Dawe v. 20 Beaver Street LLC

OATH Index Nos. 237/06 and 335/06, mem. dec. (Oct. 20, 2006)
[Loft Bd. Dkt. Nos. TH-0178 and TM-0061; 20 Beaver Street, New York, N.Y.]

Sanctions in the form of a fine of $1,000 imposed upon petitioner's counsel for counsel's willful disobedience of tribunal's orders setting trial date and requiring proper harassment pleading and production of trial exhibits. No costs awarded because parties stipulated that each would bear its own costs and attorneys' fees. Although parties stipulated to petitioner's withdrawal of these harassment and diminution cases without prejudice on the eve of trial, in fact petitioner has evaded the re-pleading and trial work ordered, and thereby subverted the final trial schedule; the parties have thwarted, without good cause, the finally set trial and pre-trial pleading and discovery deadlines ordered by this tribunal in what amounts to the parties' own grant to themselves for their convenience of an adjournment without the necessary permission of the tribunal and in derogation of the rules. In these extraordinary circumstances, it is recommended that the Loft Board either dismiss the claims outright, with prejudice, for petitioner's violations of the Loft Board's and OATH rules and orders and overall failure to prosecute, or impose specific conditions on any new filing of the same claims to avoid a repetition of petitioner's dilatory and failed prosecution of these matters. Adjournment denied and matters are marked off the trial calendar.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
MICHAEL DAWE,
Petitioner
-against-
20 BEAVER STREET LLC,
Respondent

MEMORANDUM DECISION AND REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This decision will address two open issues in these matters alleging harassment and diminution of services, which were consolidated for trial previously: (1) whether sanctions should be imposed upon the applicant's attorney, Lindsay J. Rosenberg, Esq., for disobeying the orders and rules of this tribunal and repeatedly delaying the trial; and (2) whether the parties' stipulation dated September 12, 2006 (the "Stipulation") that the applicant has withdrawn and discontinued the matters without prejudice should be given effect. I have deemed the

Stipulation, which is annexed hereto for ease of reference, an application for permission to withdraw the matters because the parties' stipulation does not finally dispose of the cases under section 1-32(f) of this tribunal's rules, and permission is required for such a withdrawal. The first question is answered in the affirmative, and the imposition of sanctions is a final decision of this tribunal, interpreting our own rules governing the conduct of litigants appearing before OATH, and not subject to further administrative review. The second question is answered in the form of a report and recommendation to the Loft Board that while the parties' bargained-for stipulation effectively removes these cases from the trial calendar of OATH, there should be serious consequences for the abuse of the adjudication process that has frustrated all attempts to bring finality to these matters. Accordingly, I recommend that the Loft Board either (A) dismiss these matters with prejudice for failure to prosecute and for repeated, willful violations by the tenant and his counsel of pre-trial orders that required very specific, final pleading, trial preparation, and final trial dates, or (B) place conditions on any new filing of the same claims to prevent the petitioner from further abusing the process of the Loft Board's referral to this tribunal of these matters for hearing, in light of the egregiously dilatory prosecution of these matters and the subversion by the applicant of the Loft Board rules and of the rules of practice and orders of OATH. Both questions are decided in a single ruling because the facts relevant to the issues are inextricably intertwined.

The voluminous files of correspondence, emails, pleadings, and motions in these matters is being returned to the Loft Board for its use in considering this ruling because these documents, together with the transcript of the oral argument held September 28, 2006, constitute the record pertinent to that review.

Protracted Litigation History

Introduction

These cases have consumed a tremendous amount of public resources and have been pending more than a year, the harassment application since July 22, 2005, and the diminution case since August 9, 2005. Administrative Law Judge Donna Merris held numerous settlement conferences with the parties and their attorneys, both in person and via telephone since August 2005, and both the conference judge and I made a site visit on March 28, 2006, to 20 Beaver Street in Manhattan with the parties and their attorneys, as an aid to understanding the issues in

the litigation. Once it became clear in the spring of this year that the settlement talks would not bear fruit, the matter was set down for trial. The conference judge afforded the parties plenty of time to file and brief announced dispositive motions and to prepare for trial. Thus, on April 4, 2006, Judge Merris originally set the first trial date for July 10, 2006. When the applicant, Michael Dawe, missed rule-based deadlines for submitting responsive motion papers and producing documents, I granted the applicant's request for an adjournment and re-set the trial date for August 1, 2006. Despite this accommodation and the selection of a later trial date, in consultation with counsel for both sides, Mr. Rosenberg and his client caused the schedule to slip again. They defaulted again on their obligation to produce trial exhibits and other documents, this time in violation of the tribunal's order for timely production by July 12, 2006, and Mr. Rosenberg set a family vacation, or allowed it to be set by his family, in conflict with the August 1 trial date chosen with his input. The trial was adjourned again to October, and is set finally for November 2006, after substantial delays by the applicant and/or his attorney, and an error by respondent's counsel in selecting the October dates during the interim days of a religious holiday without first checking with his client. Trial had been rescheduled to proceed on October 10 and 11, 2006, and marked final, but the trial had to be re-set due to that error, and was again marked final, for November 8 and 9, 2006.

MEMORANDUM DECISION

The History of the Tenant's Delay and Violation of All Pre-Trial Orders

The harassment application, as amended repeatedly, was problematic. Delays by Mr. Rosenberg and his client have completely thwarted the final trial schedule previously ordered by this tribunal. Although Mr. Rosenberg was directed by Judge Merris to replead the harassment application because it was confusing and deficient, the application, as restated and amended to date by him, and thereafter supplemented without permission by the applicant as if *pro se*, and without any apparent coordination with his counsel, remains out of compliance with Loft Board rule 2-02(c)(2)(i). The application still lacks properly numbered paragraphs throughout; it lacks the form, content and specificity, such as the dates of the alleged conduct, required by that rule. Neither Mr. Rosenberg nor his client ever indicated that they prosecuted the cases in this desultory fashion, without coordinating the tenant's and his attorney's pleadings, to minimize legal expenses, or that the tenant could not afford legal advice.

Because of all the confusion generated by the prolix and repetitive, multiple pleadings, some written by the tenant Mr. Dawe, as if *pro se*, and some, alternately, by his attorney, without regard to the applicable pleading requirements as to form and content, this tribunal directed Mr. Rosenberg in its July 5, 2006 order via email (the "order"), appended hereto for reference, to submit "the documents constituting the entire petition or application of the tenants in the above-captioned matters by Friday, July 7, 2006." The purpose of that direction was to focus the matter and prepare for trial, and, quite simply, to seek the aid of counsel in identifying the operative allegations from the mass of materials that had been filed. What Mr. Rosenberg filed instead on July 6, 2006, was a bound volume with a three-page, single-spaced recitation of a history of the pleadings, with a collection of 14 attachments (letters, notices, answers and other documents), that did not itself resemble a proper legal pleading. Mr. Rosenberg confirmed in the conference call with counsel of July 24, 2006, that the tribunal was correct to surmise that the harassment application or petition consists of Exhibits M and N to his July 6, 2006 submission. These two documents are (1) a letter from Mr. Rosenberg to Judge Merris dated February 23, 2005, which was meant to read February 23, 2006; and (2) a letter from Mr. Dawe to the Loft Board dated April 18, 2006. I indicated in a conference call with counsel on July 24, 2006, that these documents do not comply with the requirements of Loft Board rule 2-02(c)(2)(i), and were still unacceptable because, *inter alia,* the paragraphs were not properly numbered throughout, and the documents lack the specification of dates and content mandated by that rule and otherwise lack the form of a proper pleading.

The tenant continued to file material that was not permitted by this tribunal or Loft Board rule 1-06(h), outside the deadlines set forth in the order, apparently without even notifying his attorney. Both sides filed dispositive motions in June and July 2006 with respect to the harassment and diminution claims. Mr. Rosenberg missed a June 21, 2006, deadline under rule 1-34 of this tribunal to submit responsive motion papers and cross-move for summary judgment with respect to the owner's motion to dismiss. It was not until Mr. Burden wrote to the tribunal on June 21, 2006, complaining of Mr. Rosenberg's default that Mr. Rosenberg wrote later the same day, claiming that he was just about to write seeking an extension of time, and that Mr. Burden's motion papers, sent by Federal Express, had not been delivered timely to Mr. Rosenberg by the building management at his office. By email order of June 26, 2006, I granted

Mr. Rosenberg an extension until June 30, 2006, to file his papers. In the July 5th order, I set a deadline of July 17, 2006, for reply papers to be submitted on behalf of the tenant with respect to his cross-motion for summary judgment. Mr. Rosenberg did file the July 17th reply on time, in the form of an affidavit of Mr. Dawe, but Mr. Dawe, twice thereafter, filed his own supplemental reply papers by letter, on July 18, and again on July 19, 2006. The extra paper continued to stream in, with no regard for the pre-trial orders and in such a haphazard fashion, that the tribunal sent an email on July 19, 2006, to counsel to note this problem of multiplication and confusion of the proceedings from the continued filing of papers alternately by the applicant, as if *pro se*, although he is represented by counsel, and by his attorney. In that email, I required that all communications on behalf of the tenant be transmitted to OATH by Mr. Rosenberg, indicating that he has reviewed the submissions and approved and coordinated them. I directed that the parties have another conference call with me in July 2006, and ordered in the call held July 24, 2006, that Mr. Rosenberg serve as the author of all further written submissions, and memorialized that ruling in the Memorandum Decision issued July 27, 2006 (the "Decision"), a copy of which is annexed hereto for ready reference.

My July 5th order had confirmed the outcome of a telephone conference on that date and provided in pertinent part that the tenant's trial documents were already overdue and must be produced by July 12, 2006, and that the new trial date was August 1, 2006. By the time Mr. Rosenberg violated the July 5th order by missing the deadline to produce the trial exhibits to Mr. Burden, counsel for the owner, Mr. Burden had already moved on June 8, 2006, to dismiss the harassment application as time-barred and improperly pleaded. In July 12, 2006 motion papers, Mr. Burden also moved to dismiss that application without prejudice for failure to comply with the Loft Board's harassment pleading rules. Mr. Burden also hastened to write, in a letter to the tribunal on July 14, 2006, that the August 1, 2006 trial was looming and he was unable to prepare without the applicant's documents. He reiterated his motion to dismiss without prejudice in his July 14, 2006 letter, this time relying upon the applicant's failure to comply with the discovery order and "a continuing pattern on the part of the applicant and/or his counsel of not complying with deadlines set by Judge Merris and OATH's regulations," in addition to the pleading defects he had noted earlier. Only then did Mr. Rosenberg react by seeking an adjournment. The cross-applications concerning the schedule arrived via telecopied letters from

each attorney on July 14, 2006. In the subsequent conference call originally scheduled for July 20th, but actually held with counsel on July 24, 2006, when both counsel finally became available, Mr. Burden indicated that the documents sought by a formal document demand were the applicant's trial exhibits. In his July 14th letter, he stated that his client would be "severely prejudiced" in its trial preparation because of the tenant's failure to produce the documents timely.

During the telephone conference call held July 24, 2006, with the deadline for the production of documents by then gone, and the August 1st trial still on, Mr. Rosenberg stated that he had still produced no documents even as of July 24th. He had no good excuse for doing absolutely nothing. In fact, the tenant never produced the trial exhibits (Tr. 17). Neither had Mr. Rosenberg sought an extension of time prior to the July 12, 2006, court-imposed discovery deadline, although ordinary procedure requires such an application to be made before the deadline passes. Rather, Mr. Rosenberg applied for an adjournment on July 14, 2006, in his letter, on the basis that he is a solo practitioner, but only after Mr. Burden renewed his application by the letter faxed earlier that day, to dismiss the matters without prejudice for the failures by the applicant to produce documents timely and to follow the rules and orders of the tribunal. Mr. Rosenberg wrote back the same day that he had overcommitted himself:

> I have just received the letter from Mr. Burden of today's date regarding the production of documents issue. Today I had planned to address the same issue in my own letter to the Court and to Mr. Burden, coincidently. During our recent conversations regarding the motions, trial and pre-trial issues, I clearly made promises as to dates of submission which were impossible for me to meet. Being a sole practitioner located in Scarsdale, New York and a daily litigator before the Supreme and Civil Courts, in many counties in the region, I unfortunately have not been able to complete the submission of pre-trial documents in a timely fashion. In addition, the August 1 trial date will be problematic for me as I realize that I am supposed to be out of town that same week for two weeks.

This was not the first time that a deadline had already passed when Mr. Rosenberg sought to be excused from his default only after his opponent had called the default to the tribunal's attention. He had a pattern of failing to fulfill his obligations and then seeking forgiveness. Mr. Rosenberg tendered no excuse for the non-production of *any* of the documents he intended to introduce at the trial of these matters, even though these matters had been scheduled as long ago

as April 4, 2006, for trial on July 10, 2006 (adjourned briefly by stipulation to August 1, 2006, because Mr. Rosenberg missed the deadline to respond to the motion to dismiss and Mr. Burden needed time to reply). These matters have been the subject of numerous settlement conferences. The applicant had been actively filing pleadings, appearing at OATH for conferences and requesting review of the tribunal's file to make copies of legal papers his own attorney had in his possession, and it was clear for months that trial was imminent. Mr. Rosenberg also indicated in the July 24th conference call that he had made family vacation plans, or his family had made them for him, after the trial date was set in the July 5, 2006 conference call with this tribunal and confirmed in the July 5, 2006 email order setting the August trial date, plans that would take him out of town during the August 1, 2006 trial.

Cross-motions to dismiss and for summary judgment with respect to the existing pleadings were denied as moot because the applicant was required to re-plead the harassment claims, which duplicate in pertinent part, the diminution claim, and, in any event, the motions were held in abeyance until the completion of the trial. *See* 48 RCNY § 1-50 (Lexis.com 2006) (reserving dispositive motions until closing statements).[1] Mr. Burden's proposal of a dismissal without prejudice was specifically denied by the tribunal in the Decision of July 27th. The Decision was explicit and made very clear that because of numerous delays by the tenant and his counsel, the parties were to get ready for trial; there was to be no further delay and there was no provision for any kind of withdrawal and discontinuance without prejudice:

> The failure by the applicant to produce overdue documents (trial exhibits) as ordered by this tribunal to be produced by July 12, 2006, his counsel's admitted setting of a family vacation that conflicts with the previously ordered trial date of August 1, 2006, after the trial date had already been set on notice to both sides, and the multiplication of the pleadings that have caused problems in the pre-trial preparation of these matters render it necessary to set the final deadlines for all pre-trial matters and for the trial that are noted at the end of this decision. All papers must be served upon opposing counsel properly and filed with proof of service at OATH. *The unnecessary complication of these matters by delay and confusion in the prosecution of this matter to date requires that the tribunal provide direction so that the matter can be tried and concluded.* The new harassment pleadings ordered below shall contain no extraneous matter. The new harassment application/petition is to contain only matter that constitutes

[1] The applicant's late-starting contention in his motion for summary judgment that the respondent was in default for failing to answer the original harassment application and a number of amendments to the application was rejected after analysis in the Decision issued July 27, 2006.

> cognizable claims of harassment under applicable law and rules, within the applicable limitations periods, including specific dates that will allow each allegation to be evaluated with respect to those limitations periods, and is to be pleaded strictly in accordance with the Loft Board and OATH rules cited below that require specificity of content and proper dates attached to each allegation; each paragraph is to be numbered separately so that the attorneys and the tribunal can follow the proof that relates to each numbered paragraph. *Counsel are to get ready for trial, to have their witnesses and documents ready, and to make serious efforts to prepare their presentations so that the trial can proceed efficiently.*
>
> Counsel for the parties, Lindsay J. Rosenberg, Esq., and Joseph Burden, Esq., in motions filed in recent weeks, have brought to light continuing problems with the pleadings and delays in the preparation for trial of these matters, primarily with respect to the harassment application as amended. Delays by Mr. Rosenberg and his client have completely thwarted the trial schedule previously ordered by this tribunal.
>
> * * *
>
> There will be no further adjournments or extensions of time. The respondent's motion to dismiss these actions without prejudice and the cross-motions to dismiss and for summary judgment are denied as moot, given that both parties must re-plead. The motion for adjournment of the trial is granted on the foregoing terms and conditions. Pursuant to the Loft Board rules, 29 RCNY section 1-06(k)(3), when a party adjourns more than two consecutive scheduled conferences or hearings, the hearing examiner or administrative law judge may direct that the next scheduled hearing or conference be marked final and the notice shall be sent to the parties in writing. At least two consecutive conferences were adjourned at the joint request of the parties prior to this second request by the applicant to adjourn the trial date.
>
> Accordingly, this is the final adjournment.

(Emphasis supplied.)

The final schedule set on August 4, 2006, in the revised final pre-trial order, was as follows. No further adjournments or extensions of time were permitted:

FINAL PRE-TRIAL DEADLINES AND TRIAL SCHEDULE

DATE	ITEMS DUE ON DATES NOTED AT LEFT
August 18, 2006	Mr. Rosenberg shall submit a sworn statement as to whether sanctions should be imposed upon him pursuant to OATH Rules 1-13 and 1-33 for the disregard of directions and orders of OATH, including confirmation of his statements in the conference call of July 24, 2006, and all other relevant matter, as well as comments as to the appropriate form of sanctions, if any.
August 28, 2006	Mr. Burden shall submit sworn reply papers as to whether sanctions should be imposed upon Mr. Rosenberg, including all documentation concerning respondent's demand for documents, and the appropriate form of sanctions, if any, and a statement of the costs and effects, if any, on respondent's trial preparation of the conduct at issue.
September 14, 2006	Mr. Rosenberg shall submit a proper harassment application/petition that complies with Loft Board rule 2-02(c)(2)(i), and OATH Rule 1-22, and alleges only acts of harassment cognizable under relevant law and rules, which provide in pertinent part: "The complaint shall allege in separately numbered paragraphs each type of conduct claimed to constitute harassment of occupants of the IMD by the landlord. Each paragraph shall contain a complete description of the conduct complained of, including the actual or approximate date(s) on which such conduct occurred, the manner and location of each occurrence, and if the complaint is filed on behalf of more than one occupant, the occupant(s) against whom the occurrence was directed." [29 RCNY § 2-02(c)(2)(i)] "The petition shall include a short and plain statement of the matters to be adjudicated, and a reference to the particular sections of the law and rules involved. The petition shall specifically allege the incident, activity or behavior at issue, and, where appropriate, the date, time and place of occurrence. It shall identify the law, rule, regulation, contract provision, or policy that was allegedly violated." [48 RCNY § 1-22] Please take notice that the failure to comply with the rules of pleading will subject the application/petition to dismissal with prejudice. Mr. Rosenberg is reminded of the directive in the conference call of July 24, 2006, from this tribunal, that the pleading must comply with these rules specifically so that (A) the trial can proceed efficiently by linking the evidence to properly pleaded, specific and dated, numbered paragraphs, and (B) Mr. Burden can identify specifically which particular numbered paragraphs he contends are subject to dismissal, if any. Mr. Rosenberg shall also serve upon Mr. Burden all overdue documents demanded by Mr. Burden, including, but not limited to all trial exhibits.
September 28, 2006	Mr. Burden shall answer the revised pleadings.
October 6, 2006	Both counsel shall file final requests, if any, for the production of documents and witness lists.

October 20, 2006	Both counsel are to complete their document productions. They shall produce all documents due, including trial exhibits. Any documents not produced to opposing counsel by October 20, 2006, shall be subject to preclusion at the trial. Mr. Burden and Mr. Rosenberg shall serve and file at OATH a list of all witnesses they each intend to call at the trial.
November 8 and 9, 2006, at 9:30 a.m. at OATH	Trial. The parties and their counsel are to be fully prepared for trial.

The extraordinary history of delay and failure to prepare on the part of the applicant impelled this tribunal to issue the Decision and memorialize the trial preparation deadlines and trial dates formally with very specific steps laid out for the parties to exchange discovery and take all necessary steps to ensure no further delays. The November 2006 trial dates were set in the Decision after two adjournment requests by the applicant. The Decision made clear that there were to be no further adjournments or extensions of time. The parties' Stipulation, however, was executed two days before the tenant's hard work of re-pleading and producing discovery was due, on the eve of trial, and left everything unresolved, contrary in all respects to the letter and spirit of the Decision and orders of this tribunal.

It is very clear that the parties had been litigating these matters vigorously, and yet the applicant did not timely prepare for trial and balked at every trial deadline, even though he was fully consulted through counsel about the schedule. Both sides have known that this trial has been approaching for many months, since early April 2006, when the original July 10, 2006 trial date was first set. The applicant's counsel's undisputed disregard for the pre-trial orders and rules of this tribunal and delay of the trial that had been scheduled first for July 10, then August 1, and now, finally, November 8 and 9, 2006, necessitated the adjournments of the trial noted above and the issuance of the formal Decision providing further, prescribed trial preparation and final trial deadlines.

The failure by Mr. Rosenberg to produce overdue documents (especially the crucial trial exhibits), as ordered by this tribunal to be produced by July 12, 2006, his admitted setting of a family vacation that conflicts with the previously ordered trial date of August 1, 2006, after the trial date had already been set with the agreement of both sides, and the multiplication of the

pleadings that have caused problems in the pre-trial preparation of these matters rendered it necessary to set the final deadlines for all pre-trial matters and for the trial in the Decision of July 27, 2006. The unnecessary complication of these matters by this delay and confusion in the prosecution of the claims here required that the tribunal provide the parties with direction and order pre-trial discovery deadlines and a final trial date so that the matters could be moved forward to trial and concluded. Counsel were directed formally and firmly in writing, in the Decision, by order of this tribunal, to get ready for trial, to have their witnesses and documents ready, and to make serious efforts to prepare their presentations so that the trial could proceed efficiently.

Attorney Sanctions

Because the actions of counsel for the applicant had impeded and delayed the trial, this tribunal was impelled to consider the imposition of sanctions, pursuant to 48 RCNY sections 1-13 and 1-33, against Mr. Rosenberg. The trial and discovery delays were attributable to both Mr. Rosenberg and his client, and they were forewarned that there might come a time when failure to meet tribunal-ordered obligations could result in dismissal of the actions. Mr. Rosenberg admitted his failure to produce any documents in a timely manner, despite this tribunal's written pre-trial direction to make the July 12th production in the order that was memorialized in an email to both counsel on July 5, 2006.

The tribunal must consider whether Mr. Rosenberg's conduct was a "[w]illful failure to abide by the standards of conduct" set forth in OATH rule 1-13. While the tribunal indicated in the July 24th conference call and the July 27th Decision that it was loath to impose sanctions for the family vacation being planned in derogation of the order, and was not, in the circumstances then presented in July, holding Mr. Rosenberg's failures against his client, the tenant and his attorney were put on notice that the conduct here was sanctionable. The tribunal did point out that the disregard of the tribunal's orders can be sanctionable conduct attributable to the tenant under the rules of OATH: "The applicant must understand that further failures to comply with the tribunal's orders can in the future result in severe penalties such as preclusion of evidence and dismissal of the action" (Decision at 6). The tenant's failure to prosecute is treated in the next section devoted to an examination of the parties' Stipulation to withdraw these matters without prejudice. Mr. Rosenberg knowingly violated each of the scheduling orders of the trial

judge. He also failed timely to follow the directives of Judge Merris to submit a restated application that complies with the applicable rules and continued to allow his client, even after Mr. Rosenberg re-pleaded the harassment application, to multiply the pleadings without permission and to amplify the confusion that has delayed this matter. Mr. Burden had to write to Mr. Rosenberg on January 12, 2006, reminding him that he was to provide the revised harassment application by January 5, 2006, but Mr. Rosenberg did not supply the revision, which was still defective, until he wrote to Judge Merris on January 23 and again on February 23, 2006.

In the Decision, Mr. Rosenberg's representations and admissions concerning his misconduct were recorded, and he was given an opportunity to be heard fully and comment on or correct that record before sanctions, if any, might be imposed. Given the admitted failure of Mr. Rosenberg, as an attorney practicing before OATH, to abide by this tribunal's orders and directions, I found in the Decision that he must show cause why sanctions should not be imposed upon him. He was afforded a full opportunity to be heard more formally than in the conference call prior to the imposition of sanctions, if any, relating to the violations of the directions and orders of this tribunal, pursuant to rules 1-13(e) and 1-33(e) of this tribunal. Counsel for both sides submitted sworn statements in August 2006, Mr. Rosenberg pleading against sanctions and Mr. Burden strongly advocating the imposition of hefty monetary sanctions in the form of legal fees incurred by his client.

Mr. Rosenberg's sworn submission changed nothing with respect to the record of his defiance of this tribunal's orders. There were no corrections to the record. He tendered no new or different excuses. Instead, his submission confirmed his cavalier treatment of this tribunal's directives and orders. He did offer an apology for his actions, which apology is certainly appreciated. However, the apology is not enough to render sanctions moot when it comes to upholding the integrity of the tribunal's orders, rules and directives. In his Affidavit, sworn to August 17, 2006, Mr. Rosenberg proclaimed his respect for the tribunal, noted that he has never before been sanctioned by any court, and added that "[t]here are understandable misunderstandings and confusion surrounding the many claims, newer claims made by the Applicant himself and the ongoing processes leading up to an eventual trial on the matters" (Rosenberg Aff. ¶ 2). The confusion, however, stems from Mr. Rosenberg's abdication of his attorney's responsibilities and tolerance of his client's filing prolix pleadings on his own.

Counsel's use of the term "eventual trial," as if the trial were some distant occasion having nothing to do with the present, underscores his continuing refusal to prepare these matters for trial. There was simply no immediacy to the serious work that had to be done on behalf of the tenant.

As to the defects in Mr. Rosenberg's restated harassment application, he claims he "was never made aware either by opposing counsel or Judge Merris that the reconstituted claims as requested from me in letter form were still in violation of any rules as to form" and states that he is "more than happy to once again reframe these complaints to conform to the Court's desires as stated in the Decision of July 27, 2006. This will assuredly be done on a timely basis as provided" (Rosenberg Aff. ¶ 3). This defense is unacceptable in that Mr. Rosenberg was required to follow the Loft Board's pleading rules concerning harassment applications without his adversary or the conference judge having to alert him to those rules. The defense thus proffered by Mr. Rosenberg highlights a continuing refusal to take responsibility as attorney of record for the conduct of these matters. The record shows that Mr. Burden made it very clear in his motion to dismiss that the pleadings violated applicable pleading requirements, when he wrote "[i]t is entirely unclear what is the essence of the application. They [the pleadings] were not even submitted by counsel, even though Applicant was represented. Leave was not granted by OATH to amend the Application" and the "Owner is unable to respond to the application, since it is all over the place without specifying individual charges which the Owner can respond to" (Affidavit of Joseph Burden, sworn to July 12, 2006, ¶¶ 37-39). It is not necessary to make a factual finding that the conference judge in fact did call the defects in his pleading to counsel's attention because (a) Mr. Rosenberg and his client had an independent obligation to follow the rules; (b) Mr. Burden moved to dismiss because the pleadings were defective; and (c) I indicated in the July 24, 2006 conference and in the Decision that the pleadings violated applicable pleading rules and quoted those rules at length in my Decision, which is excerpted above.

Moreover, Mr. Rosenberg's reference to his willingness to write the pleading he had to be ordered to re-work and his assurances that he would correct the pleadings "to conform to the Court's desires" miss the point. He writes as if the pleading requirements were some kind of whim of an individual administrative law judge, when in reality the requirements in the rules to plead with specificity are in place to ensure a well-organized trial, and to enable the adversary

and the tribunal to discern whether the claims are proper and timely or subject to challenge. But Mr. Rosenberg never fulfilled his promise to correct the application. Rather than keeping his word, he attempted to drop out of the case as counsel without seeking the requisite permission under OATH rules, section 1-12, by entering into the Stipulation with opposing counsel on September 12, 2006, two days before the revised pleading was due on September 14, 2006, to discontinue and dismiss the pending matters without prejudice.

After I emailed the parties and their attorneys on September 20, 2006, directing them to appear for an oral argument and conference, on the record, about the handling of this matter and particularly their attempt in September to remove this matter from the trial calendar without the necessary permissions, Mr. Rosenberg first indicated by return email on September 21, 2006, that he no longer represented the applicant and expected another attorney, Lance Grossman, Esq., to take up the matter, presumably after the withdrawal of the application. Advised by OATH that he needed permission to withdraw as counsel, Mr. Rosenberg would soon retract his statement that he is no longer counsel for the tenant.

The parties attempted to barter the tenant's harassment case for the pending abandonment application of the owner. The tenant's withdrawal without prejudice of the harassment application was in exchange for his agreement that the abandonment application of the owner as to the empty fourth floor unit could be decided without the need to hear the harassment application of Mr. Dawe, the third-floor tenant who complains of long-term, building-wide harassment. I had consolidated the abandonment application with these matters for disposition. One of the many problems with the Stipulation was that Mr. Rosenberg simply assumed that he could drop these cases without filing a substitution of counsel according to the rules and without seeking the requisite permission from this tribunal to be relieved as counsel, under sections 1-12 and 1-32(f) of our rules. That the tenant is willing to have the abandonment matter decided at a time when there is no harassment application pending, even though the pendency of a harassment complaint is a factor in considering whether abandonment can be found, 29 RCNY § 2-10(f)(3)(vi), raises doubts about the validity of the harassment action.

It may well be that Mr. Rosenberg assumed that if the cases were withdrawn, the sanctions issue would be mooted, but that is not so. The conduct of attorneys and others appearing before this tribunal is a matter of ongoing concern to the tribunal and the public.

Moreover, it appears clearly from the maneuvering that went on here that Mr. Rosenberg was circumventing the orders of the tribunal yet again in an effort to lift the final pre-trial order from his shoulders, to avoid the extensive work he had undertaken to make sense of a messy set of amended *pro se* style applications, to make a careful document production, to exchange trial exhibits and witness lists, and to avoid the consequences of his careless overall approach to the matters. As I stated at oral argument, the Stipulation was an "end run" around the final orders that were intended to bring closure to these matters efficiently (Tr. 35), and Mr. Rosenberg's behavior belies his convenient declarations of respect for this tribunal.

As noted, the question for decision with respect to sanctions is whether Mr. Rosenberg's failures to abide by the applicable rules and his defiance of the orders of this tribunal were "willful." I find that, notwithstanding Mr. Rosenberg's self-serving apologies in his Affidavit, sworn to August 17, 2006, he knew and had to know that he was failing to meet his obligations, and his conduct was contumacious, as will be shown by his attribution to the tribunal of the impetus for the Stipulation, even though it was plainly not the tribunal that had sought a withdrawal of the matters at this late stage, because withdrawal without prejudice would only delay the trial even further. To the contrary, the tribunal ordered the trial to go forward. The sanctions rule of this tribunal provides in pertinent part: "Individuals appearing before OATH shall comply with the rules of [OATH] and any other applicable rules, and shall comply with the orders and directions of the administrative law judge." 48 RCNY § 1-13(a). The rule provides further: "Willful failure of any person to abide by the standards of conduct stated in paragraphs (a) through (d) of this section, may, in the discretion of the administrative law judge, be cause for the imposition of sanctions. Such sanctions may include formal admonishment or reprimand, assessment of costs or imposition of a fine, exclusion of the offending person from the proceedings, exclusion or limitation of evidence, adverse evidentiary inference, adverse disposition of the case, in whole or in part, or other sanctions as the administrative law judge may determine to be appropriate. The imposition of sanctions may be made after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case." 48 RCNY § 1-13(e).

Mr. Rosenberg states that he was not personally aware of his family's vacation plans when he made the "inadvertent" representation to this tribunal in July agreeing to the August 1

trial date. He also admits his "inability to produce the required production of pre-trial documents on a timely basis" because the documents were voluminous and his client kept finding more box loads of papers, further admits that he "should have made a formal request to this Court and counsel for an appropriate extension of time to comply," and admits that he was late with his opposition to the motion to dismiss, but denies that his failures were "willful" (Rosenberg Aff. ¶¶ 4-5). While contrition is appropriate and appreciated, Mr. Rosenberg has functioned as if he is not responsible for his actions and is exempt from the rules. His violations of the rules have had serious consequences in these matters and have significantly impeded any progress toward trial. He has not timely sought appropriate extensions of time when he should have realized he had overcommitted himself. He had some control over his leisure time, but failed to address the vacation problem until after his opponent tagged him with his default with respect to his and his client's document production and briefing obligations. Again, his assurances have become empty promises, when, for example he states: "I assure the Court that there will be no further issues related to my conduct and behavior" (Rosenberg Aff. ¶ 7).

Mr. Burden submitted his Affirmation, sworn to August 28, 2006, in which he advocated the imposition of monetary sanctions against Mr. Rosenberg in the amount of $2,500, representing, according to Mr. Burden, "legal fees incurred by our office with respect to the production of documents, conference calls and correspondence" (Burden Aff. ¶ 9). It is not possible to attribute the entire legal bill to Mr. Rosenberg's conduct because the bill is not self-explanatory, and there are items on the bill that appear to represent necessary work that was done regardless of Mr. Rosenberg's delays.

I find that Mr. Burden's request for a $2,500 penalty is excessive in the circumstances and cannot be awarded in any event. He submits, in support of his request, monthly bills for all services he rendered in June and July 2006, for which periods he billed his client approximately $2,500 and $2,800, respectively, without specifying how the delay accounted for particular tasks listed on the bills he issued to his client. He appears to be requesting roughly a month's worth of attorneys' fees, although he has submitted statements for two months' time. Mr. Burden served his document request before Mr. Rosenberg defaulted on it and would have done so in preparation for trial in any event. The cost of the work needed to prepare that request, therefore, is not chargeable to Mr. Rosenberg. Likewise, an entry that says "review opp papers" appears to

refer to motion papers, which review would have been done regardless of Mr. Rosenberg's defaults. There was no occasion for Mr. Burden to produce documents to Mr. Rosenberg, who never requested any, despite Mr. Rosenberg's announcement in a conference call in July that he wished to serve a document demand. (The Decision provided time for such a demand to be made.) Similarly, the preparation of a letter to an engineer, billed at $42.50 appears, without more, to have nothing to do with the sanctions question. Some of the entries do appear obviously to be linked, however, to Mr. Rosenberg's misconduct and the resultant need on the part of the owner and its counsel to work on trial preparation in fits and starts. For example, a telephone call with OATH on July 24, 2006, for 30 minutes, billed at $212.50, does relate to the conference call in which I directed counsel to address the problems presented by Mr. Rosenberg's defaults and raised the issue of sanctions.

Mr. Burden also contends that Mr. Rosenberg's conduct delayed the trial four months. That figure is exaggerated 25 per cent because the trial was originally set for July 10, 2006, and was adjourned because of Mr. Rosenberg's and his client's defaults, to October 10 and 11, 2006, a period of three months. The additional one-month delay was due to Mr. Burden's own error. He realized, after supplying the October trial dates -- without consulting his client -- in response to my e-mailed request to both counsel for trial dates, with the express warning that these dates could become the final trial dates, which would not be adjourned, that the dates encompassed religious holidays. It is thus fair and appropriate to attribute the three-month delay to Mr. Rosenberg's conduct, not four months. Mr. Burden asserts that his client is suffering the delay in a real way, because Mr. Rosenberg's and the applicant's conduct has delayed the disposition of the owner's abandonment application. I consolidated the fully tried abandonment application Mr. Burden made on behalf of his client, the owner, with respect to the vacant fourth floor unit of the building for disposition with the harassment and diminution claims because there are common questions of law and fact, because the same parties, property and witnesses are involved in all three cases, and because it seemed important, with a lengthy harassment application pending, to determine whether the claim of harassment in the building could be

shown to affect the grant or denial of a finding of abandonment.[2] Mr. Burden's client, the owner, has been unable to rent the fourth-floor unit. The unnecessary delays of Mr. Rosenberg and his client have certainly placed a burden on these proceedings, but the true cost of that delay, if any, to the owner as to the fourth floor will not be quantifiable unless and until it can be determined whether the owner is entitled to a finding of abandonment.

Without sufficient specificity as to how the particular charges are attributable to Mr. Rosenberg, it is not possible to award a lump sum based on Mr. Burden's June and July 2006 invoices for legal fees, nor has Mr. Burden shown any legal basis for shifting the burden of paying attorneys' fees, normally borne by each side for his own attorneys' work, wholesale to the adversary. Indeed, he has shown the contrary -- that the parties agreed that they "shall bear their own costs and attorneys' fees with respect to these proceedings," according to the September 12, 2006 Stipulation. The Stipulation post-dates Mr. Burden's affirmation in which he seeks attorneys' fees for Mr. Rosenberg's conduct, and settles the question of whether legal fees and costs should be imposed for Mr. Rosenberg's misconduct here. I find that the parties' Stipulation precludes an award of attorneys' fees and costs to the respondent, and express no opinion as to whether legal fees constitute "costs" that can be assessed pursuant to 48 RCNY § 1-13(e).

At the oral argument on September 28, 2006, on the subject of how that Stipulation should be treated, Mr. Rosenberg's misconduct was shown to be part of a pattern of willful disobedience. Asked the reason for the Stipulation, he made a solemn representation on the record that he thought that it was what the tribunal "originally had wanted" (Tr. 10) and that it was Mr. Dawe who "made the determination" to withdraw the cases after sitting down "together" with Mr. Rosenberg and Mr. Grossman (Tr. 5-9). As discussed below in the next section, the Report and Recommendation as to the Stipulation for withdrawal of these matters, which is incorporated herein by reference, this improvisation that the tribunal somehow

---

[2] I also had a real concern that Mr. Dawe appeared in the abandonment matter, by his own choice, *pro se*, even though Mr. Rosenberg knew of that hearing but chose not to file any appearance in that case. Neither Mr. Dawe nor Mr. Rosenberg sought to adjourn the abandonment hearing or re-open that record. But Mr. Rosenberg does represent Mr. Dawe in the harassment matter. It seemed prudent to hear whether there was continuing building-wide harassment in a fully litigated proceeding before deciding whether the former tenant on the fourth floor had abandoned his unit or was forced out by conduct alleged by Mr. Dawe in the harassment matter where Mr. Dawe is fully represented.

"wanted" this interference with its 11-page order is incredible. The owner's motion to dismiss without prejudice was expressly "denied as moot, given that both parties must re-plead" (Decision at 10). The parties were ordered to replead, and *not* to delay the trial by marking the cases off calendar only to restore them at some indefinite future time. The Decision directed the parties to prepare "earnestly" for trial on specified, final dates, subject to no adjournment. Thus, Mr. Rosenberg's superficial excuse was so plainly false, and his misrepresentation was so at odds with the record of these proceedings as memorialized in the orders of the tribunal, and so contradicted Mr. Rosenberg's momentary, unauthorized withdrawal from representing his client, as to exacerbate his prior conduct and to reinforce the need for sanctions to address the willful nature of his defiance of official orders. The claim that the tribunal "wanted" this delay is outrageous. It was clear that Mr. Rosenberg and his client were avoiding the fast-approaching trial. But even after I indicated that his excuse for delaying the trial was invalid, Mr. Rosenberg refused to abandon the patently false excuse he was offering, and denied that the reason for the withdrawal was that there was too much work or that it was too costly (Tr. 8-9). Even if Mr. Rosenberg really "thought" withdrawal without prejudice was something the tribunal had earlier wanted, which is not the case, as shown by my July 24th email following the conference call,[3] it was unreasonable of him to continue to think so after the Decision, and ridiculous to pretend that his thought process about an outdated and rejected proposal for delay was the sole impetus for the Stipulation defeating the trial schedule. He tendered no other explanation for the abrupt change, for his broken promise to complete the work timely, or for his own short-lived exit from the cases. Mr. Rosenberg was given a full opportunity at the oral argument to explain himself, but offered no valid reason for withdrawing these matters exactly at the point when the work was required to be completed.

It is clear from the timing of the Stipulation discontinuing and withdrawing these matters from OATH's trial calendar that Mr. Rosenberg hoped to escape sanctions entirely for this conduct as an attorney in these matters. He stated that he thought the withdrawal would "wipe

[3] Following the conference call, I emailed both counsel on July 24th: "I have not yet decided the pending cross-motions to adjourn and to dismiss without prejudice following our conference call today." I then asked them to email final trial dates to be used should I decide to adjourn the August 1 trial and set "a final schedule addressing all pre-trial matters that we discussed today, including pleading, motions, discovery and sanctions, in a formal decision and scheduling order that would be subject to no exceptions."

the slate clean" (Tr. 10-11). It is likely that both counsel believed the sanctions would be moot, because they agreed that "[t]he parties shall bear their own costs and attorneys' fees with respect to these proceedings" in the Stipulation of September 12, 2006, and are bound by that Stipulation. However, the question of sanctions is not mooted by the Stipulation. If it were so that any time an attorney faced sanctions for misconduct, he could simply withdraw the action without prejudice, race to the clerk's office before the sanctions ruling could be published and slip out of the case, leaving his client to re-file the matter, alone or with new counsel, as if there were no history, that type of evasion would so pervert the rules of any tribunal as to render those rules meaningless. There would be no limit to how many times this could be done, as each final trial date approached and the attorney and his client failed to prepare their cases. The work of administering justice would fall into chaos and sink to the lowest level of legal practice if such gamesmanship were to be encouraged. This cannot be permitted. The sanctions rule imposes accountability on those who appear in this tribunal. Although Mr. Burden attempted to revive his request for sanctions at the oral argument by asking for sanctions as a condition of any re-filing of these matters (Tr. 14-15), he and his client had already waived costs and attorneys' fees in the Stipulation, without making any exception for the pending sanctions application. Although Mr. Rosenberg's conduct was unacceptable in two ways, in that he impeded the work of this tribunal and added cost and delay to the work of the owner and its counsel, there is no occasion to award costs or fees on this record to a party who has forsworn them.

Given my finding that Mr. Rosenberg's conduct was willful, in the sense of knowing, contumacious and reckless, some sanction is warranted under sections 1-13 and 1-33 of our rules. I find that the sanction should take the form of a fine, in recognition of the inescapable fact that Mr. Rosenberg willfully violated the orders and directions of this tribunal and thereby impeded the efficient handling of complex matters pending here. Accordingly, I am hereby imposing sanctions in the form of a fine upon Mr. Rosenberg by directing him to deliver to OATH, 40 Rector Street, New York, New York 10006, a certified bank check payable to the City of New York in the amount of $1,000 (one thousand dollars). The check is to be hand delivered or delivered via overnight mail for receipt by OATH no later than November 10, 2006. Furthermore, Mr. Rosenberg has indicated that if his client is permitted to renew his applications at the Loft Board with a different attorney, Lance Grossman, Esq., representing him, then Mr.

Rosenberg may assist in that litigation and appear at OATH "of counsel to Mr. Grossman" (Tr. 19-20). It is, therefore, the decision of this tribunal that Mr. Rosenberg shall not be permitted to appear at OATH on behalf of Mr. Dawe in proceedings with respect to any newly filed applications based on or including the same harassment and diminution claims now before me, unless and until he pays the $1,000 fine in full. If Mr. Rosenberg fails to pay the fine in full by November 10, 2006, such failure shall constitute a basis upon which the Chief Administrative Law Judge of this tribunal may suspend Mr. Rosenberg for a specified period of time or indefinitely from appearing at OATH in any matter under section 1-13(f) of our rules.

Rule 1-13 is a new rule effective November 18, 2005, which has rarely been invoked to date. *See Matter of Live Centre Tenants Association,* OATH Index No. 834/05, mem. dec. (Mar. 2, 2006) (sanction of preclusion of evidence imposed as to documents that were not exchanged by tribunal's deadline for document production and attorney required to inform all witnesses to whom he had improperly issued attorney's subpoenas for their appearance at trial that he improperly issued the subpoenas in violation of OATH's rules of practice and that recipients were entitled to disregard attorney's subpoenas, citing sections 1-13(e) and 1-33(e) of our rules).

The courts, applying their own sanctions rule, have imposed severe monetary sanctions for discovery abuses. *See, e.g., Hughes v. Farrey,* 2006 N.Y. Misc. Lexis 2712, 236 N.Y.L.J. 57 (Sup. Ct. N.Y. Co. Sept. 5, 2006) ($2,500 sanction imposed pursuant to Uniform Rule 130-1.1 upon counsel for defendant who was charged with attempted murder of his wife for, *inter alia,* ignoring court's discovery orders, and $3,000 awarded to the plaintiff for defendant's refusal to obey the two court orders for discovery unless he appeared for a deposition and responded fully to outstanding discovery requests within 20 days of service of the decision of the court).

Because of the recent vintage of our sanctions rule, I am imposing a modest sanction. *Cf. 1050 Tenants Corp. v. Lapidus,* 2006 N.Y. Misc. Lexis 2828, 2006 N.Y. Slip. Op. 51925U (N.Y.C. Civ. Ct. Oct. 5, 2006) (maximum fine of $10,000 imposed under Uniform Rule 130-1.1 upon attorney for making frivolous misrepresentation and lying in sanctions hearing). However, monetary sanctions for similar misbehavior may well be higher in the future, as the public is now on notice that such conduct will not be tolerated. Those who treat this tribunal as an afterthought whose orders can simply be disregarded with impunity will be subject to appropriate sanctions considered on a case-by-case basis.

This concludes the Memorandum Decision with respect to attorney sanctions.

REPORT AND RECOMMENDATION

The Parties' Stipulation to Discontinue and Withraw these Matters Without Prejudice and the Need for Outright Dismissal with Prejudice or Conditions on Any Re-filing of these Matters

The facts and history of the tenant's delay and the findings set forth above are incorporated into this report and recommendation concerning the overall disposition of these matters.

There comes a time for finality in litigation. It is appropriate for a tribunal to close its doors where, as here, the petitioner, given many, generous opportunities, after seven months of settlement negotiations, and an additional seven months to prepare for trial, delays the administration of justice and declines or refuses to prosecute his cases. The time, resources and attention of adjudicative bodies must be devoted to those litigants who comply with the rules and official orders governing pre-trial and trial work.

Rule 1-32 of this tribunal, the rule governing adjournments, is a calendar control provision, meant to prevent abuse of process of the kind that has been shown here. It provides in section 1-32(f):

> Withdrawal of a case from the calendar by the petitioner shall not be subject to the "good cause" requirement of subdivision (b) of this section. However, such withdrawal, other than pursuant to settlement agreement or other final disposition of the case, shall be permitted only upon application to the administrative law judge, who may grant or deny the application, either in full or upon stated terms and conditions.

Judge Kramer of this tribunal explained that it is necessary and proper for an administrative law judge to scrutinize the reasons for a withdrawal without prejudice under rule 1-32(f), especially where, as here, the cases have been pending on the conference calendar for a significant period of time and substantial time, resources and effort have been allocated to attempts to resolve the dispute:

> Sound reasons of calendar control support an interpretation of the rule to require the permission of an administrative law judge before a matter may be withdrawn without prejudice. This tribunal must maintain control over its own calendar. Parties cannot be permitted to withdraw and recalendar pending cases

> at will without some scrutiny as to the reason. That is particularly true, where as here, the case has been pending on the conference calendar for a significant period of time and substantial time, resources and effort have been allocated to attempts to resolve this dispute.
>
> A rule requiring this tribunal's permission to withdraw a case that is not finally disposed of allows this tribunal to monitor its own calendar and ensure that cases are being withdrawn for proper reasons. It also allows this tribunal, where the reasons for withdrawal are properly presented, to set relevant and related conditions if appropriate before an action may be reinstated. Providing this tribunal with that basic oversight prevents abuse of the process, undue prejudice to litigants, helps preserve and ensure efficient use of scarce judicial resources, and ensures fairness in fact, as well as appearance, between the litigants.

Blueweiss v. Metropolitan Life Insurance Co., OATH Index No. 852/99, mem. dec., at 7 (Mar. 29, 1999).[4]

The parties' attorneys signed their Stipulation on September 12, 2006, two days before the September 14, 2006 deadline set in the Decision and order of this tribunal in July 2006 and in the August 4, 2006 order for both the new harassment pleading and the production by Mr. Rosenberg of his client's trial exhibits. The tenant had theretofore failed to produce this crucial work in violation of rule-based deadlines in June 2006, *see* 48 RCNY § 1-33(c), and in July 2006, in violation of the July 5th order of the tribunal. The trial exhibits sought pertained to both the diminution and the harassment matters (Burden Aff. Ex. A). But counsel did not deliver the Stipulation to me until September 19, 2006, after that important September 14, 2006, deadline

[4] Lance Grossman, Esq., appeared at oral argument on September 28, 2006, here, supposedly as an observer only. He is an attorney who may decide to represent the tenant if these matters survive. He requested and was granted permission to speak at the argument. The record shows, however, that Mr. Grossman filed a formal notice of appearance at the December 12, 2005 settlement conference held here before Judge Merris, but has not taken an active role since then. Mr. Rosenberg has not referred to Mr. Grossman as co-counsel in appearances before the trial judge, nor have counsel copied Mr. Grossman on correspondence, notices or motion papers. It was Mr. Rosenberg who represented the tenant throughout, but Mr. Grossman, having filed a notice of appearance in December, was not "new" to this matter, as he and Mr. Rosenberg presented him on September 28th, before the trial judge. Neither attorney mentioned Mr. Grossman's December notice of appearance. Mr. Grossman arguably has continuing obligations to Mr. Dawe as counsel of record in this matter. Notwithstanding Mr. Grossman's strained reading of *Blueweiss* as somehow limited to Human Rights cases under 48 RCNY § 2-26 ("Additional Rules for Human Rights Cases"), Judge Kramer's ruling clearly applies to all OATH matters and interprets section 1-32(f) of our rules in language that is certainly not exclusive to Human Rights matters. Indeed, contrary to Mr. Grossman's arguments, which he appeared to be making only from a case summary or "blurb," as he put it, not the full text of *Blueweiss* (Tr. 31-35), the incorporation by reference of section 1-32(f) into section 2-26 engrafted all of the calendar control powers bestowed upon OATH by section 1-32(f) into Human Rights Commission cases.

for pleading and production of trial exhibits had expired. The Stipulation provides that the harassment and diminution applications (Index Nos. 237/06 and 335/06) "are hereby withdrawn and discontinued without prejudice by the applicant" and that the "application of the Owner for abandonment relating to the fourth floor of the building at 20 Beaver Street . . . shall no longer be stayed and the Administrative Law Judge may render a decision in that matter." The tenant and his counsel failed to file the new pleading or serve the trial exhibits required by the August 4th order to be done by September 14, 2006.

By email dated September 20, 2006, I informed both counsel that I had received the Stipulation and directed them to appear for oral argument on the record concerning the Stipulation on September 25, 2006. Asked by Mr. Burden the next day via email, on notice to Mr. Rosenberg, what the subject of the oral argument was, I indicated that "permission of this tribunal is necessary for withdrawal of the matters under OATH Rule 1-32(f)." Mr. Rosenberg then wrote back:

> Pertaining to your notice for conference for September 25 at 11:30 a.m., please be advised that I am no longer the attorney for the applicant. New counsel for the applicant will be Lance Grossman, Esq. Both he and/or I are not available on the requested date, I am due to be in Supreme Court Bronx County in the matter of **Jessica Quirsola v. New Era Veterans, Inc and City of New York,** and Mr. Grossman has pre-scheduled to be in another location as well.

(Emphasis in original.)

Because Mr. Rosenberg had misread the rules, I replied in the next email exchanges that the date of the argument must be set as soon as possible because nothing had been resolved by the Stipulation. I copied my email to all counsel, including Mr. Grossman, and to Mr. Dawe, as to whom I now had a concern about whether he had an attorney he could rely upon:

> This email confirms that the oral argument and conference on the record will be held at OATH, 40 Rector Street, 6th Floor, New York, NY 10006, on Thursday, **September 28, 2006, at 3:00 p.m.** All counsel and Messrs. Dawe and Dubow [the owner] are expected to be present, and counsel should be prepared to address all aspects of the issues before me (including, without limitation, the need for Mr. Rosenberg to seek leave to withdraw as counsel if there is no substitution of counsel, which can be filed as of right up to 20 days prior to trial and which requires permission if sought later; and the need for permission to withdraw the applications without prejudice) under applicable rules. See 48 RCNY sections 1-12 and 1-32(f). Counsel are deemed to know the rules of OATH: "Filing a notice

> of appearance pursuant to section 1-11(a) [of OATH's rules] constitutes a representation that the person appearing has read and is familiar with the rules of this subchapter."
>
> Any new counsel intending to appear formally in these matters should be aware that the trial set for November 8 and 9, 2006, has not been adjourned or marked off the calendar, that a possible outcome of the oral argument is that the trial will go forward on schedule on those dates. These final trial dates were set and carefully selected on August 4, 2006, after extensive consultation with counsel to assure readiness and availability of parties and witnesses, and this is the third and final trial setting. None of the pre-trial work that was due under the final pre-trial order in these matters has been forgiven by the parties' stipulation of September 12, 2006, because I have not granted permission to withdraw the matter without prejudice. It should also be noted that the deadline for the submission of a proper harassment petition that complies with all applicable pleading rules to replace the defective and prolix pleadings on file is already overdue as of September 14, 2006, that it is a matter of record that there is a history of failure to prepare for trial and delay of the trial by the applicant and his counsel, and that there remains before me for decision the question of whether to impose sanctions upon Mr. Rosenberg for disregarding prior court orders and delaying the trial.

(Emphasis in original.)

The oral argument went forward on the afternoon of September 28, 2006. When asked what the reason was for the Stipulation withdrawing the matters without prejudice on the eve of trial and before the required trial work was done, Mr. Rosenberg tendered an excuse that was plainly false. He stated that he had spoken with his client and decided that because of all the confusion with the prior pleadings, they should "start fresh" (Tr. 9), claiming that this stipulation was what I, the administrative law judge, had wanted, based on discussions in the July conference call. Mr. Rosenberg also asserted that this withdrawal was not intended as an insult: "I thought I was really doing what the court originally had wanted . . . to clean it up by starting fresh" (Tr. 10). This claim that the tribunal "wanted" the Stipulation was simply preposterous. The 11-page Decision of the tribunal, as amended, ordering the parties to get ready for trial on specified dates, with particular pre-trial tasks to be completed on a carefully prepared schedule, shows this excuse to be a total sham. Despite Mr. Rosenberg's declaration that he and his client had no intention of insulting the tribunal, it is hard to imagine how this transparent and feeble excuse could be seen as anything other than an affront to the tribunal, and a blatant defiance of

its order that there would be no non-final dismissal. As noted at the oral argument, lawyers must know the effects of their actions (Tr. 7-8, 20-21). I indicated that there was no way that Mr. Rosenberg could reasonably think that I wanted a withdrawal without prejudice, given the Decision that I issued on July 27, 2006, and then revised on August 4, 2006, which orders directed the parties in no uncertain terms to get ready for the trial (Tr. 10, 20-21):

> ALJ: We went through a lot of trouble to try to put this on a track. We had some stumbling blocks, we had difficulty with the pleading as it stood. And we had confusion as we all mentioned with Mr. Dawe coming here without [Mr. Rosenberg] and filing pleadings at the Loft Board that weren't coming through to Mr. Burden. With different amendments that weren't coming through you, Mr. Rosenberg, and a lot of work went into it. I mean part of the inquiry on this rule is how much in the way of public resources has been expended on the matter. And so when I see the stipulation come in, it looks to me like this is a request to adjourn a final trial date. And functionally, it's roughly the same. And . . . it's a request to be relieved of obligations.
> MR. ROSENBERG: That was not our intention, Judge.
> ALJ: But it has that effect. And sometimes . . . intentions are, you know, deemed to be there. You know, you're a lawyer . . . you should know what the effect is when you take an action.

(Tr. 20-21).

Anyone reading the July 27th Decision and its updated version would understand that I was not directing the parties to waste time and withdraw the matters without prejudice only to restore them any time they saw fit. It cannot be disputed that the Decision and order, without any doubt or room for interpretation, manifestly directed the parties to get ready for the trial on a very specific schedule and rejected any kind of non-final dismissal. It was Mr. Burden who had raised the possibility in his motion papers back in June of a withdrawal without prejudice, and it is true that that proposal was discussed in the conference call that followed Mr. Burden's July application for relief from Mr. Rosenberg's defaults, but there was absolutely no colorable reason for Mr. Rosenberg to think that withdrawal without prejudice to avoid and further delay the trial was what the administrative law judge "wanted." The record memorialized in the written Decision, and reiterated on August 4th in writing is inescapable. I ordered Mr. Rosenberg and his client consistently and repeatedly to clean up their harassment pleadings and produce the long overdue trial exhibits by September 14, 2006, finish all trial preparation by October 20, 2006,

and go to trial on November 8 and 9, 2006. This was an effort to "bring order to the disorder" (Tr. 21). Asked whether he had simply taken on too much work, as he had admitted freely before, in July (letter of July 14, 2006) and August (Rosenberg Aff., Aug. 17, 2006), Mr. Rosenberg now denied at oral argument that he had assumed too much of a time commitment that he and/or his client could not afford. The false attribution to the tribunal of the rationale for the Stipulation left the tenant in the position of offering for the record no valid reason -- indeed, no reason at all -- for the abrupt change of heart and refusal to go forward as ordered (Tr. 8-9). At oral argument, Mr. Rosenberg would have all believe that there was no rift between his client and himself that might have supported an application by him to be relieved as counsel of record (Tr. 16-17). But having emailed the preceding week his announcement that he was done representing his client, he then did an about-face and at oral argument stated that he would stand by his client, would not abandon him, and would likely serve as co-counsel at a trial if Mr. Grossman took over. Mr. Grossman stated that he intended to enter the case after a new filing, not to meet the current deadlines (Tr. 16). This ploy by Messrs. Rosenberg and Grossman was transparent. It left no occasion to question Mr. Dawe about what had really happened in the attorney-client relationship. All three, Messrs. Dawe, Rosenberg, and the visiting Mr. Grossman, who neglected to mention his earlier appearance before Judge Merris in this matter and who declined to file a substitution (Tr. 16), which was available as of right at the time, soldiered together, to render any such inquiry irrelevant, and to block a full inquiry into the truth of what had really generated this last-minute avoidance. Mr. Grossman made no effort to confirm his status as counsel of record and acted as if he had never been here before in these matters. The only inference to be drawn from this charade was that the tenant was not ready to proceed even though he is represented by not one, but two attorneys.

The failure of the applicant Mr. Dawe to prosecute his claims, despite having been given every opportunity to do so, could suggest that he and his attorneys have doubts about the validity of those claims. After more than a year of expending the resources of the public at this tribunal, Mr. Dawe refuses through counsel to explain why he is not ready for trial, and that failure belongs to him as the applicant in some considerable part. It is his obligation to find an attorney or other representative, an agent who is ready and able to mount his cases, or to proceed timely on his own. He has not done so. He has already been given many opportunities to cure his

pleading, which is subject to dismissal as it now stands at the least for its improper form, and to prove his claims. The question then becomes: How many more chances should he get to come to this tribunal and waste time and public resources, and engage representatives who cannot or will not do the work? That inquiry is informed, if only in part, by the owner's willingness by stipulation to prolong these proceedings, and the parties' bargain, but it is also fair to consider not only their private interests, but the wasted resources of the public offices of both the Loft Board and this tribunal in attending to their controversies, to the detriment of other litigants who deserve to have their claims and defenses heard. The record suggests that the answer to the question of how many more chances the tenant should be afforded, based on the pattern of defaults by the tenant here, is: no more.

Although in other circumstances, decisions of this tribunal interpreting section 1-32(f) have been in the form of final memoranda decisions, this portion of this ruling is submitted to the Loft Board as a report and recommendation because the Loft Board has previously reviewed matters involving this rule and because the referrals from the Loft Board of matters for hearing differ from those of other agencies, in other disciplinary or enforcement matters, in that in Loft Board matters such as the ones here, the Loft Board is not a party to the action. Any new application would be filed at the Loft Board, not here. Indeed, the Loft Board appears to be unique in this way among agencies referring certain of its matters to OATH for hearings. The Loft Board acts as an adjudicator and gatekeeper with respect to applications filed at the Loft Board, *see* Multiple Dwelling Law § 282 (Lexis 2006), applications which may later be referred to OATH. Prior decisions interpreting section 1-32(f), which is a calendar control provision that protects the integrity of OATH's orders and directives, have been submitted to the Loft Board in the form of reports and recommendations, and have been adopted by the Loft Board, albeit in cases in which the applicants unilaterally sought permission to withdraw their applications without prejudice. Accordingly, the question of the appropriate treatment of the parties' discontinuance and withdrawal of these particular matters in which the Loft Board is not the petitioner is presented to the Loft Board in the form of a report and recommendation, whereas in

all other instances, with an agency, even the Loft Board, as prosecutor, the OATH decision would be final and not subject to further agency review.[5]

The question presented here appears to be novel: What is the appropriate treatment of a bilateral stipulation of the parties to withdraw Loft Board applications without prejudice to re-filing the same claims all over again, where the stipulation has the obvious effect of defeating and delaying the final trial schedule in a matter that has been pending more than a year and where the applicant has utterly failed to prepare the matters for trial, in violation of the orders of the tribunal? The Loft Board cases cited below were not cases in which the parties stipulated to such withdrawal without prejudice; they involve unilateral applications to withdraw matters without prejudice. The outcome of those cases -- dismissal with or without prejudice or without prejudice on conditions -- depended on a particularized review of the circumstances, including the expenditure of public resources on the matters, the procedural history, the merits of the applications, and prejudice to the owner if the litigation was at an advanced stage. *See Matter of Ancona*, OATH Index No. 116/96 (Dec. 8, 1995), *adopted*, Loft Bd. Order No. 1906, 16 Loft Bd. Rptr. 267D (Jan. 24, 1996); *Matter of Rutledge*, OATH Index No. 621/96 (Dec. 8, 1995), *adopted*, Loft Bd. Order No. 1909, 16 Loft Bd. Rptr. 267G (Jan. 24, 1996); *Matter of Evans*, OATH Index No. 623/96 (Dec. 8, 1995), *adopted*, Loft Bd. Order No. 1904, 16 Loft Bd. Rptr. 267B (Jan. 24, 1996); *Matter of Connors*, OATH Index No. 1357/06 (Mar. 3, 2005), *adopted*, Loft Bd. Order No. 2911 (Mar. 17, 2005) (where application clearly lacks merit, withdrawal

[5] It is conceivable that the Loft Board might refer matters to OATH for hearing where, due to events here, OATH, interpreting its own calendar control rules, may determine finally in other circumstances that withdrawal of such matters from the OATH calendar shall be with prejudice or on stated conditions, pursuant to OATH rule 1-32(f), due to abuse by litigants of this tribunal's process. In such event, a final memorandum decision from OATH that litigants bringing particular claims or defenses are barred from relitigating those claims or defenses at this tribunal due to their misuse of OATH's process would be a matter of calendar control affecting only this tribunal and not subject to further review by the Loft Board. That this tribunal has the authority under its own rules to bar particular litigation based upon a record of misbehavior by litigants here would not restrict the Loft Board from opening its doors to relitigation of applications based on or including the same claims if the Loft Board had a different view of the record; such applications would simply not be heard here. The appropriate handling of such matters is left for another day. *See* City Charter section 1048 (OATH "shall conduct adjudicatory hearings for all agencies of the city unless otherwise provided for by executive order, rule, law or pursuant to collective bargaining agreements"), and Loft Board rules, 29 RCNY § 1-06(j)(2)(ii) ("The Executive Director shall determine whether the hearing shall be conducted before a staff hearing examiner or before an Administrative Law Judge at the Office of Administrative Trials and Hearings").

without prejudice should not be allowed; dismissal with prejudice upheld).[6]

The instant matters should follow the analysis in cases like *Blueweiss*, which involve abuse of the tribunal's process and/or failure to prosecute despite ample opportunity for hearings, and have resulted in the dismissal of petitions with prejudice. *See Police Dep't v. Ortega,* OATH Index No. 580/99, mem. dec. (Aug. 6, 1999). In *Ortega*, the case would not be restored to the OATH trial calendar where the petitioner was given numerous trial dates in 1999, but then requested and received three adjournments: two because it scheduled the trial twice on the respondent's regular day off and the third because one of the agency's advocates was ill. The judge marked the case final as against the agency. On the final trial date, the complaining witness failed to appear on time and the Police Department withdrew the charges. Judge Fleischhacker ruled that a party's "unilateral withdrawal of a petition is a withdrawal with prejudice," *Ortega*, OATH 580/99, citing *Blueweiss* and OATH rule 1-32(f). The same reasoning applies here because the withdrawal here, even though the owner joined in it, was without permission and did not finally resolve the matters. *See also Dep't of Environmental Protection v. Elliott*, OATH Index No. 1647/03, mem. dec. (Feb. 17, 2004) (petition dismissed

[6] At oral argument, Mr. Grossman, having forgotten, it seems, his earlier appearance in these matters, and simply testing the waters before committing himself to the trial work ordered by early November, cited *Jacobi Medical Center v. Arceo,* OATH Index No. 161/97, mem. op. (Nov. 12, 1996), for the proposition that there is a distinction to be drawn between taking a case off OATH's calendar and discontinuing an application filed at the Loft Board. But the parties' insertion of the term "discontinued" in their Stipulation that these matters are "withdrawn and discontinued without prejudice" has no specialized meaning under our rules. They must still comply with the calendar control provision, 48 RCNY § 1-32(f), which requires permission for attempts to withdraw matters without prejudice where there is no final resolution of the matter. *Arceo* is distinguishable from the matters here. It was a disciplinary proceeding withdrawn by an agency due to the absence of a necessary witness, and Judge Spooner held that this tribunal "lacks the discretion to dismiss disciplinary charges under these circumstances," and that "its role is limited to holding a hearing pursuant to the referral of an agency and making recommendations as to a disposition of the petition on the merits." The judge permitted the withdrawal without prejudice based on the record in *Arceo,* which differs radically from the record here. Because the agency withdrew the application, Judge Spooner found, no recommendation as to the merits was appropriate. *Arceo,* OATH 161/97, at 3. Judge Spooner added that dismissal as a possible sanction pursuant to OATH's own rules was not possible because there was no showing of any rule violation in that case. This is not so here: the tenant's violation of the rules of the Loft Board and of OATH's rules and orders are numerous here. In essence, without citing rule 1-32(f), Judge Spooner exercised his discretion to allow the withdrawal of the matter in *Arceo* without prejudice, but on stated conditions, because it was through no fault of the agency that its key witness had refused to come forward because he felt intimidated, and the agency had not acted in bad faith. The agency agreed to reimburse the respondent for his 30-day pre-trial suspension. Judge Spooner, in very different circumstances from those here, conditioned the re-filing of the *Arceo* matter on an application to OATH to re-file the case with representations as to why the agency believed that the witness would cooperate and appear for trial, on the agency's service of a subpoena on the witness, on an affidavit from the witness that he would testify and understood that he would be subpoenaed and further understood that failure to comply with the subpoena could subject him to criminal contempt penalties.

with prejudice where petitioner was not ready to proceed with trial or to follow the instructions of the tribunal to proceed out of order and resume with a missing witness when that witness became available).

I directed that oral argument be held on the record pursuant to rule 1-32(f) because it was important to inquire into the legitimacy of the reasons for which the parties were now seeking to remove these matters from OATH's trial calendar. The reason tendered by Mr. Rosenberg defied credulity and showed a clear attempt on his and his client's part to subvert the final trial schedule. His disobedience of the final order was clear and his professions of regret were hollow and flatly contradicted by his actions. Although in response to my email directing him to appear and explain the reasons for the withdrawal of the matter and citing the rule requiring permission for a withdrawal that resolved nothing, Mr. Rosenberg emailed back on September 21, 2006, that he no longer represented Mr. Dawe. Yet at the oral argument a week later, as if to cut off any legitimate inquiry about the attorney-client relationship, he refused to seek permission to withdraw as counsel, indicated he would continue to represent Mr. Dawe if the trial went forward, and brought the announced, "new attorney," Mr. Grossman. But both these attorneys declined to file a substitution of counsel that would have allowed the trial to go forward on schedule in November. Mr. Grossman appeared merely as a prospective attorney/visitor, purportedly without obligations to this tribunal.

Having relied on the excuse that he was a solo practitioner who had overcommitted himself to the heavy work involved in preparing these matters for trial, Mr. Rosenberg at oral argument flatly denied that he had taken on too much work, and indicated that he would continue to represent Mr. Dawe at counsel table if I were to deny the application to withdraw the matters without prejudice and the trial went forward as scheduled. He did not indicate that he was not being paid, nor did he say that Mr. Dawe could not afford to pay him. Messrs. Dawe, Rosenberg and Grossman came to the argument united in perfect harmony, but none of them ready for trial. Mr. Rosenberg admitted that he has still, even now, not produced any documents to Mr. Burden (Tr. 10). Mr. Rosenberg had missed the deadline to produce the trial exhibits he had long neglected and refused to produce according to rule and two official orders, and had failed to re-plead the harassment application, in reliance, he said, on the Stipulation to obviate that work, all due by the September 14, 2006 deadline set in the Decision. His argument is frivolous. He and

Mr. Burden stated that they had not understood that they needed permission to withdraw the matters from the calendar without prejudice in these circumstances (Tr. 6-9, 20). But as attorneys appearing at OATH, they were required to know the rules. *See* 48 RCNY § 1-11(d) ("Filing a notice of appearance constitutes a representation that the person appearing has read and is familiar with the rules of this subchapter").

It is noteworthy that although Mr. Burden admitted that he had not read rule 1-32(f) when he signed the Stipulation and claimed he did not understand it to require permission of the administrative law judge for a withdrawal of the matters, on consent, without prejudice, where the parties have not finally resolved the matters (Tr. 20), he did have some experience with this rule (not, it must be noted, involving discontinuance without prejudice by consent), even if he did not recall it. He was counsel of record for the petitioner in the *Ancona* litigation, and for the respondent owner in the *Munzer* litigation, *Matter of Munzer,* OATH Index Nos. 2109-10/01 (May 13, 2002), *adopted,* Loft Bd. Order No. 2743 (June 25, 2002), *application for reconsideration denied,* Loft Bd. Order No. 2927 (June 10, 2005), both of which matters involved that rule. In *Ancona,* the Loft Board adopted the report and recommendation of Judge Fraser, which report fully explained rule 1-32(f). Judge Fraser held in that case, *Matter of Ancona,* OATH Index No. 116/96, at 10 (Dec. 8, 1995), *adopted,* Loft Bd. Order No. 1906, 16 Loft Bd. Rptr. 267D (Jan. 24, 1996), that the Loft Board rules were silent on the question of whether applicants are entitled unilaterally[7] to withdraw their applications without prejudice, and if not, under what circumstances and conditions they should be allowed to do so, and that, therefore, the rules of OATH apply under Chapter 45-A, section 1049(3)(d) of the City Charter. The Charter provides that the powers granted to administrative law judges at OATH include the authority to "regulate the course of the hearing in accordance with agency rules and chapter forty-five of the charter [the City Administrative Procedure Act, CAPA], provided that if agency

[7] Although the parties' consent arguably carries greater weight in determining whether to give effect a withdrawal without prejudice than does a disputed, unilateral application to withdraw matters without prejudice, there is no practical difference under rule 1-32(f) between a unilateral withdrawal by a petitioner of a matter without prejudice and a withdrawal by the petitioner without prejudice on consent in the sense that both types of proposed withdrawals require permission of the tribunal. This is so because both types of withdrawal do not finally resolve the matter either by settlement agreement or other final disposition, and the language of the rule requires permission of the tribunal in both instances so that the administrative law judges can control abuse of the OATH calendar.

rules are silent as to a particular matter, the rules of the office of administrative trials and hearings shall apply."

Mr. Burden strenuously argued that going forward with the trial on November 8 and 9, 2006, would severely prejudice his client, even with trial exhibits of Mr. Dawe precluded based on his defiance of the pre-trial order to produce the documents, because of the prolixity of the existing harassment application as amended (Tr. 17-20, 22-23). The parties bargained for this delay, which at least in theory would allow Mr. Dawe to do what he has thus far failed to accomplish -- proper pleading and preparation of his cases, in return for issuance of the abandonment decision. Thus, the owner has its own tactical reasons for consenting to the withdrawal without prejudice, and the parties acted as if they could trade judicial decisions at will by bargaining the harassment case for the abandonment action.[8] Mr. Burden stated that when he represents a respondent, he is almost always agreeable to a discontinuance or withdrawal because the case may not be restarted or it may be different and "a lot easier" for him (Tr. 11). Considered in its best light, the parties' theory in entering into the Stipulation apparently was that if there were no more harassment and diminution matters to be tried, there would be no impediment to issuing the abandonment decision, which had been consolidated with the other matters for disposition. They erroneously referred to a "stay" being lifted, but there never was a stay, as such, imposed by the tribunal. There was simply an indication by letter dated March 7, 2006, that the matters would be consolidated for disposition; the three matters involve related issues, the same parties and the same property.

Mr. Rosenberg admitted that he had produced no documents, but denied that he and the tenant had done absolutely nothing to comply with the pre-trial orders. He asserted on questioning about what work had been done that there had been work done on redrafting the harassment pleading. I asked to see the re-draft. The tenant and his attorneys did not have the draft with them at oral argument. Mr. Rosenberg indicated that he could fax it to me that evening. On my request, Mr. Rosenberg submitted a rough re-draft of a revised harassment application, shortly after 5:00 p.m. on September 28, 2006. He submitted this draft document to

[8] The abandonment application will become ripe for decision after the Loft Board rules upon this Report and Recommendation. The timing of the disposition of that application will depend upon the Loft Board's ruling with respect to the instant matters.

me on notice to Mr. Burden, but the draft itself was submitted only *in camera,* as agreed by all, and was accepted solely for the purpose of showing whether any kind of work was done by the tenant or his attorneys since the July 27th Decision and order. The draft bore a date of September 2, 2006, but it was in no way finished, and appeared still to be in the form and in the type-face of the pleadings Mr. Dawe had historically submitted on his own. It was not clear who was the author of the draft -- Mr. Dawe, Mr. Rosenberg or Mr. Grossman, or some combination of them. But it makes little difference; the parties simply let themselves off the hook and stopped working on the trial preparation without seeking permission for their agreement to end the matters without prejudice to their renewal, and the analysis is unchanged by the incomplete and aborted effort by somebody to re-draft the chaotic pleadings.

In effect, the parties' stipulation can be seen as an improper adjournment which they granted to themselves in violation of the adjournment rules of this tribunal. Section 1-32(b) of the rules provides in pertinent part:

> Applications to adjourn conferences or hearings shall be made to the assigned administrative law judge as soon as the need for the adjournment becomes apparent. Applications for adjournments are addressed to the discretion of the administrative law judge, and shall be granted only for *good cause*. Although consent of all parties to a request for an adjournment shall be a factor in favor of granting the request, such consent shall not by itself constitute good cause for an adjournment. Delay in seeking an adjournment shall militate against grant of the request.

48 RCNY § 1-32(b) (Lexis 2006) (emphasis supplied). The parties showed no cause that would justify an adjournment, and chose instead to put these matters off to another day. Nor did they seek permission for any adjournment, likely because there was no "good cause" to support such a request. Indeed, Mr. Rosenberg stated that he did not want an adjournment (Tr. 8). Rather, the parties decided together to withdraw these matters without any final resolution. The net effect of their stipulation is to delay even further the trial and disposition of these matters. The rules were not intended to be exploited in this fashion, and there should be consequences for this transparent attempt by the parties and their attorneys to usurp the role of the adjudicative body. The tenant's continuing delays in bringing to the tribunal's attention any need for adjournment weighs heavily against any application to adjourn, even if he had properly presented a motion to adjourn. "Indeed, this tribunal's rules provide that, 'Delay in presenting . . . a motion may . . . weigh

against the granting of the motion.'" *Police Dep't v. Ortega*, OATH Index No. 580/99, mem. dec., at 2 (Aug. 6, 1999) (citing, *inter alia*, 48 RCNY section 1-34(a)).

The consequences of Mr. Rosenberg's actions as an attorney practicing in this tribunal fall squarely on his shoulders. But the question of what effect to give the parties' stipulation to knock these matters off the trial calendar of this tribunal also implicates his client's behavior. Mr. Dawe has never expressed any dissatisfaction or displeasure with his attorney's conduct of this matter, and he did not discharge Mr. Rosenberg. In fact, they functioned as a team in delaying and multiplying the work in these matters.

I recommend that either the harassment and diminution claims be dismissed with prejudice for the failure to prosecute and for the willful violations by the tenant and his counsel of all pre-trial orders, including the order to produce their trial exhibits in both matters, or that strict conditions be imposed upon the applicant should he be permitted to return to the Loft Board to file the same claims in the future. To do otherwise would encourage litigants to abuse the process of this tribunal and would undermine not only the authority of OATH, but also that of the Loft Board, which refers matters here for hearings. Accordingly, parties should not be permitted to defy solemn, final trial settings by removing matters from the OATH calendar at will, to suit their own convenience and perceived tactical advantage, or to waste public resources and delay the administration of justice without some real limitation on the re-commencement of the same actions.

The Loft Board may wish to consider that, in my view, the extraordinary record here fully supports the strictest disposition of the Stipulation to withdraw these matters without prejudice: Dismissal with prejudice. The August 4, 2006 final pre-trial order provided: "Please take notice that the failure to comply with the rules of pleading will subject the application/petition to dismissal with prejudice." This notification followed the quotation in detail of the rules of pleading of both this tribunal, 48 RCNY § 1-22, and the pleading requirements for harassment applications, 29 RCNY § 2-02(c)(2)(i). The parties struck their deal because it suited their private interests, and they each stood to gain either time or some other litigation advantage from it. If there is no review of that Stipulation, they will have sabotaged the orders of this tribunal that set the final trial dates for the express purpose of preventing further delay. I have considered and rejected the notion that because the parties are willing to

start from scratch and have made an agreement to do so, their agreement should be elevated over the rules, orders, and directions of the tribunal, where, as here, the applicant has abused the adjudicative process and subverted the rules. Our rules provide for scrutiny of such abuses and for denial of any non-final withdrawal of a petition on the eve of trial.

The harassment and diminution cases are both subject to dismissal because the applicant's failure to produce the requisite trial exhibits by September 14, 2006, in violation of the final order, would, pursuant to OATH rules, section 1-33(e), ordinarily result in the preclusion of all trial exhibits the applicant might seek belatedly to introduce at trial, and possibly dismissal of the claims with prejudice. The harassment application can, in addition, be dismissed as in violation of the Loft Board's pleading rules and there was clear and ample notice both in the July 27th Decision and the August 4th order that the failure to comply with the pleading rules by the deadlines set therein would subject the petition to dismissal with prejudice. It would also be within the permissible remedies for the subversion of the hearing rules for this tribunal and the Loft Board to dismiss both the harassment and the diminution claims, with prejudice, for the tenant's repeated violation of all the pre-trial orders here in what amounts to a failure after more than a year to prosecute the matters, both under Loft Board precedent and under OATH rules. *See Matter of Munzer,* OATH Index Nos. 2109-10/01 (May 13, 2002), *adopted,* Loft Bd. Order No. 2743 (June 25, 2002), *application for reconsideration denied,* Loft Bd. Order No. 2927 (June 10, 2005) (tenant failed to appear at scheduled hearing, which had been adjourned several times and marked final; application dismissed for failure to prosecute); 48 RCNY § 1-33(e). *See generally Dep't of Education v. Butler*, OATH Index No. 554/93, mem. dec. (May 24, 1993) (extreme sanctions like dismissal are imposed for willful misbehavior; sanctions may also be appropriate for persistently negligent noncompliance with discovery orders).

Although the tenant here did not fail to appear at the hearing, he did fail to follow the orders to file a proper petition and also defaulted on the order for production of trial exhibits, serious defaults that have stymied the progress of these matters. The tenant in *Munzer* similarly failed to meet discovery deadlines to provide copies of all trial exhibits to the owner. As in *Munzer,* Mr. Dawe's sudden desire to withdraw his cases was likely prompted in large part by fear that an adjournment request submitted for no legitimate reason would be denied, and

possibly by a concern about the looming final resolution of claims he has been unable to plead properly. Judge Spooner in *Munzer* noted that in *Matter of Tekosky,* mem. dec., OATH Index No. 470/97 (Apr. 18, 1997), the withdrawal of a housing maintenance violation was deemed to be with prejudice due to the legal expense the owner had already incurred in defending against the claims, which were enforcement claims brought by the Loft Board as petitioner. Judge Spooner also reasoned that in *Matter of Gala,* Index No. 582/97 (Dec. 9, 1996), *adopted,* Loft Bd. Order No. 2054, 17 Loft Bd. Rptr. 30 (Jan. 9, 1997), a tenant's withdrawal of a harassment application without prejudice was conditioned upon any new application being litigated to finality or withdrawn with prejudice, unless expressly agreed otherwise by the landlord. In *Gala,* no trial date had yet been set, but the responding party had retained counsel, answered, attended a pre-trial conference, and filed a motion to dismiss, and Judge Fraser noted that because the litigation had advanced substantially, with the concomitant heavy consumption of public resources both at the Loft Board and at OATH, close scrutiny was required of the attempt to withdraw the matter without prejudice and preserve the ability to re-file the case and start all over again at some time in the future. In *Munzer,* there had been nearly a year of vigorous litigation by both sides; here, there has been more than a year of vigorous litigation, ending with numerous defaults by the tenant over many months, despite ample opportunity to prepare. Here, notwithstanding the owner's willingness to go along with the tenant's program for some perceived procedural advantage to the owner -- the acceleration of the decision of its abandonment application and the possibility that these cases might simply go away -- there is more here to support dismissal with prejudice. The parties here jointly circumvented the legitimate process of the tribunal for their perceived, respective tactical advantages, and their unity in this should not deflect attention from the tenant's end run around the orders of the tribunal and the parties' mutual avoidance of the hearing.

Alternatively, it is recommended that at a minimum these matters not be permitted to be re-commenced without strict conditions governing the conduct of any repetitious litigation. To prevent the manipulation of the trial calendar, I recommend that the parties be subject to the following conditions if the same claims are allowed to be re-filed at the Loft Board and referred to OATH for hearing:

1. Mr. Dawe shall be required to file, along with any new harassment and diminution application based on or including the same claims asserted in cases 237/06 and 335/06 against 20 Beaver Street LLC, an attestation, sworn before a notary public, that he intends to pursue the applications to final disposition.

2. Any failure to comply with the Loft Board rules concerning the proper pleading of harassment allegations will subject any new harassment application to dismissal with prejudice.

3. Any withdrawal of such new harassment and diminution applications based on or including the same claims asserted in cases 237/06 and 335/06 will be with prejudice.

4. Any re-filing of harassment and diminution applications based on or including the same claims here shall be limited to the same claims previously asserted in cases 237/06 and 335/06, and will not be supplemented with new claims; the applicable limitations periods shall be frozen as of the dates of the original pleadings such that any defense asserted by the owner will be deemed to relate back to the time of its assertion in these proceedings.

5. Any such new harassment and diminution applications will be set for hearing on an expedited schedule.

6. If Mr. Dawe files no such new harassment and diminution applications with respect to 20 Beaver Street LLC within 90 calendar days of a Loft Board Order concerning these recommendations such applications will be forever barred.

Both sides accepted at oral argument at least the concept of imposing conditions on any new filing of the same claims, if not the particular conditions to be imposed.

The Loft Board has in the past adopted similar conditions based upon recommendations from administrative law judges of this tribunal and has dismissed claims lacking in merit with prejudice. *See Matter of Ancona,* OATH Index No. 116/96 (Dec. 8, 1995), *adopted,* Loft Bd. Order No. 1906, 16 Loft Bd. Rptr. 267D (Jan. 24, 1996); *Matter of Rutledge,* OATH Index No. 621/96 (Dec. 8, 1995), *adopted,* Loft Bd. Order No. 1909, 16 Loft Bd. Rptr. 267G (Jan. 24, 1996); *Matter of Evans,* OATH Index No. 623/96 (Dec. 8, 1995), *adopted,* Loft Bd. Order No.

1904, 16 Loft Bd. Rptr. 267B (Jan. 24, 1996).[9]

The ultimate sanction of dismissal with prejudice would be entirely justified by the lawless conduct seen here. The bargained-for stipulation has thrown off the final trial schedule, which had built into it specific requirements for a new harassment petition and answer, a final demand for documents based on the new pleadings, and final production of trial documents and witness lists on specific dates in September and October, and trial in early November. The owner strenuously objected at oral argument to being forced to go to trial in November without the corrected pleading, because of the confusion engendered by the existing hodgepodge of amendments, even if the draconian sanction of preclusion of all trial exhibits of the tenant were imposed for the tenant's failure to comply with discovery orders. Mr. Burden argued here that the owner would be severely prejudiced if forced to trial in November even if all trial exhibits of the tenant were precluded because the petition is "mish mosh," inadequate to satisfy Loft Board requirements. "So there are no framed pleadings for Your Honor, there are no things for us to respond to. And the documents haven't been produced, so how do we prepare?" (Tr. 17-23). It is true that such a trial would be unsatisfactory. Without the promised, mandated revision of the harassment pleading, the tenant has thrown off the entire schedule. In these extraordinary circumstances, it would be fair, fitting and proper, to close the door to further litigation of these neglected claims. As noted in *Ortega*, "fundamental fairness dictates that this case not be revived." *Police Dep't v. Ortega*, OATH Index No. 580/99, mem. dec., at 3 (Aug. 6, 1999).

It is for the Loft Board in the particular circumstances here, as guardian of the applications filed with it, to consider and determine the precise consequences of the parties' conduct here. In the meantime, there being no cause demonstrated for adjournment of the trial, the Stipulation *qua* application for an adjournment is denied. There being no satisfactory way,

---

[9] It is noteworthy that the federal courts close their doors to a plaintiff who has once voluntarily dismissed an action without prejudice, meaning that the plaintiff has a second chance to re-file the same case and no more. Rule 41 of the Federal Rules of Civil Procedure provides that the plaintiff may effectuate one voluntary dismissal of an action as of right by filing notice of dismissal at any time before service of the answer or by stipulation signed by all parties who have appeared in the action. "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim." Fed.R.Civ.P. 41(a). Furthermore, if a plaintiff who has once dismissed an action in any court then commences an action based upon or including the same claim against the same defendant, "the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order." Fed.R.Civ.P. 41(d).

however, to conduct the trial that was scheduled for November 8 and 9, 2006, because the parties' Stipulation has, for all intents and purposes, defeated the final setting of the trial, the above-captioned matters are marked off the trial calendar and shall not go forward on those dates. There is ample reason to dismiss these matters with prejudice. These cases have an extraordinary and tortured history. It is recommended that the Loft Board, therefore, call a halt to this litigation.

Joan R. Salzman
Administrative Law Judge

Dated: October 20, 2006

SUBMITTED TO:

MARC RAUCH
Chairperson

APPEARANCES:

LINDSAY J. ROSENBERG, ESQ.
LANCE GROSSMAN, ESQ.
Attorneys for Petitioner

BELKIN BURDEN WENIG & GOLDMAN, LLP
Attorneys for Respondent
BY: JOSEPH BURDEN, ESQ.