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

155 WEST ASSOCIATES ,

Petitioner-Landlord

-against-

KENNETH DAPPER
155 WEST 81ST STREET
APT 1B
New York, New York 10024

Respondent-Tenant

"JOHN DOE" AND/OR "JANE DOE"

Respondents- Undertenants

HON. SABRINA B. KRAUS

DECISION & ORDER
Index No.: L&T 56608/07

BACKGROUND

This summary holdover proceeding was commenced by **155 WEST ASSOCIATES** (Petitioner), and seeks to recover possession of **Apartment 1B** at **155 West 81ST STREET** (Subject Premises), based on the allegation that **KENNETH DAPPER** (Respondent)**,** the rent-stabilized tenant of record, does not live in the Subject Premises as his primary residence. Respondent appears by counsel, denies the allegations of the petition, and asserts that the petition should be dismissed based on the acceptance of rent after the expiration of the last executed lease agreement between the parties.

PROCEDURAL HISTORY

Petitioner served a Golub Notice, on or about October 4, 2006, advising Respondent that his tenancy was terminated effective January 31, 2007, and would not thereafter be renewed.

The Notice of Petition and Petition issued on or about February 5, 2007. The parties appeared, by counsel, and on March 5, 2007, Respondent moved to dismiss the proceeding for failure to state a cause of action. Petitioner cross moved on March 20, 2007, to amend the petition. Per decision and order dated May 7, 2007, Respondent's motion was denied and Petitioner's cross motion granted. Respondent's counsel filed a notice of appearance and an answer on June 4, 2007, and a corrected notice of appearance and answer on June 6, 2007.

In June 2007, Petitioner moved for an order striking Respondent's defenses and allowing discovery, and Respondent cross-moved for an order deeming Respondent's answer timely served *nun pro tunc*. On June 29, 2007,the parties stipulated to resolve the motions, Respondent withdrew his first jurisdictional defense and first affirmative defense, and consented to Petitioner's discovery requests. The proceeding was marked off the court's calendar.

On February 27, 2008, Petitioner moved for relief based on alleged defaults by respondent in complying with discovery. Per decision and order dated April 24, 2008, Petitioner's request for production of documents was granted, but the balance of Petitioner's motion denied, and the proceeding remained off calendar.

On December 15, 2008, Petitioner for permission to seek additional discovery. On January 20, 2009, the motion was granted by stipulation. The proceeding was initially set for trial on March 26, 2009, and on June 9, 2009, the proceeding was assigned to Part S for trial.

The trial took place on June 9, June 23, June 25, and July 22, 2009. On August 11, 2009, the parties presented closing arguments, and the Court reserved decision.

FINDINGS OF FACT

Documentary Evidence

Petitioner is the owner of the premises known as 155 West 81st Street, New York, New York , 10024 pursuant to a deed dated August 1973 (Exhibit 1). The premises is a multiple dwelling, and HPD has on file a MDR for the period commencing March 31, 2009 (Exhibit 5). Respondent took possession of the Subject Premises, pursuant to a written lease agreement dated March 22, 1999, for a term from February 1, 1999 through January 31, 2001 (Exhibit 2). The most recent renewal lease is dated October 18, 2004, for a term from February 1, 2005 through January 31, 2007 (Exhibit 3). The Subject Premises are subject to Rent Stabilization, and have been registered with DHCR. The registration for the Subject Premises as of July 30, 2008, lists the tenant of record as Respondent at a legal rent of $748.36 per month (Exhibit 4).

It is undisputed that for the majority of the two year period that preceded the service of the Golub Notice herein, Respondent was in the State of California. Respondent has a California Driver's license listing his address as 1024 Ocean Park Boulevard, Santa Monica, California 90404 (Ocean Park Residence) (Exhibit 6HI). The California license was valid through July 31, 2008. Respondent acknowledges spending time at the Ocean Park Residence, during the relevant period, and states it is a home owned by Tanya Elliott, a woman he described as a friend since 2002, a significant other and a girlfriend.

Respondent also submitted into evidence a New York State Drivers License (Exhibit II) which was issued October 11, 2006, just shortly after Respondent would have received the Golub Notice mailed on October 4, 2006. Respondent testified that he received a renewal notice for his New York license from DMV in October 2006.

Petitioner had requested in discovery any driver's license from 2004 forward. At the deposition, Respondent only produced the license issued on October 11, 2006. Respondent testified that he did not have the license that preceded the October 11, 2006 license, because it had been stolen, but the license in effect prior to the October 11, 2006 was also from New York. Respondent did not disclose his California Drivers License to Petitioner, but it was revealed in employment records produced by Respondent's Employers in California.

Respondent testified that he had a California Driver's license since 1989. Respondent stated he always maintained a California driver's license, even after getting a New York State driver's license in 1997. Respondent testified that he was advised his California license always remained valid. Respondent acknowledged that he had a valid California driver's license in 2004 , 2005 and 2006.

Respondent testified that at the time of the deposition, he was not in possession of his California driver's License, and that he didn't have it at the time of the trial either. Respondent testified that his California driver's license had been stolen prior to the deposition. Respondent testified that both his New York driver's license and his California driver's license had been stolen on a couple of different occasions. Respondent's testimony in this regard, and his explanation for failing to disclose the California license in discovery were not credible.

On or about November 29, 2004, Respondent applied for employment with Equinox Fitness Club as a Personal Trainer, at their location in Santa Monica, California. Respondent was hired by Equinox, and was employed there through April 4, 2005, the date of his resignation (Exhibit 10). Respondent applied for the position at Equinox, by walking into the location and filling out paperwork. He provided in connection with his application, a California Driver's

license and listed his address as the Ocean Park Residence. Respondent also submitted a W4 form to his employer that listed the Subject Premises as his home address.

Exhibit 13 contains documents related to Respondent's employment with Windsor Capital Mortgage Corp.. On or about February 2006, Respondent applied for a position with Windsor Capital Mortgage Corp. in San Diego, California. Respondent made such application immediately after being issued a Real Estate Salesperson Conditional License from the California Department of Real Estate. In his application, Respondent asserted that he resided in California. On the W-9 form submitted with said application he listed his address as PO Box 462, Santa Monica, California, 90405. He also listed his contact information and home address as the Ocean Park Residence.

Respondent had an active Salesperson's License in California during the period of 1990 through 1994, and sat again for the exam and applied for a renewed license in California in the beginning of 2006. Respondent also submitted a resume in support of said application, listing his address as the Ocean Park Residence. The information listed by Respondent on his loan officer/broker application to Windsor was certified as true by Respondent on January 13, 2006, including that his home address was the Ocean Park Residence. Respondent's relationship with Windsor Capital terminated as of April 2006. It is undisputed that Respondent never received any compensation from his association with Windsor Capital.

Respondent's California Real Estate License indicates several changes of mailing address. From 1990 through 1994, Respondent listed a PO Box in San Diego as his mailing address. From January 2006 through November 2006, his address was listed in California, at a PO Box he kept in Santa Monica from January to March 2006, and then at an address associated

with Windsor Capital from March to November 2006. On November 2, 2006, Respondent changed his mailing address to the Subject Premises. His conditional salesperson license expired July 30, 2007, and his Salesperson license was suspended indefinitely as of the same date (Exhibit 8).

Respondent is registered to vote in California. Respondent registered to vote on June 25, 1996. As of June 19, 2006, his registration status was listed as active, and showed that he voted in California on November 2, 2004 in the General Election (Exhibit 7).

Respondent owns a car. As of October 2, 2006, the car is registered to him at the Ocean Park Residence and is kept in California (Exhibit 11).

On or about March 31, 2005, Respondent became a member of Gold's Gym in Venice California. Respondent entered a contract for a one year membership for an initial term from March 31, 2005 through February 24, 2006 . The cost was $307.98 which included first and last month dues of $24.99 (Exhibit T).

On or about December 2005, Respondent commenced a law suit in Los Angeles, California regarding an accident he had, while driving in Santa Monica in October 2004. In the complaint Respondent stated under oath that he was a resident of California, and had been since at least October 2004 (Exhibit 9). Respondent testified at the trial herein, that the allegation he made in the complaint was false.

Exhibit A consists of tax documents related to the 2004 tax year. Included are various 1099 forms, some of which list the Subject Premises as Respondent's address, and some which are blank as to Respondent's address. However, at least two different 1099 forms list the Ocean

Park Residence as Respondent's address. Respondent did not timely prepare or file taxes for the 2004 year.

Exhibit A indicates that the taxes were prepared by an accountant on October 5, 2006. Respondent did list the Subject Premises as his address on his Federal tax returns for the 2004 year, however, the Golub Notice in this case was served by mail on Respondent at the Subject Premises and the Ocean Park Residence on October 4, 2006. Respondent listed his business on his 2004 tax returns as model, actor, and personal trainer.

Exhibit D contains documents related to New York State taxes filed by Respondent for the tax year 2004. This return indicates that Respondent stated he lived in New York for twelve months in the 2004 tax year.

Exhibit B contains tax documents for the 2005 tax year. The W2 statements attached list the Subject Premises as Respondent's address. A 1099 form from a talent agency in California is blank as to Respondent's address. A letter addressed to Respondent from his accountant is included, and dated October 5, 2006, advising Respondent on instructions for filing. Respondent listed the same professions on his 2005 Federal tax return, as for 2004.

Respondent indicated that he used the Subject Premises as an office for his business during the 2004 tax year, and specified expenses for an automobile or truck, as well as, office expenses related to the Subject Premises. Respondent further indicated that he was in California for 270 days of the 2004 tax year.

Similarly, Exhibit E contains a California nonresident tax return for the 2005 tax year wherein Respondent states that he spent 180 days in California during that year. Exhibit I contains Respondent's New York Tax Documents for 2006, wherein he stated he resided in New

York for twelve months during 2006, and stated in his California Non Resident return that he was only in California for 5 days in 2006.

Witnesses Presented at Trial

Carlos Arenas

The first witness to testify for Petitioner was Carlos Arenas, who has been the Super for the Subject Building, and living in the basement of the Subject Building since July 2004. Mr. Arenas testified that his normal work schedule is 8am to 5pm, but that he is always at the building. The Subject Building has 68 units, and no doorman or other on site staff. Mr. Arenas stated he is familiar with Respondent from having done repairs in the Subject Premises.

Mr. Arenas testified that he initially believed a couple to be the tenants of the Subject Premises. He described the couple as a bald chubby middle aged man, and a skinny blond woman, about five feet tall, a few years younger than the man. Mr. Arenas testified that he observed the couple in the lobby of the building on most mornings, and also met them when he did a repair for them in the Subject Premises, that required the bathtub to be unclogged. Mr. Arenas testified that he continued to observe the couple in the Subject Building through 2006.

Mr. Arenas testified he first met Respondent in August 2006, and that he had never seen Respondent in the Subject Building prior to that date. In August 2006, Respondent came to the Super's apartment in the basement, to report a leak from the apartment above his. Mr. Arenas continued to observe Respondent in the building for about one month, through September 2006, and then testified that he next saw Respondent in November 2006.

Mr. Arenas was the only witness presented by Petitioner on its *prima facie* case. The court found Mr. Arenas to be a credible witness.

Paul Glynn Burgess

The first witness called by Respondent was Paul Glynn Burgess. Mr. Burgess is a friend of Respondent, and met Respondent approximately 12 years ago, while playing softball. Mr. Burgess testified that prior to October 2004, he would visit Respondent at the Subject Premises between one and three times per week. He described Respondent as his best friend. In or about 2004, Mr. Burgess testified that he no longer saw Respondent at the Subject Premises, because Respondent had gone to California. Mr. Burgess testified that Respondent went to California to "get healthy" and get treatment for foot pain. Mr. Burgess testified that after Respondent left for California, Mr. Burgess stayed in the Subject Premises as he needed to. Mr. Burgess testified that he lived in Jersey City, worked in New York City, and stayed in the Subject Premises for a day or two at a time, and sometimes as long as a week at a time.

During this period Mr. Burgess watered Respondent's plants, kept the Subject Premises clean, and forwarded Respondent's mail to him in California. Mr. Burgess stated that there were three or four different addresses Respondent gave him for forwarding mail, but that most mail was forwarded to a PO box Respondent maintained in California. Mr. Burgess spoke to Respondent, while Respondent was in California approximately once a month by phone.

Mr. Burgess acknowledged that other people also stayed in the Subject Premises during Respondent's absence. Mr. Burgess stated that these individuals included Respondent's friends and family, and Respondent's father. Mr. Burgess did not know the names of the individuals who stayed at the Subject Premises, or how long they stayed there. Mr. Burgess does not know how the other individuals, who occupied the Subject Premises accessed the apartment, and testified that he never stayed in the Subject Premises with anyone else.

Mr. Burgess also testified that he had met Tanya Elliott, and was aware of Respondent's relationship with Ms. Elliott.

Respondent

Respondent next testified on his own behalf. Respondent stated that he first started living in the Subject Premises in 1997, when he sublet the Subject Premises. At the time Respondent was living in Miami and California. In 1999, Respondent became the tenant of record for the Subject Premises. Respondent was an actor and a model, and came to New York to pursue theater and due to greater opportunities for modeling.

Respondent maintained cable and phone service in his name at the Subject Premises, but cancelled his phone for the Subject Premises. Respondent testified that when he moved to New York, he got a New York Driver's license, and that his license has been replaced a few times since then, because it was lost or stolen. Respondent testified that he had gotten a California License in 1988 or 1989, and that he kept that license until 1997, when he moved to New York.

Respondent testified that in or about the year 2000 he developed a foot injury, he described as a bone spur that grew on his left heel. Respondent stated he received treatments for this in 2001. Respondent stated in 2002, he had a surgery on his foot that left him on crutches for the better part of the next two years. Respondent stated that he could not work during this period. Respondent testified that he had a second surgery on his foot in May 2003, and that from that point through October 2004 he was in terrible condition, using crutches on and off for the next one and half to two years, sometimes with a cast or walking boot.

Respondent did not feel that New York City was a good or safe environment for him to be living in. Respondent decided to go to California to seek alternate avenues of treatment for

his foot, and allow himself to get healed. Respondent found living in New York and his condition to be depressing.

Respondent testified that he left for California in August 2004 with a duffle bag and a suitcase. Respondent testified that he did not intend to remain in California very long, he just wanted to research everything and get healthy. Respondent testified that he had no specific plan on how long he was going to remain in California, but that he intended to eventually return to New York.

While in California, in October 2004, Respondent got into a car accident, and he testified he sustained injuries to his back and leg. Respondent testified that while in California he stayed with friends, sleeping on whatever couch was available. Respondent testified that he only stayed with Tanya Elliott for a short time when he first went to California, leaving the Ocean Park Residence, after approximately one week, to stay with other friends.

Respondent testified that from the Fall of 2004 through the Spring of 2005, he stayed with Moya Rimp, who rented a residence, and that for the better part of the Spring 2005 through 2006 he stayed with his father. Respondent testified that when he stayed with his father, he slept on the floor. Respondent also listed several other friends he stayed with, and noted that he also stayed with his sister, who owns homes in Palm Springs and Huntington Beach.

Respondent contradicted himself continuously throughout the trial. For example on direct examination, Respondent testified that by the Spring of 2005 he felt much better. Respondent stated he felt more like his old self and that he was feeling better about himself and "where he was at." Respondent planned to return to New York by the Summer of 2005. However, on cross-examination he testified that in the Spring of 2005 he began to experienced

more pain on a daily basis. Respondent stated that at this time he stopped receiving physical therapy. On direct examination, Respondent testified that he stopped receiving physical therapy in the Spring of 2005, because he was not insured, but on cross-examination, he testified that he continued to receive physical therapy in the Spring of 2005, because his providers were willing to give him the services free of charge. These contradictions render wholly incredible any of Respondent's testimony regarding his physical condition, as well as his argument that his time in California was an excusable "temporary relocation" under the Rent stabilization code.

Respondent continued on cross-examination to testify that he received physical therapy for the better part of 2005, that he went in one to two times per week, and required no appointment. Respondent testified that his doctors performed these treatments "off the books," and that this was the only treatment he received, while in California in 2005. Respondent essentially claimed that his doctors treated him for one year, without payment, on demand, without prior appointment, and without keeping any records, so it could be off the books. None of these details came out in Respondent's direct examination, but only when counsel for Petitioner was exploring contradictions in Respondent's testimony on cross-examination.

Respondent testified that up until the Spring of 2005, his physical therapy was being paid for by funds obtained from the lawsuit he filed in California, in relation to his October 2004 car accident. Respondent acknowledged that the complaint for said lawsuit was not filed until December 2005, and could offer no explanation as to how the funds preceded the law suit. Respondent testified that he received checks as a result of the accident, prior to the filing of the lawsuit, that he cashed, and the funds went to pay for his physical therapy. Respondent stated he had no records to substantiate his explanation, nor did he have medical records for any of the

treatments he received in 2005. Later in the trial, Respondent testified that he received the settlement funds from this lawsuit in 2006, when he opened his Schwab Investment account in California.

Respondent testified that in the Summer of 2005, he was still in California and had an MRI. Respondent testified that the results of the MRI made him change his mind about coming back to New York, and that he decided to remain in California for treatment. Respondent testified that during the Summer of 2005, prior to the MRI he felt better, and felt it was time to return to New York. On cross-examination, Respondent testified that the MRI results were only one of many reasons why he changed his mind about coming back to New York in the Summer of 2005. Additionally, on cross-examination, Respondent acknowledged that the MRI did not take place until the Fall of 2005, precluding the results of said scan as being the reason Respondent changed his plans about returning to New York in the Summer of 2005.

Respondent testified that from 2005 through 2008, he had a series of never ending treatments and that his condition got worse in 2006. Respondent testified that he returned to New York in the summer of 2006. After spending one week in New York in August 2006, Respondent testified that he left for Alaska to visit his family. Respondent stated that in August 2006 he resumed work as a photographer in New York Respondent testified on cross-examination that he received no medical treatments related to his feet in 2006.

Respondent worked for Equinox in California for several months in 2005, and the records from his employer indicate that he was employed there from November 29, 2004 through April 4, 2004 (Exhibit 10). Respondent stated he had been hired for a short term assignment to help open the gym. Respondent acknowledged that at he time he applied for work with Equinox in

California, he supplied them with his California Driver's license as identification. Respondent stated that while working for Equinox he was just doing "consulting," and did not engage in activities related to weight lifting. Respondent stated that for the first month of his employment with Equinox, the club was not open for business, and he was just helping to launch the club. After that, Respondent worked with other trainers and did work with pregnant women as he was pre-natal certified. Respondent stated that he acted more as a consultant than a trainer.

During cross-examination, Respondent acknowledged that at his deposition he had not mentioned working as a consultant for Equinox, and had only testified that he worked at the gym training clients. Respondent further acknowledged that Equinox had productivity requirements for his position, as detailed in Exhibit 10, and asserted that he was not physically capable of meeting those requirements. Although Respondent testified that he had arranged for the job at Equinox in New York, he acknowledged his application indicated he applied as a walk-in. Respondent testified that he left his job at Equinox in April 2005, because his job was done, and the club was up and running, but acknowledged that Equinox records show that he resigned for personal reasons, and do not reflect that his position ended because the job was completed. The records further provided that he was eligible for re-hire (see exhibit 10).

Respondent testified that after he left Equinox, he did not continue to work as a personal trainer, but later acknowledged that he continued to do "consulting" regarding personal training after leaving his job at Equinox. Respondent stated that he would travel to his clients' homes, and prepare workout programs for them, and instruct them on training. Respondent testified that his physical condition did not prevent him from acting as a personal trainer. Respondent testified that he continued to perform this work in California throughout 2005 and 2006. Respondent

testified that, from 2004 through 2006, work as a personal trainer was his primary source of income, and acknowledged that he was not doing any acting during this period.

Respondent testified that to get to his client's homes he would occasionally drive his 1969 Bronco or get a free loaner from the shop. The court did not find this testimony credible.

Respondent testified that he purchased a 1969 Ford Bronco in Colorado in 2002 or 2003, because he wished to restore the vehicle. Respondent testified that, between 2002 and 2006, the truck was being continuously restored. Respondent described it as a full restoration involving a body strip down and two new engines. Respondent testified that during 2004 through 2006 the shop would always give him a free loaner to drive. Respondent testified that to pay for the four year restoration, he used money from his parents, money saved for medical treatments and whatever residual income he still had coming in. Respondent testified that the shop restoring the truck over the four years, allowed Respondent to make whatever payments he could afford. Respondent stated that he was able to drive at all times regardless of his crutches and or walking boot.

The Court did not find Respondent's testimony regarding the use of his truck and free loaners credible given the extensive amount he would have had to use an automobile in California.

Respondent acknowledged that he kept the vehicle in California, used it while in California, and insured it in the State of California. Respondent testified that he elected to keep it and insure it in California because that where he was going to work on restoring the vehicle, and because it was too expensive for him to rent a car when he spent time in California.

Respondent testified that when he wasn't in California, he kept the vehicle at the Ocean Park Residence, at his father's home and also in the "desert". Respondent testified that, for the majority of the time, it was in a shop being restored, and that he did not actually use the vehicle. Respondent testified that he hired mechanics to do the restoration work. Respondent's explanation, of how he came to have a car he kept in California, was not credible and was inherently contradictory.

Respondent testified that he obtained a Real Estate License in California in the late fall or early winter of 2005 for two reasons, it had been one of his long term goals, and he wished to sell property belonging to his family, that was located in California.

Regarding his financial documents, Respondent testified that while in California he opened a credit card with Chase that he no longer has (Exhibit 6E). Respondent also opened an account with Charles Schwab in 2006 (Exhibit 12), when he received a settlement from the car accident he had in California. Respondent testified that he opened the Schwab account because he wished to invest the settlement funds, rather than spend them. Respondent acknowledged that at the time he opened the account, he listed the Ocean Park Residence as his home address, and only changed it to the Subject Premises, after he returned to New York. Respondent testified that he used his California address to open the account, because it was the first time in his life he had made an investment, and he wanted to stay on top of the investment. Respondent also testified that the statements were sent to a Post Office Box he had in California for the purposes of receiving mail.

Respondent testified that in October 2004, while in California, he had an accident which affected his back. Respondent testified that at this time he had no health insurance, because his health insurance from Screen Actors Guild had expired.

Respondent acknowledged that he voted in the general election in California in November 2004. Respondent testified that he never received an absentee ballot to vote from New York, and that he registered to vote in California, when he registered his Bronco with the California Department of Motor Vehicles. Respondent testified this was the only election he voted in while in California.

Respondent testified that on October 5, 2006, he was in California for one week, for an operation. Respondent testified that a few days after the procedure he returned to New York. Respondent filed no taxes during the years 2004 through 2006, only filing for this period was done in October 2006 (Exhibit D). Respondent testified that he believes he filed his return for 2004, but had no actual recollection as to the date it was filed, and could only state he would have received the return for filing after October 5, 2006, when he was in California.

Respondent acknowledged that he joined Gold's Gym in California, signed a membership contract on March 31, 2005, and remained a member through 2006 (Exhibit T). Respondent testified that Gold's Gym also has a location in Midtown Manhattan, implying that the membership would be useful to him when in New York as well, but the Court notes that the contract indicates on the front page that it is not a "Multi Gym" contract. Respondent testified that he needed to join Gold's Gym in California, because he needed access to the equipment for his rehabilitation.

Respondent was also a member of the Reebok Sports Club during this period, and acknowledged that they have gyms in Los Angeles, but stated that he was not a member of any Reebok except the one in New York City.

Respondent testified that beginning in 2006, he was able to obtain health insurance as a result of his changing relationship with Tanya Elliott. Respondent testified that Tanya Elliott decided to help him get well, and put Respondent on her health insurance. Respondent testified that Tanya Elliott put Respondent on her insurance, because she knew it would help him. Respondent stated that Ms. Elliott received health insurance through her employment with a pharmaceutical company. Respondent testified that he did not know what requirements existed for him to obtain health insurance through Ms. Elliott's employer, but that it "evolved" out of his relationship with Ms. Elliott. The Court did not find Respondent's claimed ignorance of necessary requirements to become insured through Ms. Elliott to be credible.

Respondent testified that as of 2006 he and Ms. Elliott maintained a close relationship, and that at that time Ms. Elliott was his "significant other". Respondent stated that in 2006 he was staying at the Ocean Park Boulevard Residence, and occasionally with his father. Respondent remained as an insured through Ms. Elliott from 2006 through 2009.

At the time of the trial, Respondent testified that he and Ms. Elliott were friends. Respondent testified that he continues to be in a relationship with Ms. Elliott, but it is a long distance relationship as she continues to reside in the Ocean Park Residence. Respondent testified that he did not spend the majority of his two years in California staying at the Ocean Park Residence. At his deposition, Respondent testified that he spent the entire month of July

2006 living there, but at trial he testified he was there for half the month, and in Alaska for the balance of the month visiting family.

Respondent could not recall where he stayed in June 2006, but he recalled testifying at the deposition that he spent the majority of that month living at the Ocean Park Residence, and affirmed that said testimony was correct. Respondent acknowledged that he kept his clothes at the Ocean Park Residence, but stated he kept no belongings there.

Respondent testified that in February 2007, he paid rent for the Subject Premises by mailing in a check which was cashed by Petitioner (Exhibit JJ). The check was dated February 2, 2007, and the funds were returned to Respondent by letter from Petitioner's agent dated February 8, 2007 (Exhibit 6I). Respondent did not testify that the acceptance of the check caused him any confusion as to his status as a tenant, or Petitioner's intention to proceed with this litigation.

Respondent concluded his direct testimony by stating that he never intended to stay in California for as long as he did, and that he hated living out of a suitcase for twenty months. Respondent testified that he strained a lot of relationships by staying with family and friends without paying for it, and that he found the whole thing very depressing.

Respondent returned to New York in August 2006, but only for a short time. He was back in California by early September 2006 (see credit card charges in Exhibit 6C). Respondent stated he went back to California for a "surgery, " scheduled in October 2006. On cross-examination, Respondent acknowledged that the "surgery" was an out patient procedure, and that immediately after the procedure he was out and about, making ATM withdrawals and dining out in restaurants. Respondent testified that in November 2006, he spent time in California for the holidays, but

records from his credit card show Respondent in California as early as November 5, 2006, with regular activity continuing through November 17, 2006.

John Harra

John Harra testified for Respondent. Mr. Harra has lived in the Subject Building for twenty-six years, and knows Respondent. Mr. Harra testified that he saw Respondent in the lobby on various occasions in 2004, and remembers the date because Respondent had limited mobility. Mr. Harra provided him with assistance for errands and shopping. Respondent told Mr. Harra that he was going to California around that time, because he had family there who could help him. Mr. Harra testified that Respondent came back from California before June 2008, and that since that time Mr. Harra has seen Respondent in the building with the same frequency as prior to his departure for California in 2004. Mr. Hara testified that when Respondent returned to New York he was still using crutches to walk.

Mr. Harra acknowledged that he and Petitioner have a contentious relationship, and alleged that Petitioner has been harassing him and trying to evict him from the building from the inception of his tenancy. At the time of his testimony, Mr. Hara acknowledged there was a holdover proceeding pending against him.

Mr. Harra further acknowledged on cross examination that he could not recall the exact year that he saw Respondent prior to Respondent's departure for California, and that it could have been in 2003 rather than 2004. Mr. Harra stated that Respondent was gone for a long time and that his absence could have exceeded one and half years. Mr. Harra acknowledged that even after Respondent's return, there were gaps of time when he did not see Respondent at the building, and that Respondent continued to be regularly absent for months at a time. Mr. Harra testified that

only an absence exceeding several months would be unusual and noteworthy, with respect to Respondent's presence at the building.

Anthony DiStefano

Anthony DiStefano also testified for Respondent. Mr. DiStefano is an accountant and Respondent is his client. Mr. DiStefano testified that Respondent had been his client since approximately 2003. Mr DiStefano testified that he prepared Respondent's 2004 tax return on October 5, 2006. Mr DiStefano testified that Respondent had received a notice from the IRS asking for the 2004 return, which Respondent had forwarded to him (Exhibit KK). The notice is dated May 15, 2006. Mr. DiStefano doesn't recall when he received the notice, and could only state it would be sometime after Respondent had received it. Mr. DiStefano had no recollection of when Respondent provided him with the information necessary to prepare the 2004 return. Mr. DiStefano had no recollection as to when or if Respondent's tax returns were filed. The Court did not find Mr. DiStefano's testimony to be of probative value because he had no recollection as to what was done, or the applicable dates of the tax returns, and primarily provided testimony limited to reciting his normal and customary practices.

John Gregory DeYoung

John Gregory DeYoung also testified for Respondent. Mr. DeYoung testified that he met Respondent in 1997 on an audition for a commercial, and that they became friends at that point. Mr. DeYoung lived on West 76th Street in Manhattan from 1995 through 2000. Mr. DeYoung described Respondent as an avid runner, and noted that Respondent ran the New York City marathon in 1998 or 1999. Mr. DeYoung testified that from 1997 through 2000 he saw Respondent two to four times per week, and that in 2000 he moved to Santa Monica, California.

Respondent visited Mr. DeYoung in California in 2002. Mr. DeYoung stated that Respondent had become homesick for California, and visited him in 2004 as well.

Mr. DeYoung testified that in 2002 Respondent started having problems with his foot and had some surgeries. Mr. DeYoung testified that, in October of 2004, Respondent went to California to escape New York for the winter. Mr. DeYoung stated that Respondent wanted to stay with him, but that he was unable to accommodate Respondent's request, and that Respondent told him he was going to stay with his father, who lives in Pasadena California. Mr. DeYoung acknowledged that he had no first hand knowledge as to where respondent was staying while in California.

Mr. DeYoung saw Respondent in California in 2004, and stated that Respondent had less muscle tone, no longer had crutches, but was walking with a cane. Mr. DeYoung stated that Respondent was not working during this period, had no money , and often borrowed money from others. Mr. DeYoung described Respondent as lost, and drifting without any specific plan.

Mr. DeYoung stated that he did not discuss healthcare with Respondent, but knew that Respondent was not receiving medical treatment in California during this period because he had no health insurance. Mr. DeYoung testified that starting in 2005 Respondent was just lingering in California, without any specific plan. Mr. DeYoung testified that Respondent did not return to New York in 2005, and had no plan to return to New York. Mr. DeYoung testified that there was nothing in New York for Respondent to return to, that Respondent was not well, and received no further treatment until 2006.

In 2006, Mr. DeYoung testified that Respondent had not made much progress and that he and his wife had urged Respondent to make a plan. Mr. DeYoung testified that Respondent had

become pathetic and needed "a kick in the ass" to get going. Mr. DeYoung described Respondent as looking for validation on all levels. Mr. DeYoung testified that, in 2006, Respondent was working out more, had built up muscle, and that while physically Respondent was much better, Respondent was not working. Mr. DeYoung testified that Respondent left California in 2006, but he didn't know which month.

On cross-examination Mr. DeYoung testified that Respondent is a good friend, and that he wishes to help Respondent in this proceeding. Mr. DeYoung testified that in the years 2004 through 2006 Respondent was continuously in California. Mr. DeYoung testified that Respondent had surgeries in 2002 and 2003, but none in 2004. Mr. DeYoung testified that he did not visit Respondent at the hospital, because all three of Respondent's surgeries were in New York.

Mr. DeYoung knows Tanya Elliott and lived next door to her in 2002. By 2004, Ms. Eliott had become Respondent's girlfriend.

Mr. DeYoung stated that his discussions with Respondent while in California, focused on Respondent's unemployment and lack of direction professionally, and that they did not discuss any health issues at length. Mr. DeYoung testified that there was no change in Respondent's physical condition in 2004 and 2005, and that Respondent did not receive treatment during this period, other than occasional physical therapy.

Harvey Eisenstein

Petitioner called one witness on its rebuttal case, Harvey Eisenstein, a managing agent for Petitioner. Mr. Eisenstein manages the Subject Premises, and a total of fifteen hundred units. Mr. Eisenstein testified that a secretary employed by the firm had inadvertently accepted a

payment from Respondent in February 2007. Mr. Eisenstein while reviewing deposit slips, a day or two later, noticed that rent had been inadvertently accepted from Respondent and, after consulting with counsel, sent Respondent a reimbursement check. The reimbursement check was sent by letter dated February 8, 2007, which advised Respondent that the rent had been inadvertently accepted and further provided "The landlord will not accept rent payments from you at this time inasmuch as your tenancy has been terminated and legal proceedings have been commenced against you. (Exhibit 6I)"

DISCUSSION

Respondent's Second Affirmative Defense is Dismissed

Respondent's second affirmative defense asserts that the petition must be dismissed, because Petitioner accepted rent after the expiration of the lease. The Court finds, based on the testimony and credible evidence at trial, that the acceptance of the February 2007 rent by Petitioner was inadvertent, and that its prompt return by Petitioner precludes any finding of a waiver by Petitioner of its right to proceed with this litigation (*PCV/ST LLC v. Finn,* 2003 NY Slip Op 50897 [U][App Term, 1st Dept][*acceptance of rent for three months following termination of the tenancy and prior to petition did not require a finding that landlord vitiated or waived its notice of non-renewal*]; *205 East 78th Street Associates v Doe,* NYLJ Sept 27, 1991, p.21, col.4 [App Term 1st Dept][*inadvertent acceptance of one month's rent did not vitiate Golub Notice where payment was promptly returned*]). Additionally, Respondent was not prejudiced in any manner by the inadvertent acceptance of rent, and offered no testimony suggesting that he did not believe that Petitioner intended to pursue the litigation.

Non Primary Residence

In order to prevail upon a claim of non-primary residence, Petitioner must establish, by a preponderance of the credible evidence, that Respondent has failed to use the Subject Premises for actual living purposes, and that Respondent lacks a strong, continuing physical connection with the premises (*Toa Construction Co. Inc v. Tsitsires* 54 AD3d 109 [1st Dept 2008]).

RSC § 2520.6(u) provides that while no single factor is controlling, the determination may be based on consideration of : 1) whether the tenant lists another address on tax returns, motor vehicle registrations, drivers license or any other documents filed with public agencies; and 2)whether the tenant uses another address for voting purposes; and 3) whether the tenant has spent over 183 days in the premises in the preceding calendar year; and 4) whether the premises have been sublet.

Petitioner has established all of the above criteria at trial by a preponderance of evidence and for the most part, these facts are uncontested by Respondent. During the relevant period he was in California well over 183 days per year, he allowed others to use and occupy the Subject Premises in his absence, he voted from California, had a California drivers license, and listed a California address on some tax related documents.

Respondent argues that his absence from the premises constitutes a temporary period of relocation pursuant to § 2523.5(b)(2) of the RSC, which is referenced in § RSC § 2520.6(u)(3). § 2523.5(b)(2) provides that minimum periods of required residency are not interrupted by certain types of absences, including where the Respondent is hospitalized for medical treatment, or if Respondent "has such other reasonable grounds that shall be determined by the DHCR ...".

There is no specific affirmative defense asserting this claim in Respondent's answer.

Respondent also freely acknowledges that he has always spent regular periods of time in California and that this continue to date, even Respondent's own witnesses, for example, mr. Harra, acknowledge that it is normal for Respondent to be absent from the Subject Premises for months at a time.

Additionally, as noted above the Court found not credible Respondent's claim that he was in California for medical treatment. Respondent's own witnesses do not support his claim that he needed to go to California for medical treatment.

Particularly telling was the testimony of Mr. DeYoung, Respondent's good friend. Mr. DeYoung testified that Respondent was not receiving medical treatment while in California, but that Respondent went to escape the New York winter and decided to linger there without plan or purpose. Mr. DeYoung testified that after being in California for over one year, Respondent had no plan or intention to return to New York. Mr. DeYoung testified that he never visited Respondent in any hospital because Respondent's surgeries had all predated 2004 and had all been in New York. During the two years that Respondent admits to living in California, Mr. DeYoung stated that they rarely discussed any health issue affecting Respondent but that their discussions were focused on Respondent's lack of direction professionally.

Respondent asks the Court to rely on other cases where courts held that absence for medical reasons did not constitute non-primary residence but these cases are readily distinguished for the case at bar. For example Respondent cites to *Katz v. Gelman*, 177 Misc2d 83 (App Term, 1st Dept, 1998), where the Court held that tenant's involuntary commitment to residential facilities to address mental health issues did not constitute non-primary residence. Respondent also relies on *WSC 72nd Owners LLC v Bondy,* 21 Misc3d 145(A)(App Term, 1st

Dept, 2008) where the Court held that an acknowledged involuntary absence for medical reasons while tenant was institutionalized excusable. There was nothing in voluntary about respondent's two year sojourn in California, Respondent was not required to be there for treatment, Respondent was not even an inpatient at any medical facility during the relevant period, let alone subject to involuntary commitment.

Respondent also asks the Court to rely on *542 East 14th Street LLC v. Lee* 883 NYS2d 188 (2009) as authority for the proposition that the time he spent in California constitutes an excusable absence for nonprimary residence purposes. The Court finds that there are significant differences between the case at bar and *Lee*. For example, in *Lee* the tenant was required to relocate to California because that is where her sick and elderly parents were located. In the case at bar, Respondent presented no credible evidence as to why he could not have received any medical treatment necessary in New York City, home to some of the country's finest medical facilities. In this case, Respondent had a California Driver's license and Real Estate License prior to his "temporary relocation' to California. .

In *Lee,* the tenant never voted in California, owned a car in California, or opened any bank accounts there. Here, Respondent voted in California during the relevant period, maintained a car there, and when he received funds for investment, opened a Schwab account for those funds in 2006 from his California address. In *Lee*, the tenant timely filed tax returns from her New York Address, during the relevant period and there was no evidence of a sublet. In this case, the only allegation regarding filing taxes for the relevant period, refers to actions taken after the issuance of the Golub Notice.

There was nothing temporary about Respondent's relocation to California, well

past his asserted return date he had significant contacts there, including but not limited to receiving medical benefits through his "significant other" Tanya Elliott owner of the Ocean park Residence listed as an address for Respondent on many of the documents in evidence

Respondent also argues that Petitioner failed to establish an alternate address as Respondent's primary residence. Petitioner has no obligation to do so. The fact that Respondent alleges that he slept at several different places, instead of just the Ocean Park Residence, is insufficient to defeat Petitioner's non-primary residence claim. Assuming *arguendo,* that: Respondent's long term relationship with Ms. Elliott; and his receipt of health insurance through her employer; and his admission that he kept clothes, personal belongings and his car at the Ocean Park Residence; and listing that as his address on various documents and employment applications: were collectively sufficient to prove that the Ocean Park Residence was his primary residence, Petitioner is not obligated to prove where Respondent did live, only that his connection to the Subject Premises was insufficient to constitute it continuing as his primary residence (*Toa Construction Co. Inc. v. Tsitsires* 54 AD3d 109 [2008][*proof of nonprimary residence does not require proof that tenant maintains alternative primary residence*]; *Rocky 116 LLC v. Weston* 195 Misc2d 363 [App Term, 1st Dept, 2003]; *Oakridge Center LLC v. Anthopoulis* 21 Misc3d 132[A][App Term, 1st Dept, 2008]).

In specifically excluding housing accommodations not used as the tenant's primary residence from the protections of rent stabilization "...the Legislature has made clear its intention that regulatory protection should not be available where the tenant's claim to the subject premises is based on less than the need for a place to call home. This intent is entirely consonant with the public policy sought to be advanced, which is to promote the availability of affordable

housing units. ...Public policy is not advanced by permitting housing units to be held, partly or wholly unutilized..(*Park South Associates v. Mason*, 123 Misc.2d 750, 753 *affd* 126 Misc2d 945)".

Evaluated as a whole, the preponderance of credible evidence at trial establishes that Respondent's use of the Subject Premises is based on something less than the need to call the apartment his home (*Sommer v. Turkel* 137 Misc2d 7 [App Term, 1987]). To the extent that Respondent alleged that his absence was excusable, the Court finds said claim entirely lacking in credibility.

CONCLUSION

Based on the foregoing, the Court awards Petitioner a final judgment of possession. The warrant of eviction shall issue forthwith.

This constitutes the decision and order of this Court.

Dated: New York, New York
October 23, 2009

Sabrina B. Kraus, JHC

TO: CUTLER MINIKES & ADELMAN LLP
Attorneys for Petitioner
By: JONATHAN MINIKES ESQ.
708 Third Avenue
New York, NY 10017
(212) 983-1199

BERANBAUM MENKEN BEN-ASHER & BIERMAN LLP
Attorneys for Respondent
By: MARK H. BIERMAN, Esq.
80 Pine Street, 32nd Floor
Yonkers, New York 10005
(212) 509-1616

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