To Be Argued By:
Magda L. Cruz
Time Requested: 15 Minutes

APL-2020-00127

New York County Clerk's Index Nos. 100873/17 and 156504/17
Appellate Division, First Department Case No. 2018-4179

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

ROBINSON CALLEN, as Trustee of CASPER R. CALLEN TRUST
c/o SALON REALTY CORPORATION,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,

against

NEW YORK CITY LOFT BOARD,

Respondent-Appellant,

(Caption Continued on the Reverse)

BRIEF FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT, ROBINSON CALLEN, AS TRUSTEE OF THE CASPER R. CALLEN TRUST

Of Counsel:

Magda L. Cruz
Sherwin Belkin
Joseph Burden

Date Completed: February 26, 2021

BELKIN · BURDEN · GOLDMAN, LLP
Attorneys for Petitioner-Respondent and Respondent-Respondent, Robinson Callen, as Trustee of the Casper R. Callen Trust
270 Madison Avenue
New York, New York 10016
212-909-2144
mcruz@bbgllp.com

and

RICHARD FISCINA, LUKE WEINSTOCK,
ZENIA DE LA CRUZ, and MARIA THERESA TOTENGCO,

Respondents-Respondents.

In the Matter of the Application of

RICHARD FISCINA,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,

against

NEW YORK CITY LOFT BOARD,

Respondent-Appellant,

and

ROBINSON CALLEN as Trustee of CASPER R. CALLEN TRUST,
LUKE WEINSTOCK, ZENIA DE LA CRUZ, and MARIA THERESA TOTENGCO,

Respondents-Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other Authorities

CORPORATE DISCLOSURE STATEMENT

The Casper R. Callen Trust, the owner of the property at issue, and a respondent on this appeal, is a family trust comprised of individuals, and therefore, not a corporation or business entity subject to disclosure under 22 N.Y.C.R.R. Part 500.1(f) of this Court's Rules of Practice.

Salon Realty Corporation is the owner's managing agent, named in the caption only in a representative capacity. No papers have been filed by or on behalf of this corporation, and therefore, it does not fall under the disclosure requirements of 22 N.Y.C.R.R. Part 500.1(f) of this Court's Rules of Practice. In any event, Salon Realty Corporation has no parents, subsidiaries, or affiliates.

COUNTER-QUESTIONS PRESENTED

1.

Q. Does the NYC Loft Board have jurisdiction to compel tenants, who wish to withdraw an unadjudicated application for Loft Law coverage, to continue prosecuting their withdrawn application after the tenants reach a settlement agreement with the owner that provides for Rent Stabilization rights and protections?

A. The Appellate Division answered this question in the negative.

2.

Q. Can housing accommodations that are not reflected on a building's certificate of occupancy nonetheless be protected under the Rent Stabilization Law?

A. The Appellate Division answered this question in the affirmative.

3.

Q. Was allowing the tenants to withdraw their coverage application before any coverage determination was made against public policy?

A. The Appellate Division answered this question in the negative.

PRELIMINARY STATEMENT

Petitioner-Respondent/Respondent-Respondent, Robinson Callen, as Trustee of the Casper R. Callen Trust c/o Salon Realty Corporation ("Owner"), respectfully submits that the order of the Appellate Division, First Department, entered on January 16, 2020 (the "Order"), should be affirmed. The Order correctly upheld so much of the judgment of the Supreme Court, New York County (Bluth, J.), entered on April 10, 2018, as held that Appellant, New York City Loft Board ("Loft Board"), lacked authority to compel tenants to prosecute a Multiple Dwelling Law Article 7-C ("Loft Law") coverage application, which they voluntarily, and with advice of counsel, applied to withdraw, with prejudice.

The Loft Board determinations, dated March 16, 2017 (Loft Board Order #4630) and February 18, 2016 (Loft Board Order #4480), to the extent they declined to allow Petitioner/Respondent, Richard Fiscina, and Respondents, Luke Weinstock, Zenia de la Cruz, and Maria Theresa Totengo (collectively "Tenants"), to voluntarily withdraw their unadjudicated Loft Law coverage application pertaining to 430 Lafayette Street - Rear, New York, New York (the "Rear Building"), were annulled.

The Tenants' voluntary and knowing withdrawal of their coverage application was predicated upon a global settlement agreement reached between Owner and Tenants, with both sides represented by experienced Loft Law counsel,

and overseen and approved by an Administrative Law Judge ("ALJ") of the Office of Administrative Trials and Hearings ("OATH"), before any coverage determination was made.

The settlement agreement provided that the Rear Building would be transferred to lawful residential use under the Rent Stabilization Law. The settlement agreement also achieved a benefit to the community-at-large by unifying the regulatory status of the Rear Building with the front building at this location, which already was subject to the Rent Stabilization Law, and thereby ensured that both buildings would have uniform regulatory tenant protections.

The Supreme Court and the Appellate Division reviewed the settlement agreement and found it contained enhanced protections and rights for the Tenants, and a timetable for obtaining a new residential certificate of occupancy ("CO") for the Rear Building that mirrors the timetable in the Loft Law [MDL § 284(1)]. The settlement agreement also required Owner to comply with all fire and safety mandates in the New York City Building Code in the interim.

Without the settlement agreement, Tenants faced a real risk of eviction from their loft units in the Rear Building. Some of the Tenants may not have resided in the Rear Building during operative window periods under the Loft Law, and thus, may not have qualified for coverage under the Loft Law.

Thus Tenants, both as a collective whole and individually, gained valuable regulatory protections, safer homes, rent stabilized leases and affordable regulated rents by way of the settlement agreement that they may not otherwise have been entitled to receive under the Loft Law. The question of Loft Law coverage (and conversion of the Rear Building to a Class "A" multiple dwelling, if coverage applied) would have taken years and tens of thousands of dollars in legal fees to finally determine through the protracted Loft Board administrative process, with no certainty of the outcome. Conversely, the settlement provided finality and certainty to the parties, an expedited and more efficient conversion process, and immediate regulatory protections to the Tenants.

As noted by the Supreme Court: "While the Loft Board may not agree with the settlement, it is irrational to refuse to allow an applicant to withdraw his application…and force litigation." (R. 7, 12.) In affirming the Supreme Court, the Appellate Division further observed: "it was irrational to refuse to allow the tenants to withdraw their conversion application because the Loft Law was not the sole basis for legalization of the subject units."(R. 734-735.)[1]

This appeal by the NYC Loft Board is gravely misguided and inconsistent with its mission as a tenant-protective governmental body. It defies logic why the

[1] "R" references the bound Record on Appeal followed by the applicable page number(s).

Loft Board would seek to compel parties to litigate coverage applications when (a) individual units may fall outside of the Loft Law, as a matter of law, (b) the parties agreed to legally convert the Rear Building to a Class "A" multiple dwelling, (c) Owner agreed to realign the rents and provide leases to all the Tenants in accordance with the Rent Stabilization Law, and (d) the absence of a new residential CO alone does not render Tenants' occupancy illegal or unsafe.

This is not a situation where parties are attempting to evade the rent laws, deny tenants lawful residences, or charge illegal rents. To the contrary, the actions taken by the parties achieve a result that increases and improves the regulated housing stock in New York City through a deliberate negotiation process, which was negotiated by experienced counsel and overseen and approved by an Administrative Law Judge. The settlement agreement is beneficial to both sides, and the neighboring community, without the need for further agency or court intervention. The Loft Board should applaud these parties' efforts; not frustrate them by forcing unnecessary and costly continued litigation. This Court should not countenance such an ill-conceived position.

No public policy or legal right has been undermined here. The Order should be affirmed in all respects.

COUNTER-STATEMENT OF FACTS

The Parties and the Subject Premises

Petitioner-Respondent/Respondent-Respondent, Robinson Callen, as Trustee of the Casper R. Callen Trust c/o Salon Realty Corporation ("Owner"), is the owner of the subject premises located 430 Lafayette Street - Rear, in the NOHO neighborhood of Lower Manhattan, New York ("the Rear Building") (R. 18-19, 25). The 1918 CO for the Rear Building states it is five story mixed use building, partially approved for dwellings (first story) and partially for factory and storage uses (upper floors).[2] There are four lofts currently in the Rear Building; three of which are used by the Tenants for living purposes.

Owner also owns an adjoining building, hereafter referred to as the "Front Building." In order to reach the Rear Building from the street, one must pass through the Front Building.[3] (R. 25.)

The Front Building is a five-story multiple dwelling with eight rent stabilized apartments. (R. 25, 47.) The 1918 CO for the Front Building states that the basement and first story were for offices, and the upper floors were for

---

[2] CO 772: http://a810-bisweb.nyc.gov/bisweb/CofoJobDocumentServlet

[3] The physical connection between the adjoining buildings is illustrated by the diagram prepared by the Owner's architect, Robert Tan. (R. 47.)

"bachelor apartments."[4] In combination with the Rear Building, the two buildings could be deemed a "horizontal multiple dwelling" for rent stabilization coverage purposes under both, Loft Board Regulation §2-08 and Rent Stabilization Code §2520.11(d), because they share many common and overlapping elements, including, common ownership, common plumbing and sprinkler systems, interconnected basement, joint entrances, and the mailboxes and electric meters for both buildings are located in the same area in the Front Building. (R. 25, 35, 701.)

430 Lafayette Street, together with neighboring buildings, Nos. 428, 432 and 434, were landmarked by the New York Landmarks Preservation Commission in 1965 as "La Grange Terrace" a/k/a "Colonnade Row", a series of notable residences built in the 1800's.[5]

Petitioner-Respondent, Richard Fiscina, and Respondent-Respondent, Luke Weinstock, are tenants of Units [redacted] and [redacted], respectively, at the Rear Building. Respondents-Respondents, Maria Theresa Totengco, and Zenia de la Cruz, are co-tenants of Unit [redacted] at the same (collectively, "Tenants"). (R. 19.)

Respondent-Appellant, the New York City Loft Board ("the Loft Board"), is a New York City agency established by Article 7-C of the Multiple Dwelling Law

---

[4] CO 748: http://a810-bisweb.nyc.gov/bisweb/CofoJobDocumentServlet

[5] http://www.neighborhoodpreservationcenter.org/db/bb_files/VIEW-430-LAFAYETTE-REPORT-IN-ORIGINAL-FORMAT.pdf

(MDL §§ 280-287) to administer the conversion of former manufacturing and commercial spaces used residentially (a/k/a "Interim Multiple Dwellings" or "IMDs") to lawful rent stabilized residential apartments. (R. 19.)

The Coverage Applications

On March 11, 2014, Tenant Fiscina filed an application with the Loft Board pursuant to 29 RCNY §§ 2-05(b)(6) and 2-08(q) seeking Loft Law coverage pursuant to MDL § 281(5) for the four residential units at the Rear Building: "[redacted], [redacted] and the residential units on the third and second floors." (R. 49-51.)

On July 11, 2014, the Loft Board transferred Mr. Fiscina's application to the Office of Administrative Trials and Hearings ("OATH"), which assigned the matter to Administrative Law Judge ("ALJ") Ingrid M. Addison for adjudication. (R. 26, 138.)

On August 20, 2014, Mr. Fiscina filed an amended coverage application, adding Tenants, Weinstock, Totengco, and de la Cruz. (R. 26, 60-64; the "Coverage Application".)

Owner answered the Coverage Application on September 18, 2014. (R. 26.) Owner disputed that Tenants met the statutory criteria for Loft Law coverage, including, but not limited to, that they residentially occupied the subject units in the Rear Building during the required 2008 – 2009 statutory window period. [MDL §281(5)(a).] (R. 26, 107-110, 280.)

The Settlement Agreement

After several conferences at OATH, and months of negotiation with the parties and their counsel (all of whom are experienced Loft Law practitioners - R. 138), on January 21, 2015, Owner and Tenants entered into a comprehensive Settlement Agreement. (R. 26, 293-307.)

The Owner and Tenants jointly submitted the Settlement Agreement to the Loft Board, and Tenants' counsel informed the Loft Board that Tenants were voluntarily withdrawing the Coverage Application, with prejudice. (R. 27, 114, 702.)

The Settlement Agreement provided, *inter alia*, that (a) Tenants would be recognized as rent stabilized tenants and Owner would give them rent stabilized leases, at an agreed-upon affordable base rent (R. 294-295), and register the units with the New York State Division of Housing and Community Renewal ("DHCR") as rent stabilized (R. 295); (b) Owner would waive all rights to high income deregulation (R. 295); (c) Owner would waive all rights to any rent increase based on code compliance or legalization costs to obtain the new residential certificate of occupancy (R. 296-297); (d) Owner would obtain a new residential certificate of occupancy within an agreed-upon defined timeframe (R. 297-299); (e) Tenants would have specific remedies to ensure Owner's compliance with its conversion

obligations, including the right to recoup reasonable attorneys' fees in any enforcement action (R. 299).

In accordance with the Settlement Agreement, in February 2015, Owner entered into leases with each of the Tenants, allowing residential use of their respective units and coverage under the Rent Stabilization Law. (R. 129-131.) In May 2015, Owner registered the units with DHCR, listing them all as subject to the Rent Stabilization Law and Code. (R. 133-136.) Owner also prepared plans to convert the Rear Building to a Class A multiple dwelling. (R. 27, 151, 155-156, 370, 581, 702.)

The ALJ Decision and Recommendation

By decision dated March 16, 2015, ALJ Addison recommended that the Loft Board accept Tenants' fully informed withdrawal of their Coverage Application. (R. 139.)

The Loft Board Order

Almost a year later, by Order dated February 18, 2016 (No. 4480), the Loft Board rejected the Tenants' withdrawal of the Coverage Application ("Loft Board Order"). The Loft Board Order stated that the Settlement Agreement underlying the proposed withdrawal was "against public policy" because Tenants' present residential occupancy was illegal, and registration with DHCR did not otherwise "legitimize" such illegal residential occupancy. (R. 139-140.)

The Loft Board Order did not point to any legal authority permitting the Loft Board to force an applicant to prosecute a coverage application against the applicant's will, or barring voluntary withdrawal of an unadjudicated coverage application. Nor did the Loft Board Order find that the detailed, agreed-upon, conversion timeline in the Settlement Agreement was inconsistent with the legalization requirements in or underlying purposes of the Loft Law.

The Loft Board Order did not address the evidence of the Rear Building having a 1918 CO permitting mixed use, or being rent stabilized as a horizontal multiple dwelling with the larger stabilized Front Building, without the need of intervening Loft Law coverage.[6]

The Loft Board Order did not point to any violation issued by the NYC Department of Buildings ("DOB"), the NYC Environmental Control Board ("ECB"), the NYC Department of Housing Preservation & Development ("HPD"), or the NYC Fire Department ("FDNY") against the current residential usage at the Rear Building.

---

[6] The doctrine of "horizontal multiple dwelling" under the Rent Stabilization Law is one that enables a building with less than six units (which would normally be exempt), to become rent stabilized if it is adjacent to a larger building and shares common characteristics with the larger building. As previously noted, *supra,* the Rear and Front Buildings could be deemed a "horizontal multiple dwelling" for rent stabilization coverage purposes under both, Loft Board Regulation §2-08 and Rent Stabilization Code §2520.11(d), because they share many common and overlapping elements, including, common ownership, common plumbing and sprinkler systems, interconnected basement, joint entrances, and the mailboxes and electric meters for both buildings are located in the same area in the Front Building. (R. 25, 35, 701.)

The Loft Board Order simply insisted that "Owner's effort to legalize the [Rear] Building 'in a timely manner' does not render Tenants' residential occupancy legal during the conversion process." (R. 140.)

The Parties Ask the Loft Board to Reconsider

In March 2016, Owner and Tenants filed separate Applications for Reconsideration of the Loft Board Order. (R. 146-171, 326-342, 367-370.) Owner and Tenants each argued that the Settlement Agreement was mutually beneficial to the parties, consistent with Loft Law and Rent Stabilization Law objectives, and nothing in the Loft Law authorizes the Loft Board to compel parties to litigate if a coverage applicant elects, with advice of their own experienced and competent counsel, and before any coverage adjudication, to withdraw their coverage application. Owner also pointed out that the Loft Board was assuming jurisdiction over property and parties, which may not be entitled to Loft Law coverage at all. At no point during the administrative proceedings was it ever determined that the Rear Building or the Tenants met Loft Law coverage prerequisites.

The Reconsideration Applications further argued that the Rear Building might be subject to rent stabilization without having to undergo any Loft Board process because the Rear Building is part of a horizontal multiple dwelling with the adjoining Front Building, located in the same Block and Lot. The Front Building is subject to rent stabilization as it contains more than six (6) housing

accommodations and is registered with DHCR. [Emergency Tenant Protection Act of 1974 ("ETPA") (NY CLS Unconsol, Ch. 249-B) §5(a)(4)(a), Rent Stabilization Law §26-504[a] and Rent Stabilization Code §2520.11(d).] Accordingly, since the units in question are likely already covered under the Rent Stabilization Law, independent of Loft Law coverage, and have already been registered with DHCR as rent stabilized by the Owner, Owner and Tenants argued that residential occupancy was permissible and they should not simultaneously be subject to a second regulatory scheme under the Loft Law. (R. 150, 370.)

The Loft Board Order Denying Reconsideration

By Order dated March 16, 2017 (No. 4630), the Loft Board denied the Reconsideration Applications and remanded the proceeding to OATH. (R. 173.) The Executive Director's Report and Recommendation continued to maintain that the Settlement Agreement "perpetuates an illegality" because the Tenants' residential occupancy of a building without a new residential certificate of occupancy is illegal. (R. 176.) Based on this "illegality" all other arguments by Owner and Tenants were found by the Loft Board to be unavailing. (R. 174-177.)

The Parties Seek Article 78 Judicial Review

The Owner and Tenant Fiscina each commenced an Article 78 proceeding seeking judicial review of the Loft Board Orders. (R. 13, 604). Tenants Weinstock

Totengco, de la Cruz, and their counsel filed an affirmation and a memorandum of law in support of Tenant Fiscina's petition. (R. 698-720.)

The Article 78 proceedings were heard together, and by orders dated April 10, 2018, the Supreme Court, NY County (Bluth, J.), granted both petitions and annulled the Loft Board Orders. The Supreme Court found that the Loft Board Orders were "without rational basis." (R. 7, 12.) The Supreme Court explained:

> Here, the building owner and tenants/residents have settled their differences and the Loft Board has refused to accept the settlement. This leaves two options – one is for the tenants to default at the forced hearing and the other is for the tenants [and owner] to spend plenty of money and time litigating something they do not wish to litigate. Both options are wasteful and make no sense. While the Loft Board may not agree with the settlement, it <u>is</u> irrational to refuse to allow an applicant to withdraw his application.

(R. 7, 12; underscore in the original.)

The Supreme Court added:

> To be clear, this Court is not finding irrational the Loft Board's position to not approve a settlement it considered inappropriate – This Court <u>does</u> find it irrational to refuse to allow the applicants to withdraw the application and force litigation.

(R. 7, 12; underscore in the original.)

The Appellate Division Order

On January 16, 2020, the Appellate Division, First Department upheld the Supreme Court's orders to the extent they found that the Loft Board had no authority or rational basis to bar Tenants from withdrawing their application for Loft Law coverage. (R. 729-740.)

The Appellate Division stated:

> [I]t was irrational to refuse to allow the tenants to withdraw their conversion application because the Loft Law was not the sole basis for legalization of the subject units.

(R. 734-735.)

The Appellate Division explained:

> The broad remedial purpose of the Loft Law is to confer rent-stabilized status on qualifying buildings by legalizing them as interim multiple dwellings (*see* Multiple Dwelling Law §§ 283, 285, 301; *see also Blackgold Realty Corp. v. Milne*, 119 A.D.2d 512, 515 [1st Dep't 1986], *affd* 69 N.Y.2d 719 [1987]). This conversion process, however, does not necessarily negate rent stabilization coverage for qualifying buildings that, for whatever reason, do not undergo the conversion process set forth in the Loft Law.

(R. 735.)

Citing *Acevedo v. Piano Bldg., LLC,* 70 A.D.3d 124, 129 (1st Dep't 2009), *app. wthdrwn* 14 N.Y.3d 834 (2010), as a notable precedent, the Appellate Division stated that "there is no blanket prohibition barring rent-stabilization of units that are not subject to the Loft Law." Specifically, "[w]here zoning expressly

allows residential use as of right and apartments can be legalized by the owner filing a certificate of occupancy, there is no rationale … to foreclose [rent-stabilization]" (*Acevedo,* at 130-131).

The Appellate Division added: "the Rent Stabilization Law is 'inclusive, rather than exclusive' and, as such, incorporates within rent stabilization 'all housing accommodations which it does not expressly [exempt]' (*Matter of Salvati v. Eimicke,* 72 N.Y.2d 784, 791 [1988])." (R. 735.)

To that end, the Appellate Division pointed out that "there is a separate and independent track for the tenants to obtain rent regulation coverage outside the Loft Law's statutory scheme." To wit, since it is undisputed that the applicable zoning laws permit residential use in the area where the Rear Building is located, and the Rear Building shares common facilities and other material characteristics with the Front Building (which has a residential CO and is a registered rent stabilized building), they can jointly "constitute[] a horizontal multiple dwelling for purposes of rent stabilization (*see e.g., Matter of Ruskin v. Miller,* 172 A.D.2d 164 [1st Dep't 1991]; *Nine Hunts Lane Realty Corp. v. New York State Div. of Housing & Community Renewal,* 151 A.D.2d 465 [2d Dep't 1989]; and *Matter of Krakower v. State of N.Y., Div. of Hous. & Community Renewal, Office of Rent Admin.*,137 A.D.2d 688 [2d Dep't 1988], *lv. den.* 74 N.Y.2d 613 [1989])."

Further rejecting the notion that the Tenants faced potential eviction for alleged illegal occupancy absent [presumed] Loft Law coverage, the Appellate Division called it an "unfounded concern[]" by the Loft Board. The Appellate Division emphasized that:

> This Court, however, has consistently held that a landlord cannot evict a putative rent-stabilized tenant under the Multiple Dwelling Law on the basis that there is no certificate of occupancy, if the housing accommodation can be legalized (*see Acevedo v. Piano Bldg, LLC,* 70 A.D.3d 124; *Duane Thomas LLC v. Wallin*, 35 A.D.3d 232 [1st Dep't 2006]; *Sima Realty v. Philips,* 282 A.D.2d 394 [1st Dep't 2001]; *Hornfeld v. Gaare,* 130 A.D.2d 398 [1st Dep't 1987]). … Instead of mandating eviction of tenants, this Court's "tendency would be to compel the landlord's expeditious conversion of the premises to residential use" (*id.*).

(R. 737.)

Thus, while the Loft Board may have had a rational basis for rejecting the Settlement Agreement (since the agency statutorily delegated to oversee conversion of commercial/manufacturing buildings to residential use has no obligation to approve an alternative process; R. 737-738), the Appellate Division held, nonetheless, that "there is no valid reason for the Loft Board's refusal to grant the tenants' request to withdraw the conversion application." (R. 737.) "[O]nce the tenants decided to withdraw their conversion application…, the Board no longer had authority to supervise and approve the legalization process of the

building because the tenants relinquished their rights to proceed to conversion pursuant to the Loft Law." (R. 738.)

Leave to Appeal the Order to this Court is Granted

On September 1, 2020, this Court granted the Loft Board's motion for leave to appeal the Order (R. 726-727), and this appeal ensued.

POINT I

THERE WAS NO LEGAL BASIS FOR THE LOFT BOARD'S REJECTION OF THE TENANTS' WITHDRAWAL OF THEIR COVERAGE APPLICATION

A. Neither the Loft Law Nor the Loft Board Rules Preclude Withdrawal or Discontinuance of an Unadjudicated Coverage Application

At pages 11-12 of the Loft Board's brief, the process for filing a Loft Law coverage application is explained. The Loft Board recognizes that a New York City building can become subject to the Loft Law by only two ways. An owner can register its building with the Loft Board as an "interim multiple dwelling" ("IMD"), or an occupant of a building can file an application with the Loft Board seeking Loft Law coverage. *See* MDL § 284(2) and 29 RCNY §§ 2-05(b)(6) and 2-08(q).

Coverage, therefore, by the Loft Board's own admission, can only be initiated by an interested private party. The Loft Board has no authority to independently pursue coverage of any building. Its jurisdiction to determine whether a building is subject to the Loft Law is entirely registration or application driven. *Id.*

In the case of an occupant application, like Tenants, here, nothing in the law or regulations compels any occupant to file for Loft Law rights, or bars an occupant from electing to withdraw an application once filed. While MDL § 282 authorizes the Loft Board to decide issues of Loft Law coverage, and Loft Board

rules grant the Loft Board discretion to review stipulations [*see* 29 RCNY § 1-06(j)(5)], there is no provision that gives the Loft Board the power to force adjudication of a coverage application against the applicant's will.

In the case at bar, there was never a determination made as to whether any of the units in the Rear Building met Loft Law coverage criteria. The Tenants withdrew their Coverage Application before any adjudication of the Application took place. Nevertheless, the Loft Board is seeking to assert jurisdiction over the Rear Building, without an application, over units that may not fall within the Loft Law.

Both Supreme Court and the Appellate Division properly rejected that position. On the sole issue before this Court – *i.e.,* whether the Loft Board had a rational basis to refuse to allow Tenants to withdraw their Coverage Application – the Loft Board cannot pass even the most basic jurisdictional test.

B. Parties Should Not Be Compelled to Litigate a Case Which Was Settled in a Reasonable, Fair and Lawful Manner

Even were there to be statutory or regulatory authority for barring withdrawals of Loft Law coverage applications (which there is not), it is irrational to force litigation here.

In *Bank* of *America v. Douglas*, 110 A.D.3d 452 (1st Dep't 2013), the Court held that: "a party ordinarily cannot be compelled to litigate and, absent

special circumstances, such as prejudice to adverse parties, a discontinuance should be granted." In instances where the parties have knowingly settled their claims, such "special circumstances" rarely exist. *See Burnham Serv. Corp. v. National Counsel on Comp. Ins. Inc.,* 288 A.D.2d 31 (1st Dep't 2001) (knowledgeable and well-represented parties should not be compelled to litigate a claim which has been resolved in an amicable, reasonable, mutually beneficial, transparent, and lawful manner). Thus, it is widely understood that when leave to discontinue a case is requested by all parties in a case, such application should generally be granted.

Consistent with Loft Board Rules and precedent, the ALJ, here, recommended that Tenants' Coverage Application be withdrawn inasmuch as the Settlement Agreement fully protected Tenants' rights and required Owner to legalize the Rear Building within a defined timeframe, grant rent stabilized leases to the Tenants and register the subject units with DHCR. This more than satisfied the provisions of 48 RCNY § 1-32(f), which directs that withdrawal of a case from the calendar by a petitioner "shall not be subject to 'good cause' requirement" but shall only be permitted upon application. The Loft Board rule makes it clear that withdrawal requests are to be liberally granted.

While in some cases, the timing of the requested withdrawal and the merit of the application may be factors in determining whether to allow the

withdrawal of the application [*see, e.g.*, *Matter of Mark-Holli Realty Corp.*, Loft Board Order No. 2160 (October 10, 1997), upholding a voluntary dismissal unless there are circumstances that warrant a "more stringent result"], the parties, here, fully overcame those factors, and more.

The withdrawal of the Coverage Application occurred in the context of a conferencing process -- before a hearing took place -- with the participation of the ALJ, who is encouraged to try to resolve applications without litigation. Tenants had experienced and competent Loft Law counsel, who fully assessed the strength (and weakness) of Tenants' Coverage Application, and determined that the Settlement Agreement was far more beneficial to Tenants than proceeding with the risky Coverage Application. The Settlement Agreement gave Tenants a degree of finality and certainty not possible via the unpredictable OATH/Loft Board proceedings.

In light of those circumstances, coupled with the steps that Owner had already begun to undertake in order to obtain a new CO for the Rear Building reflecting the four residential units, withdrawal of the Coverage Application was appropriate. Through the settlement, the units occupied by the Tenants transitioned to coverage under the Rent Stabilization Law by virtue of the apartment registrations with DHCR and rent stabilized leases with legal regulated

rents provided to all of the Tenants. The end result of the Loft Law legalization process is rent stabilization. *See* MDL §§280, 286(3).

Here, the parties expedited and simplified the often contentious and extremely costly and time-consuming Loft Law process in order to obtain the same result -- rent stabilized units, legalized for residential use with the approval of DOB – on a much faster and less costly track. Tenants had acquired *more rights and protections,* plus a conversion process that was much quicker and less costly than they would have had, even if they had prevailed in their Coverage Application – the outcome of which was not assured at all.

There was uncertainty over Tenants meeting the statutory window period occupancy criteria, and a significant issue whether Loft Law coverage could legally apply to the Rear Building. The prospect of litigating these fact-intensive issues over many months, if not years, was daunting.

Even if Tenants could overcome those foundational coverage issues, they would still have the burden of engaging in proceedings involving the myriad of issues that arise during a major conversion project to obtain a new CO for a building; particularly one that is part of a landmark designation. Additional proceedings would be required in order to set legal rents in light of the costs of conversion, followed by a transition process to rent stabilization coverage.

With such number of variables in play, Tenants knowingly and reasonably elected to withdraw their Coverage Application predicated on the extensive benefits and assurances they received under the Settlement Agreement.

Settlement agreements "are judicially favored and may not be lightly set aside" (*IDT Corp. v. Tyco Group, S.A.R.L.,* 13 N.Y.3d 209, 213 [2009]). *See also, Hallock v. State of New York and Power of Authority of the State of New York*, 64 N.Y.2d 224 (1984); *Matter of Galasso,* 35 N.Y.2d 319, 321 (1974). There is a "societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy" and assurance that their agreements will be honored provides them "finality and repose upon which [to] order their affairs" (*Denburg v. Parker Chapin Flattau & Klimpl,* 82 N.Y.2d 375, 383 [1993]). Moreover, settlement agreements are favored because they also promote "efficient dispute resolution" (*IDT Corp.,* 13 N.Y.3d at 213), "avoid[ing] potentially costly, time-consuming litigation and preserv[ing] scarce judicial resources" as "courts could not function if every dispute devolved into a lawsuit" (*Denburg,* 82 N.Y.2d at 383; *see also IDT Corp.,* 13 N.Y.3d at 213).

Conversely, by seeking to compel the parties to litigate, the Loft Board was forcing the Tenants to forego the substantial rights, protections, and cost-savings they were receiving under the Settlement Agreement and to assume the risk of losing their homes. This was not rational.

C. Permitting Withdrawal of the Coverage Application Does Not Offend Public Policy

The Loft Board repeatedly asserts that allowing Tenants to withdraw their Coverage Application violates public policy because they are not legally residing in the Rear Building absent a new residential CO. The Loft Board contends that the Settlement Agreement does not mandate a new residential CO, only good faith efforts to obtain one, and if it is never obtained, Tenants' occupancy remains illegal indefinitely. The Loft Board calls it a "scheme to maintain illegal occupancy outside of the Loft Law framework" (App. br. at 42).

The Loft Board's argument is incorrect. As aptly emphasized by the Appellate Division below, the Loft Law is not the only statutory scheme that protects tenants living in units that do not conform to a building's certificate of occupancy. Ample examples can be found in rent stabilization jurisprudence.

Courts have recognized rent stabilization coverage as an alternate path to rent regulation where Loft Law coverage is unavailable, but the loft premises are capable of being legalized. *See Acevedo v. Piano Building*, 70 A.D.3d 124 (1st Dep't 2009), *app. wthdrwn* 14 N.Y.3d 834 (2010); *182 Fifth Avenue v. Design Dev. Concepts,* 300 A.D.2d 198 (1st Dep't 2002); *Tan Holding Corp. v. Wallace,* 187 Misc.2d 687 (App. T. 1st Dep't 2001); *South Eleventh Street Tenants Associates v. Dov Land, LLC,* 872 N.Y.S.2d 514 (2d Dep't 2009).

These cases reflect judicial recognition of a separate and independent track to obtain rent regulation coverage even though a certificate of occupancy providing for residential use may not presently exist. A mechanism, beyond just the Loft Law, exists to protect such tenants living in non-conforming dwellings in buildings that may not otherwise qualify for Loft Law coverage, like the Rear Building at bar. This line of cases holds that even if rent regulation coverage is not obtained through the Loft Law, rent stabilization could still be achieved, despite the technical illegality of the tenants' occupancy. The cases refute the Loft Board's repeated assertion that the Loft Law coverage process is the only ticket to rent stabilization when a CO is missing or does not authorize residential use of the premises during the conversion process.

Indeed, many cases have found stabilization coverage for units that do not appear on a building's CO, and even when violations for illegal occupancy were issued because units were created contrary to the number authorized in the building's CO. *See Ortiz v. Songhen*, 56 Misc.3d 19 (App. T. 2d Dep't 2017); *Rivas v. Conty*, 57 Misc.3d 986 (Civ. Ct. Qns. Co. 2017), and *Rashid v. Cancel*, 9 Misc.3d 130(A)(App. T. 2nd Dep't 2005), involving illegal apartments, all found to, nonetheless, be subject to rent stabilization protections.

What is significant about these cases is that the CO violations did not defeat regulatory protection. The "illegal" occupancy did not require removal of

the tenant from the premises. What mattered was that the "illegal" units were being used for actual living purposes (in some cases, residential usage that endured over the course of many years), which, in turn, triggered the stabilization protections. *See e.g. Rashid v. Cancel, supra,* where the Court specifically noted: "In our view, the use of the basement as a sixth housing accommodation *over a multi-year period* brought the entire building under rent stabilization." (Emphasis added.)

As this Court explained in its seminal holding on the issue of *de facto* stabilization, *Gracecor Realty Co. v. Hargrove*, 90 N.Y.2d 350 (1997), the Rent Stabilization Law covers "*housing accommodations* in class A or class B multiple dwellings made subject to this law pursuant to the ETPA." RSL § 26-504(a) & (b) (emphasis supplied). The definition of "housing accommodation" for rent stabilization purposes appears in the Rent Stabilization Code, which defines the term as: "that part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment, and all services, privileges, furnishings, furniture and facilities supplied in connection with the occupation thereof." RSC § 2520.6(a). *Hargrove, supra,* 90 N.Y.2d at 354. The absence of a CO is irrelevant to whether the occupancy will be protected.

In pertinent part, the *Hargrove* Court instructed:

> Whether a period of occupancy is accompanied by sufficient indicia of "permanency" such that the space occupied may be characterized as a “home, residence or dwelling unit” for rent-stabilization purposes is a fact-intensive question substantially turning on the intent and behavior of the parties. One factor to consider in reaching an appropriate determination is the length of time a landlord permits a person to continuously occupy the same space. (*see, e.g.,* Rent Stabilization Code [9 NYCRR] § 2520.6 [j]; RPAPL 711).

In *Hargrove,* the landlord had rented a cubicle within a lodging house to the respondent for a continuous period of two years, and respondent had no other residence during that time. The landlord allowed respondent to retain a key over an extended period, which enabled respondent to exclude others from his designated space, and also gave respondent extended permission to store all of his personal possessions, including clothes and a television set, inside a locker within the enclosed confines. The landlord's conduct in relation to respondent's use of the space demonstrated that it was expected and intended that respondent would occupy the space as his residence.

Although DHCR opined that such partitioned space was not protected by the RSL, the *Hargrove* Court found that the statute’s language and purpose encompassed the cubicle because the cubicle was actually, and substantially, used for residential purposes. The *Hargrove* Court noted: “The Rent Stabilization Code itself identifies the intent of the occupant as a relevant consideration [RSC §

2520.6(a)], providing that a tenant must occupy or intend to occupy that part of any building or structure as a residence, home or dwelling unit." 90 N.Y.2d at 354 [1997].

In light of these cases, which show that the path to rent regulation protection need not necessarily pass through the Loft Board, it cannot be said that the Tenants' withdrawal of their Coverage Application pursuant to the Settlement Agreement violated public policy. Indeed, the Settlement Agreement achieved the same objective (and more) as if the Loft Law coverage proceeding had been adjudicated in Tenants' favor.

Loft Board's assertion in its brief that withdrawal of the Coverage Application pursuant to the Settlement Agreement injures the Tenants is demonstrably false. The Loft Board points to no evidence showing that the conditions at the Rear Building are unsafe. The Loft Board fails to demonstrate that any Tenant is at risk by reason of the absence of a new residential CO. The Record has no evidence that any of the multitude of governmental agencies empowered to enforce fire and safety regulations has issued any violation against the Rear Building.

Similarly, the Loft Board's argument that without Loft Law compliance, residential occupancy is *per se* illegal is unavailing. It has never been determined that the Rear Building or any of its Units fall under the Loft Law. The

fact is that Tenants have been living in the Rear Building for years and have never been forced to vacate by the DOB or HPD – the agencies empowered to enforce the New York City Building and Housing Codes – on account of any illegal occupancy. Nor have those agencies taken any steps to vacate the Rear Building while the Owner completes the work necessary to obtain a new residential CO.

The Loft Board's reliance upon *Chazon v. Maugenest*, 19 N.Y.3d 410 (2012) is misplaced. In *Chazon,* the loft premises had already been determined to be covered by the Loft Law; whereas, here, coverage has never been determined by the ALJ or the Loft Board. In *Chazon,* the owner was found to have repeatedly defaulted in meeting Loft Law legalization requirements. In contrast, here, no court or agency has issued any order finding Owner to be non-compliant in failing to obtain a new residential CO for the Rear Building. And lastly, *Chazon* was primarily a dispute over collecting rent during a time when the owner was not adhering to its legalization obligations and the building had no residential CO. The collection of rent is not an issue in the case at bar.

As the Appellate Division observed, the Loft Board's professed public policy concerns are not borne out by the law or facts of this case. The Loft Board's true objection is not with the presumed dangers of living in a building without a new residential certificate of occupancy, or the technical illegality of the Tenants' occupancy until a new residential C-of-O is issued, but rather, with the

parties' desire to chart their own course in a manner that fully conforms with the rent laws and the objectives of tenant protections and the building codes. The Loft Board errs in asserting that such desire undermines the rent laws or public policy – particularly where coverage under the Loft Law has never been determined.

In short, the voluntary and knowing withdrawal of the Coverage Application, which the Loft Board seeks to prevent in favor of continued litigation, actually reinforces sound public policy because it was underpinned by a contractual framework – fully consistent with the rent laws and the building codes and fully enforceable in a court of law -- for: (a) legalization of the residential use of the Rear Building; (b) protection of the leasehold interests of the Tenants; and (c) addition of regulated housing stock. The parties voluntarily agreed to *impose* rent regulation and assure the applicability of rent regulation to current and future residents.

Public policy does not dictate that Tenants place their homes at risk where Loft Law coverage is unclear, at best. Yet, that is what the Loft Board urges in this appeal. It is a position that must be rejected, especially given that the Loft Board has no independent authority over the Rear Building or the Units. Denying withdrawal of the Coverage Application is to hold a building captive where no authority may lie.

Notwithstanding the Loft Board's protestations, Tenants are living safely and comfortably in their rent stabilized Units, and Owner is working within DOB guidelines to obtain a new residential CO for the Rear Building. Tenants properly and wisely elected to withdraw their Coverage Application.

The Loft Board's Orders rejecting withdrawal of Tenants' Coverage Application were issued: (a) without citing any factual evidence supporting the Loft Board's claim that Tenants were endangered by the lack of a new residential CO or the anticipated renovation work, (b) without recognition that the Loft Board had no power to force parties to litigate settled claims where no Loft Law coverage had been determined, and (c) wrongly casting doubt on the legitimacy of the Tenants' coverage under the Rent Stabilization Law. They were properly annulled by the courts below.

POINT II

THE REAR BUILDING COULD BE SUBJECT TO RENT STABILIZATION WITHOUT LOFT BOARD INVOLVMENT BY VIRTUE OF IT BEING PART OF A HORIZONTAL MULTIPLE DWELLING WITH AN ADJOINING BUILDING

The Rear Building and the Tenants' Units may be subject to rent stabilization under the Emergency Tenant Protection Act of 1974, even if they are not otherwise covered by the Loft Law. *See e.g., 142 Fulton LLC v. Hegarty,* 839 N.Y.S.2d 45 (1st Dep't 2007)*; Duane Thomas LLC v. Wallin,* 826 N.Y.S.2d 221 (1st Dep't 2006); and *Acevedo v. Piano Bldg., LLC, supra.*

Specifically, while RSC § 2520.11(d) exempts from the Rent Stabilization Law "buildings containing fewer than six housing accommodations on the date the building first became subject to the RSL", if such buildings, like the Rear Building, share predominantly common characteristics with another adjacent building (which, when combined, causes the aggregate number of units in the two buildings to be six or more), such buildings have been found to be subject to rent stabilization. In such instances, the adjoining buildings are commonly referred to as a horizontal multiple dwelling ("HMD").

RSC § 2520.11(d) provides:

> For the purposes of this subdivision, a building shall be deemed to contain six or more housing accommodations if it was part of a multiple family garden-type maisonette dwelling complex containing six or more housing accommodations having common facilities such as a sewer line, water main or heating

> plant and was operated as a unit under common ownership on the date the building or complex first became subject to the RSL, notwithstanding that certificates of occupancy were issued for portions thereof as one or two-family dwellings.[4]

It is undisputed that the Rear Building adjoins to the Front Building, which is already subject to rent stabilization. Given that the Buildings share common ownership, a sprinkler system, plumbing system, a basement, a front entrance, and that their respective electric meters and mailboxes are at the same location, the Rear Building could qualify as a horizontal multiple dwelling with the Front Building, rendering both subject to rent stabilization.

The HMD concept has not been limited to garden-type maisonette dwelling complexes. This Court has held that a comprehensive examination of the common elements of each building should be conducted when determining whether two or more buildings constitute an HMD. *Matter of Salvati v. Eimicke*, 72 N.Y.2d 784 (1998). Then, "where common features predominate" separate premises may be deemed to constitute a single horizontal multiple dwelling for purposes of rent regulatory coverage. *Nine Hunts Lane Realty Corp. v. DHCR*, 151 A.D.2d 465 (1st Dep't 1989). *See also, Crakower v. DHCR* 137 A.D.2d 688 (2nd Dep't 1988) (two buildings, together containing more than six units, with

---

[4] The Loft Board Rules define HMD status similar to that found in the RSC. *See* 29 RCNY § 2-08. The Rear Building could qualify as an HMD under Loft Law regulations as well.

common ownership, coupled with a shared heating plant in the basement constituted an HMD for rent stabilization coverage).

In view of the foregoing it would appear that the Front and Rear Buildings could be regarded a Horizontal Multiple Dwelling with both subject to rent stabilization under the jurisdiction of DHCR.

Notably, the Loft Law was not intended to govern buildings that were already under the jurisdiction of DHCR. In *Blackgold Realty Corp. v. Milne*, 119 A.D.2d 512 (1st Dep't 1986), *aff'd* 69 N.Y.2d 719 (1987), the Court held that the Loft Law was not intended to encompass premises already determined to be subject to the Rent Control Law. The Court found that the premises were subject to the Rent Control Law, and therefore, the tenancies were outside the scope of the Loft Law. Specifically, this Court ruled:

> [T]he Loft Law has no application under the circumstances of the present case even if the subject building were otherwise to qualify. The legislative findings of Multiple Dwelling Law, article 7-C, § 280 specifically refer to tenancies of "uncertain status" and "illegal and unregulated residential conversions" in buildings formerly used for manufacturing, warehousing, and commercial purposes.

The tenancies at bar are not "tenancies of uncertain status." They are now rent stabilized and duly registered with DHCR and a new residential CO will be obtained for the Rear Building, reflecting four residential units, in accordance with the New York City Building Code pursuant to the DOB-approved plans. The

primary purpose of the Loft Law - to integrate interim multiple dwellings into rent stabilization pursuant to the Building Code (*see* MDL §§§ 283, 285, and 301) - has been achieved.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Owner respectfully submits that the Order of the Appellate Division, First Department, entered on January 16, 2020, should be affirmed, with costs.

Respectfully submitted,

Dated: New York, New York
February 26, 2021

BELKIN BURDEN GOLDMAN, LLP
Attorneys for Petitioner-Respondent/
Respondent-Respondent
Robinson Callen, as Trustee of the
Casper R. Callen Trust
270 Madison Avenue
New York, New York 10016
(212) 867-4466

By: _____
Magda L. Cruz
mcruz@bbgllp.com

MAGDA L. CRUZ
JOSEPH BURDEN
SHERWIN BELKIN
Of Counsel

RULE 500.13(c)(1) CERTIFICATION

I hereby certify that the foregoing brief was prepared on a computer using Microsoft Word 2010.

Type: A proportionately spaced typeface was used, as follows:
Name of typeface: Times New Roman
Point Size: 14

Word Count: The total number of words in this brief, exclusive of pages containing the table of contents, table of authorities, corporate disclosure statement, counter-statement of questions presented, proof of service, and this Certification is 7,423.

Dated: New York, New York
February 26, 2021

BELKIN BURDEN GOLDMAN, LLP
270 Madison Avenue
New York, New York 10016

BY:_____
MAGDA L. CRUZ, ESQ.