

**542 East 14th Street LLC v. Lee**  
N.Y.Sup.App.Term,2007.

Supreme Court, Appellate Term, New York,  
First Department.

**542 EAST 14TH STREET LLC,**  
Petitioner-Landlord-Appellant,

v.

Charlene LEE, Respondent-Tenant-Respondent.  
Dec. 28, 2007.

**Background:** Landlord commenced holdover summary proceeding against tenant, seeking possession of tenant's rent-stabilized apartment on ground of nonprimary residence. The Civil Court of the City of New York, New York County, [Kevin C. McClanahan](#), J., after a nonjury trial, dismissed the petition, awarded tenant attorney fees in the sum of \$39,053, and denied landlord's motion to vacate the attorney fees award. Landlord appealed.

**Holding:** The Supreme Court, Appellate Term, held that apartment remained tenant's primary residence even after she temporarily relocated to California to care for her ailing parents.

Affirmed as modified.

[Douglas E. McKeon](#), P.J., filed dissenting opinion.

**[1] Landlord and Tenant 233**  **278.4(3)**

**233** Landlord and Tenant

**233IX** Re-Entry and Recovery of Possession by Landlord

**233k278.1** Suspension of Remedies

**233k278.4** Persons and Premises Subject to Regulations

**233k278.4(3)** k. Occupancy for Dwelling Purposes. [Most Cited Cases](#)  
Rent-stabilized New York apartment remained tenant's primary residence even after she temporarily relocated to California to care for her ailing parents, and, thus, landlord was not entitled to possession of the apartment on ground of nonprimary residence, where tenant never rented or owned any realty in California, but, rather, lived in makeshift quarters with

friends and family, and tenant maintained an ongoing substantial physical nexus to the apartment.

**[2] Trial 388**  **255(3)**

**388** Trial

**388VII** Instructions to Jury

**388VII(E)** Requests or Prayers

**388k255** Necessity in General

**388k255(3)** k. Evidence and Matters of Fact in General. [Most Cited Cases](#)  
Landlord waived any right to a missing witness inference by failing to timely request appropriate jury instruction at trial in nonprimary residence holdover proceeding against tenant.

Present: McKEON, P.J., [McCOOE](#), [DAVIS](#), JJ.

PER CURIAM.

\*1 Final judgment (Kevin C. McClanahan, J.), dated December 22, 2005, and order (Kevin C. McClanahan, J.) dated March 27, 2006, affirmed with \$25 costs. Judgment (Kevin C. McClanahan, J.), entered March 2, 2006, modified to reduce tenant's recovery of legal fees to the sum \$34,053, and as modified, affirmed, without costs.

In this holdover summary proceeding, landlord seeks possession of tenant's stabilized apartment on the ground of nonprimary residence. The trial court, crediting tenant's testimony, found that tenant did not abandon the subject apartment premises, but rather, temporarily relocated to California to care for her elderly, infirm parents.

**[1]** Giving due deference to the trial court's findings of fact and credibility (see [Claridge Gardens, Inc. v. Menotti](#), 160 A.D.2d 544, 554 N.Y.S.2d 193 [1990]), the determination that the subject Manhattan apartment is tenant's primary residence represents a fair interpretation of the evidence and is not disturbed. The record reveals that tenant, a registered nurse, cared for her ailing parents in California on a daily basis from the Spring of 2001 to December 2002, tending to their health needs by administering medication and checking their vital signs, overseeing their personal care, and taking them to medical

appointments. Tenant, who at no time rented or owned any realty in California, lived in makeshift quarters during her temporary stay there, first in a residence owned by her sister and brother-in-law and later at a friend's house. The temporary relocation for the purpose of caring for ailing parents does not in itself mandate a finding of nonprimary residence (*see Nussbaum Resources I, LLC v. Gilmartin*, 2003 N.Y. Slip Op. 50553[U], 2003 WL 262341 [2003]; *Kalimian v. Holmberg*, 2001 N.Y. Slip Op. 40297[U], 2001 WL 1530165 [2001] ). Tenant's credited testimony established that her father was in his mid-eighties and suffered from various systemic diseases, including lupus, and that her mother, who was recovering from knee surgery, was physically incapable of caring for her husband. The fact that tenant was employed while in California is understandable since she had to financially support herself and her daughter. Nor does the fact that tenant did not live with her parents on a full-time basis in what she described as a "tiny" one-bedroom unit undermine her credited account of her care-giving efforts. This is particularly so considering that any such cohabitation would have violated the rules of her parents' senior care facility. Also readily explainable was tenant's need to obtain a California driver's license during her temporary stay in the state. The evidence relating to tenant's filing of her tax returns was ambivalent, with tenant listing the Manhattan apartment premises as her residence in connection with the returns filed two of the three years provided. Notably, tenant did not own any real property or vote in California.

As the trial court expressly found, tenant maintained an ongoing substantial physical nexus to the New York apartment, where her teenaged daughter remained while attending Stuyvesant High School in Manhattan. Tenant returned to the apartment every two or three months, staying between two and five weeks, continued to maintain utility accounts at the premises, kept her furnishings there and maintained bank accounts listing the apartment. Evaluating the entire history of the tenancy (*see 615 Co. v. Mikeska*, 75 N.Y.2d 987, 988, 557 N.Y.S.2d 262, 556 N.E.2d 1069 [1990] ), and considering the landlord's failure to effectively refute the tenant's credited testimony (*see 23 Jones St. v. Keebler-Beretta*, 284 A.D.2d 109, 726 N.Y.S.2d 30 [2001] ), we agree that a forfeiture of the stabilized tenancy is unwarranted.

\*2 In deciding the primary residence issue framed on this appeal, our task is not to decide whether tenant acted inappropriately in allowing her teenaged daughter "to live alone in a New York City apartment" (dissenting op. at ----) or to pass judgment on her efficacy as a parent. Instead, our affirmance of the trial court's resolution of the legal issue in tenant's favor is based upon an objective evaluation of the facts developed in the lengthy trial record and the application of relevant case law precedent recognizing a tenant's right to temporarily relocate in order to care for an ailing parent without losing primary residence status.

[2] We note, from a procedural standpoint, that landlord waived any right to a missing witness inference by failing to timely request it at trial (*see Spoto v. S.D.R. Constr.*, 226 A.D.2d 202, 204, 641 N.Y.S.2d 20 [1996] ). We have reduced tenant's recovery of legal fees to the extent indicated.

DOUGLAS E. McKEON, P.J. (Dissenting).

Inasmuch as tenant, during her extended residency period in California, did not maintain an "ongoing, substantial, physical nexus with the [stabilized] premises for actual living purposes" (*Emay Props. Corp. v. Norton*, 136 Misc.2d 127, 129, 519 N.Y.S.2d 90 [1987] ) by reason of her daughter's presence in the subject Manhattan apartment or otherwise, I respectfully dissent and would award landlord the possessory judgment warranted by its persuasive trial proof.

A mother, who lives elsewhere, cannot rely on a child's residence to establish her own. In New York, the legal presumption is that the residence of the child is with the parent, not visa versa (*see Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 651 N.Y.S.2d 418 [1996] ). Thus, even assuming that tenant's 15-year old daughter continued to live-for much of the time alone and without adult supervision-in the Manhattan apartment during the year-and-a-half period of tenant's absence, and that the daughter did not reside with any of the other close family members who lived nearby, the daughter's putative presence in the apartment should be given little, if any, weight in determining the tenant's primary residence, and certainly cannot be viewed as the "most compelling evidence" of tenant's residency, as the trial court characterized it. The trial court's reliance on *Berwick Land Corp. v. Mucelli*, 249 A.D.2d 18, 671 N.Y.S.2d 44 [1998] is totally

misplaced. In fact, [Berwick Land](#) supports a finding of nonprimary residence, as it stands for the proposition that the presence of a family member in a regulated apartment is not imputed to a tenant of record, not living in the apartment, for primary residence purposes.

This is not the typical case where a rent stabilized tenant spent periods of time away from a New York primary residence to care for ailing parents. Tenant, by her own admission, moved to California and lived there full time. In truth, she abandoned her New York apartment, leaving behind a 15-year old daughter to fend for herself. While asserting that the motivation for the move was a desire to care for her sickly mother and father, tenant, a nurse, could not even remember at her deposition the various ailments said to have afflicted them. Moreover, no medical documentation was offered at trial to substantiate any claimed parental maladies. Tenant's daughter, who did not testify at trial, never mentioned at her deposition, in referring to her mother's move to California, that it was motivated by her grandparents' failing health. This is hardly surprising since, at the time of mother and daughter's depositions, tenant's avowed legal aim, as evidenced by the pleadings (as well as her lawyer's time records which, in fairness, were not before the court below when it issued its ruling) was to obtain succession rights for the daughter. Hence, establishing that tenant's presence in California was motivated by the medical needs of her parents was then of little strategic significance (*see* [Rent Stabilization Code § 19 NYCRR § 2523.5](#)[b]).

\*3 Significantly, it is undisputed that tenant never lived with her parents in California, even though she falsely used their address to obtain a California drivers license, almost a year before she claims to have moved there. Tenant worked full-time in California, and her filing of a California tax return, while minimized by the majority as "ambivalent," was a clear expression that tenant considered herself a California resident. The fact that she failed to file California tax returns for the following year, when she concedes she worked exclusively in California and was likely obligated to do so, was a decision probably motivated by the institution of this proceeding and her desire to bolster her claim of New York primary residency. Parenthetically, when tenant moved back to New York, she claimed that her father's health-he was then pushing 90-had sufficiently improved to permit her to

do so. Of course, that raises the fundamental question of whether tenant's parents were so ill as to justify her moving full time to California in the first instance. While tenant has several siblings, including two in the New York area, none was called at trial. In short, we have only tenant's unsubstantiated testimony to describe her parents' medical circumstances and needs.

Turning to other reasons advanced by the majority in support of their position, the frequency of tenant's claimed return visits to New York was belied by the testimony of the daughter at her deposition. The maintenance of New York bank accounts adds little to tenant's claim of New York primary residence since it was necessary to have available sources of funds for the daughter left behind. Whether tenant owned real property or voted in California, as noted by the majority, adds nothing. There is no evidence that she owned real property in New York or voted with any regularity. Of course, tenant left furnishings in the New York apartment in which her daughter allegedly was living.

From a procedural standpoint, the trial court erred in refusing to give landlord the benefit of an adverse inference for tenant's failure to call either of her sisters who lived in the New York area. It is well settled that a relative is "perforce deemed" to be under the control of a party (*see* [People v. Rodriguez](#), 38 N.Y.2d 95, 98 n. 1, 378 N.Y.S.2d 665, 341 N.E.2d 231 [1975]). In the case of one sister, a professor at Baruch College, she worked mere minutes away from the New York apartment where tenant's teenage daughter allegedly lived alone. She was also a short subway ride from the courthouse. Surely, she would have been expected to testify "favorably" about her sister's claimed need to move to California and whether her niece lived alone in the New York apartment.

Finally, notwithstanding the trial court's stated sympathy for tenant's "unenviable" circumstances, my colleagues in the majority are remarkably restrained in their comments about her choice to leave a 15-year old daughter behind to live alone in a New York City apartment. Let me not mince words. Such testimony, if true, and the decision underpinning it, give new meaning to the phrase "incredible as a matter of law." Yes, the court below portrayed tenant as a conflicted person, torn between parents and child, desirous of allowing her daughter to complete high

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school at a specialized, prestigious New York institution, yet called by duty to be at the side of her parents. But the decision to leave a teenager to fend for herself 3,000 miles away is one that few parents in good conscience would make and is one which is hardly deserving of judicial approbation.

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