

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : PART P

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219 WEST 81st RESIDENTIAL HOLDINGS LLC,

Petitioner-Landlord,

Index No. L&T 058159/11

-against-

DECISION and ORDER

JOAN DAVIDSON A/K/A JOAN WINSTON,

Respondent-Tenant,

-and-

“JOHN DOE” and “JANE DOE”,

Respondents-Undertenants
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PETER M. WENDT, J.

Following trial in this summary holdover proceeding, held on September 18th, 19th, 29th, and December 2, 2014, the court sets forth below its findings of fact and conclusions of law.

Petitioner commenced this proceeding to recover possession of Apartment 5-K (the “subject premises”) at 219 West 81st Street, New York, New York (the “Building”). Petitioner elected to terminate Respondent Joan Davidson a/k/a Joan Winston’s (the “Respondent”) tenancy on the grounds that Respondent does not occupy the subject premises as her primary residence.

Petitioner claims in its predicate notice of non-renewal that Respondent: 1) owns and resides in the single family residence, purchased in or about May 1973, located at 22 Preservation Drive, Becket, Massachusetts, 01223 (“22 Preservation Drive”). Respondent maintains utility service at 22 Preservation Drive in her name

provided by Western Massachusetts Power Company, which service was established in or about October 1993. The invoices are issued in Respondent's name as the customer of record and sent to, and received by Respondent at 22 Preservation Drive;

2) maintains telephone service in her name at 22 Preservation Drive with telephone number 413-623-5407; 3) upon information and belief, although Respondent is registered to vote with the New York City Board of Elections, she has been voting by absentee ballot since on or about October 31, 2003. Upon information and belief, the New York City Board of Elections has directed absentee ballots to Respondent through the United States Postal Service forwarded to Becket, Massachusetts; 4) upon information and belief, the most recent absentee ballot was mailed to Respondent by the New York City Board of Elections on or about October 4, 2010 and forwarded to Respondent at Becket, Massachusetts; 5) upon information and belief, Respondent is the President of the Becket Arts Center of the Hilltowns located at 12 Booker Hill Road, Off Route 8, having a mailing address of P.O. Box 286, Becket, Massachusetts 01223, and a phone number of 413-623-6635. Respondent is President of the Becket Arts Center of the Hilltowns, and serves on its Executive Board; 6) upon information and belief, Respondent additionally resides at 676 Yokum Pond Road, Becket, Massachusetts 01223 ("676 Yokum Pond Road"), a single family residence owned by Respondent's husband, Arthur Winston, since on or about October 7, 1998; 7) upon information and belief, Respondent and her husband maintain telephone service at 676 Yokum Pond Road, and Respondent receive mail at that address; 8) upon information

and belief, Respondent and her husband maintain utility service through Western Massachusetts Power Company of which Mr. Winston is the customer of record for service provided to 676 Yokum Pond Road; 9) upon information and belief, Respondent owns and previously resided and/or resides at 261 Tyne Road, Becket, Massachusetts ("261 Tyne Road"), purchased by Respondent on or about August 31, 1990; 10) upon information and belief, Respondent maintains a driver's license issued by the State of Massachusetts listing her residence address as 261 Tyne Road; 11) upon information and belief, Respondent also resides at the premises known as 1507 Clower Creek Drive, Unit 165, Sarasota, Florida 34231 ("1507 Clower Creek Drive"), a residential condominium owned by Mr. Winston which Respondent has listed as her mailing address; and 12) upon information and belief, Respondent and her husband maintain telephone service to the premises known as 1507 Clower Creek Drive and Respondent receives mail at that premises.

Respondent interposed an Answer asserting: 1) estoppel; 2) violation of §352eeee of the General Business Law; and 3) she resides at the subject premises as her primary residence. Respondent also counterclaims for \$2,000,000.00 for compensatory and punitive damages, and legal fees in excess of \$25,000.00.

Petitioner called four witnesses at trial: Respondent, Stanley Leibowitz, an agent of Petitioner, Simon Simonian, a employee for Orsid Realty, the management company for the Building, Colon Brady, the doorman for the Building, Angel Echavarria, a doorman/porter for the Building, and Bassirou Sarr, an employee of

Avonova Condominium. Petitioner's *prima facie* case (Petitioner's Exhibit 1) was admitted into evidence without objection along with: 1) the Board of Elections Record for Respondent (Petitioner's Exhibit 5); 2) Petitioner's Notice to Admit (Petitioner's Exhibit 7A); and 3) Respondent's Response to Petitioner's Notice to Admit (Petitioner's Exhibit 7B). Over objection, Respondent's New York State Department of Motor Vehicle Record was admitted into evidence as Petitioner's Exhibit 6.

Stanley Leibowitz, agent for Petitioner, testified that he is employed by Classic Realty LLC for twenty-five (25) years as Vice President. He asserted that Respondent is the tenant of the subject premises, and Petitioner owns the unit. Further, he stated that Classic Realty became the manager of the subject premises in or about January 6, 2010, and his duties consist of collecting rent, repairs, and monitoring occupants of the apartments in the Building. He testified that he commissioned an investigation of Respondent's primary residence. On cross-examination, Mr. Leibowitz asserted that the subject premises is a condominium.

Petitioner also called Respondent as a witness. Respondent testified that she appeared for depositions held on November 17, 2011 (Petitioner's Exhibit 2) and February 8, 2012 (Petitioner's Exhibit 3), at Petitioner's counsel's office. Respondent testified that she signed the transcripts and returned it back to Petitioner's counsel. The various lines of the depositions were read into evidence, without objection, from the deposition held on November 17, 2011: 1) page 23, line 21 to page 24, line 25; 2) page 25, line 5 to page 26, line 1; 3) page 47, line 22 to page 48, line 19; 4) page 49, line 7

to page 52, line 11; 5) page 53, line 13 to page 54, line 12; 6) page 56, line 8 to page 57, line 15; 7) page 28, line 10 to page 62, line 14; and 8) page 66, line 8 to page 66, line 13. The following lines were read into evidence, without objection, from the deposition held on February 8, 2012: 1) page 97, line 16 to page 98, line 5; 2) page 106, line 16 to page 107, line 5; 3) page 107, line 11 to page 107, line 13; 4) page 115, line 21 to page 116, line 16; 5) page 117, line 21 to page 118, line 24; 6) page 121, line 22 to page 122, line 13; 7) page 125, line 8 to page 126, line 6; 8) page 126, line 20 to page 127, line 20; 9) page 130, line 7 to page 130, line 20; 10) page 136, line 4; 11) page 136, line 19 to page 137, line 8; 12) page 137, line 17 to page 137, line 23; 13) page 139, line 16 to page 140, line 16; 14) page 140, line 19 to page 141, line 7; 15) page 141, line 7 to page 141, line 20; 16) page 148, line 3 to page 148, line 6; 17) page 148, line 25 to page 149, line 6; 18) page 149, line 10 to page 150, line 2; 19) page 150, line 9 to page 150, line 21; 20) page 153, line 2 to page 153, line 4; and 21) page 153, line 18. Also, admitted into evidence as Petitioner's Exhibit 4 was the Addendum to the depositions.

Petitioner called Simon Simonian, an employee of Orsid Realty, the management company for the Building, as a witness. Mr. Simonian testified that he is the resident manager for the Building for approximately five and a half (5½) years, and resides in apartment 1E. He stated that the Building has one main entrance and one gate for deliveries. He asserted that in 2009, 2010 and 2011, he saw Respondent at the Building two or three times each year. On cross-examination, he testified that he is

normally stationed in the lobby from 9am to 10am from Monday through Friday. He stated he would not see Respondent or her husband if they entered or left the Building after 10am on the weekdays, or anytime during the weekends. On re-direct, he asserted that most of his work is done in his office, however he does go to different parts of the Building throughout the day. Moreover, he asserted that he is in the Building on weekends because he lives there. On re-cross, Mr. Simonian asserted that he does not station himself at the lobby on weekends.

Petitioner called Colon Brady as a witness. Mr. Brady testified that he has been a doorman for the Building for approximately thirty (30) years. He stated that he works from 7:30am to 3:30pm, Tuesday through Saturday, and has had this same work schedule for approximately twenty-five (25) years. Mr. Brady asserted he is familiar with Respondent as his job is to observe people entering and leaving the Building. He further asserted that in 2009, 2010, and 2011, he saw Respondent approximately two to three times a year each year. On cross-examination, he testified that he is only stationed in the lobby of the Building, and would not see people entering or leaving the building on Sundays and Mondays, or anytime between Tuesday through Saturday after 3:30pm. He stated he is familiar with many tenants at the Building however does not know their name. Moreover, he asserted that no written record is made of the people entering or exiting the Building.

Petitioner called Angel Echavarria as a witness. He testified that he has been employed as a doorman/porter for the Building for approximately five (5) years. He

stated he started as a doorman in 2009. He asserted that in mid-2011, he became a doorman and a porter. In 2009, he stated his work schedule was from Friday to Sunday from 3:30pm to 11:30pm, and Monday and Tuesday from 11:30pm to 7:30am. Mr. Echavarria stated he is familiar with Respondent, and that she resides at the subject premises. He testified that in 2009 and 2010, he saw Respondent approximately four to five times each year. In January 2011 to March 2011, he stated he saw Respondent and her husband at the Building four to five times. On cross-examination, he testified that he is unaware of how long Respondent stayed at the Building during the times he saw her.

Petitioner called Bassirou Sarr as a witness. He testified that he has been employed as a doorman for the Building for approximately fourteen (14) years. He asserted that his shift is always 11:30pm to 7:30am from Wednesday through Sunday. In 2009 and 2010, he testified that he saw Respondent and her husband entering and leaving the building approximately three or four times each year. He asserted that he is stationed at the desk in front of the entrance door of the Building during his shift, and sees everyone entering and exiting the Building. Moreover, he stated that it is not possible for anyone to enter or exit the Building without passing him. On cross-examination, Mr. Sarr stated that he never missed work. Further, he testified that if a tenant left or entered the Building on Monday or Tuesday, he would not know.

Respondent testified on her own behalf. She asserted that she has been residing at the subject premises since 1958 with her mother. She stated thereafter, she entered

into a lease for the subject premises in 1970. Respondent testified that she had been a teacher in the New York City Public School system, and retired in 1995. She asserted that two years after retiring, she went back to work, and has continued to work to date. She stated she has been a volunteer teacher in the New York City Public School system since March 1, 2011. Respondent asserted that between 2008 and 2011, she was involved with the New York State Art Teacher's Association ("NYSATA"). Moreover, she stated she is a "delegate" from Region 8 of NYSATA, and is the representative from New York City for NYSATA. Respondent asserted she is also a coordinator for New York State legislative student exhibit. She stated she has been the President of New York City Art Teacher's Association ("NYCATA") since 1981, and her duties are to plan events to encourage membership, to make sure there are opportunities for students and teachers, to oversee activities of the organization, ensure budgets are adhered to, review minutes of meetings, and be the liaison/advocate with the United Federation of Teachers ("UFT"). Respondent asserted that her organization has an office located at 50 Broadway, 10th Floor, New York, NY, and meetings are held at UFT at 50 or 52 Broadway, New York, NY. She asserted that meetings are held once or twice a month in February, March, April, May, June, September, October and November, and she is present at all the meetings. Over objection, posters for the 30th Annual City-Wide All Day Art Education Conference for the years 2008 (Respondent's Exhibit B), 2009 (Respondent's Exhibit C) and 2010 (Respondent's Exhibit D) were admitted into evidence. Respondent testified that she starts the year

before to plan the next year's conference. Admitted into evidence without objection were the Artworks NYCATA-UFT Conference Brochures for 2008 (Respondent's Exhibit E), 2009 (Respondent's Exhibit F) and 2010 (Respondent's Exhibit G). Respondent asserted that she assists in preparing the brochures, and that she can prepare the brochures anywhere. Respondent stated she prepares the brochures in New York City. Respondent asserted she is also the President of Becket Art Center.

Respondent testified that from 2008 to 2010, her primary physician was Dr. Tammy Leopold with an office at 58th Street between 8th and 10th Avenues, New York, New York. She asserted that Dr. Leopold would send her to West Side Radiology on 59th Street, and went to Quest Labs for blood tests. Respondent asserted that in 2008, she saw a chiropractor, Dr. Rob Davidowitz, in New York City. Respondent stated she also has a dentist, Dr. Jeffrey Lember, and a periodontist, Dr. Dominick Galasso in New York City. Respondent testified that she filed her tax returns, including resident New York tax returns, for 2008, 2009 and 2010 from the subject premises. Respondent asserted she personally voted in New York City, and did not vote by absentee ballot. Respondent stated that from 2008 to 2011, she never voted in Massachusetts or Florida, and was never required to vote in those states. Respondent also asserted that her cars are registered in New York State. Respondent stated she had a Massachusetts driver's license because she did not pass the test in New York City, however, Respondent currently has a New York State driver's license.

Respondent asserted she met her husband Arthur Winston in 2001. Respondent stated that in 2001, Mr. Winston lived at 676 Yokum Pond Road. Moreover, she testified that from 2008 to 2001, Mr. Winston primarily resided at 1507 Clower Creek Drive while Respondent resided at the subject premises. She stated that from 2008 to 2011, Mr. Winston walked with a cane, and couldn't walk long distances without sitting down. She also testified that in 2008, Mr. Winston's eyesight was very poor, and did not improve, and she would attend to his physical needs as his main caregiver. Respondent asserted that in or about 2008/ 2009, Mr. Winston lost his hearing. Respondent testified that she never resided in Florida with Mr. Winston. She stated that New York City is her home, and she went to Florida to care for her husband after they married. She asserted that they are members of the Society for Advancement of Judaism. She further testified that when they travel for vacation, she and Mr. Winston leave and return from the subject premises.

Respondent testified that she used medical records, meetings records, travel documentation and appointments to compute the days she spent in New York City. Moreover, Respondent asserted she has two (2) adult children and grandchildren residing in Brooklyn and the Bronx. She testified at trial that she spent 192 days in New York City in 2008; 191 days in New York City in 2009; and 160 days in New York in 2010. Respondent stated that 22 Preservation Drive has a roof problem, and has been in repair for a year and a half. Respondent further asserted that 261 Tyne Road was under construction as the basic structure was not finished. Respondent

testified that she got to own 22 Preservation Drive and 261 Tyne Road as part of the divorce settlement with her ex-husband. Respondent asserted that prior to 2011, her daughter occupied 22 Preservation Drive the entire summer. Respondent stated that she went to the house at 22 Preservation Drive on school holidays and during summer. Respondent testified that she has an art studio and gallery at 22 Preservation Drive. Respondent asserted that from 2008 to 2011, she went to 22 Preservation Drive and 261 Tyne Road at the end of May, June, September, and October. Respondent asserted that she owns 22 Preservation Drive individually. Respondent testified that she receives two tax bills for 22 Preservation Drive at 1507 Clower Creek Drive, Sarasota, FL, her husband's condominium. Respondent further stated that she receives the tax bills for 261 Tyne Road at either 1507 Clower Creek Drive or 676 Yokum Pond Road. Respondent testified that throughout 2008 to 2011, she received other mail at 1507 Clower Creek Drive as well as 261 Tyne Road. Respondent asserted that she is the sole owner of 261 Tyne Road. Moreover, she testified that in the summer of 2008, 2009 and 2010, she stayed with Mr. Winston at his house located at 676 Yokum Pond Road.

On cross-examination, Respondent testified that it is not a requirement to be a New York City resident as President of Region 8 of NYCATA. She asserted that the NYCATA has a minimum of four (4) exhibits a year, and the exhibits could last as long as one month. Respondent stated that in 2009 to 2010, the NYCATA held two (2) annual exhibits that she did not attend. Respondent stated that she would schedule her

appointments with Westside Radiology for mammograms and bone density tests when she knew she would be in New York City for meetings. Respondent was also the President of Becket Arts Center from 1999 to 2012.

Respondent asserted that she has a son who has been living in Brooklyn for approximately three to four years. She stated that in 2008 to 2011, he resided in his own apartment located at 421 West 162nd Street, Apt. 1C, NY, NY. Admitted into evidence, over objection, as Petitioner's Exhibit 9 was an affidavit sworn to by Respondent on November 19, 2010 stating that Arthur Winston, Respondent, her son and his daughter were residing at the subject premises. Nevertheless, Respondent testified that she did not recall if her son, Jonathan Davidson, was residing at the subject premises at that time.

Respondent testified that she did not recall whether she received an absentee ballot in Massachusetts. Respondent testified that she received a New York State driver's license in 2011. Moreover, she asserted that she held a Massachusetts' driver's license for a long time prior to getting her New York State driver's license. Respondent stated she also had a driver's license from Florida while she was a student at University of Miami, and also a driver's license from Hawaii. Respondent asserted that in 2007 to March 2011, she maintained a bank account at Legacy Bank in Pittsfield, MA. Respondent further asserted that between January 2008 and March 2011, she maintained a bank account with MBT bank and TD Bank in Pittsfield, MA. Respondent testified she also maintained a Florida bank accounts, and that those

statements were sent to 1507 Clower Creek Drive. Respondent asserted she paid income taxes in Massachusetts.

On re-direct, Respondent testified that from 2008 to 2011, she maintained bank accounts in Massachusetts because of the houses she owns. Respondent also asserted that from 2008 to March 2011, 261 Tyne Road was not being rented due to renovations which took seven (7) years to complete. Respondent stated that her accountant informs her of where to pay her taxes. Respondent testified that she filed non-residential income tax returns in Massachusetts. Respondent asserted that she started to travel to Sarasota, FL because she wanted to follow her husband who primarily resides there, and assist him due to his health. Respondent stated that she and her ex-husband bought 22 Preservation Drive in 1973. Respondent further testified that between 2008 and 2011, she did not purchase additional homes in Massachusetts. She testified that in November 2010, Respondent's son and her grandchild stayed in both the subject premises and 421 West 162nd Street, Apt. 1C, New York, NY. Respondent asserted that her son and grandchild stayed at the subject premises because the apartment on West 162nd street had inadequate heat. Respondent stated that when she is active in Becket Art Center, she has to be present in Becket, MA from late June to early September. Respondent asserted that for NYCATA, she held meetings in New York City, and for NYSATA she attended meetings in Albany. Respondent stated that she coordinated art student's exhibits for NYSATA, and stayed at hotels in Albany. Respondent asserted that she would travel by Amtrak to and from

Albany. Moreover, from 2008 to 2010, Respondent testified that her daughter and her family resided at 22 Preservation Drive while she and her husband would stay at 676 Yokum Pond Road when they are in Massachusetts.

Primary residence has been defined as requiring an “ongoing, substantial, physical nexus with the controlled premises for actual living purposes- which can be demonstrated by objective, empirical evidence.” *Emay Properties Corp. v. Norton*, 136 Misc.2d 127, 129 (App. Term 1st Dept. 1989). *See also, Toa Construction Co. v. Tsitsires*, 54 A.D.3d 109, 113 (1st Dept. 2008); *89 E. 3rd St. Tenants Assocs. v. Lamotta*, N.Y.L.J., October 16, 2001, p. 18, col. 1 (App. Term 1st Dept.); *Sullivan Properties v. Sanabria*, N.Y.L.J., September 9, 1999, p. 26, col. 2 (App. Term 1st Dept.); *Ram LLC v. Estes*, N.Y.L.J., March 24, 1999, p. 26, col. 1 (App. Term 1st Dept.); *332 E. 4th St. Assocs. v. Robertson*, N.Y.L.J., February 27, 1995, p. 27, col. 3 (App. Term 1st Dept.); *Sommer v. Ann Turkel, Inc.*, 137 Misc.2d 7 (App. Term 1st Dept. 1989).

In a non-primary residence proceeding, the burden falls on the landlord to prove the tenant’s non-primary residence by a preponderance of the evidence. *See Katz v. Lubotta*, N.Y.L.J., May 20, 1985, p. 13, col. 6 (App. Term 1st Dep’t); *750 Tenth Ave. Assocs., Inc. v. Vallant*, N.Y.L.J., April 14, 1992, p. 26, col. 3 (Civ. Ct. N.Y. Co.); *Coronet Properties Co. V. Brychova*, 122 Misc.2d 212, 469 N.Y.S.2d911 (Civ. Ct. N.Y. Co. 1983).

Once the landlord has established its entire *prima facie* case, the burden of going forward shifts to the tenant to establish that the premises is in fact the tenant's primary residence. See *Harran Holding Corp. v. Fowler*, N.Y.L.J. April 28, 1987, p. 5, col. 4 (App. Term 1st Dep't); *McKoy v. Halpin*, N.Y.L.J., February 23, 1987, p. 15, col. 2 (App. Term 1st Dep't); *Elghanayan v. George*, N.Y.L.J., October 29, 1997, p. 30, col. 2 (Civ. Ct. N.Y. Co.). However, the burden of proof remains with the landlord throughout the trial. The issue is whether objective, empirical evidence shows that respondent utilizes the premises as his or her primary residence. *Sommer v Ann Turkel, Inc., supra.*

Courts have looked at a number of factors in determining whether a tenant occupies an apartment as his or her primary residence. Specific documentation that has been used to illustrate a "sufficient nexus" to show primary residence includes the address listed on a tenant's driver's license, voter registration, and income tax returns, the amount of time the tenant has spent in the subject premises, and whether the tenant sublet the subject premises. See *Cox v. J.D. Realty Associates*, 217 A.D.2d 179 (App. Div. 1st Dept); *Pendias v. 3 E. 69th Street Associates*, 119 A.D.2d 467 (App. Div. 1st Dep't 1986); *Elghanayan v. George, supra.*; *750 Tenth Ave. Assocs., Inc. v. Vallant, supra*; *Merit Management Co. v. Davis*, N.Y.L.J., April 10, 1991, p. 21, col. 2 (App. Term 1st Dep't). Evidence of utility usage, *Mandel v Steinman*, NYLJ, Oct. 10, 1985, at 11, col 3 (App Term, 1st Dept), and the observations made by the superintendent have also been considered, *Harran Holding Corp. v Fowler*, NYLJ, Apr. 28, 1987, at

5, col 4 (App Term, 1st Dept). An important factor that courts examine in determining whether or not a tenant occupies an apartment as his or her primary residence is the amount of time that a tenant spends at the apartment. *Claridge Gardens, Inc. v Menotti*, 160 AD2d 544 (1st Dept 1990).

In the instant matter, Petitioner proved its prima facie case through Respondent's deposition testimony on November 17, 2011 and February 8, 2012. During Respondent's deposition, she testified that she did not spend more than approximately 112 days of the year at the subject premises. On November 17, 2011, Respondent testified at p. 23, line 21 to page 24, line 12:

Q: Have or did you live elsewhere either on a permanent or temporary basis?

A: No. On a temporary basis.

Q: Tell me where else you lived:

A: I live on a temporary basis, I go on vacation to Becket, MA.

Q: Do you have an address in Becket, MA?

A: 676 Yokum Pond Road.

Q: Describe what that property consists of; is it a single-family residence, an apartment, a condominium?

A: It's a single-family residence.

Q: Who is the owner of that single-family residence?

A: My husband.

national conference, what period you took trips, what period you were in New York, and what period you were in Massachusetts in 2011?

A: And I changed my answer.

Q: In what respect?

A: It's fourteen and a half weeks.

Q: ...where were you for the other remainder 37 and a half weeks?

A: Okay, so in January of 2011 for three weeks we were in or around South America. In February, one week I was in New York and three weeks I was in Sarasota. In March, one week I was in New York and one week I was in Seattle, Washington. April about a half a week I was in New York and the rest in Sarasota. In May one week I was in Sarasota, three weeks I was in New York. June three weeks I was in New York, one week I was in Massachusetts. In July four weeks I was in Massachusetts. In August four weeks I was in Massachusetts. In September two weeks I was in New York and two weeks I was in Massachusetts. In October three weeks I was in New York and then we went to for about a week, more like two weeks, we were like in Santa Fe. In November, one of the weeks I was still around New Mexico and Arizona, so two weeks. Two weeks I was in, two and a half weeks I was in New York and then another half week we were visiting family in Massachusetts, Boston. Then we get to December, which December is four weeks in Sarasota.

Q: The question would be for 2010, number one, how much time did you spend living in Sarasota living with your husband in 2010 and once we answer that question, we'll move on to the other time periods for that year. The first question is how much time did you spend living in Sarasota for the year 2010?

A: I would say it would be relatively maybe by a week, the same pattern. It's the same pattern because of my professional life, I know that I have to have these certain meetings. Every year we do these same activities.

Q: Okay, so, then did you spend the same amount of time in South America in 2010 that you testified in 2011?

A: In 2010 we went to Vietnam.

Q: Did you spend the same amount of time?

Mr. Yellen: Every year they travel someplace else.

A: It's the same pattern.

Q: Did you spend the same amount of time in Santa Fe in 2010 as you did in 2011?

A: 2010 we went to San Diego.

Q: For what period of time, I'm going to ask you to recite as you did for 2011. Start with 2010 through December 2010 and give me the time periods of where you were?

Mr. Yellen: She just testified that it's essentially the same as it was 2011, except the vacation spot may change but basically it's the same.

A:It's a pattern.

Q: Were you in Seattle in 2010?

A: No, we went probably to Baltimore.

Q: Then I want to know the time frames:

A: It's the same time frame. I represent New York City when I go to the national organization, I have to go representing New York City.

Q: When did you go to Vietnam?

A: In Vietnam we went-- it was either in December or January.

Respondent failed to establish that she occupies the subject premises as her primary residence since she concedes through her deposition testimony that she did not occupy the subject premises as her primary residence for one hundred and eighty-three (183) days of the year routinely for the entire relevant time period of 2008-2011. As demonstrated in Respondent's deposition testimony, she spent no more than 112 days per year in occupancy at the subject premises during the relevant time period. Moreover, Respondent has deep roots and substantial ties in Massachusetts. Respondent owns two (2) properties in Becket, MA, and has paid income tax in Massachusetts. The tax bills for Respondent's two Massachusetts properties are also mailed to her husband's properties, either 1507 Clower Creek Drive, Sarasota, FL or 676 Yokum Pond Road, Becket, MA. She has her art studio and gallery at 22 Preservation, and was the Present of the Becket Art Center from 1999-2012. Respondent asserted she also stays at her husband's house at 676 Yokum Pond Road

when she is in Massachusetts. Respondent also spends a substantial amount of time at 1507 Clower Creek Drive. The Court finds Respondent's deposition testimony detailed, credible and probative since the deposition was held before she had time to tailor her responses. Respondent had an opportunity to review the depositions and make changes prior to returning it to Petitioner's counsel. Notably, Respondent did not make one change to the deposition transcripts. The Court also finds Respondent's testimony at trial incredible as she attempted to disavow what was testified to at her deposition by increasing the number of days spent in New York City. At trial, Respondent also testified that she did not vote by absentee ballot, however Petitioner's Exhibit 5 clearly shows that an absentee ballot was sent to Respondent in Becket, MA. Moreover, Respondent asserted that in 2008 to 2011, her husband's primary residence was at 676 Yokum Pond Road, and thereafter 1507 Clower Creek Drive. However, Petitioner's Exhibit 9, an affidavit sworn to by Respondent states that he resided at the subject premises with her in November 2010. Further, Respondent admitted that she plans her appointments and trips to New York City around her conferences and meetings with NYCATA.

It appears to this Court that at trial Respondent was very calculating in her attempts to keep a rent stabilized apartment where she could stay when her business brings her to New York, while for most of the year, she actually resides in elsewhere. She clearly altered her testimony between the depositions and the trial regarding salient facts. This Court therefore finds Ms. Davidson's testimony far from credible.

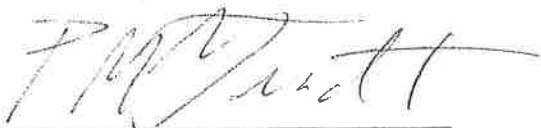
The objective evidence demonstrates that Respondent was not residing at the subject premises as her primary residence but utilizing it only when she would have meetings with NYCATA and NYSATA in New York City.

After careful consideration of all the testimony, the credibility of the witnesses, and documentary evidence elicited at the trial, the Court finds that under the circumstances of this case, Respondent did not have the type of ongoing substantial, physical nexus with the subject apartment for actual living purposes that constitutes a primary residence. After trial, based on the documentation and credible testimony presented, the Court finds Petitioner sustained its burden of proving by a preponderance of the evidence that Respondent did not occupy the subject premises as her primary residence during the relevant time period from 2008 to 2011.

Accordingly, the Court hereby awards Petitioner a final judgment of possession against Respondent. The issuance of the warrant of eviction shall be forthwith, with execution stayed four (4) months after service of a copy of this Decision and Order together with a notice of entry upon Respondent's attorney, conditioned upon Respondent paying monthly use and occupancy at the monthly amount stated in the most recent lease.

This constitutes the decision and order of the Court.

**Dated: New York, New York
March 9, 2015**


PETER M. WENDT, J.H.C.