

Westlaw

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New York Law Journal
Volume 235

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Wednesday, March 15, 2006

Decision of Interest

NEW YORK COUNTY CIVIL COURT

Landlord Fails to Prove Tenant Did Not Maintain Subject Apartment as Her
Primary Residence

Judge Milin

HAROUNIAN v. TOFTE--This is a holdover proceeding predicated on grounds that respondent, Lynda Tofte, does not maintain Apartment 21 (Apartment), located at **132 East 17th, New York, New York** (Building) as her primary residence. Petitioner alleges that respondent lives at 144 Lake Avenue, Staten Island, New York (House), and that she maintains the rent stabilized Apartment simply for convenience. Respondent appears by counsel and has interposed an answer denying the petition and asserting various defenses and a counterclaim. Respondent contends that the Apartment is her only home, and that the House in Staten Island was purchased for the benefit of her husband, who lives there exclusively.

This Court conducted a trial to resolve these issues. The record is summarized below.

Petitioner David Harounian testified that in addition to owning the Building, he is a carpet manufacturer with a business located at the corner of 29th Street and Fifth Avenue in Manhattan. He explained that since this is the only building he owns, he goes 'there very, very often', 'at least four times a week ... during the course of a day, and after five P.M.' He testified that during the relevant time period, he did not see Ms. Tofte at the Building. He stated: 'If we had a problem in the Building with her particular apartment, we would call her, it would take a day or two for her to respond.'

Mr. Harounian explained that after he finished work, at some point between five o'clock and seven o'clock, he would stop by the Building on his way home to Queens.

He stated that during the relevant time period he had occasion to talk to Ms.

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Tofte 'regarding repairs.' ... and 'if she was actually living there.' He testified that during these conversations:

she said she lives there, but she only had a night light that was on constantly and recording machines to take messages.

He further stated that the message on her answering machine at the Apartment announced that 'she is not in and to leave a message.'

A representative from Consolidated Edison Company (Con Ed), Gerald Vomacka, testified on behalf of the petitioner regarding electrical and gas service to the Apartment. Mr. Vomacka testified that there were usage charges on both the electrical and gas service accounts for the Apartment. He indicated that during the relevant time period, the electrical usage at the Apartment was 'low consumption' and that gas service was 'basically paying for the service to be there.'

Janet King, who works for the New York City (NYC) Department of Finance in the personal exemptions unit, testified as a witness for the petitioner. Ms. King testified that based upon information on record with her agency, Ms. Tofte obtained a New York State School Tax Relief (STAR) exemption, beginning in 1998, for a house in Staten Island. Ms. King testified that the STAR program became effective in 1998 and that it permits an owner occupied property to receive a real estate tax exemption (homestead tax exemption). She also explained that once the initial application to apply for a STAR tax exemption is submitted, it does not have to be renewed unless it is a senior citizen's application. Ms. King was unable to produce a copy of the application filed by Ms. Tofte to receive the STAR exemption.

William Spong, Ms. King's supervisor from the Department of Finance testified that the applications submitted to the program in 1998, the first year it became effective, were misfiled. He explained that when this initial 'batch' of applications was sent to a storage warehouse 'the archiving process ... wasn't properly done' and those records could not be located.

Introduced into evidence as Petitioner's Exhibit 18 was a copy of an original application submitted for a STAR exemption in the first year of the program, with the name and address of the actual homeowner redacted. The forms attached to that application indicate that there are two types of STAR programs: The 'Basic STAR' program which applies to all homeowners 'where at least one of the owners is an occupant', and the 'Enhanced STAR' program, which is available to senior citizen homeowners.

Linda Tofte testified that she moved into the Apartment in 1978. She explained that the Apartment 'overlooks the street', contains 'three small rooms, bathtub in the kitchen, and the back room is a separate, small bedroom.' She testified that

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located in the hallway approximately 15 feet from the front door of the Apartment is 'my bathroom, my toilet.' She stated that 'at one time, everyone in the building had toilets out in the hall', and now, except for her, all the other tenants in the Building have bathrooms inside their Apartments. She added that the electrical service for the bathroom is 'on the landlord's line.'

Introduced into evidence as part of petitioner's case were several photographs of the Apartment and the Bathroom (Petitioner's Exhibits 14-14G, 15A-15C).

As to the circumstances underlying the origin of the photographs, Ms. Tofte explained that she was at work when, she received a call from Mr. Harounian asking her to come home because he needed access to her Apartment to make repairs. She testified that:

I asked him if he could put off the repairs until I got home from work and he said no, absolutely no, because he needed me to be there, then I came home within 20 minutes from work.

Upon entering the Apartment, Mr. Harounian took several photographs, without Ms. Tofte's consent. There is a photograph of respondent's kitchen table on top of which are keys, a battery case, earphones, a coffee cup and 'Chinese food' condiments. There is also an image of the shelf over respondent's kitchen sink which contains toothbrushes, toothpaste, peroxide, dish detergent and mouthwash. There is a pair of shoes in one photograph, as well as clothes that are hung up on a clothes-drying rack. There is also a dish rack upon which are several 'take away' plastic food containers. Another photograph shows a fully furnished living room.

The photographs of the bathroom depict a very small space containing a commode. The lid of the toilet seat has a 'shag carpet' type cover over it. There is a framed print or mirror on the wall, and a plunger is placed in one corner. There is also a very large candle on a glass holder on a shelf next to the commode. Ms. Tofte testified that the candle was required because:

Maybe a year I didn't have light in the bathroom and my attempts to have the superintendent come and fix it were unsuccessful.

Ms. Tofte further testified that the Apartment has 'two overhead lights' and that she has 'a bedside lamp, [and] a small lamp in the living room'. The stove is extremely old, she estimated that it 'was made in 1910' and she has not used the stove since about 1998 because it is defective. She explained that she 'takes in food a lot' which she 'picks up on the way home ... or I go out later in the evening and there are a lot of restaurants in the area.' She testified that she did not have an air conditioner in the Apartment until 2002.

She further testified that she had two cats in the Apartment. One was named Her-

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cules, a 'blue Persian', who lived with her for about 14 years, and the other was named Kiki, a 'longhair' tabby, that lived with her for about 16 years. Both cats passed away in 2002.

Ms. Tofte is a law librarian and from 1998 until 2003 she worked for the law firm of Frankfort Garbus Klein and Selz which is located in Manhattan. She explained that she worked long hours because her job involved 'a lot of overtime.... there were big cases.' She testified that when she was required to work late, she would return to the Apartment 'in a black car or my boss might drop me off in a taxi.' She also assisted one of the partners in the law firm, Martin Garbus, by doing research for a book he was writing 'after hours and on weekends.'

Ms. Tofte has had a long-term relationship with Robert (Bob) Fass. They were married in 1997. Ms. Tofte explained that Mr. Fass is a radio journalist who is renown for his style of broadcasting and for a program he hosts on radio station WBAI. She testified that during his 40 year career he has acquired an extensive collection of 'tapes and audios', which he maintains for use in his radio programs because 'it has historical value. It is a history of social time.'

In 1991, Ms. Tofte purchased a house located at 144 Lake Avenue, Staten Island, New York (House) for Mr. Fass to live in. It is a 'single family' dwelling and a 'very old house.' It does not have a basement. The first floor contains a 'large living room, kitchen, bathroom and a miscellaneous add-on room.' The second floor has two bedrooms. Ms. Tofte explained that the house was purchased with a cash payment and that Mr. Fass contributed a portion of those funds.

Ms. Tofte testified that the deed was placed in her name to 'protect financial interests.' She explained that Mr. Fass 'had several ex-wives', he had 'bad credit' and 'We just thought, and he's older, for me it would be better to keep the house in my name.' She further testified that :

We primarily got it as a storage and workplace for his work. He has an extensive audio visual library and it was costing a fortune keeping it in storage and it was cheaper to buy this place, move all his tapes and archives in there and have access to it.

Ms. Tofte testified that Mr. Fass moved into the House and she 'remained alone on 17th Street.' She explained that she would visit him at the House but that she had no regular schedule. She stated that 'It depended what was going on at the time.' She testified that she would go to the House for the purpose of performing specific chores, such as raking leaves in the fall, shoveling snow in the winter and trimming hedges in the summer. She explained that she would perform these tasks because of Mr. Fass' age and health. She was 'afraid of him having a heart attack.'

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In addition to helping Mr. Fass with maintenance of the House, she testified that she would also go to the House to help Mr. Fass find materials from his collection required for one of his projects.

He uses his library as a source of income and I know it inside out so I would go there because I know how to mind the materials better than anybody.

She testified that on those occasions when she was sick, she would go to the House to be with Mr. Fass. She explained that she did this because she did not want to rely on a bathroom that was down the hall when she was not feeling well, 'plus the heat was better.'

Ms. Tofte testified she keeps her clothes and personal possessions in the Apartment. She stated that she stored old clothes in the House: '... I have a lot of costumes from the 60's and early 70's that I keep there and I don't wear, but I think has historical value.'

Ms. Tofte explained that she maintains telephone, electric and gas service for the Apartment and the accounts are in her name. There is telephone service at the House which is listed in both her name and Mr. Fass'. She explained that electric service for the House is listed only in her name because, as an existing account holder, she did not have to pay a security deposit, as would have been the case in order to establish an account in Mr. Fass's name and/or in both names.

Petitioner also introduced into evidence copies of 2001 tax returns filed jointly on behalf of Ms. Tofte and Mr. Fass (Petitioner's Exhibits 2A and 2B). When asked by petitioner's counsel why she used the address 132 East 17th Street on her tax returns even though Robert Fass is listed along with her, Ms. Tofte's reply was:

My home is 132 East 17th Street and there is no other room on here for any other address.

Ms. Tofte also has a Discover Credit Card which lists the Apartment as the home and billing address, both she and Mr. Fass are the account holders on this credit card. Ms. Tofte explained that the couple held this credit card jointly in an effort to help Mr. Fass establish a credit history of his own. She added that 'everything else was in my name.'

Petitioner also submitted records of long distance telephone service for the Apartment (Petitioner's Exhibit 27). These records indicate that hundreds of long distance calls were made during the relevant time period from the Apartment.

Ms. Tofte acknowledged during her testimony that she contributed the greater portion of the money to the couple's income. Her testimony also indicated that she had principle responsibility for paying bills and conducting financial transac-

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tions, although she also stated that her style of financial management was 'chaotic'. Except as noted above, the credit cards she held were issued in her name only and listed the Apartment as the billing address. The couple's only bank account was a joint checking account which listed only the Apartment address.

Ms. Tofte testified that she keeps her personal life separate and distinct from her relationship with her husband. She stated that she has maintained a long term friendship with Omshanti Parnes who she sees on a frequent basis. Her testimony was that the two friends meet often in Manhattan and that Ms. Parnes sometimes stays overnight at the Apartment with her.

Ms. Tofte was unable to recall the details regarding the circumstances which led to the receipt of the STAR exemption for the House. It was her belief that she had filed some documents relating to a tax benefit but she understood that this had something to do with the fact that her husband was a senior citizen. In December 2004, she wrote a letter to the NYC Department of Finance requesting that her homestead tax exemption be re-evaluated retroactive to 1997 and that her STAR exemption be discontinued. Introduced into evidence as Respondent's Exhibit v. was a copy of the letter, along with the receipts of mailing.

Bob Fass testified that he and Ms. Tofte met in the late 1970's, and the couple began to live together in the mid-1980's at the Apartment. He explained that before he moved into the House, he kept his large collection of radio-broadcast materials at a commercial storage warehouse called 'Nice Jewish Boys Warehouse.'

He testified that he contributed about \$40,000 of his personal funds to the purchase of the House. He explained that 'the house was put in her name ', because

I wasn't sure whether my previous families would decide since I had something of value they would try to take it from me ...

He testified that even during the time the couple were living in the Apartment, they did not spend everyday together on a regular basis:

Sometimes I would go to Woodstock where I have friends, stay with them. Sometimes I would sleep at the station.

Mr. Fass further testified that during the relevant time period, Ms. Tofte would come to the House, but it was usually for a particular purpose 'like shoveling the sidewalk in a snowstorm or trimming the hedges ... Sometimes she'd help me to find various materials, put a program together. Other times we might go to dinner with some people on Staten Island.'

Mr. Fass testified that when Ms. Tofte came over to the House it was not a general practice that she would spend the night. He emphasized that Mr. Tofte had no

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distinct routine regarding the regularity or the duration of the time she spent at the House:

You know, there was nothing normal about it. Sometimes she would be there on the weekend, sometimes she would be there midweek. I guess she was working very long hours and sometimes I wouldn't see her for weeks.

He testified that he owns an automobile and that his driver's license and his car are registered to the Staten Island House. He testified that when Ms. Tofte would come to stay with him in Staten Island she might bring a change of clothes or a toothbrush. He explained that there was nothing kept in the bathroom at the House that Ms. Tofte would use exclusively. In addition he stated that although she has 'clothing she had from when she was a kid stored there ...', she does not keep her clothes at the House.

Mr. Fass testified that Ms. Tofte does not cook and that he does all his own cooking and the food shopping for the House. However, he added that on those occasions when he needs to buy something heavy like a 40 pound bag of cat litter, 'I can't carry it easily without hurting myself, so she may come along to help.' Mr. Fass also takes in stray cats and he explained that he has about 9 cats with him at the House; however, none of these cats ever lived in the Apartment.

Mr. Fass testified that although the couple does maintain a joint checking account, it is Ms. Tofte who pays almost all the bills and maintains responsibility for their finances and related issues. He stated that Ms. Tofte does not receive mail at the House. He receives social security benefits which are directly deposited into the joint bank account. When asked by petitioner's counsel about financial issues, he testified that:

You have to understand, I'm someone who hasn't had a salary since 1977 except for \$25.00 a week when I was 21, so I'm a little distant from financial affairs.

Omshanti Parnes testified that she and Ms. Tofte are close friends and they have known each other for over 25 years. Ms. Parnes explained that she is an attorney and she lives in upstate New York. She testified that from 1999-2001, she was employed on a part-time basis as a lawyer for various not-for-profit groups located in Manhattan. She explained that she regularly spends time with Ms. Tofte. She recalled that in 1999, when both she and Ms. Tofte were working late hours, they would meet for dinner or coffee after work at least two or three days a week, near the Apartment. She stated that she also visits with Ms. Tofte at the Apartment.

She described the Apartment as 'basically three tiny rooms' and 'it was very cluttered' and disorganized. She stated that Ms. Tofte had two cats in the Apartment. She explained that there was also a very small refrigerator in the Apartment

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and that

Lyndie didn't seem to keep much food in the Apartment, other than drinks or take out food from the store downstairs.... I never saw her cook in that apartment.

She testified that the stove in the Apartment was very old: 'The only other place I seen a stove like that is silent movies, like Charlie Chaplin movies.'

She stated that she has stayed overnight in the Apartment. She explained that she continues to see Ms. Tofte 'probably two or three times a week.' She has never been to the House in Staten Island.

Respondent also introduced documentary proof that during the relevant time period, she was summoned for jury duty and received other correspondence related to jury service at the Apartment (Respondent's Exhibits 'A', 'B' and 'C '). Respondent also received mail at the Apartment from her college alumni office, CUNY, College of Staten Island (Respondent's Exhibits 'E' and 'F '). Respondent's produced proof that her credit cards and the corresponding billing statements all reference the Apartment as her address (Respondent's Exhibits 'G', 'H', 'I', 'J' and 'K'). There was documentary evidence that the 'Discover Card' which is held in the name of both Ms. Tofte and Mr. Fass is issued to the Apartment address (Respondent's Exhibit 'L'). Introduced into evidence as Respondent's Exhibits 'M' and 'N' were copies of her W-2 forms for 1999 and 2000 which indicate the Apartment address. Respondent's Exhibit 'P' in evidence is addressed to 'Fass-Robert M and Tofte, Lynda L' at the Apartment. Respondent's Exhibits 'Q' and 'R' in evidence are letters from the IRS and the New York State Division of Taxes regarding claims against income tax refunds sent to Mr. Fass and Ms. Tofte at the Apartment. Introduced into evidence as Respondent's Exhibit 'S' was a reminder notice from the IRS dated November 17, 2000 addressed to the Apartment for Ms. Tofte and Mr. Fass. Respondent's Exhibit 'T' in evidence is a social security earnings statement for 2001 for Ms. Tofte and which was addressed to the Apartment. Records from the Board of Elections indicate that respondent has been registered to vote at the Apartment since 1980 (Respondent's Exhibit 'U').

In a holdover proceeding based on allegations of nonprimary residence, the petitioner has the burden of establishing by a fair preponderance of the credible evidence that the tenant does not maintain an ongoing substantial physical nexus with the rent regulated premises for actual living purposes. *Sharp v. Melendez*, 139 AD2d 262 (1st Dept. 1988), app.den. 73 NY2d 707 (1989); *Katz v. Gelman*, 177 Misc 2d 83 (AT 1st Dept. 1998). Courts consider a number of 'traditional indicia' when determining whether a tenant occupies a rent regulated premises as her primary residence, but no single factor is determinative of the issue of primary residence. *Kerry v. DHCR*, NYLJ. June 21, 2001, 18:5, (App. Div. 1st Dept.), *Village Assocs. v Walker*, 282 AD2d 369 (1st Dept. 1986). Indeed the entire history of

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the tenancy may be evaluated. 615 Co. v. Mikeska, 75 NY2d 987 (1990), GSL Enterprises Inc. v. Williams, NYLJ, March 30, 2001, 19:6 (Civ. Ct. NY Cty.).

Petitioner submits that there are two critical facts which establish that respondent has forfeited her right to maintain the Apartment as her primary residence: (1) that she owns a home in Staten Island House, and the deed is solely in her name; and (2) that she embraced the Staten Island House as her primary residence in order to obtain a tax benefit. Petitioner contends that by these actions she has charted her course in determining her primary residence and the mere fact that she has a paper trail connecting her to the Apartment cannot overcome these undisputed admissions.

However, although these facts may be 'troublesome', they do not negate the other compelling factors which establish respondent's substantial physical nexus to the Apartment.

To begin with there is respondent's consistent and credible testimony that the Apartment has been her only home and primary residence for over 25 years. She maintains her personal possessions, furniture, clothes and other necessities for daily living at the Apartment. These facts were confirmed by the photographs introduced by petitioner and corroborated by the testimony of both Ms. Parnes and Mr. Fass. It is uncontradicted that she was very dedicated to her job located in Manhattan, where she regularly worked long hours and weekends.

In addition there is the overwhelming documentary proof which establishes that she has continuously resided in the Apartment for actual living purposes. Respondent maintains utility service in her name at the Apartment and the service bills are sent to that address. She is registered to vote and was summoned for jury duty at 132 East 17th Street. All her credit cards and her bank account are issued and/or billed to that address. Respondent's income tax returns as well as other tax documents indicate that the Apartment is her primary residence. She demonstrated without contradiction that she receives her mail at the Apartment.

It was also undisputed that she did not sublet or assign the Apartment.

It is evident that Ms. Tofte and Mr. Fass have a great and stubborn affection for each other and are involved in a long term, committed relationship. Nevertheless, it is also clear that they have maintained this relationship within the context of leading very separate lives.

The record is punctuated by the unwavering and forthright acknowledgment by both Ms. Tofte and Mr. Fass that they did not have what could be characterized as a conventional 'spousal' relationship. Ms. Tofte maintained without equivocation that she lived at the Apartment and Mr. Fass lived at the House and that she kept her personal life separate from her relationship with her husband. Mr. Fass very

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poignantly testified that after the two were married, he had hoped that this arrangement might change, but it did not.

It is well established that spouses need not share a primary residence and that legitimate arrangements of this kind should be acknowledged without penalty. See, *Matter of Rose Assocs v. State Div of Hous. and Community Renewal*, 121 AD2d 185 (1st Dept 1986).

Within the realm of housing law, this issue was addressed in *Glenbriar Co. v. Lipsman*, 11 AD3d 352, (1st Dept. 2004). In that case the landlord contended that the married tenants were maintaining their Bronx apartment for convenience and not as a primary residence. The tenants jointly owned a Florida apartment, claimed a Florida homestead exemption, filed joint Federal income tax returns listing Florida as their residence and did not file New York State income tax returns. However, there was also proof that the respondent wife resided in New York for actual living purposes for approximately six months each year and maintained bank accounts, her personal possessions and her voting residence in New York. Based on these factors the Appellate Division, First Department, affirmed the Appellate Term's decision to reverse the lower court's award of judgment in favor of the owner. It was concluded by the Appellate Division that the tax considerations underlying tenants' application for a Florida homestead exemption and failure to file a local resident return did not compel a finding of non-primary residence under circumstances where the respondent wife has kept a consistent presence at the premises. The Court emphasized that no one factor should be considered controlling in a primary residence case. *Glenbriar*, 11 AD3d at 353-354. The decision of the Appellate Division was affirmed by the Court of Appeals. (2005 NY Slip Op 07730).

Any review of the appellate decisions in the *Glenbriar* case would not be complete without mentioning that there were strong dissents at both the Appellate Term and Appellate Division. However, both the dissenting Appellate Term and Appellate Division Justices took issue not with the general rule that no single factor should be considered fatal to a genuine claim of primary residence in New York, but with the application by the majority of that rule to the facts at hand:

While the law is that a husband and wife can have separate residences, this does not apply where they simultaneously reside together at the same jointly owned or leased residences and share a joint and inseparable life in all relevant respects, both legal and personal. Finding separate primary residences would produce an inconsistent result where the evidence as to residence is substantially the same as to both tenants who are united in a long term conventional marriage.

Glenbriar, NYLJ, June 5, 2002, 21:4, App Term, (1st Dept), J. McCooe dissenting.

Accordingly, as these opinions emphasize, the appropriate standard for determining whether two spouses have established separate primary residences and may seek

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the mutually exclusive benefits of each jurisdiction, depends on the particular facts of each case. When undertaking this scrutiny the pivotal issue to be resolved is whether this is a sincere and deliberate arrangement or a mere contrivance for considerations of personal gain. *Glenbriar*, 2005 NY Slip Op 07730, at p. 5. See also, *Cox v. J.D. Realty Assocs*, 217 AD2d 179, 185 (1st Dept 1995).

The evidence and testimony contained in this record convincingly demonstrates that respondent and Mr. Fass genuinely maintain separate and distinct lives.

There was no regularity or set routine regarding the amount of time Ms. Tofte and Mr. Fass spent together. When they were together it was for a definite and limited purpose, such as if Ms. Tofte was sick or to accomplish seasonal tasks involving upkeep of the House. They did not share daily meals or basic household duties. Mr. Fass credibly testified that he did all the grocery shopping and cooked his own meals at the House. Ms. Tofte did not cook and would bring back prepared food to the Apartment, or she went out for dinner. Ms. Tofte was responsible for handling all financial matters. Mr. Fass frankly testified that he was indifferent to issues regarding money and finance.

They even kept separate pets and independently cared for them. Ms. Tofte had two cats and she was clearly very attached to them. She was a doting pet owner, aware of both the specific breeds and ages of her cats. Mr. Fass, on the other hand, took in strays, had nine cats, but he knew 'too much about them to become a cat lover.'

Both Ms. Tofte and Mr. Fass provided credible and consistent testimony that the reasons the deed for the House was placed only in Ms. Tofte's name was because Mr. Fass was older and there were concerns about claims being made against his assets. The record also supports the fact that the couple were not inclined to enter into formal arrangements concerning their relationship. Therefore, it logically follows that they would put the deed in Ms. Tofte's name since it would clearly alleviate any need to take further action with regard to her future rights to maintain ownership of the property.

In like manner, the fact that Ms. Tofte may have declared the House her primary residence for purposes of requesting a 'STAR' homeowners tax exemption does not preponderate over the strong testimonial and documentary evidence to the contrary.' See, *Patchin Place v. Fox*, 2004 NY Slip Op 50327 [U] (App Term, 1st Dept).

Neither Ms. Tofte nor Mr. Fass focused much attention on issues related to the management of their personal financial affairs. Ms. Tofte specifically testified that she was not fastidious in maintaining personal financial records. As such, while the fact that she submitted an application declaring the House as her primary residence may be evidence that she is careless and inattentive to detail, it does not negate the many other factors that demonstrate respondent's substan-

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tial, physical nexus to the Apartment. See, e.g. *Taback v. Steele*, 2005 NY Slip Op 25177 (App Term, 1st Dept). Furthermore, whether the City of New York wishes to reevaluate the tax benefits provided to Ms. Tofte from 1998 through 2004 is up to the City.

The remaining arguments asserted by the landlord are also insufficient to support the petition.

Petitioner's reliance on the Con Ed records of utility usage to support his claim that the Apartment is underutilized is unpersuasive on several grounds. First, it was uncontradicted that Ms. Tofte's stove is defective and she has not used it since at least 1998. Next, it was established that Ms. Tofte does not cook her meals but instead eats at restaurants or picks up prepared food to eat in the apartment. Therefore, whether the actual gas usage at the Apartment is minimal is of no moment.

The record also reveals that Ms. Tofte did not have any major electrical appliances or lighting systems in the Apartment. It is also uncontradicted that she worked long hours during the relevant time period and she often returned home late just to go to sleep. Moreover, the witness from Con Edison indicated that Ms. Tofte's electric bills were only reflective of 'low' usage. He conceded that since the amount of service required was dependent on the kind of appliances and the particular lifestyle of each consumer, it would be very difficult to characterize the significance of utility usage.

Mr. Harounian's claims that he did not see Ms. Tofte at the Building were not persuasive since he was there at times when Ms. Tofte could not be expected to be home. Mr. Harounian testified that he visited the Building during the day and also between 5:00 P.M. and 7:00 P.M. Since respondent testified that she was either at work or out for dinner at these times, Mr. Harounian's testimony was not probative of any disputed fact. Likewise, it must also be noted that there is no evidence from either building personnel or disinterested witnesses, such as neighbors, regarding how often respondent was seen at the premises.

Petitioner's production of several photographs to support his claim that the respondent is not maintaining the Apartment as a home is similarly lacking in probative value and is actually disingenuous. It also bears noting that the photographs were taken by the petitioner after requiring respondent to provide access upon almost no notice. Despite the circumstances of this essentially unannounced intrusion, the photographs indicate that the Apartment is furnished and actively occupied. The fact that the Apartment may be modestly furnished and messy does not mean that respondent does not use it as her home and primary residence. If anything, the photographs lend support to respondent's testimony that she had a tendency to be 'disorganized' and 'chaotic' in the day-to-day details of her life and

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that she is not a person who is overly concerned with personal possessions.

The facts underlying this incident also serve to undermine Mr. Harounian's testimony that whenever he contacted Ms. Tofte to arrange for access to her Apartment, that it would take her a day or two to respond. It is uncontradicted that after receiving the landlord's call that he required immediate access to her Apartment, Ms. Tofte promptly left her office and returned home to accommodate him.

Equally unavailing is petitioner's selective interpretation of the evidence submitted regarding long distance telephone service at the Apartment. While conceding that the long distance telephone records for the Apartment demonstrate 'literally hundreds of toll calls' made during the week, the petitioner nevertheless argues that since weekend long distance usage was low, the conclusion must be drawn that respondent was almost never at the Apartment on weekends. Notwithstanding petitioner's strained interpretation, it is apparent from the number and frequency of long distance calls, that respondent has a consistent presence at the Apartment. In addition, petitioner's claim that a negative inference should be drawn against respondent because she did not submit into evidence records of local telephone service for the Apartment and telephone records for the House, is counterproductive. The burden of proof in this proceeding is on petitioner and although these records were subpoenaed by and available to petitioner, he choose not to submit this evidence.

Accordingly, based upon the foregoing, it must be concluded that the petitioner has failed to prove that respondent does not maintain the premises as her primary residence. What has been demonstrated, particularly by the credible and consistent testimony of Ms. Tofte and Mr. Fass and the voluminous documentary proof, is that respondent has a substantial physical nexus to the Apartment for actual living purposes. The petition is therefore dismissed, with prejudice.

This constitutes the decision and order of the Court.

3/15/2006 NYLJ 18, (col. 1)

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