IVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : HOUSING PART R
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NORFOLK DEVELOPMENT LLC,

Petitioner-Landlord,

-against-

DECISION/ORDER
Index No. L & T 76794/06

ELIZABETH KEE a/k/a RITA ELIZABETH KEE,
106 Norfolk Street,
Apartment No. 25
New York, New York 10002

Respondent-Tenant,
RENATO STABILE,
"JOHN DOE"AND/OR"JANE DOE"
Respondents-Undertenants

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BACKGROUND

NORFOLK DEVELOPMENT LLC (Petitioner) commenced this summary holdover proceeding to recover possession of 106 Norfolk Street, Apartment 25, New York, NY 10002 (Subject Premises) on the grounds that **ELIZABETH KEE** (Respondent) does not occupy the Subject Premises as her primary residence. Respondent served a verified answer which asserted a general denial and affirmative defenses.

PROCEDURAL HISTORY

The proceeding was initially returnable in Part H on June 30, 2006. Respondent appeared by counsel (Charles H. Smalls Esq) on said date and filed a written answer, asserting four affirmative defenses, based on procedural defects, and a counterclaim for attorneys' fees. Petitioner was originally represented by Feldman Rosman.

On August 29, 2006, Petitioner moved for discovery. On October 6, 2006, Respondent cross-moved for summary judgment on her fourth affirmative defense, which was based on a claim that Petitioner accepted rent from Respondent after the expiration of the lease and prior to the commencement of the proceeding. On November 21, 2006, the parties entered into a stipulation resolving Petitioner's motion for discovery and withdrawing Respondent's cross-motion. The stipulation provided that the underlying lease between the parties provides for attorneys' fees, and the proceeding was marked off calendar pending the completion of discovery.

Respondent's deposition was held on January 25, 2007.

Petitioner moved for relief pursuant to CPLR § 3126 on August 24, 2007, and Respondent cross-moved for summary judgment. On September 26, 2007, the court (McClanahan, J.) issued a conditional order granting Petitioner's motion and denied Respondent's cross-motion without prejudice "as short-served and incomplete." The proceeding remained off calendar.

On January 31, 2008, Petitioner made a second motion for relief pursuant to CPLR § 3126, the court (Cohen, J.) denied the motion finding that Respondent had substantially complied with her discovery obligations.

On February 26, 2008, Respondent again moved for summary judgment. On June 26, 2008, the court (Cohen, J) issued an order granting summary judgment to Respondent and dismissing the proceeding finding that Petitioner had failed to submit admissible evidence contradicting Respondent's showing that she had maintained the Subject Premises as her primary

residence during the period in question. The court dismissed the petition and Petitioner appealed. Petitioner retained new counsel for the appeal and the rest of this proceeding.

On August 14, 2008, Respondent moved for attorneys' fees. On September 15, 2008, the parties stipulated to mark the motion off calendar pending Petitioner's request for a stay at the Appellate Term.

On May 5, 2009, the Appellate Term issued a decision (23 Misc3d 136[A]) reversing Judge Cohen's grant of summary judgment and the dismissal of the petition. The Appellate Term held:

> This nonprimary residence holdover proceeding is not susceptible to summary dismissal, since there exist material questions of fact as to the nature and extent of tenant's presence at and usage of the subject Norfolk Street apartment and a Duane Street apartment allegedly leased by her (now former) boyfriend. The record, including tenant's own deposition testimony and supporting affidavit, reveals that, during the two-year period referenced in the petition, tenant spent, at a minimum, three days a week at the Duane Street apartment, where she maintained a study space or "studio," and where she at times received her mail and kept her dog and its "stuff," and that tenant allowed a friend, respondent Stabile, to stay in the subject Norfolk Street apartment at least 'occasionally." The evidence thus failed to establish as a matter of law that tenant maintained her primary residence at the Norfolk Street apartment, and the drastic remedy of summary judgment was unwarranted.

On June 30, 2009, Petitioner moved for an order restoring the proceeding to the calendar and for related relief. Respondent failed to appear and the court (Fitzpatrick, J) granted the motion to the extent of setting the matter down for an inquest on July 16, 2009.

On July 15, 2009, Respondents's motion to vacate the default was granted and the proceeding was marked off calendar for completion of additional discovery. On November 12, 2009, Respondent moved to restore the proceeding to the calendar for an immediate trial, and Petitioner cross-moved for relief pursuant to CPLR § 3126. On December 16, 2009, the parties

entered into a stipulation, pursuant to which Respondent withdrew her motion and granting Petitioner's cross-motion to the extent of Respondent's agreement to provide Petitioner with authorizations for document production and granting Petitioner's request to depose Michael Tuscano.

In July 2010, Tuscano retained counsel who advised Petitioner he would not appear absent a court order requiring him to do so. On January 7, 2011, Petitioner moved for a court order requiring Tuscano to appear for a deposition. On March 18, 2011, the court (Stanley, J) denied the motion and set the matter down for a trial on April 26, 2011. On April 26, 2011, the matter was assigned to Part R for trial. The trial did not commence on that date but was adjourned by the Trial Judge (Halperin, J) to May 24, 2011. The proceeding was adjourned in the trial part over the following dates: May 25, May 31, June 9, and September 12, 2011. For reasons that are not clear from the file, the trial does not appear to have started on any of these dates.

On September 14, 2011, Petitioner moved for an order quashing subpoenas served by Respondent on third parties. The motion was denied by the court (Halperin, J) as moot because Respondent agreed to withdraw all three subpoenas. Judge Halperin scheduled trial for October 17, 2011. On October 13, 2011, Petitioner again moved for an order to strike pursuant to CPLR § 3126, and on October 17, 2011, Petitioner moved for an order staying the trial pending determination of the motion. On November 14, 2011, Respondent cross-moved for sanctions.

On November 14, 2011, the court (Kraus, J) denied the motion for a stay and ordered that the trial would commence on November 21, 2011, and continue day to day until completed. On November 15, 2011 the court issued an order granting Petitioner's motion to the extent of

precluding Respondent from offering into evidence any document which she had been ordered to produce and failed to do, and finding Respondent's notice to admit had been untimely and would not be considered at trial. The court denied the balance of the relief sought by Petitioner as well as Respondent's cross-motion for sanctions.

Both parties appealed this court's November 14, 2011 decision, and on December 13, 2011 the Appellate Term granted Petitioner's motion for a stay of the trial pending appeal (2011 NY Slip Op 92300[U]).

On February 9, 2012, Petitioner's motion to reargue the November 14, 2011 decision was denied by the court.

On March 7, 2012, Respondent's counsel moved for permission to withdraw before the Appellate Term. On March 8, 2012, the Appellate Term denied said motion (2012 NY Slip Op 66699[U]).

On May 10, 2012, the Appellate Term issued an order affirming this court's November 14, 2011 decision (35 Misc3d 138[A]), and on May 21, 2012, the court granted Respondent's motion to restore the case for trial and issued an order scheduling the trial for June 18 through June 21, 2012, and further directing that any additional motions were to be made prior to June 10, 2012.

On June 11, 2012, and after the Appellate Term had affirmed the court's November 14, 2011 decision, Respondent moved to reargue the court's November 14, 2011 decision. That motion was denied. There were several other motions regarding subpoenas that were made and addressed in June and July 2012.

On June 18, 2012, the trial commenced, Petitioner's application for a continuance was

granted and the proceeding was adjourned to July 9th, 2012 for continued trial. On July 9, 2012, the court granted a motion to quash a subpoena served by Respondent on Petitioner's prior counsel, and the trial continued on July 10, 2012. On July 10, 2012, the court halted the trial to give counsel an opportunity to review what documents had been admitted into evidence and marked for identification, and adjourned the continued trial to July 12, 2012.

On July 12, 2012, one of Respondent's two attorneys submitted an order to show cause seeking to stay the trial "pending determination of medical examination as to whether respondent's attorney needs to withdraw out of medical necessity." The order to show cause was signed by the court and made returnable on July 17, 2012. The court granted the order to the extent of adjourning the trial to August 6th, 2013, to afford Respondent's non-impaired co-counsel an opportunity to come up to speed on the case and take over as lead counsel.

On July 26, 2012, Respondent *pro se* submitted an order to show cause seeking a mistrial, which was not signed by the court.

On August 1, 2013, Respondent obtained new counsel who made an application for a continuance. The application for a continuance was granted, per written order, which provided that any motions for additional relief were to be made prior to August 10, 2012, and adjourning the proceeding to said date for all purposes included scheduling the continued trial.

By August 7, 2012, Respondent's newly retained counsel had advised that no further motions were going to be made, and the court scheduled continued trial for September 12, 2012. The trial continued in the afternoon of September 12, 2012 and on September 13, 14, 19, and 20. The trial then continued on October 17, 18, 19, 2012. The trial then continued on January 9, and concluded on January 10, 2013.

The proceeding was adjourned to April for the submission of post trial memos and the court reserved decision.

FINDINGS OF FACT

Petitioner is the owner of the subject building pursuant to a deed dated September 6, 2002 (Ex 1). Respondent became the tenant of record of the Subject Premises, pursuant to a written lease agreement, dated May 17, 2000, between Respondent and Joel Abramson as Receiver. The lease was for a two year term from June 1, 2000 through May 31, 2002, at a rental of $587.38 per month (Ex 2). Said lease was last renewed by the parties in January 2004, for a term through May 31, 2006, at a rent of $669.32 per month (Ex 3). Respondent is a rent stabilized tenant and her rent has been registered with DHCR (Ex 5).

Petitioner issued a notice of non-renewal on February 13, 2006, over 90 days prior to the expiration of Respondent's last renewal lease.

Respondent is a Real Estate Professional and participates in the management of her family's real estate holdings. When Respondent rented the Subject Premises, the court finds that she did so as an investment. Respondent testified that she rented the Subject Premises through the brokerage service where she worked, Manhattan Apartments. Respondent was given the listing to enter into the system. Respondent testified she rented the Subject Premises based on her manager's opinion that the neighborhood was up and coming, it was rent stabilized and a really good deal.

Respondent rented the Subject Premise sight unseen. Respondent testified that the Subject Premises was uninhabitable when she rented it. Most of the windows were missing, the floor was rotten wood, there were no working light fixtures. Respondent gut renovated the

Subject Premises, at her own expense and with the owner's permission, right down to installing new Sheetrock.

Although Respondent signed an initial lease for the Subject Premises on May 17, 2000 (Ex 2), she acknowledges that she did not move into the Subject Premises until May 2001. Respondent testified that she had signed another lease for a different apartment with her roommates, that covered the same period of time, and that for a period of five months she paid rent on both apartments. The Subject Premiss is a two bedroom apartment.

On or about September 2004, Respondent sublet the Subject Premises to Renato Stabile (Stabile). Stabile, an attorney, paid Respondent cash for staying in the Subject Premises, as well as paying Respondent's expenses on occasion. Respondent denied the sublet, but acknowledged that by late 2005, Stabile was regularly staying at the Subject Premises, and leaving his clothes there and he had his own key for the Subject Premises. Prior to Stabile's occupancy, in the winter of 2003, Respondent sublet the Subject Premises to Tatiana Nadievez (Tatiana). Tatiana lived in the Subject Premises, the winter before Stabile moved in and kept her belongings there. Tatiana worked for Tuscano.

Respondent originally tried to portray Stabile as an occasional guest in the Subject Premises. First in a letter dated February 24, 2006, Respondent's attorney asserted that Stabile was not at the Subject Premises more then two nights a week, and that Respondent was always there with him (Ex JJ). Then, in Respondent's September 24, 2007 affidavit (Ex 32) in support of her summary judgment motion she stated that Stabile "visited and slept over occasionally" during the two years prior to the service of the Golub Notice. This allegation differed substantially from the evidence at trial, including Stabile's testimony which showed he was more

of a subtenant then an occasional visitor. Stabile admitted in his testimony that he was "living" at the Subject Premises at least from the end of 2004 through 2005.

However, there are portions of Stabile's testimony which the court does not accord great weight. Stabile's testimony that for this period he and Respondent shared the murphy bed was not credible. Similarly, Stabile's testimony that there was not a single night in 2004 when he stayed in the Subject Premises, and Respondent was not there lacked credibility. Stabile acknowledged that in 2005 there were occasions when Respondent wasn't there, but he could not recall how often or how long Respondent's periods of absence lasted.

Stabile acknowledged that on more then one occasion he visited Respondent at the Duane Street Apartment. Tuscano was not there at the time of said visits. Stabile acknowledged he was aware Respondent was staying in the Duane Street apartment in 2005. Stabile also visited Respondent on at least one occasion at the First Avenue Apartment.

Stabile acknowledged that as a *quid pro quo* for living in the Subject Premises he payed for his fair share of things, and that he gave Respondent money that he "supposed" went towards the rent. Stabile acknowledged paying Respondent thousands of dollars in this regard, but claimed that he could not recall how often the payments were made. Additionally, Stabile acknowledged paying for a vacation he took with Respondent in 2005, but could not recall whether the cost of the luxury hotel, airline tickets and meals exceeded several thousand dollars.

Stabile acknowledged that he had overnight guests at the Subject Premises including women he was dating, some friends who visited once or twice, and his friend Justin who stayed there "frequently." Stabile is now married. He started dating his wife in August of 2005. Stabile moved from the Subject Premises to his present apartment, which he shares with his wife, whom

he married in early 2006. Respondent was not invited to the wedding.

In late September 2004, Respondent requested additional key cards for Stabile to access the Subject Premises. A written request was faxed to Management from Stabile's office under Respondent's name seeking two additional key cards and agreeing to pay $15 per each additional card issued (Ex 37). Respondent received these cards on October 23, 2004 (Ex 38).

Stabile acknowledged in his testimony that he had his own key to the Subject Premises, and to the entrance of the subject building. Stabile contradicted Respondent's testimony by acknowledging that the request for additional keys, appeared to have been prepared by him, and that while Respondent may have been to his office it was rare for her to be there.

Stabile acknowledged that he moved his clothes for work, leisure and personal items into the Subject Premises, and that while a few items remained at his parents' apartment he kept a "substantial" amount of his clothing at the Subject Premises. Stabile kept his clothes in the second bedroom of the Subject Premises, which was not used as a bedroom but was primarily used for storage. During the period Stabile lived in the Subject Premises, he testified that Tuscano never stayed there, and that Tusacno did not visit on more then one or two occasions. Stabile testified that Respondent's mother never stayed at the Subject Premises while he was living there.

Stabile had no personal knowledge as to where Respondent lived from June to September 2004, the period immediately prior to his becoming a subtenant of the Subject Premises.

Moishe Friedman (Friedman) testified for Respondent and was a credible witness. Friedman has known Respondent for thirteen years. They met when they both worked at Manhattan Apartments, a real estate agency. Friedman described Respondent as one of his

favorite people in life.

Friedman knew Tuscano and may have even worked for Tuscano as a driver on one or more occasions. Friedman testified that Respondent had been dating Tuscano in 2004 and 2005. One evening, Friedman went with Respondent to the apartment she shared with Tuscano, Apt. 25F at 630 First Avenue, New York, New York (First Avenue Apartment), to help Respondent move her belongings out, because Respondent and Tuscano had broken up.

Friedman testified that "we've been best friends for most of that time, ever since we got to know each other again ...". This testimony references a period of time after the incident where Friedman helped Respondent with the move, where Friedman and Respondent lost touch. As a result, Friedman had little knowledge of developments between Tuscano and Respondent after that period, but was more acquainted with Respondent's life from 2010 forward.

Friedman had a faulty recollection regarding dates and time periods, but a clear memory of accompanying Respondent to the First Avenue Apartment, where he and Respondent let themselves in and removed one to two duffle bags full of the belongings Respondent had been keeping there.

As of, July 2012, Friedman testified that Respondent was living with her new boyfriend Jack and that he has visited Respondent at Jack's apartment. Friedman testified that Respondent was living with Jack and that Jack's apartment was located on 36th street. It is a large two to three bedroom apartment, Friedman has visited Respondent there on several occasions, and testified credibly that Respondent has been living there since at least 2010.

Friedman's testimony appears to be a reference to the cooperative apartment owned by Alan Fox, Respondent's step father, Apt. 123A at 34 East 38th Street, New York, New York (Ex

58) which is occupied by Jack Cassare. Friedman later added that most of the time he has known Respondent, she has lived on the lower east side, but he seemed to be trying to make up for letting it slip that even at the time of the trial Respondent was not regularly living in the Subject Premises.

Tuscano was called by Petitioner as a witness. The court found Tuscano to be a credible witness. Tuscano and Respondent started dating in late 2003. At that time, Tuscano lived at the First Avenue Apartment and Respondent lived at the Subject Premises. By late 2004, Respondent was living with Tuscano at the First Avenue Apartment. After obtaining the key cards so Stabile could access the Subject Premises, Respondent discontinued her telephone service at the Subject Premises. In January 2005, Respondent had her mail forwarded from the Subject Premises to the First Avenue Apartment. For example, Respondent's W-2 statement for 2004 lists the Subject premises as her address but was mailed to her at the First Avenue Apartment(see eg Ex RR-5).

Tuscano helped Respondent move her belongings to the First Avenue Apartment. Respondent kept many belongings at the First Avenue Apartment during this period, including one room filled with sewing machines and other items related exclusively to her education. Respondent kept clothing at the First Avenue Apartment, shoes and other personal items. The couple entertained together at the First Avenue Apartment and jointly hosted dinner parties there.

Respondent had her own keys to the First Avenue Apartment as well as her own keys to the car the couple kept parked in the building's garage and an electric key to the rooftop of the building. Tuscano also gave Respondent one of his credit cards to use for their home and

related expenses.

Respondent referenced the fact that she and Tuscano had established a home together at the First Avenue Apartment, in several emails. In December 2004, Respondent wrote to Tuscano:

Thank you for taking the time last night, in all the flurry of excitement and decision making, to make **our home** even better. I appreciate you going out to the grocery store in the terrible weather to pick up much needed odds and ends on the one night of the week that you like to relax.

Without even knowing it, you picked my favorite ice cream! Do you know how happy it makes me that you even got ice cream, let alone my favorite, hard to find, ice cream? And you washed the yucky dishes and took out the garbage, without me even nagging!

I hope you know that I am grateful for these things and that **I am very happy in the home we have made together** (Ex 46, emphasis added).

Similarly, on February 5, 2005, Respondent sent Tuscano an email which read "I love you and am so happy we are good. **Let's make our home** exactly how we both always have wanted it, full of trust and love (Ex 51)."

In November 2005, Respondent sent Tuscano an email reminding him to bring back to their "home" information she needed regarding one of her pieces of jewelry (Ex 48).

These emails make it clear that Respondent's testimony that she was not living with Tuscano at his First Avenue Apartment is false, and that her absence from the Subject Premises was in no way intended to be temporary.

Tuscano also owns a home in Amagansett, New York, which he and Respondent shared while dating. The couple was almost always together during their relationship and that was primarily at Tuscano's First Avenue Apartment or the home they shared in Amagansett. During the summer months, the couple primarily lived in Amagansett. The couple also entertained

together in Amagansett (Ex 54).

By the summer of 2005, the couple decided to look for a new apartment in the city to live in together and make their permanent home. Respondent found a two bedroom apartment located at 105 Duane Street. Respondent went to the management office and filled out an application for the apartment for herself and Tuscano. Respondent and Tuscano signed the application on June 27, 2005. Respondent listed her mother, JoAnn Fox (Fox) as one of the emergency contacts on the application (Ex 13).

Respondent received the application via facsimile on June 23, 2005 (Ex 15 A) and faxed a copy to the landlord from Amagansett on June 25, 2005, with a fee and request to view the apartment the following Monday (Ex 15), the date when the original application was signed.

As part of the application, a credit check was done on Respondent. Respondent signed an authorization for the credit report to be done (Ex 14). The credit history indicates Respondent's residence from December 2004 forward was 630 First Avenue, Apt 25F. Respondent was rejected by the landlord as a prospective tenant based on her credit report. For that reason, when the couple rented the apartment only Tuscano was listed as a leaseholder, and Respondent was listed as a permissible occupant.

On July 18, 2005, Respondent signed a Lease Progression Checklist prepared by management indicating she accepted the lease on behalf of herself and Tuscano (Ex 22). Respondent arranged for occupancy of the Duane Street apartment in advance of the commencement of the lease. Respondent executed a move in inspection form for the apartment and received the keys for the apartment and the mailbox on July 20, 2005 (Ex 17A). Both Respondent and Tuscano had their own keys for the Duane Street Apartment and the mailbox

associated with that address. Respondent and Tuscano moved into the Duane Street Apartment in July 2005.

In addition to the documents entered into evidence supporting these findings, Petitioner offered the credible testimony of Dennis Davies, who testified about the usual and customary business practices of the landlord of the Duane Street apartment.

The lease for the Duane Street apartment was dated June 30, 2005 (Ex 24). The term of the lease was for one year at a monthly rent of $4,901.00. The Duane Street apartment was a rent stabilized apartment, pursuant to a tax abatement received by the landlord. Because Respondent had a dog, the couple arranged for a Pet rider for the Duane Street apartment. The fact that Respondent lived at Duane Street with her dog is also confirmed by the complaints filed by her neighbors regarding the dogs barking (See Exs 11, 12 and 18).

Moreover, the court finds credible and reliable the testimony of Petitioner's expert witness that the signature on the application was that of Respondent.

One of the rooms in the Duane Street Apartment was set up as a sewing room for Respondent's use, as had been in the First Avenue Apartment. Respondent decorated the Duane Street Apartment for the couple and the apartment had ample closet space in which Respondent stored her clothing.

In December of 2005, Respondent and Tuscano broke up. There was a fight on December 13, 2005 at the Duane Street apartment, and Respondent called the police. Both Tuscano and Respondent filed complaints against each other.

Sergeant Baldwin from NYPD testified at the trial. He responded to the incident on December 13. He testified that in 2005 NYPD policy was only to prepare a Domestic Incident

Report if the people were married, blood relations or living together. In the case of Respondent and Tuscano one was prepared because they stated they lived together. Seargeant Baldwin's notes from that evening reflect that Respondent called 911 at 8:51 pm, and asserted she was being assaulted. At 9:53 pm, Respondent left the Duane Street Apartment and the officers drove her to the Cosmopolitan Hotel near the corner of Duane Street and Chambers (Ex Ct-1) where Tuscano arranged to pay for a room for her to stay in through December 16. Notably Respondent did not return to the Subject Premises after the incident or assert to the police at any point that she resided anywhere but the Duane Street Apartment.

In the domestic incident report (Ex 7a) filed by Respondent, she told police that she and Tuscano had been dating for over two years, and that for the year of 2005 Tuscano had been financially supporting her. Respondent listed her home address as 105 Duane Street and her home phone number as (917) 613 8686. Respondent told the police she and Tuscano lived together at 105 Duane Street. Respondent proved her residency by showing the officers a mattress receipt addressed to her at the Subject Premises.

The Officer noted that Respondent stated that she and her former live in boyfriend were ending their relationship and would no longer be residing together. The report indicates that Respondent identified Tuscano as her live in boyfriend.

Respondent's signed statement provides:

When I arrived w/my belongings he returned home told me I had to leave, pushed me and grabbed me by the sweater, dragged me across the room near the couch to the door. I called 911. I have been dating Michael Tuscano for more than two years. He has supported me financially for the last year. In August he asked me to stay with him @ 105 Duane Street apt 47E. Our relationship fell apart because he began staying out all night and he asked me to move all of my belongings out of his apartment and Amagansett House. With his permission, I moved all items from Amagansett to Duane Street to be ready for the final move on Dec 19, 2005 to 106 Norfolk Street.

The report indicated that Respondent was not injured as a result of the incident. The fight had started on that evening because Tuscano wanted Respondent to leave the Duane Street apartment, and she refused to leave.

Tuscano's complaint against Respondent from the same incident provides:

> Complainant states he came home and became involved in a verbal argument with his former live-in girlfriend. Complainant further states that he and his girlfriend are ending their relationship and will no longer be residing together.

Tuscano stated Respondent had moved out of the Amagansett home and became upset when she saw that he had packed all her belongings in the Duane Street apartment. Tuscano stated Respondent called the police and claimed he was hitting her (Ex DD).

Tuscano got a hotel room for Respondent to stay at for the next three days, but on December 16, 2005, after midnight, Respondent broke her agreement with Tuscano and chose to go back to the Duane Street Apartment and assert her right to remain living there. When Tuscano wouldn't let her in she called the police. Again because Respondent asserted that the Duane Street Apartment was her home domestic incident reports were filed.

Respondent's actions in this regard make clear that her intention was to embroil Tuscano in a fight for the purposes of having him excluded from the Duane Street Apartment so that she could have exclusive use and occupancy of same. After having made an agreement with Tuscano that she would move out on December 19, and after staying at a hotel on his dime, she shows up unannounced at the Duane Street Apartment after midnight. Not surprisingly Tuscano does not wish to let Respondent in and keeps the chain on the door.

In the domestic incident report filed by Tuscano, the Officer noted that Tuscano only wanted Respondent to leave the premises which he asserted was his apartment, but Respondent

claimed it was both of their apartments and that she had established her residency at the Duane Street Apartment.

Tuscano's statement provided :

> I was asleep. Elizabeth came to the door and called the police to get in Tue night I got her a hotel room for three days and she stayed there sshe is moving out on the 19 she is not on the lease. I am leaving to make the situation go away she threatened to uses squatters rights to stay (Exs 10 & EE)

The domestic incident report indicated that Respondent had not been injured, but that she had a verbal dispute with Tuscano, because Tuscano wanted her to leave the Duane Street apartment, and she refused advising the police that she had established her residency at the Duane Street apartment and was entitled to keep living there over Tuscano's objection (see ex 8). The entire reason for the dispute appears to be Respondent's position that notwithstanding the breakup, she had the right to continue living at the Duane Street Apartment, and that Tuscano could not force her to leave or stay out.

The position of Respondent is summarized on the domestic incident report she filed which states Respondent "had a verbal dispute w/her boyfriend. Boyfriend wanted (Respondent) to leave their apartment but (Respondent) **having established residency at address** refused to leave (Ex 8 emphasis added)."

Respondent submitted the following statement in support of her complaint:

> When I arrived at 105 Duane #47E, the chain was on the door. Michael was very aggressive and verbally threatened to physically assault me again as he did not want to let me get my belongings and my coming over to his apartment made him very angry. I was afraid to leave without my belongings because he threatened to remove them without my knowledge or permission. Police removed him from the apartment (Ex 8).

Both reports indicate Respondent was not injured, no photos were taken and no arrests were made.

On December 19, 2005, Tuscano came back to the Duane Street Apartment with movers to move Respondent and her belongings out of the Duane Street Apartment. Respondent had Tuscano arrested and charged with assault and attempted assault. Respondent packed a bag of clothes for Tuscano to take with him, and later that day obtained an order of protection against Tuscano preventing him from entering the Duane Street Apartment unless accompanied by police.

There was no additional incident that led to Tuscano's arrest on December 19, other then his return to the Duane Street Apartment as agreed. All domestic incident reports provide there was no injury to Respondent on either December 13 or December 16. On December 16 there was not even any physical contact, there was only an allegation of verbal abuse. Respondent succeeded in her plan to have Tuscano excluded from the Subject Premises and managed through her effort between when Tuscano left on the December 16th and when he returned on the 19th to have the event from December 13th elevated to the level requiring Tuscano's arrest. How she managed this was not clearly established at trial.

That Tuscano had arranged for Respondent to move out of the Duane Street Apartment on December 19, 2005, is however confirmed by the letter from the management company dated December 16, 2005, confirming that Respondent had directly scheduled her move with the management company for the Duane Street apartment (Ex 21), which has attached to it a Lease Amendment providing Respondent was no longer a permissible occupant of the Duane Street apartment. All of these actions were taken because Respondent insisted on her right to continue living in the Duane Street Apartment, even after her relationship with Tuscano had ended.

On December 19, 2005, Respondent obtained an order of protection against Tuscano in

Criminal Court. Because Respondent represented that she lived at the Duane Street address, the order prevented Tuscano from returning to that apartment without NYPD being present. From that date forward Respondent had sole and complete access to the Duane Street apartment (Ex 9a) and Tuscano was excluded from occupancy of same.

On March 27, 2006, Tuscano pled guilty to a violation of harassment in the second degree and was conditionally discharged (Ex DDD-1). The record was ordered sealed pursuant to CPL 160.55.

Tuscano was thus forced to commence an eviction proceeding to have Respondent removed from the Duane Street apartment. Tuscano was displaced while Respondent remained in possession (See ex 28). On December 29, 2005, Tuscano issued a Notice to Quit (Ex 23) requiring Respondent to surrender possession of the Duane Street apartment by January 15, 2006. By the end of January, Respondent had permanently vacated the Duane Street apartment. On February 2, 2006, Respondent filed a change of address form with the post office to have her mail forwarded from the Duane Street Apartment (Exs 6A & 6B).

Tuscano surrendered the apartment back to the landlord as of February 8, 2006 (Exs 25 & 26).

To the extent Respondent offered the testimony of Joseph Perry (Perry) to somehow put her assertion of residency at Duane Street in the context of the domestic disputes in a different light, the court did not find Perry's testimony persuasive. Perry appeared to have an emotional attachment or even a crush on Respondent. For example, in what would otherwise be a cover letter sending Respondent the final order of protection. Perry added a handwritten note on the bottom encouraging Respondent to "Please stay in touch!" and signed it "Joe."

Perry acknowledged that it was unusual for him to pen a personal note to a complainant on an official communication. In the court room, when Perry was present for his testimony he and Respondent embraced. During his testimony, Perry acknowledged that generally he would not vividly recall a case from seven years ago, but that he had a strong memory of the details of this case because Respondent had substantially "made an impact" on him.

Finally, in response to the Court's inquiry as to whether an ADA was permitted to testify about the criminal prosecution of Tuscano in light of the fact that his conviction by plea of a violation had been sealed pursuant to CPL 160.55, Perry answered that he did not know and had not considered the issue.

Respondent's battles with Tuscano continued for years. The court notes that Respondent is suing both Tuscano and his counsel in Supreme Court under Index Number 155010/2012, and her attorney filed a complaint against Tusacno's attorney with the Departmental Disciplinary Committee on August 14, 2012. Petitioner argues these actions were taken after Tuscano's initial testimony at the trial to silence Tuscano from testifying further in this proceeding.

DISCUSSION

"In view of the considerable protections accorded tenants of regulated units, the beneficiaries of these safeguards are required, as a quid pro quo to actually and principally utilize their apartments for dwelling purposes (*409-411 Sixth Street, LLC v. Mogi* 100 AD3d 112, 119 *citations omitted*)." Primary residence has thus been defined in case law as an ongoing, substantial physical nexus with the premises for actual living purposes *(Katz Park Ave. Corp v Jagger* 11 NY3d 314). It is permissible for the court to examine the entire history of the tenancy to ascertain primary residence (*Mogi, supra* at 120).

In order to prevail in this proceeding, Petitioner has the burden of establishing that Respondent failed to occupy and live in the Subject Premises during the relevant period (*Glenbriar Co. v Lipsman* 5 NY3d 388). Once Petitioner has established a *prima facie* case the burden shifts to Respondent to rebut said showing, but the ultimate burden remains with Petitioner to establish nonprimary residence (*Emel Realty Corp. v. Carey* 288 AD2d 163).

Respondent had absolutely no credibility as a witness. Respondent repeatedly lied and contradicted herself throughout the course of this six year litigation. Respondent intentionally attempted to prevent the truth from being known by the court. For example in her affidavit dated September 24, 2007, Respondent lied when she stated that Stabile was not a subtenant but a friend who "..visited and slept over occasionally during the time period in question (1/2004 through 2/2006) (Ex 32)." This statement was established as false by Stabile's own testimony at trial which established that he was living there on a regular basis and providing Respondent remuneration for same.

Similarly, in the same affidavit Respondent's own statement that her only connection to the Duane Street Apartment was to occasionally visit and sleep over was a lie. The same affidavit references the W-2 statements from Claremont Academy as proof of her primary residence at the Subject Premises, but neglects to advise the court that she received those documents at the First Avenue Apartment after she had gone to the post office to have her mail forwarded.

Respondent exhibited the main indica of nonprimary residence by living with Tuscano first at the First Avenue Apartment, and then at the Duane Street Apartment. Respondent additionally sublet the Subject Premises during this period.

The court finds that Petitioner met its burden of establishing by a preponderance of the credible evidence at trial that Respondent was not living at the Subject Premises from at least September 2004 through and including December 2005. The Court notes that Respondent's tenancy had only commenced in 2000, and she only started living in the Subject Premises in 2001. This is not a case where a long term tenant had a temporary absence.

Rather the court finds that Respondent intended to permanently cease living in the Subject Premises and live with Tuscano, first at 630 First Avenue and then at the Duane Street apartment. Since the inception of the tenancy, Respondent treated the Subject Premises more like an investment then a home, and although she listed it as her address on many documents this was done intentionally, as Respondent, a sophisticated real estate professional, wished to maintain a paper trail connecting her to the Subject Premises and keep her rent stabilized apartment long after she stopped living there.

For example, although most of the documentation but into evidence lists the Subject Premises as Respondent's home address, almost no evidence exists as to where these records were received by Respondent. The envelopes were not put into evidence.

Respondent had initially provided copies of her documents to be marked in evidence. Respondent's attorney mistakenly left an original of the W-2 wage and Tax statement she received from Claremont Riding Academy in the file of one of the exhibits. The court found the original and observed that the other side, copies of which had not been provided to Petitioner indicated that while the W-2 listed the Subject Premises as Respondent's address it was actually mailed to Respondent at 630 First Avenue Apartment 25F, New York, New York based on a mail forwarding request filed by Respondent with the post office, on or about January 23, 2005

(Ex RR-5).

Respondent's attempt to rebut Tuscano's testimony and the documentary evidence by establishing a 'promiscuity defense' was unsuccessful. Respondent went out of her way in her testimony to identify a series of other men she asserted she was dating during the time period she was living with Tuscano. Respondent put in a series of photographs of her with these men and volunteered throughout her testimony that she had spent the night with many of them. Respondent went so far as to testify that in one such photograph (Ex CCC-12) she was wearing her "Blow Job Pants" and that she only wore those with stilettos.

Similarly, the court does not give great weight to the testimony of Respondent's mother Fox. Fox showed a lack of objectivity in her testimony and lacked credibility and consistency. Fox tried to substantiate Respondent's testimony that Respondent dated plenty of men and was not living with Tuscano, but although Fox testified that she knew them well, referencing them, by pet names in her testimony, she was unable to identify the alleged boyfriends when shown their photos. Similarly, Fox stated she was in the Subject Premises at least once a month with Respondent, but that she didn't meet Respondent's dog purchased in July 2005 until November 2005. Fox's explanation that Respondent's dog was "being held hostage" by Tuscano lacked credibility.

Fox's acknowledged that Jack Casara was in occupancy of the apartment owned by Respondent's family on 38th street, which Friedman had testified was where Respondent lived at the time of the trial with Jack. Although the Court can not consider the testimony of Respondent's own witness that from 2010 through the date of the trial she was living with Casara on 38th Street, in the context of determining her primary residence for the two years

before the Golub Notice, it is relevant to the consistent lack of credibility shown by Respondent throughout the trial.

Fox also acknowledged that Respondent had been dating Tuscano as early as 2003. Finally Fox referred to the Duane Street apartment as the "Love Nest" of Respondent and Tuscano.

Respondent failed to rebut the strong evidence presented by Petitioner. Notably Respondent presented the testimony of not a single disinterested witness that supported her claim of living in the Subject Premises during the relevant period. In her deposition Respondent stated that there tons of people who wrote letters or signed statements attesting to Respondent's living in the Subject Premises (Ex 35, pg 108). If these witnesses existed, they were not presented at trial.

The witnesses presented by Respondent like Freedman, who testified about Respondent living at 630 First Avenue, and Stabile, who admitted living in the Subject Premises, supported Petitioner's claim of nonprimary residence. While the court does not find it appropriate to apply a negative inference, the court does find that it contributes to an overall lack of Respondent's ability to rebut the strong evidence provided by Petitioner.

> An acknowledged purpose of the Rent Stabilization Law is to secure from eviction, during a period of scarcity in rental accommodations, those tenants who actually require and actively use their apartment for dwelling purposes. Persons such as the tenant herein ... who reserve a (rent stabilized apartment) for secondary purposes of convenience and occasional use ... cannot fairly cloak themselves with the protections of extended stabilized status.

(*Sommer v Turkel* 137 Misc2d 7, 10).

It is clear that Respondent did not use the Subject Premises for living purposes during the relevant period of time.

CONCLUSION

The court finds that Petitioner is entitled to a final judgment of possession as against Respondent and the forthwith issuance of the warrant. Execution of the warrant is stayed through July 15, 2013. No evidence was presented about any other current occupant of the Subject Premises as such the proceeding is dismissed as against Renato Stabile, John Doe, and Jane Doe.

This constitutes the decision and order of this court.

Dated: New York, New York
June 12, 2013

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Hon. Sabrina B. Kraus
J. H. C.

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