

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART N

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245 EAST 30th STREEET LLC,

Petitioner,

Index No. 70872/2015

- against -

DECISION/ORDER

JOANNA ALARCON,

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

245 East 30th Street LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Joanna Alarcon, the respondent in this proceeding (“Respondent”), seeking possession of 245 East 30th Street, Apt. 5, New York, New York (“the subject premises”) on the ground that Respondent is tenant subject to the Rent Control Law and that Respondent does not maintain the subject premises as her primary residence. Respondent interposed an answer. This matter appeared on the Court’s trial calendar on March 19, 2018, April 11, 2018, May 21, 2018, August 2, 2018, August 3, 2018, and September 7, 2018, and the Court then adjourned the matter to October 5, 2018 for post-trial submissions.

Neither party disputed that Petitioner is the proper party to commence this proceeding, that Respondent is a tenant of the subject premises, that the subject premises is subject to the Rent Control Law, and that Petitioner timely effectuated service of a thirty-day predicate notice prior to the commencement of this proceeding which purported to terminate Respondent’s tenancy as of June 30, 2015. See Kaycee West 113th Street Corp. v. Diakoff, 160 A.D.2d 573 (1st Dept. 1990).

A witness who testified that he ran management for the building in which the subject premises is located (“the manager”) testified that he was unable to gain access to the subject premises; that he installed security cameras and key fobs; that he hired an investigator; that Respondent was not there; and that a woman who was taller and heavier with brown hair was seen on footage coming in and out of the subject premises.

On Petitioner’s case, Respondent testified that she grew up in the subject premises; that the subject premises was her parents’ apartment; and that she succeeded to her parents’ tenancy. The parties stipulated that Respondent is the grantee on a deed for real property in Puerto Rico (“the first Puerto Rico home”). Respondent testified that she purchased the first Puerto Rico home, which is a one-bedroom condominium, in 2011 for investment purposes; that she owns another apartment (“the second Puerto Rico home”) in the same town, and within walking distance of, the first Puerto Rico home; that it is a two-bedroom apartment; that she had purchased it before 2011; that no one has lived in the second Puerto Rico home the entire time that she has owned it; that she did not remember when she bought the second Puerto Rico home; that the second Puerto Rico home was for sale in 2011; and that she stayed in the second Puerto Rico home a few times. A mortgage annexed to a notice to admit that Petitioner had served upon Respondent pursuant to CPLR §§3123 and 408 stated that Respondent’s residence in the first Puerto Rico home was a condition of the mortgage. Income tax returns in evidence showed that Respondent took home mortgage tax deductions.

Respondent testified on Petitioner’s case that she is married to her husband (“Respondent’s husband”); that Respondent’s husband lives in the subject premises; that Respondent’s husband works in construction; that she does not know what location Respondent’s

husband works at; that Respondent's husband has a job with duties as a super in another building; that Respondent's husband does not have to be at that building twenty-four hours a day; that Respondent's husband co-owns the first Puerto Rico home and the second Puerto Rico home (collectively, "the Puerto Rico properties") with her; that Respondent's husband came to Puerto Rico many times between 2013 and 2015; that she is retired and he is not; that she never legally separated from Respondent's husband; but that she and Respondent's husband had been having what she characterized as a "little spat."

Respondent testified on Petitioner's case that someone that Respondent had some kind of a relationship with ("Respondent's paramour") got keys to the subject premises in 2013 or 2014; that Respondent's paramour did not pay Respondent rent for the subject premises; that she does not remember where Respondent's paramour worked at the time; that Respondent's paramour's full-time residence is in upstate New York somewhere; that she does not have pictures of her and Respondent's paramour; and that Respondent's paramour did not visit her in Puerto Rico. Petitioner's counsel read into the record Respondent's deposition testimony that Respondent's paramour gave Respondent \$500.00 a month for a time including when Respondent was not in the subject premises.

Respondent testified on Petitioner's case that she takes psychiatric medications.

Respondent testified on cross-examination on Petitioner's case that she bought the first Puerto Rico home so that she could get some space from Respondent's husband, with whom she had difficulties; that Respondent's paramour did not live in the subject premises full-time; that Respondent's paramour gave Respondent money sometimes as a casual gift; that she had a romantic relationship with Respondent's paramour that caused her anxiety and shame about her

sexual orientation; that she does not see Respondent's husband on a day to day basis; and that she does not discuss Respondent's husband's work with him.

Respondent testified on redirect examination on Petitioner's case that she went to Puerto Rico to think about things and that she didn't know until she was in Puerto Rico that English is not spoken there.

The parties stipulated to the admissibility of Respondent's driver's license, which was issued on September 20, 2011 with the subject premises as her address and a reduced-fare metrocard with the subject premises as Respondent's address.

A friend of Respondent's ("Respondent's first witness") testified that he is a hairstylist; that he has been living in the same neighborhood as the subject premises for twenty years; that he met Respondent twenty years before his testimony through mutual friends and they became friends themselves; that he sees Respondent at least once a week, sometimes in the subject premises, sometimes in his home, sometimes in the neighborhood, and sometimes with Respondent's religious group; that Respondent lives at the subject premises; that Respondent's kitchen is fully stocked; that Respondent loved the idea of getting a place in Puerto Rico; that Respondent was gone, in Puerto Rico, for a couple of months in 2014; that Respondent complained about being unable to communicate with people in Puerto Rico and being isolated due to Respondent's inability to speak Spanish; that Respondent would call him from Puerto Rico to help her communicate with people there because he speaks Spanish; that Respondent expected to live in the subject premises for the rest of her life; that Respondent is a Buddhist; and that Respondent attends religious services every week.

Respondent's first witness testified on cross-examination that he was in the second Puerto

Rico home once on a weekend a long time ago without Respondent's husband; that he met Respondent's paramour casually a couple of times at the subject premises; and that he didn't know that Respondent's paramour lived in the subject premises.

Respondent's first witness testified on redirect examination that he cuts Respondent's hair at home; that he cuts hair once a month; and that at one point or another he cut Respondent's hair in between 2013 and 2015, but doesn't remember when, because she was gone.

Another friend of Respondent's ("Respondent's second witness") testified that she lives in another apartment in the building in which the subject premises is located ("the Building"); that she has known Respondent since 1996; that she has had occasions to be in the subject premises over the years, including from 2013 through 2015; that she was in the subject premises in 2018 and observed the same furnishings she has always observed, albeit with more papers around; and that she did not see Respondent when Respondent told her that she was stuck in Puerto Rico having oral surgery.

Respondent testified (on Respondent's case) that she feels a lot of anxiety, which affects her ability to answer questions;¹ that her date of birth was September 28, 1944; that she has never lived anywhere but the subject premises; that she maintains renter's insurance for the subject premises; that she is currently married to Respondent's husband; that they married in 2001; that Respondent's husband lives in the subject premises; that Respondent's husband stayed in the subject premises four to five times per week; that Respondent's husband said in 2014 that he felt uncomfortable in the subject premises and only stayed in the subject premises from Thursdays

¹ Respondent had been appointed a guardian *ad litem* pursuant to CPLR §1201 in this matter.

through Sundays; and that her source of income is Social Security-Disability, which she receives because of a mental disability, to wit, a major depressive disorder, panic attacks, agoraphobia, and paranoia.

Records of Respondent's credit card and/or debit card purchases in evidence show purchases in Puerto Rico on April 10, 22, and 26 of 2013, May 3, 6, 13, and 14 of 2013, June 15, 17, 18, and 26 of 2013, July 3, 5, 23, 25, and 29 of 2013, August 2 and 14 of 2013, and September 4, 19, 20, and 23 of 2013; a purchase of tickets to New York on September 27, 2013, purchases in New York on October 2, 3, 5, 10, 15, 24, 25, and 28 of 2013, November 4, 6, 8, and 22 of 2013, December 12 and 16 of 2013, January 7, 16, 17, 21, and 31 of 2014, February 4, 5, 6, 10, 11, and 19 of 2014, purchases in Puerto Rico on February 27, 2014, March 5, 6, and 13 of 2014, a purchase in New York on March 20, 2014, purchases in Puerto Rico on March 28, 2014, April 9, 10, 16, 17, 23, 25, and 28 of 2014, May 5, 14, 15, 19, and 20 of 2014, June 10, 16, 23, and 26 of 2014, July 15, 30, and 31 of 2014, August 4, 6, 7, 8, 15, 18, 25, and 27 of 2014, September 12, 15, 19, and 30 of 2014, October 3, 6, 9, and 15 of 2014, purchases in New York on October 21 and 27 of 2014, November 2, 3, 4, 10, 22, 25, 26, and 28 of 2014, December 5, 8, 11, 12, 15, 19, 26, 29, 30, and 31 of 2014, January 5, 6, 7, 12, 20, 23, and 27 of 2015, and February 2, 3, 4, 5, 6, 9 of 2015; purchases in Puerto Rico on February 13, 17, and 25 of 2015, March 2, 10, and 11 of 2015, April 3, 24, and 30 of 2015, May 4 and 11 of 2015, purchases in New York on May 14, 18, and 20 of 2015, and a purchase in New York on June 10, 2015.

The bank statements and credit card statements were mailed to Respondent and the subject premises from September of 2013 through October of 2015. Respondent also introduced into evidence a 1099 form generated because of her Social Security income in 2014 sent to

Respondent at the subject premises; Respondent's driver's license, which issued in New York on September 20, 2011 with the subject premises as Respondent's address; Respondent's car insurance, which placed her at the subject premises in January of 2014; Respondent's voter registration, showing her as registered to vote at the subject premises; insurance bills from February through August of 2015 that were sent to Respondent at the subject premises; Respondent's federal and New York income taxes for 2013 and 2014, which Respondent filed in 2014 and 2015, respectively, in New York using the subject premises; documents from Medicare using the subject premises as her address on January 16, 2014, in October of 2015, and on December 11, 2014; hospital bills sent to Respondent at the subject premises from New York University-Langone and other medical providers dated January 16, 2014, February 17, 2014, February 20, 2014, March 12, 2014, December 11, 2014; other medical bills and insurance documents sent to Respondent at the subject premises on February 17, 2014, March 12, 2014, March 15, 2014, April 14, 2014, May 16, 2014, June 14, 2014, July 5, 2014, August 4, 2014, September 3, 2014, October 3, 2014, December 5, 2014, December 30, 2014, February 20, 2015, March 16, 2015, and April 15, 2015, an award letter from the Social Security Administration sent to Respondent at the subject premises for 2013 and 2014; documentation of renter's insurance for Respondent at the subject premises for December 2014 and December 2015; a bill from an endocrinologist sent to Respondent at the subject premises on February 20, 2014; an application for a senior-citizen metrocard for Respondent using the subject premises as her address on December 4, 2013; and a senior citizen metrocard identification for Respondent that expires on July 31, 2016.

Respondent's husband's name was on the Con Edison bills for the subject premises from

2013 through 2015. Respondent testified that she jointly owned a car with Respondent's husband.

Respondent testified that she receives medical care in New York City, including her primary care physician, a gynecologist, an asthma specialist, and an audiologist.

Respondent testified that she belongs to a Buddhist institution on 15th Street in Manhattan and that she attends the institution every day once or twice a week; that she did not remember if she went to meetings between 2013 and 2015; and that she went to a Buddhist institution in Puerto Rico for a short amount of time but she was not comfortable because she does not speak Spanish and the people there were not willing to speak English.

Respondent testified that she has arranged for space for herself at a cemetery in Queens because her mother is interred there.

Respondent testified that Respondent's husband suggested that she go to Puerto Rico when she experienced anxiety in 2014 concerning her relationship with Respondent's paramour. Respondent testified that when she was in Puerto Rico in 2014, she woke up one morning and found blood all over her pillow; that she sought medical attention; that a series of painful dental procedures ensued that took a protracted amount of time because of a temporomandibular joint (TMJ) disorder she suffers from; and that she did not return to New York during the time of the dental work because she was afraid of getting a blood clot or asthma attack on the plane. The bank statements in evidence show payments to a doctor in Puerto Rico on March 5, 2014, March 10, 2014, May 14, 2014, May 20, 2014, June 16, 2014, and June 23, 2014. Respondent testified that she eventually flew back to New York around October because her doctor and she felt it was a safe time to go; that she returned to Puerto Rico from February to April of 2015; and that she

never intended to move to Puerto Rico permanently.

Respondent testified that the Puerto Rico properties have mortgages and flood insurance, that the Puerto Rico properties are furnished with second-hand furniture left by the seller of the Puerto Rico properties; that she never opened bank accounts in Puerto Rico; and that she receives no mail in Puerto Rico. Respondent expressed some indignation that people in Puerto Rico would not speak English to her, even when she understood that they could speak English. Respondent testified that she called New Yorkers she knew who spoke Spanish to help her purchase items in Puerto Rico.

Respondent testified on cross-examination on her own case that she had no relationship of a physical nature with Respondent's paramour; that, even though Respondent's husband said that he was fixing the Puerto Rico properties up to sell, that they were not sold at the time of the trial; that Respondent's paramour stayed in the subject premises a few nights a week and had keys to the subject premises; and that Respondent's paramour would leave money on the table for Respondent to help Respondent out.

Respondent's testified on redirect testimony that she did not ask Respondent's paramour for money and that she did not remember how much money Respondent's paramour left for her.

Respondent's strongest argument that she maintained the subject premises as her primary residence is the use of the subject premises on his important documents, like tax returns, Glenbriar Co. v. Lipsman, 5 N.Y.3d 388, 392-393 (2005), her voter's registration, Id., W.S.L.D.J. & J. Weinreb. A. & M. Reiss v. Martin, N.Y.L.J. Nov, 20, 2002 at 21:1 (App. Term 1st Dept.), Lesser v. Park 65 Realty Corp., 140 A.D.2d 169, 174 (1st Dept. 1988), Brg 321 LLC v. Hirschorn, 52 Misc.3d 131(A)(App. Term 1st Dept. 2016), RSP 86 Prop. LLC v. Sylvester, 47

Misc.3d 137(A)(App. Term 1st Dept. 2015), her driver's license, Glenbriar Co., *supra*, 5 N.Y.3d at 392-393, 300 East 34th St. Co. v. Habeeb, 248 A.D.2d 50, 55 (1st Dept. 1997), W.S.L.D.J. & J. Weinreb, A. & M. Reiss, *supra*, N.Y.L.J. Nov, 20, 2002 at 21:1, her correspondence from the Social Security Administration, correspondence relating to Respondent's medical care, and bank statements. 300 East 34th St. Co., *supra*, 248 A.D.2d at 55, Lesser, *supra*, 140 A.D.2d at 174, Brg 321 LLC, *supra*, 52 Misc.3d at 131(A), RSP 86 Prop. LLC, *supra*, 47 Misc.3d at 137(A).

As important as those documents are, however, Respondent must maintain an ongoing, substantial, physical nexus with the subject premises for actual living purposes in order for the Court to find that she maintains the subject premises as her primary residence. Katz Park Ave. Corp. v. Jagger, 11 N.Y.3d 314, 317 (2008). A physical presence at an apartment is significant toward a determination of primary residence. *See, e.g., Vill. Dev. Assocs., LLC v. Walker*, 282 A.D.2d 369 (1st Dept. 2001), 370 Columbus Realty LLC v. Liew, 38 Misc.3d 135(A)(App. Term 1st Dept. 2013). Conversely, an absence from an apartment is probative that a tenant is not maintaining the apartment as a primary residence. Berwick Land Corp. v. Mucelli, 249 A.D.2d 18 (1st Dept. 1998), Sommer v. Ann Turkel, Inc., 137 Misc.2d 7, 9-10 (App. Term 1st Dept. 1987), *leave to appeal denied*, 1988 N.Y. App. Div. LEXIS 65 (1st Dept. 1988).

Records of credit card activity and bank activity (like, for example, withdrawals from ATMs) can provide persuasive evidence showing where someone actually physically spends their time for purposes of determining primary residence. *See, e.g., 409-411 Sixth St., LLC v. Mogi*, 100 A.D.3d 112, 118-119 (1st Dept. 2012)(the trial Court found that a tenant did not maintain

her apartment as her primary residence in large part on reliance on credit card and bank activity),² 155 West Assoc. v. Dapper, 2009 N.Y. Misc. LEXIS 5293 (Civ. Ct. N.Y. Co. 2009)(credit card activity probative to a tenant's primary residence).

Records of Respondent's transactions in Puerto Rico and New York make it clear that Respondent was in Puerto Rico for a solid block of time in between April 10, 2013 and September 27, 2013, five-and-a-half months, then another solid block from February 27, 2014 through October 15, 2014, seven-and-a-half months, and then one more block of time from February 13, 2015 through May 11, 2015, three months. The total amount of time Respondent was in Puerto Rico in the twenty-four months before Petitioner's purported termination of Respondent's tenancy was fifteen months. An absence from a rent-controlled apartment for more than 183 days, i.e., half of a year, per year tends to show nonprimary residence. 9 N.Y.C.R.R. §2200.3(j)(3).

Another factor showing nonprimary residence is a sublet of the rent-controlled premises. 9 N.Y.C.R.R. §2200.3(j)(4). Glenbriar Co., *supra*, 5 N.Y.3d at 392-393, Riverbay Corp. v. Houston, 23 Misc.3d 1104(A)(Civ. Ct. Bronx Co. 2009). A sublet is presumed when a tenant is absent and another person is in occupancy. 27 W. 84th St. Tenants Ass'n v. Knight, 11 Misc.3d 129A (App. Term 1st Dept. 2006), Kimmel v. Estate of Ling Kai K'Ung, 1993 N.Y. App. Div.

² In this decision, the Appellate Division reversed the findings of the Housing Court and determined that the tenant maintained her apartment as her primary residence. The Court of Appeals reversed this determination of the Appellate Division for employing the wrong standard of review and remanded the matter to the Appellate Division for review by the appropriate standard. 409-411 Sixth St. LLC v. Mogi, 22 N.Y.3d 875, 877 (2013). On this standard, the Appellate Division upheld the finding of the Housing Court that the tenant did not maintain her apartment as her primary residence. 409-411 Sixth St. LLC v. Mogi, 112 A.D.3d 558 (1st Dept. 2013).

LEXIS 12983, 2-3 (App. Term 1st Dept. 1993). The record shows that Respondent's paramour had possession of the subject premises when Respondent was in Puerto Rico. Although Respondent equivocated about Respondent's paramour's payment of money to Respondent, both while Respondent was and was not in occupancy, Respondent did testify at a deposition that Respondent's paramour gave Respondent periodic payments while Respondent was in Puerto Rico. Furthermore, the bank statements in evidence show deposits that were not made by direct deposit from the Social Security Administration in amounts that were redacted on April, 15, 2013, April 29, 2013, May 1, 2013, May 8, 2013, May 29, 2013, May 31, 2013, June 28, 2013, July 1, 2013, July 22, 2013, July 29, 2013, July 31, 2013, September 3, 2013, September 6, 2013, February 28, 2014, March 3, 2014, March 1, 2014, April 1, 2014, April 4, 2014, April 12, 2014, May 1, 2014, May 30, 2014, June 2, 2014, July 1, 2014, August 4, 2014, August 29, 2014, September 3, 2014, September 22, 2014, October 1, 2014, October 7, 2014, February 13, 2015, March 2, 2015, March 27, 2015, March 30, 2015, May 4, 2015, May 6, 2015, and May 7, 2015, all times when Respondent's transaction activity places her in Puerto Rico. While the bank statements do not indicate the source of these deposits, they bear at least some probative value that Respondent received payments for the use of the subject premises by Respondent's paramour, in connection with Respondent's deposition testimony. On this record, the preponderance of the evidence shows that Respondent sublet the subject premises to Respondent's paramour.

While a tenant's occupancy of regulated premises for an aggregate of less than 183 days in the most recent calendar year is not dispositive as a matter of law, Boulder Apartments, LLC v. Raymond, 59 Misc.3d 141(A) (App. Term 2nd Dept. 2018), Rego Estates v. Lillian, 1998 N.Y.

Misc. LEXIS 771, at *1-2 (App. Term 2nd Dept. 1998), Nicole Assets, Inc. v. Yeargin, 238 N.Y.L.J. 32 (Civ. Ct. N.Y. Co. 2007), such an absence certainly is probative, to say the least, and when Courts excuse it, they have done so specifically in part because the regulated tenants did not sublet the regulated premises. See, e.g., King Enters., Ltd. v. Glazer, 27 Misc.3d 127(A)(App. Term 1st Dept. 2010), Boulder Apartments, LLC, supra, 59 Misc.3d at 141(A), Rego Estates, supra, 1998 N.Y. Misc. LEXIS at 771.

While Respondent's use of the home mortgage tax deduction on her income taxes and the provision in the mortgage for the Puerto Rico properties requiring Respondent to reside there are not determinative of primary residence, Corona Apartments v. Benitez, 1 Misc.3d 79, 80 (App. Term 2nd Dept. 2003), these facts are probative of primary residence as well. E. Hattan Realty Corp. v. Antonio, 25 Misc.3d 135(A)(App. Term 1st Dept. 2009). Compare Four Winds Assocs. v. Rachlin, 248 A.D.2d 352, 353 (2nd Dept. 1998)(a tenant's withdrawal of an application for a homestead exemption for a Florida residence is probative that the tenant considered the rent-regulated apartment in New York her home). See Also BDS Assocs., LLC v. Qi Song Lin, 50 Misc.3d 1208(A) (Civ. Ct. N.Y. Co. 2016)(another residence owned by a rent-regulated tenant does not compel a finding of nonprimary residence when the tenant specifically states in a tax return that the other residence is not for the personal use of the tenant).

The Court finds that the objective evidence of Respondent's physical absence from the subject premises, i.e., the bank records showing transactions in Puerto Rico for the majority of the two years before Petitioner's purported termination of Respondent's testimony, outweighs the subjective evidence of Respondent's whereabouts at that time, i.e., Respondent's first witness and Respondent's second witness. Respondent's absence for more than 183 days a year,

Respondent's co-ownership of two properties in Puerto Rico, where she spent the majority of her time, Respondent's taking of a home mortgage tax deduction for those properties, the provision in Respondent's mortgage requiring her to live there, and Respondent's sublet of the subject premises outweigh the documentary evidence connecting Respondent to the subject premises. The preponderance of the evidence therefore shows that Respondent has not maintained the subject premises as her primary residence.

Respondent argued that she had a medical excuse for her absence, to wit, that her relationship with Respondent's paramour caused her to experience something like an anxiety attack such that she needed an escape to a getaway like the Puerto Rico properties, and that she experienced dental issues that grounded in Puerto Rico while she was there in 2014. See Katz v. Gelman, 177 Misc.2d 83, 84 (App. Term 1st Dept. 1998)(a rent-regulated tenant's involuntary absence from the regulated premises for medical reasons is excusable for purposes of determining the tenant's primary residence). Respondent did not plead these defenses and the Court denied Respondent's motion to amend her answer prior to trial. Notably, even Respondent's proposed amended answer in that motion did not allege defenses related to an excuse for her absence from the subject premises.

However, even assuming *arguendo* that Respondent pleaded these defenses, Respondent did not support them with any evidence from any medical professional showing a connection between Respondent's relocation to Puerto Rico and any psychiatric or medical need. Significantly, Respondent herself testified to the effect that even if she had gone to Puerto Rico when she experienced something like an anxiety attack, she would still take her problems with her, undermining her position that her medical and/or psychiatric needs occasioned her travel to

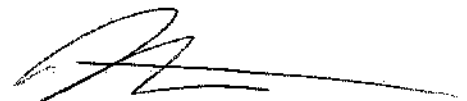
Puerto Rico. While the bank statements in evidence did show a number of payments made to a medical professional in Puerto Rico, showing of payments alone does not prove that a dental issue bound Respondent, by medical necessity, to remain in Puerto Rico. Nor do any of these medical issues explain why Respondent sublet the subject premises or availed herself of a home mortgage tax deduction.

For all of these reasons, the Court finds that Respondent did not maintain an ongoing, substantial, physical nexus with the subject premises for actual living purposes. Katz Park Ave. Corp., supra, 11 N.Y.3d at 317. The Court therefore awards Petitioner a final judgment of possession. Issuance of the warrant of eviction is permitted forthwith, execution thereof is stayed through November 16, 2018 for Respondent to vacate possession of the subject premises. On default, the warrant may execute. As Petitioner has discontinued this proceeding against the other parties, the judgment is only against Respondent.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York
October 16, 2018



HON. JACK STOLLER
J.H.C.