Matter of Smith

OATH Index No. 1112/15, mem. dec. (Feb. 6, 2015)
[Loft Bd. Dkt. No. PO-0003; 26-40 Tiffany Place, Brooklyn, N.Y.]

Occupant of IMD unit moved to withdraw without prejudice, her application for protected occupancy status because of pending litigation in Civil Court. Prime lessee opposed occupant's motion, arguing that the occupant is forum-shopping and that her claim, which is predicated on an illusory tenancy argument, should properly be determined by the Loft Board. In the interest of judicial efficiency, occupant's motion to withdraw her application without prejudice is granted.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS
In the Matter of
KATHRYN E. SMITH
Petitioner

MEMORANDUM DECISION

INGRID M. ADDISON, *Administrative Law Judge*

Pending before me is petitioner's motion to withdraw her application before the Loft Board for protected occupancy status, without prejudice. This concerns one of two applications filed with the Loft Board on August 6, 2014, by petitioner/applicant Kathryn E. Smith (Loft Board Docket No. PO-0003), against 40 Tiffany Place, Corp., the owner of a horizontal multiple dwelling (registered with the Loft Board under interim multiple dwelling numbers 30003-30004) located at 26-40 Tiffany Place in Brooklyn, New York ("premises") (ALJ Ex. 1). Richard Rutner is the protected occupant and prime lessee of unit 2R of the building at 30 Tiffany Place. In the application at issue, Ms. Smith asserts that she has resided at unit 2R as a subtenant since December 2012, pursuant to an agreement with Mr. Rutner whom, she alleges, has resided permanently in Texas, since about 2001. Ms. Smith therefore asserts that Mr. Rutner is an illusory tenant. The owner and Mr. Rutner were served on July 31, 2014, and answers were due on September 4, 2014. Mr. Rutner filed an answer with the Loft Board on September 25, 2014. The owner failed to respond.

In his answer, Mr. Rutner argued that Ms. Smith is his roommate, not a sub-lessee, and she is therefore not entitled to protected occupancy status under an illusory tenancy theory or any other ground (ALJ Ex. 2).

The Loft Board transferred the matter to this tribunal on October 20, 2014, and a conference was scheduled for February 3, 2014. On January 23, 2014, Ms. Smith moved to withdraw the subject application without prejudice due to pending litigation in the Housing Part of the Civil Court, Kings County (ALJ Ex. 3). She explained that following her application to the Loft Board, Mr. Rutner commenced an illegal lockout proceeding, and the owner commenced a primary residence proceeding in the Housing Court. In response, Mr. Rutner moved to stay the owner's primary residence proceeding pending a decision on Ms. Smith's protected occupancy application by the Loft Board. However, in an effort to avoid the triangular and potentially inconsistent outcomes of parallel proceedings of protected occupancy, illegal lockout, and primary residence, petitioner hopes to consolidate the matters and have them decided in a single forum (ALJ Ex. 4).

Mr. Rutner opposed Ms. Smith's motion to withdraw without prejudice on grounds that she is forum-shopping. He contends that Ms. Smith (respondent in the illegal lockout proceeding), had previously sought a stay of the illegal lockout proceeding pending a ruling by the Loft Board on her protected occupancy application. Mr. Rutner (petitioner in illegal lockout proceeding), opposed Ms. Smith's motion to stay the proceeding while simultaneously moving to have her illusory tenancy defense stricken (ALJ Ex. 5). Housing Court Judge, Hon. Gary Marton, denied Ms. Smith's motion to stay but struck the illusory tenancy defense because of her applications before the Loft Board. Referring to those applications, the judge ruled that "prior to this proceeding's reasonably foreseen commencement, respondent sought at the Loft Board, relief on these two grounds. Respondent, having selected that forum as the one in which to raise the two issues, this court will not entertain them here" (ALJ Ex. 6 at 5-6). In a footnote, the judge noted that neither party had notified the court of any developments in the administrative process (ALJ Ex. 6 at 5, note 2).

For the following reasons, Ms. Smith's motion to withdraw her application for protected occupancy status without prejudice is granted.

ANALYSIS

Where an agency's rules are silent as to a particular matter, the rules of this tribunal apply. City Charter, § 1049(3)(d) (Lexis 2014). The Loft Board rules do not address application withdrawals, thus triggering reliance on our rules. Section 1-32(f) of this tribunal's Rules of Practice provides that withdrawal is not subject to the "good cause" requirement applicable to adjournment requests. However, withdrawal of a petition by the petitioner, other than pursuant to settlement or other final disposition, "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." 48 RCNY § 1-32(f) (Lexis 2014).

Even though our rules place no restrictions on the discretion of the administrative law judge to rule on withdrawal applications, in the exercise of such discretion we have been guided by existing applicable Loft Board decisions. *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); *Matter of Rutledge*, OATH Index No. 621/96 at 10 (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 at 10 (Dec. 8, 1995), *adopted*, Loft Bd. Order No. 1904, 16 Loft Bd. Rptr. 267B (Jan. 24, 1996). We have further noted that Loft Board precedents "reveal a strong preference for allowing withdrawal without prejudice where the applicant requests [such withdrawal]" *Matter of Ancona*, OATH 116/96 at 11.

Here, petitioner's motion to withdraw is predicated on her intent to have the matters consolidated in the housing court. This tribunal's rules of practice support consolidation in the furtherance of justice, efficiency or convenience. *See* 48 RCNY § 1-41 (Lexis 2014). The housing court, as a court of competent jurisdiction, has concurrent jurisdiction with the Loft Board to hear issues with respect to the Loft Law. *Suraci v. Mucktar*, 187 Misc.2d 848, 850 (Civ. Ct. N.Y. Co. 2000), citing *County Dollar Corp. v. Douglas*, 161 A.D.2d 370, 371 (1st Dep't 1990) ("Unless the Legislature has expressed an explicit intention to vest exclusive jurisdiction in the administrative agency," the court has concurrent jurisdiction). It is true that the courts have held that under the doctrine of primary jurisdiction deference should be made to the Loft Board where the matter at issue is within the Board's expertise. *Matter of Bikman*, 2012 N.Y. Misc. LEXIS 3620 (Sup. Ct. N.Y. Co. 2012); *Wong v. Gouverneur Gardens Housing Corp.*, 308 A.D.2d 301, 303 (1st Dep't 2003). And that may be what Judge Marton was contemplating

when he struck petitioner's illusory tenancy defense in the illegal lockout proceeding before him. But here, the illegal lockout and primary residence matters which are properly before the housing court are inextricably linked to petitioner's protected occupancy claim. Moreover, it would seem that petitioner's illusory tenancy argument is integral to a determination in at least the primary residence proceeding. Thus, given that petitioner's motion pre-dates the pre-hearing conference and/or hearing before this tribunal, as well as a determination by the Loft Board, I find it non-prejudicial and judicially efficient for petitioner to be permitted to withdraw her application. *Muktar*, 187 Misc.2d at 850 (the deference does not preclude the court's determination when the Loft Board has never ruled on the issue).

CONCLUSION

Accordingly, petitioner's motion to withdraw her application for protected occupancy status without prejudice is granted.

Ingrid M. Addison
Administrative Law Judge

February 6, 2015

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