

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

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YNC REALTY CORP., :

Petitioner-Landlord, :

-against- :

WAH LIU TSANG, :

Respondent-Tenant. :

Index No. L & T 053137/2006

**DECISION and ORDER**

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**DAVID B. COHEN, J.:**

I. Question Presented

This is a non-primary residence summary holdover proceeding involving a rent controlled apartment under the New York City Rent Control Law. The sole issue to be determined by the court is whether the tenant of record is utilizing the apartment as his primary residence.

II. Introduction

A. Parties

Respondent-tenant Wah Liu Tsang ("respondent") is the tenant of record of apartment 7R (the "subject apartment" or "subject premises"), a rent controlled unit at 167 Hester Street, New York, New York (the "subject building"), as a statutory tenant pursuant to the New York City Rent Control Law. Petitioner-landlord, YNC Realty Corporation ("petitioner"), has been the owner-managing agent of the subject premises for the past 23 years.

B. Factual Background

The subject premises is a multiple dwelling, properly registered at the time of the commencement of this proceeding. On April 1, 1968, respondent entered into a two-year lease of the subject apartment, a rent controlled unit, with the previous owner, Yam K. Seid, who resided at 171 Hester Street. The subject apartment has been described as either a small one-bedroom or a studio apartment. Respondent claims that he has resided in the subject apartment, as his primary residence, with his mother, Oi Sau Lau ("Ms. Lau" or "respondent's mother"), who died on August 6, 2004 at the age of 93.

The evidence at trial established that respondent and his wife, Lai Ching Tsang, married in or around 1968, and that the couple had two sons. The eldest, Wilson, testified that he was born at the subject premises in 1968. At some point thereafter, the respondent's wife, and his two sons, moved to an apartment at 77 Madison Street, New York, New York. Respondent's mother, Oi Sau Lau, remained in the subject apartment and occupied it as her primary residence until her death on August 6, 2004.

It is undisputed that respondent is the co-owner, with his wife, of a two-family home at 1389 East 93rd Street, Brooklyn, New York (the "Brooklyn house" or "Brooklyn address"), in the Canarsie section of Brooklyn, which they purchased on November 2, 1990, and that respondent's wife currently resides at the Brooklyn address with the couple's son, Wilson, and Wilson's wife. The second floor of the Brooklyn house is rented to a tenant.

Respondent maintains that he and his wife are estranged and have been living separate lives for some time; that even though he moved his family to Madison Street and then to Brooklyn, he was still primarily residing with his mother at the subject premises in order to care for her and that even

when he purchased the home in Brooklyn, he would stay with his family in Brooklyn only one or two nights per week. Respondent claims that the subject apartment is *his* primary residence, and that the Brooklyn address is the primary residence of his wife, from whom he is separated, his adult son, Wilson, and his son's wife.

C. Procedural Background

Following the death of respondent's mother, petitioner-landlord, YNC Realty Corporation ("petitioner"), the current owner-managing agent of the subject premises, terminated respondent's statutory tenancy, on November 30, 2005, by a thirty-day notice served on October 26, 2005, alleging that respondent has failed to occupy the subject apartment as his primary residence. Petitioner claims that respondent's primary residence is not the subject apartment but is rather the Brooklyn house. Since the commencement of this proceeding, petitioner has not accepted rent from respondent, and respondent has not relinquished possession of the subject apartment.

III. Legal Analysis

In this proceeding, the landlord has the burden of proof to demonstrate initially "that the tenant[] did not use the apartment as a primary residence . . . [whereupon t]he tenant may rebut the landlord's evidence and demonstrate that there was a substantial physical nexus to the apartment" (*Glenbriar Co. v Lipsman*, 5 NY3d 388, 392-393 [2005]). As the party seeking possession of the subject premises, petitioner bears the burden of proof that the respondent did not utilize the apartment as his primary residence by a preponderance of the evidence (*id.* at 392; *see Chelsmore Apts., LLC v Garcia*, 189 Misc 2d 542, 543, 547 [Civ Ct, NY County 2001]; *see also* Scherer & Fisher, *Residential Landlord-Tenant Law in New York* § 8:200 [West 2003]). A court examining

primary residency should be able to "evaluate the entire history of the tenancy" (*see 615 Co. v Mikeska*, 75 NY2d 987, 988 [1990]).

Primary residence has been defined as "an ongoing, substantial, physical nexus with the controlled premises for actual living purposes -- which can be demonstrated by objective, empirical evidence" (*Emay Props. Corp. v Norton*, 136 Misc 2d 127, 129 [App Term, 1st Dept 1987]; *see East End Temple v Silverman*, 199 AD2d 94, 94 [1st Dept 1993]).

"Primary residence" is "a term in common use and the facts may be measured against its conventional meaning" (*224 East 18th Street Assoc. v Sijacki*, 138 Misc 2d 494, 497-498 [Civ Ct, NY County 1987], *affd* 143 Misc 2d 565 [App Term, 1st Dept 1989]). "Primary" is defined as "first or highest in rank or importance; chief; principal \* \* \* first in order in any series, sequence, etc." (*Sijacki*, 138 Misc 2d at 498, quoting Random House Dictionary of English Language [2d ed 1987].)

As further explained by the court in *Sijacki*:

"Whether an apartment is a primary residence depends in common understanding on the use a tenant makes of it and the extent of her reliance on it for residential purposes. The uses which respondent makes of [the subject apartment] are all of an ordinary residential nature. It is not maintained as a vacation residence, a weekend retreat, a pied-a-terre or a location exclusively or primarily dedicated to some specialized activity, e.g., a business or hobby. Neither is it kept in reserve for special purposes like the reception of overnight guests or as a play area for visiting children. Nor does it appear that respondent has ever sublet it." (138 Misc 2d at 498).

The New York City Rent Control Law excludes from housing accommodations subject to rent control, any housing accommodation not occupied by the tenant as his or her primary residence, as determined by a court of competent jurisdiction (NY City Administrative Code § 26-403 [e] [2] [i] [10]). This court has jurisdiction to determine primary residency in a holdover proceeding, and to issue judgment to the landlord-petitioner where the apartment is determined not to be the tenant's primary residence (*Madison Co. v Derderian*, 130 Misc 2d 200 [App Term, 1st Dept 1985]).

A tenant may only occupy a rent regulated apartment actually utilized by the tenant as a home, as opposed to a mere possessory interest, for example, as a pied a terre or as an apartment used for convenience (*Chelsmore Apts.*, 189 Misc 2d 542; *Park South Assocs. v Mason*, 123 Misc 2d 750 [Civ Ct, NY County 1984], *affid* 126 Misc 2d 945 [App Term, 1st Dept 1984]). Sporadic use and convenience is not the purpose or goal of rent regulation, and regulatory protection is inappropriate where the claim to the subject premises is based on less than a need for a place to call home (*85<sup>th</sup> Columbus Corp. v Furmansky*, 32 HCR 458A, NYLJ, July 21, 2004, at 18, col 1 [Civ Ct, NY County 2004]).

The Legislature has codified factors which may be considered as evidence of primary residence in NY City Rent and Eviction Regulations (9 NYCRR) § 2200.3 (j), governing rent controlled dwellings, and in Rent Stabilization Code (9 NYCRR) § 2520.6 (u), governing rent stabilized dwellings; both provisions are substantially the same.

Traditional indicia of "primary residence" which may be considered as evidence include, but are not limited to: (1) the address given on any tax return, motor vehicle registration, driver's license or other document filed with a public agency; (2) the address given on any voter registration; (3) whether the tenant occupied the apartment for an aggregate of less than 183 calendar days in a given year, except for temporary periods of relocation specified in the statutes<sup>1</sup>; and (4) whether the tenant sublet the apartment<sup>2</sup> (*see* Scherer & Fisher, *Residential Landlord-Tenant Law in New York*, § 4:45).

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<sup>1</sup> Allowable "temporary periods of relocation" are more specifically set forth in NY City Rent and Eviction Regulations (9 NYCRR) § 2204.6 (d) (1) and in Rent Stabilization Code (9 NYCRR) § 2523.5(b) (2), none are applicable at bar.

<sup>2</sup> These factors have been codified in NY City Rent and Eviction Regulations (9 NYCRR) § 2200.3 (j) (2007), which provides:

The statutes provide that "no single factor shall be solely determinative" (NY City Rent and Eviction Regulations [9 NYCRR] § 2200.3 [j]; see Rent Stabilization Code [9 NYCRR] § 2520.6 [u]).


In a non-primary residence holdover proceeding, primary residency is determined by "traditional indicia of primary residence" such as federal and State tax returns, driver's license and registration, voter registration and other documents belonging to the tenant, combined with evidence indicating actual presence or lack thereof in the apartment (*O'Quinn v. NY City Dept. of Hous. Preserv. and Dev.*, 284 AD2d 211 [1st Dept 2001]). Determining a tenant's physical nexus to a subject apartment is a fact-sensitive inquiry (*TOA Constr. Co. v Tsitsires*, 9 Misc 3d 469, 489 [Civ Ct, NY County 2005], *rev'd on other grounds* 14 Misc 3d 65 [App Term, 1st Dept 2006]), and the factors must be viewed in their totality; no single factor is determinative (*Tsitsires*, 9 Misc 3d at 489; *Chelsmore Apts.*, 189 Misc 2d at 544). Courts have also considered other factors, not specifically enumerated in the statutes, in deciding whether a tenant has had the requisite physical nexus with the dwelling unit such as a tenant's relevant window-period telephone bills, showing how frequently

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(j) Primary residence. Although no single factor shall be solely determinative, evidence which may be considered in determining whether a housing accommodation subject to this Subchapter is occupied as a primary residence shall include, without limitation, such factors as listed below:

- (1) Specification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;
- (2) Use by an occupant of an address other than such housing accommodation as a voting address;
- (3) Occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation pursuant to section 2204.6 (d) (1) of this Title;
- (4) Subletting of the housing accommodation.

The Rent Stabilization Code (9 NYCRR) § 2520.6 (u) (2007) defines "primary residence" in virtually identical language.



a tenant used the telephone in a rent-regulated unit (*Janco Realty Co. v Lee*, 15 HCR 222C, NYLJ, July 16, 1987, at 11, col 1 [App Term, 1st Dept], *affil* 141 AD2d 1011 [1st Dept 1988]), a landlord's employee's testimony about a tenant's absence from a rent-regulated unit (*Harran Holding Corp. v Fowler*, 15 HCR 131C, NYLJ, Apr. 28, 1987, at 5, col 4 [App Term, 1st Dept]), and evidence of utility usage in a rent-regulated unit during the relevant period of time (*Mandel v Steinman*, 13 HCR 335D, NYLJ, Oct. 10, 1985, at 11, col 3 [App Term, 1st Dept]). Other 'customary indicia of continuous residence' include telephone records, utility bills, bank records, and credit card records (*Furmansky*, 32 HCR 458A, NYLJ, July 21, 2004). The presence of the tenant's clothing and personal belongings is also a factor to be considered as to whether a residence is a primary residence (*see Chelsmore Apts.*, 189 Misc 2d at 544).

Documentary evidence of a change of address is not necessary to prove one's primary residence (*300 East 34th Street Co. v Habeeb*, 248 AD2d 50, 55 [1st Dept 1997], *lv denied* 1998 NY App Div LEXIS 3545 [1st Dept 1998]). Although "the traditional indicia of primary residence" including driver's license, voter's registration, tax returns, telephone and bank records, has been found to be competent evidence establishing a period of residency (*Lesser v Park 65 Realty Corp.*, 140 AD2d 169, 174 [1st Dept 1988], *lv dismissed* 72 NY2d 1042 [1988]), they are not required evidence (*Habeeb*, 248 AD2d at 55). While documentation, or the absence thereof, might be a significant factor in evaluating primary residency (*Rose Assocs. v State Div. of Hous. & Community Renewal*, 121 AD2d 185 [1st Dept 1986]; *Cox v J.D. Realty Assocs.*, 217 AD2d 179 [1st Dept 1995]), especially in the case of the dubious credibility of witnesses, it is not a dispositive factor (*West 15th St. Assocs. v Sassoonian*, 156 AD2d 137 [1st Dept 1989]), especially when there is a preponderance of credible personal testimony (*Rose Assocs.*, 121 AD2d at 186 [where tenant

submitted competent documentary evidence of her residence at subject premises and testified credibly that she used apartment as her primary residence, testimony of managing agent and superintendent that they had not seen tenant in three years was "hardly dispositive on the issue of whether the tenant did in fact live there"]; *see also Village Dev. Assocs., LLC v Walker*, 282 AD2d 369 [1st Dept 2001] [tenant's address on her tax return is merely one of many factors to be considered in determining primary residence; it is not a controlling factor]).

The ultimate issue to be resolved is whether the respondent has maintained "an ongoing, substantial, physical nexus with the controlled premises for actual living purposes" (*see Emay Props.*, 136 Misc 2d at 129).

#### IV. Trial Testimony and Evidence

Both parties produced a number of witnesses and extensive documentary evidence in connection with the non-primary residence claim.

##### A. Petitioner's Claims

The petitioner corporation produced its two principals, brother and sister, Hon Keung Choy, president, and Shuk Mei Choi, secretary of the corporation. Both testified that petitioner has owned the subject building for 23 years, with their main office located at 8 Chatham Square, New York, New York. The witnesses testified that they were familiar with the respondent's mother, although they did not know her name, and were aware that she was living in the subject apartment; they were present "many times" at the subject premises and saw respondent's mother either sitting outside the building, or inside the subject apartment. Additionally, Ms. Choi testified that she utilizes two apartments as an office/residence on the second floor of the subject building, where she performs work related to the management of the building and the collection of rents, and stores leases and



other documents pertaining to the building. Consequently she was often on site, and often saw and exchanged greetings with respondent's mother.

Both petitioner's witnesses testified that respondent's mother's rent would be paid in cash which was delivered to them each month by Ms. Wong, the neighbor in apartment 8R. They testified that to their knowledge, respondent's mother was living alone in apartment 7R. During this entire 23 year period, neither of them had ever met, seen or spoken with respondent until after his mother's death, despite their testimony that they were present at the subject premises at various times during the week, and, at times, on weekends.

They testified that after the death of respondent's mother, they were informed by the neighbor, Ms. Wong, that the tenant in apartment 7R had passed away. Since 2004, they have attempted to gain access to the subject apartment, but no one was ever home when they knocked on the door.

Ms. Choi further testified to a conversation with respondent's mother in which Ms. Lau allegedly stated that she "lived alone" and that, upon her death, she wanted to return the subject apartment to petitioner.<sup>3</sup> Ms. Choi testified that after respondent's mother's death, respondent appeared at petitioner's office at 8 Chatham Square, stating that he was the tenant in apartment 7R, and attempted to pay rent on the subject apartment by check. Ms. Choi refused to accept the rent because she did not know who he was.

Two Con Edison representatives testified and produced documentary evidence concerning the utility usage at the subject apartment. Kathleen Connolly and Suzanne Briggs of Con Edison

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<sup>3</sup> The court cannot credit this self-serving, hearsay statement.

collectively testified that the electricity usage in the subject apartment was relatively constant in early 2004, but dropped significantly after August 2004.<sup>4</sup> For a number of months after respondent's mother's death, from October 2004 to January 2005, the gas usage was zero.<sup>5</sup>

B. Respondent's Claims

Respondent and three other witnesses testified on his behalf: Wilson Tsang, his son; Alice Tse, a former co-worker at the senior center in Chinatown where respondent works; and May Hor Wong, the neighbor who resides in apartment 8R at the subject building.

Respondent who is 69 years old testified that he has physically occupied the subject apartment as his primary residence during the years his mother was alive up through the present. Respondent testified that he and his wife are separated and have been living apart for some time. For this reason, and also because he needed to care for his elderly mother, respondent testified that he resided in the apartment as his primary residence with his mother, while she was alive, and now, continues to live there by himself. Even though he moved his family to Madison Street when the children were young and the subject apartment became too small for them, and then to Brooklyn, he was still primarily residing with his mother at the subject premises in order to care for her; and even

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<sup>4</sup> The subject apartment utilized 611 kilowatts of electricity in July 2004 and 472 kilowatts in August 2004, whereas in September 2004 only 105 kilowatts of electricity were used. During the comparable period of time in the summer of 2006, the subject apartment utilized 69 kilowatts in July, 94 kilowatts in August, and 66 kilowatts in September. This decrease in kilowattage after respondent's mother's death was characterized by the witnesses as "substantial." From October 2006 to January 2007, less than 40 kilowatts per month were utilized.

<sup>5</sup> Respondent claims that the sparse use of natural gas is due to his preference not to cook at home after spending all day at work as a cook, and dining every evening with his wife, son and his family at his son's Brooklyn residence (*see infra*). Respondent testified that he "rarely" cooks at the subject apartment.


when he purchased the home in Brooklyn, he would stay with his family only one or two nights per week. Respondent asserts that the Brooklyn address is his wife's primary residence.

Respondent testified that since 2000, he has been employed as chief cook at the Mott Street Senior Citizen's Center (the "senior center") in Chinatown. Prior thereto, he had been unemployed for approximately two years, and before that he had worked as a cook in New Jersey. Respondent testified that his daily routine since about January 2003 is to rise at 5:00 a.m. and go to work at the senior center, where his work hours are from 6:00 a.m. to 3:00 p.m.<sup>6</sup> After work he may have coffee with a friend in Chinatown, and then at about 4:45 p.m., he travels from Chinatown to the Brooklyn address each weekday after work to eat a dinner prepared for him by his wife, and to see his son, Wilson. He arrives in Brooklyn at about 6:00 p.m. His estranged wife prepares dinner for him but does not eat with him. At about 7:30 p.m., he returns to the apartment on Hester Street on Monday through Thursday evenings to sleep and he may go to OTB if he is home early enough. Although he rarely cooks at the subject apartment, he may prepare himself noodles for dinner if he did not like his wife's cooking that evening. Respondent makes his trip to Brooklyn each Monday to Thursday by taking two subways trains and a bus, approximately one and one-half hours each way, for a round trip totaling approximately three hours, and remains at the Brooklyn home only long enough to eat dinner. He will call his son upon his return, either from the subject apartment or from his cellular phone, to let him know that he has arrived safely back in Chinatown.

Respondent testified that he sleeps in the Brooklyn home on Friday and Saturday nights with his family, but separately from his wife, primarily to spend some time with his son, Wilson, and then

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<sup>6</sup> According to testimony of Ms. Wong, it is a five-minute walk from the subject apartment to the senior center.



returns to Hester Street on Sunday. Respondent acknowledged keeping a few items of his clothing at the Brooklyn address, although most of his clothing and all his possessions are kept at the subject premises. Respondent's testimony is corroborated by photographic evidence of the subject apartment, which appears to depict that respondent is actually living there. Respondent testified that he was never too tired to return to Hester Street since he was "very interested" in the work of the senior center.

The testimony of respondent's elder son, Wilson Tsang, corroborated that of respondent in pertinent aspects. Wilson testified that respondent visits the Brooklyn address every weekday night for dinner, where he remains for only about one-half hour, and then returns to the subject premises in the evening. Respondent sleeps over in Brooklyn on Friday and Saturday on a couch and returns to the subject apartment on Sunday. His father calls him from the subject apartment or from his cellular phone to let him know that he has arrived safely back in Chinatown. Respondent's son testified that his father keeps a few items of clothing but no toiletries or other possessions at the Brooklyn address.

Wilson testified that he, his wife and his mother reside on the first floor of the Brooklyn home, and that he pays rent to his father, that a tenant currently resides in the second floor of the home and that they "always" rented the second floor to various tenants. Wilson also confirmed that his parents have been living separate lives for years, and that respondent did not regularly reside with the family but stayed with respondent's mother at the subject apartment.

Ms. Tse, respondent's former co-worker, and a friend of both respondent and his mother, testified to having seen respondent at various times at the subject premises. She often telephoned respondent at the subject premises at night and either respondent or his mother would answer the

phone. Ms. Tse also testified to seeing respondent and his wife together on social occasions. Petitioner argues that this casts doubt on respondent's testimony that he was estranged from his wife. Respondent, however, explained that Chinese culture does not approve of divorce as it is not good for the children, therefore, he and his estranged wife would socialize together if they had no choice, such as at family gatherings and work related events.

Finally, Ms. Wong, the neighbor in apartment 8R, who has resided there since 1979, testified to have seen respondent living with his mother in the subject apartment for years, coming and going during the week, purchasing groceries for his mother. Ms. Wong testified that respondent left the subject premises each morning at about 5:00 or 6:00 a.m. and came home to Hester Street between 6:00 p.m. and 8:00 p.m. every night during the week. She testified to a close friendship with respondent's late mother, often visiting with her in the subject apartment, and testified to having been told by respondent's mother that respondent lived with her and slept in a pull out sofa bed in the living room of the subject apartment. Ms. Wong stated that respondent has lived in the subject apartment "the entire time." The court finds Ms. Wong's testimony to be very credible in all respects. She is the most disinterested witness who testified in these proceedings and was in the best position to have firsthand knowledge of the respondent's presence in the subject apartment on a daily basis.

C. Documentary Evidence

In evidence before the court is the deed to the Brooklyn house which respondent and his wife purchased in November 1990.<sup>7</sup> Also in evidence is a STAR exemption printout of a computer screen from the records of the New York City Department of Finance, indicating that in 1999,

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<sup>7</sup> The deed to this property listed the respondent's and his wife's residence at the time as 77 Madison Street, New York, New York, and not the subject premises.

respondent received a STAR tax exemption for the Brooklyn house based upon the property being the owner's "primary residence." The testimony from John Hagen of the NYC Department of Finance was that respondent continues to receive the STAR tax exemption on the Brooklyn property to the present on the basis of the representation that the Brooklyn property is owner occupied as a "primary residence." Testimony at trial suggested, however, that only one applicant need occupy the premises as a primary address to qualify for the STAR exemption.<sup>3</sup> Respondent's wife, a co-owner of the property, would have been entitled to qualify for the STAR exemption.

In June 2000, respondent and his wife took a second mortgage (also described as a home equity line of credit) on the Brooklyn house and listed the Brooklyn address on all the mortgage documents with Chase Manhattan Bank. As part of the mortgage documents, respondent swore in an affidavit that he resided at the Brooklyn address. Respondent testified that this was done on the advice of the bank official who was fluent in Chinese and who assisted him in completing the application materials, which were in English.

Testimony of respondent and his son indicated that the second floor of the Brooklyn address has been utilized to produce rental income for a considerable period of time since the purchase of the premises. Most recently, in August 2004, respondent entered into a two-year lease of the second floor for a monthly rent of \$700. The lease lists respondent as the landlord and indicates his residence as the Brooklyn address. Testimony at trial was that the tenant continues to live on the second floor and pay rent although the lease has not been formally renewed.

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<sup>3</sup> Respondent testified that he did not apply for the STAR exemption but rather it was sent to him. Testimony indicated that the STAR application form may have only been in English at the time.

In addition, respondent's 2003, 2004 and 2005 tax returns all list the Brooklyn house as his address, however, respondent elected to file *joint* tax returns for those years with his wife, who resides at the Brooklyn address.

Other documents listing respondent's address as the Brooklyn house include W-2 forms from his current employer; two credit card accounts; a checking account at HSBC Bank; and his mother's death certificate.

Respondent explained the documentary evidence showing his residence at the Brooklyn address by asserting that due to his limited fluency in English, he routed important documents to Brooklyn so that his son, who is fluent in English, could assist him in handling these matters. Respondent also testified that he has had difficulty receiving mail at the Hester Street address and his mail was often misdirected by the U.S. Post Office.<sup>9</sup> Therefore, he preferred to send important documents to Brooklyn.

The Con Edison utility records for the subject premises and the Brooklyn address from 2003 to present are in evidence. Con Edison witnesses testified that since December 1994, the utility account at the subject premises had been in the name of Oi Sau Lau (respondent's mother), until February 2006, at which time the account was changed to respondent's name; the utility account for the Brooklyn address had been in respondent's name since it was first opened on November 2, 1990, and in January 2006, the name on the account changed to Wilson Tsang.

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<sup>9</sup> Respondent has produced documentary evidence of his complaint, dated December 8, 2004, to the U S Postal Service (USPS) concerning lost mail on USPS form 1510 "Mail Loss/Rifling Report". Respondent indicates in this form that he sent mail to petitioner-landlord, using his Hester Street return address, containing a rent check, by certified mail on October 29, 2004. The letter was mailed to the landlord from the Chinatown Post Office.

In addition, Verizon records with reference to the telephone usage from the phone line inside the subject apartment during the period from 1990 to present are in evidence. Petitioner argues that these records indicate the telephone usage during the period after respondent's mother's death was "minimal" and reflected telephone calls made from the subject apartment considerably less than 183 days per year.<sup>10</sup> Respondent argues that these telephone records corroborate his presence in the apartment, and points out that the volume of calls placed from the apartment is due to his routine and work schedule, and also due to the fact that he also uses a cellular phone.

The Verizon telephone records show a large volume of telephone calls placed from the apartment prior to respondent's mother's death, but considerably fewer telephone calls placed from the apartment after her death. This result is not unexpected given the fact that Ms. Lau was essentially homebound before her death and apparently used the phone prolifically. The court observes that the timing and sequence of the telephone calls placed from the apartment after her death, mostly in the early morning and late evening, corroborate respondent's testimony regarding his schedule and habits and support his testimony that he regularly sleeps in the apartment weekdays.

Until 2001, the telephone account at 167 Hester Street was in the name of a "T.W. Chu", whom respondent testified was a friend and former tenant of the subject apartment. Respondent allowed the phone to remain in the name of the former tenant so that he could avoid having to pay a new connection fee. In 2001, respondent changed the phone listing at the Hester Street apartment to his name, according to his testimony, in order to establish his claim for 9-11 benefits.

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<sup>10</sup> According to the Verizon records, phone calls from the apartment during the calendar year 2005 were made on 129 of 365 days. In the month of December 2004, only 2 phone calls were made from the apartment the entire month. During the twelve months prior to petitioner's November 30, 2005 termination of the rent-controlled tenancy, calls were made on 117 of 365 days in the year.



The documents in evidence showing respondent's address as 167 Hester Street are his New York State driver's license, issued in June 2001; respondent's juror qualification questionnaire; correspondence to respondent from the Federal Emergency Management Agency ("FEMA"), dated March 3, 2003, and a letter from the Lower Manhattan Development Corp ("LMDC"), Residential Grant Program, regarding a grant to respondent for \$1,000, written in Chinese, dated December 4, 2002. Respondent has his T-Mobile cell phone account and bank accounts at GreenPoint and North Fork Bank listing the Hester Street address, admittedly opened after respondent's mother's death in 2004. A certificate filed with the NYS Division of Housing & Community Renewal, Office of Rent Administration by petitioner in 1989 lists respondent as a rent controlled tenant of the subject apartment. As previously noted, respondent's complaint on USPS form 1510, "Mail Loss/Rifling Report," indicates that on October 29, 2004, respondent sent a letter and rent check via certified mail to the petitioner-landlord, using his Hester Street return address, which letter had been mailed at the Chinatown Post Office.

Respondent's "Juror's Proof of Service Certificate" from the County Clerk and Clerk of the Supreme Court, dated August 8, 2005, and addressed to respondent at the subject premises, shows that respondent served two days of jury duty in New York County in August 2005. In a "Juror Qualification Questionnaire" addressed to respondent at the subject premises, and filled out and returned to the Clerk's office by respondent, dated January 12, 2005, respondent answered "yes" to the question whether he was a resident of New York County and requested exemption from jury duty based on his age and limited knowledge of English. Significantly, respondent did not seek an exemption claiming to be a resident of Brooklyn (Kings County).

## V. Findings of Fact and Conclusions of Law

After hearing and evaluating the testimony, evidence, and the credibility of all witnesses, the court makes the following findings of fact and conclusions of law:

Respondent rented the subject rent controlled apartment 7R beginning in 1968. There is no evidence that respondent ever sublet the apartment.

The court accepts as true respondent's testimony that he and his wife have separate lives and have established separate residences, and that he has as primarily resided with his mother at the subject premises prior to her death. Respondent's testimony is credible and is supported by the testimony of respondent's other witnesses, for example, his son, Wilson, and his neighbor, Ms. Wong, in particular, who places respondent in the subject apartment consistently during the week during the entire course of the tenancy. Ms. Wong does not appear to have any particular interest in the outcome of the litigation. Ms. Tse also places respondent in the subject apartment on a routine basis.

There is insufficient evidence on this record to conclude that respondent has ever abandoned the subject apartment as his primary residence, therefore, the court concludes that he has not. Although testimony indicates that respondent's wife and family moved to 77 Madison Street and then to Brooklyn during the course of the leasehold, respondent testified that even then he maintained his primary residence with his mother at the subject apartment, that he and his wife had been living separately and that he was only spending one or two nights per week with his family because he had to care for his elderly mother.

The court accepts respondent's explanation for listing the Brooklyn address on many of the documents in evidence so as to route important documents to his son who, unlike respondent, is fluent in English. Consequently, the court concludes that fact that respondent lists the Brooklyn address on

various documents is not particularly probative of respondent's primary residence. Further, the use of an alternative address on joint tax returns filed with respondent's wife is insufficient to defeat his primary residence claim (*see Village Dev. Assocs., LLC v Walker*, 282 AD2d 369 [1st Dept 2001] [tenant's address on her tax return is merely one of many factors to be considered in determining primary residence; it is not a controlling factor]).

Although respondent is co-owner of the Brooklyn premises, where his estranged wife, son and daughter-in-law reside, respondent does not utilize this dwelling as his primary residence. Rather, it appears to be utilized as a means to provide a comfortable home for his family and also for investment purposes to generate rental income. One can own a dwelling, for investment purposes or otherwise, which is not one's primary residence (*Hudson St. Equities Group v Escoffier*, 11 Misc 3d 63 [App Term 1st Dept 2006] [tenant who owned home in Alabama, which he and his family used sporadically and which contained few of his personal possessions, did not abandon Manhattan apartment as his primary residence]; *Chelsmore Apts.*, 189 Misc 2d at 546-548 [wife, who jointly purchased two adjoining homes in Florida with estranged husband primarily for investment purposes, which were rented to various tenants and where she occasionally stayed in one bedroom reserved for her, did not abandon her rent controlled apartment in NYC as her primary residence]), unless other factors establish that the tenant has a substantial physical nexus elsewhere (*cf. Studley v NY City Dept. of Hous. Preserv. and Dev.*, 277 AD2d 101 [1st Dept 2000] [tenant, who owned a home in Maryland, had Maryland driver's license and car registration, paid taxes and voted in Maryland, and whose children attended Maryland public schools, was not occupying his Mitchell-Lama apartment in NYC as his primary residence]).

Respondent's daily visits to the Brooklyn home is indicative of his desire to maintain contact with his son and visit with his family. Although separated, respondent acknowledges that he and his wife have feelings for each other. One can visit a family member or even a spouse and not forfeit a primary residence elsewhere (*Glenbriar Co.*, 5 NY3d at 392-393 [the decision of wife to spend winters with her husband at his residence in Florida should not cause wife to forfeit her principal residence in New York]; *Weinreb v Martin*, 2002 NY Slip Op 50452U [App Term, 1st Dept 2002] [wife who visited her husband's residence in Bristol, England for considerable time, but with a single suitcase, and kept all her furniture and personal belongings in and regularly returned to subject apartment, did not abandon it as her primary residence]).

The Verizon telephone records generally establish respondent's presence in the subject apartment on a fairly consistent basis, and on the days and times which are consistent with his testimony as to his routine and schedule. Admittedly, minimal telephone calls were made from the apartment during the months of December 2004 and February and May, 2005. Nevertheless, while the presence of telephone calls establish respondent's physical presence in the subject apartment, the sporadic absence of telephone calls alone is not conclusive proof that he was not there.

Moreover, because the telephone records establish that respondent had a substantial presence in the subject apartment, petitioner's testimony that they were "always" at the apartment but never saw respondent is not reliable. The fact that petitioners never saw respondent may be attributable, in part, to respondent's unusual work schedule and routine but the more likely inference is that Ms. Choi was not in the building as often as she claimed. In any event, the court finds Ms. Choi's testimony that respondent was never at the subject premises was directly contradicted by Ms. Wong, who lived in the building for nearly 27 years.

Respondent testified that he rarely uses gas to cook, therefore, gas usage is not a reliable indicator of respondent's presence in the subject apartment. Although electrical usage (as well as telephone usage) decreased after Ms. Lau's death, this decrease is to be expected since Ms. Lau was at home all day whereas respondent is generally out of the apartment from early morning until late at night.

A husband and wife may establish separate residences during the marriage, even while they maintain a "conventional" marriage (*see Glenbriar Co.*, 5 NY3d at 393). Therefore, clearly respondent and his wife, who live separate lives, may and do lawfully maintain separate residences (*id.*).

The court finds that the testimony of the respondent and his witnesses that respondent has occupied the premises as his primary residence, is the more credible and persuasive, and is supported and corroborated by the other evidence at trial. The weight of evidence supports the conclusion that respondent maintains an "ongoing, substantial physical nexus" to the subject apartment and has used the subject apartment as his primary residence for his own "actual living purposes" during the relevant period. The subject apartment is near where he works, where he makes telephone calls early in the morning and late in the evening, where his clothing and possessions are located, and the address reflected on many of the documents in evidence.


VI. Conclusion

Based on all of these factors, the court finds that petitioner has not established by a preponderance of the evidence that the subject premises is not the respondent's primary residence; and that respondent has established by a preponderance of the evidence that the subject apartment is his primary residence. Accordingly, the petition is dismissed.

The clerk is directed to mail a copy of this decision to all parties.

This constitutes the decision and order of this court.

Dated: May 18, 2007  
New York, NY



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DAVID B. COHEN, J.H.C.



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