Matter of 25 Jay Street Tenants Assoc.

OATH Index No. 1210/07 (July 19, 2007)
[Loft Bd. Dkt. No. TM-0063; 25 Jay Street, Brooklyn, N.Y.]

Evidence established that current owner diminished elevator service of protected residential occupants of an interim multiple dwelling.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
25 JAY STREET TENANTS ASSOC.

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, an association of tenants at 25 Jay Street, Brooklyn, applied to the Loft Board for an order finding that building's owner has unlawfully diminished elevator service for protected occupants of Interim Multiple Dwelling (IMD) units. Respondent, the landlord, was initially found in default because its answer was received a day late by the Loft Board. 29 RCNY § 1-06. The Loft Board referred the matter to this tribunal for a hearing and respondent's timely motion to vacate the default was granted. 29 RCNY § 1-06(i)(2).

In its diminution application, petitioner alleged that respondent has restricted access to the building's only elevator. Petitioner requested unrestricted access to a fully functioning elevator. Respondent replied that the elevator is only suitable for bulk freight and it is not designed for daily, unsupervised use by the building's residents.

At a hearing on February 23, April 23, and May 21, 2007, petitioner presented testimony from three tenants and an insurance agent. Respondent relied upon testimony from an elevator expert. Both sides also offered documentary evidence.

For the reasons below, petitioner's application should be granted.

ANALYSIS

25 Jay Street is a five-story IMD building that the owner registered with the Loft Board in 2000. Until recently, residential occupants had round-the-clock access to the building's elevator. In July 2006, respondent removed a key from the elevator that was needed to operate it. As a result, members of the tenants' association no longer had unrestricted elevator access. Petitioner claims that there has been an unlawful diminution of services. Respondent contends that the elevator is unsafe for passenger use.

Petitioner demonstrated that members of the tenants association have had unrestricted use to the elevator for more than twenty years. Tenants Steve West, Karen Johnson, and Ross Von Burg offered detailed and unrebutted testimony concerning the elevator's usage. West has occupied a fifth floor loft in the building since August 1991, when he signed a "standard form loft lease" (Tr. 20). The lease required the owner to provide passenger elevator service from 8:00 a.m. to 6:00 p.m. on weekdays and from 8:00 a.m. to 1:00 p.m. on Saturdays; freight elevator service was required from 9:00 a.m. to noon and from 2:00 p.m. to 5:00 p.m. on weekdays (Pet. Ex. 1, ¶ 31). When West signed the lease, the landlord's agent gave him a key to unlock a roll-down gate leading from the street to the elevator (Tr. 62).

In 1991, the elevator was manually operated. Tenants pulled a cable to make the elevator move. To retrieve the elevator from another floor, tenants had to call out to each other. The elevator cab, which was not completely enclosed, had scissor gates (Tr. 28, 51).

Six or seven years ago, the landlord upgraded the elevator. An electronic mechanism was installed which required the scissor gates to be closed for the elevator to move (Tr. 60-61). The cable system was replaced with a continuous pressure device (Tr. 62, 68). Instead of pulling a cable, tenants pushed a button inside the elevator cab and held it down until the elevator arrived at the desired floor (Tr. 29, 51, 56, 76). Buzzers were installed on each floor. Although the buzzers did not automatically summon an elevator to floors, tenants no longer had to shout to each other to retrieve the elevator (Tr. 32, 53, 56, 102).

Following the upgrade, the elevator required a key to operate. Until last year, the key was always in the elevator and turned to the "on" position (Tr. 31, 62, 69, 72, 79-80). The scissor gates also broke a few years ago and someone taped the connection, which allowed the elevator to move with open gates (Tr. 70-71, 112-13, 119).

When West first leased the loft in 1991 it was his art studio. He had unlimited access to the elevator, which he used the elevator to transport supplies, artwork, and guests (Tr. 26-27, 29). Two years later, he began using the loft as a residence (Tr. 45). Although West generally used the stairs, he took the elevator whenever he had groceries, art supplies, or guests (Tr. 27, 45. 55). After respondent took over the building in 2000, West and other tenants continued to have unlimited access to the elevator (Tr. 30-31). The current superintendent, Aaron Armstrong, has lived in the building for many years and occasionally rode the elevator with West and other tenants as they lugged groceries, garbage, or heavy materials (Tr. 32-33).

Johnson moved in with West in 2001 (Tr. 76). She used the elevator two or three times a week for laundry, groceries, and garbage (Tr. 78). Guests, including West's elderly mother, also used the elevator (Tr. 76). Until last year, landlord Joe Torres saw Johnson on the elevator at least once a month, often when she was doing laundry (Tr. 77).

Von Burg moved into his fifth floor unit in 1995 (Tr. 88). His lease provisions regarding elevator use were similar to West's (Tr. 89, 92; Pet. Ex. 6). Upon signing the lease, the landlord's representative gave Von Burg a key to a roll-down gate leading to the elevator (Tr. 94). Von Burg had unlimited access to the elevator, which he used to haul supplies and remove garbage (Tr. 96-7). Because commercial tenants used the elevator during the day, Von Burg used it mostly on nights and weekends (Tr. 97). He recalled that he was often awakened at 6:00 a.m. by other tenants who rang the buzzer to request the elevator (Tr. 98, 118). Occasionally, for large parties or an annual community arts festival, tenants paid someone to run the elevator and ferry groups of passengers (Tr. 115-16, 130, 132.)

When the current owner, Torres, took over the building, there was no change in elevator service (Tr. 100). Building superintendent Armstrong saw Von Burg use the elevator on weekends to transport luggage or bicycles (Tr. 102). If the elevator was broken, Von Burg notified Armstrong, who arranged for repairs (Tr. 131).

Mel Leifer, another member of the tenants' association attended the first day of the hearing, but was physically unable to return (Tr. 297). As a result of Leifer's unavailability, West was recalled and permitted to testify regarding conversations he had with that tenant regarding elevator usage. Leifer, who moved into the building in 1985, told West that he had unlimited elevator access and used it to haul ceramic art supplies and finished goods, groceries, and garbage (Tr. 297-99, 303-04).

In March 2006, following a fire in the building's basement, the elevator was taken out of service. It was repaired within a few weeks and the tenants had intermittent elevator access from March to June, 2006 (Tr. 36). On behalf of the tenants' association, West complained to the owner (Tr. 34; Pet. Ex. 2). The owner responded by accusing tenants of vandalizing the elevator (Tr. 35). West complained again (Pet. Ex. 3). In mid-July, 2006, without any notice, respondent removed the key that operated the elevator (Tr. 33-34, 40, 73). When the superintendent was unavailable, members of the tenants' association could not use the elevator (Tr. 107-08). On at least one occasion in 2006, Von Burg needed to bring thousands of pounds of stones to his fifth floor loft for an art installation (Tr. 103). The superintendent told Von Burg that tenants could not use the elevator, because it was broken or not up to code, and only building employees could operate it (Tr. 103). Thus, Von Burg had to carry many 50-pound bags up the stairs (Tr. 103). Similarly, Johnson recalled an incident in October 2006, when she was not permitted to gain access to the elevator for furniture delivery (Tr. 85-86).

However, other tenants continued to enjoy access to the elevator. West and Johnson testified that two non-members of the tenants association, who also resided on the fifth floor, routinely operated the elevator after July 2006 (Tr. 37-39, 80-81, 85-86). In September 2006, those neighbors allowed a film crew to use the elevator for an entire day (Tr. 81-83; Pet. Ex. 5). Von Burg saw those same tenants using the elevator three or four times a day to take their dog for a walk and other routine errands (Tr. 106). West and Von Burg saw those other tenants using the elevator less than a week before the hearing (Tr. 39, 67, 128).

Anticipating respondent's defense that the elevator posed an unacceptable risk, petitioner called insurance agent David Page as a witness. Page reviewed eight pages of an insurance renewal provided by respondent. According to Page, the documents were incomplete because standard forms, endorsements, and exclusions were not attached (Tr. 140, 169-170, 174; Pet. Ex. 8). Respondent's counsel said that he was unable or "having trouble" obtaining a complete copy of the insurance policy because respondent recently changed insurance brokers (Tr. 140, 146, 151-52, 167-69). Based upon the limited information provided, Paige testified that respondent's insurance policy classified the premises as a residential building with a passenger elevator (Tr. 172, 211). There was no indication in the available documents that respondent's insurance company had placed any restrictions on the use of the elevator (Tr. 178).

According to Page, if an elevator was in poor condition, a prudent insurer would insist that the owner make repairs, comply with all relevant laws, and limit the number of operators to a few qualified people (Tr. 183, 188-89, 198-99, 202, 219). For special events when the building was open to the public, insurers would require additional coverage that could cost as much as $10,000 (Tr. 192-94, 204). Page examined the elevator in this building and noted that an insurer might have problem with the broken scissor gates and unlimited use by the tenants (Tr. 205-07, 209). From an insurance perspective, Page asserted that the two biggest needs for this elevator were installation of a safe enclosure and limiting operation to qualified individuals (Tr. 212, 217, 224). Page suggested that the elevator cab would be safer if it was encased in plexi-glass (Tr. 196). It would also be easier to insure if only employees were allowed to operate the elevator, but other trustworthy people, including tenants, could be qualified (Tr. 224, 228). Another solution would be to convert the elevator to fully automated operation, which is "done all the time" (Tr. 213).

Respondent's offered no witnesses to rebut petitioner's evidence regarding the actual use of the elevator. There was no testimony from the owner, the superintendent, another insurance agent, or any other tenants. Instead, respondent called elevator expert, George Cattabiani, who examined the elevator and offered estimates on repair costs (Tr. 237-38).

According to Cattabiani, the elevator was nearly 100 years old and its hoist mechanism, a counter-weight drum, was an outdated technology that had not been used for new passenger elevators since 1915 (Tr. 242-43). The elevator had a freight elevator inspection certificate and had been inspected within the past two years (Resp. Ex. F, Tr. 250). Cattabiani did not know whether any building code violations had been issued for the elevator (Tr. 273).

Cattabiani estimated that it would cost from $250,000 to $400,000 to "covert this freight elevator to a passenger elevator, and make it lawful for a self-operating passenger elevator" (Tr. 269-70). He conceded that his estimate included replacement of the counter-weight drum with a more modern hoist system at a cost of $40,000 even though such a replacement was not required by law (Tr. 291). Cattabiani asserted that elevator conversion would require an architect, installation of a leveling device, power-operated doors instead of scissor gates, an automatic call feature, a deeper pit in the elevator shaft, and possible structural changes to the building (Tr. 260-63, 267-68, 282).

At issue in this case is whether respondent can limit the protected tenants' use of the building's elevator. Elevator service is not a minimum housing service, such as heat or hot water, which an owner has an affirmative duty to provide. However, the Loft Board rules mandate that a landlord "shall not diminish nor permit the diminution of legal freight or passenger elevator service and shall cause said service to be maintained in good working order." 29 RCNY § 2-04 (b)(9). This section of the rules does not refer to a specific timeframe, but the Loft Board has interpreted it to forbid diminution of services below those provided on June 21, 1982, the effective date of the Loft Law. *See, e.g., Matter of Hennen,* OATH Index No. 2323/01, at 9 (Oct. 22, 2002), *remanded,* Loft Bd. Order No. 2762 (Nov. 19, 2002); *Matter of 42 North Moore St.,* Loft Bd. Order No. 1411, 14 Loft Bd. Rptr. 79, 84-84 (Mar. 3, 1993).

A landlord may also assume an obligation to provide additional service if it is provided for in a lease. Section 2-04(c) of the Minimum Housing Maintenance Standards provides, in relevant part:

> *Additional lease agreement services.* In addition to those services mandated by § 2-04(b) of this Rule, owners, lessees of whole buildings and agents shall maintain and shall continue to provide to residential occupants services specified in their lease or rental agreement. In the absence of a lease or rental agreement, owners, lessees of whole buildings and agents shall provide those services to residential occupants which were specified in the lease or rental agreement most recently in effect in addition to those service mandated in §2-04(b). There shall be no diminution of services. Nothing contained in these rules allows reduction in the prior services supplied by mutual agreement where those services exceed the services mandated by § 2-04(b). Where the prior services are below those mandated by § 2-04(b), the services mandated by 2-04(b) shall be provided.

Thus, section 2-04(b)(9) mandates that the elevator service in place on the effective date of the Loft Law is the minimum that must be provided. If the landlord later agreed to provide additional service, section 2-04(c) applies. Additional elevator service provided by mutual agreement may not be unilaterally discontinued. *See, e.g., Matter of Perretti,* Loft Bd. Order No. 989, 10 Loft Bd. Rptr. 65, 71 (Jan. 25, 1990) (owner obligated to provide access to elevator as required by five-year lease in effect from 1984 to 1989, even though elevator not mentioned in 1979 lease); *see also Matter of Myers,* Loft Bd. Order No. 1336, 13 Loft Bd. Rptr. 369 (June 25, 1992) (last expired lease required elevator service even though it was not actually provided on June 21, 1982).

Here, there was no evidence regarding either leases or elevator use in 1982. However, there was ample proof that the landlord subsequently agreed to provide elevator service. Leases signed by current members of the tenants association in 1985, 1991, 1994, and 1997, required the landlord to provide freight elevator service from 9:00 a.m. to noon and from 2:00 p.m. to 5:00 p.m. on weekdays and passenger service from 8:00 a.m. to 6:00 p.m. on weekdays and from 8:00 a.m. to 1:00 p.m. on Saturdays (Pet. Ex. 1, ¶ 31; *see also* Pet. Exs. 6, 11, 12, and Resp. Ex. A).

Moreover, beyond the provisions in the leases, the parties agreed to supply additional service. The owner gave tenants keys to the street-level elevator gate upon signing of the lease, the owner installed buzzers on every floor which allowed the tenants to notify each other when the elevator was needed, and, after the continuous pressure operating system was installed, the operating key was routinely left in the "on" position. There was no advance notice requirement before the elevator could be used and the owner never designated the superintendent to be the lone authorized operator. Until last year, the tenants operated the elevator for twenty years with the knowledge and acquiescence of the owner and its agents. The owner did not merely agree to allow the tenants to operate the elevator – it expected them to do so.

Petitioner proved that the previous landlord agreed to provide unlimited elevator service and respondent continued to provide that service for two decades. The evidence also showed that respondent unilaterally diminished those services by preventing tenants from using the elevator. Petitioner presented credible evidence that these new restrictions imposed undue hardship and inconvenience. Most notably, Von Burg had to haul thousands of pounds of supplies up five flights of stairs.

Respondent argues that the tenants' use of the elevator is illegal and unsafe. Those claims are without merit. To begin with, where a lease provides for a service, the landlord has contracted to make sure that such service is provided lawfully. *See Matter of Seyfreid,* OATH Index No. 127/97, at 44 (Jan. 3, 1997), *adopted in part*, Loft Bd. Order No. 2083 (Mar. 20, 1997), *on remand*, Loft Bd. Order No. 2107 (May 22, 1997) (for purposes of diminution application where landlord assumed contractual responsibility of providing lawful elevator service, legality of prior use is irrelevant).

Moreover, the credible evidence established that this building's elevator is legal. It appears that the Department of Buildings has inspected the elevator and never issued a violation. In addition, the Administrative Code contains a grandfathering clause which limits the

retroactive application of the certain Building Code provisions for existing elevators. *See* NYC Admin. Code § 27-994. The Administrative Code also expressly excludes continuous pressure elevators, such as the one in this building, from the requirement that elevators must have a designated operator (Tr. 276, 289). *See* NYC Admin. Code § 27-1005 ("Every power driven passenger elevator and freight elevator with a rise of more than one story, *except automatic operation and continuous pressure elevators and sidewalk elevators,* shall be in charge of a designated competent operator ....") (emphasis added).

The evidence also failed to show that it would be too costly to allow tenants to operate this elevator. At respondent's behest, its expert provided a rough estimate of the cost to "covert this freight elevator to a passenger elevator, and make it lawful for a self-operating passenger elevator" (Tr. 268-69). But that evidence was ambiguous. The cost of bringing an elevator up to code is part of the legalization process, which provides that "all new and existing passenger or freight elevators" in registered IMD buildings shall be brought into compliance with relevant local laws. *See* Reference Standard 18-1, Rule 1201.13, available at the Department of Buildings' website (http://www.nyc.gov/html/dob) (visited July 18, 2007). Moreover, at the end of the legalization process, such elevators will be deemed "service elevators" suitable for passenger use. *Id.* It was not clear from respondent's expert that his estimate represented the actual cost of converting a freight elevator to a service elevator.

Furthermore, respondent's expert did not provide a detailed breakdown of how he arrived at his estimate. The estimate seemed off-the-cuff, vague, and inflated. For example, the expert conceded that only component of his estimate that he itemized, $40,000 to replace the hoist mechanism, was not an improvement required by law (Tr. 291). And respondent offered no context to evaluate the overall cost. There was no evidence regarding the value of the building, the gross or net revenues generated by the building, or the value of individual loft units. Moreover, reasonable costs associated with conversion of the freight elevator may eventually be passed along to the tenants. *See Matter of Myers,* Loft Bd. Order No. 1336, 13 Loft Bd. Rptr. at 376. Under these circumstances, respondent failed to show that reasonable costs of necessary repairs would impose a financial hardship.

Respondent's argument that the tenant's continued use of the elevator poses an unacceptable insurance risk is similarly flawed. Respondent failed to produce a complete insurance policy. As petitioner's expert witness recognized, little can be gleaned from such

incomplete evidence. However, the partial documentation that respondent provided indicated that elevator was already deemed a passenger elevator by respondent's insurance company.

It is also clear that any reasonably competent adult, including one or more tenants, could be trained to operate the elevator. Respondent failed to establish that it was necessary to bar tenants from operating the elevator. Indeed, there was no evidence that respondent's agent, the building superintendent, had received any specialized training regarding operation of the elevator. *See 9-01 44th Drive Tenants Assoc. v. Corastor Holding Co., Inc.*, OATH Index No. 224/04, at 13-14 (Jan. 21, 2004), *aff'd*, Loft Bd. Order No. 2851 (Mar. 18, 2004), *reconsideration denied*, Loft Bd. Order No. 2966 (Oct. 20, 2005) (tenants could be trained and designated as operators for manual cable operated elevator; thus, owner could not use need for designated operator as basis for diminishing access to elevator); *Matter of 24 Harrison St.*, OATH Index No. 1120/96 (Feb. 12, 1999), *aff'd*, Loft Bd. Order No. 2380 (Mar. 23, 1999) (owner gave tenants keys to freight elevator and condoned their operation of it). An insurer might prefer that an employee operate the elevator, but that is not an absolute requirement to obtain insurance.

Finally, there is substantial evidence that respondent's claims regarding financial hardship and insurance risks are a pretext. The unrebutted testimony established that, a year ago, respondent restricted elevator access for members of the tenants association. Yet other tenants, unaffiliated with the association, continued to enjoy unrestricted daily use of the elevator for a wide range of activities from filmmaking to dog walking. This suggests that other tenants were given operating keys that were withheld from members of the tenants' association. Respondent offered no evidence to rebut that inference.

In sum, respondent failed to show that its restriction on the protected occupants' use of the elevator was legally justified.

RECOMMENDATION

Petitioner's application for a finding of diminution of services should be granted.

Kevin F. Casey
Administrative Law Judge

July 19, 2007

SUBMITTED TO:

MARC RAUCH
Chairperson

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