, New York, New York, is an interim multiple dwelling under the Loft Law.

RECOMMENDATION

I recommend that the Loft Board dismiss petitioner's application.

Christine Stecura
Administrative Law Judge

May 20, 2024

SUBMITTED TO:

JAMES S. ODDO
Commissioner

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