Appellate Court Reinstates Judgment For Landlord in 'Mogi'

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In our December 2012 column, we wrote about the Appellate Division, First Department's Oct. 2, 2012 decision in *409-411 Sixth Street v. Mogi* (*Mogi I*).[1] In *Mogi I*, a three-judge majority of the First Department (Justices Dianne T. Renwick, Angela M. Mazzarelli and Helen E. Freedman), reversed the Appellate Term and dismissed the landlord's non-primary residence holdover proceeding. In doing so, the Appellate Division did not apply the well-established standard of review giving due deference to the findings of the trial court, and instead made its own findings based on an independent analysis of the evidence.

We noted some surprise at the majority's decision, which we stated called into question the degree of deference the Appellate Division, First Department would give to the findings of the trial court on a bench trial in non-primary residence proceedings. We also pointed to the strong two-judge dissenting opinion (by Justices James M. Catterson and David Friedman) which expressly criticized the majority for using an incorrect standard of review. We further observed that in light of the strong dissent, this matter could very well end up before the Court of Appeals.

In fact, this matter did go to the Court of Appeals. In *409-411 Sixth St. v. Mogi*, 22 N.Y.3d 875 (2013), the Court of Appeals reversed and remitted the matter back to the Appellate Division, finding that the Appellate Division applied an incorrect standard of review. The Appellate Division then issued its Dec. 31, 2013 decision[2] (*Mogi II*), which reinstated the trial court's judgment awarding possession to the landlord.

Background

The facts as recited by the majority opinion in *Mogi I* are as follows. The respondent-tenant, Masako Mogi, occupied a studio apartment at the subject building at 409-411 Sixth Street in Manhattan, pursuant to a rent-stabilized lease entered into in 1980 and periodically renewed thereafter. By timely notice dated Sept. 19, 2006, the petitioner-landlord, 409-411 Sixth Street, LLC, terminated the tenancy effective Dec. 31, 2006, on the ground that the tenant had relocated to Vermont and that she occupied the apartment less than 180 days a year during the preceding two-year period. The landlord then commenced a holdover proceeding in Civil Court, New York County to recover possession of the apartment, on the ground that the tenant did not occupy the apartment as her primary residence. Tenant answered, denying the material allegations of the petition and averring that the property she owned in Vermont was not her primary residence, but was her summer vacation home.

A trial was held before Civil Court Judge Jean T. Schneider. At trial, the tenant testified that, inter alia, since about 1990, tenant owned, in addition to the apartment, a cabin in Westminster, Vermont which she shared with her friend, Isogai. During the relevant period of 2004 through 2006, two telephone lines were maintained at the Vermont property, and the telephone, gas and electricity bills were all listed in tenant's name. In addition, in 2004 through 2006, the tenant maintained a driver's license issued by Vermont, and co-owned a vehicle (with her friend Isogai) which was registered in Vermont and insured using a Vermont agent.

The landlord presented witnesses who testified about the tenant's utility bills for her New York apartment during the relevant period. One of the landlord's witnesses testified that the tenant's electricity usage at the apartment of 50-150 kilowatts per month (based on the utility bills for 2004 through 2006) was "considerably below" the average usage for a single-room studio apartment such as the apartment at issue.[3] The landlord also

proffered the testimony of one of tenant's friends and also a private investigator. The investigator testified that he was told by the friend that the tenant spent "the majority of her time in Vermont."[4] The landlord also submitted into evidence tenant's credit card statements and bank ATM transactions for the 2004-2006 period, which landlord maintained demonstrated that the tenant "makes frequent transactions in and around the Vermont area" and "that by 2006, the [tenant] was spending a majority of the time in Vermont" and "in 2004-2005 the [tenant] did not spend a majority of the time in New York."[5]

After trial, the Civil Court granted the landlord's petition, finding that the evidence established that the tenant did not have a "substantial nexus" to the New York apartment and thus the apartment was not the tenant's primary residence. In making this determination, the court found that:

> [t[he most persuasive evidence offered at trial was Ms. Mogi's banking and credit card records. These records include Ms. Mogi's credit, debit, and ATM transactions over the relevant period, and appear to give an accurate account of her location for most days between 2004 and October 19, 2006….Ms. Mogi spent 120 days during the relevant time period visiting her family in Japan. These days tell us nothing about her primary residence. Of the remaining 846 'known' days in the time period, Ms. Mogi appears to have spent 378, or 45%, in New York and 468, or 55% in Vermont. Based primarily upon the banking and credit card records, I find that respondent did not spend 183 days per year in her New York apartment. Accordingly, final judgment is directed for petitioner.[6]

In addition, while the Civil Court had "primarily based its determination on the banking and credit card records,"[7] the court also referred to other factors indicating that the tenant's primary residence was in Vermont, including (1) "that the jointly held vehicle was registered in Vermont, and that both women held only Vermont driver's licenses," (2) "that the tenant's witnesses who testified that they regularly saw her in New York did not have 'any detailed knowledge of when she was in New York and when she was in Vermont,'" and (3) "that the tenant 'herself also admitted that she could not identify dates when she was in New York and dates when she was in Vermont.'"[8]

Standard of Review

On appeal, the Appellate Term, First Department affirmed.[9] Giving deference to the trial court's findings, the Appellate Term held that "a fair interpretation of the evidence supports the trial court's determination that the rent-stabilized tenant did not occupy the subject East 6th Street studio apartment as her primary residence."[10]

The Appellate Division, First Department granted the tenant leave to appeal. In *Mogi I*, the Appellate Division reversed. In reversing, the majority found that "the landlord ha[d] not established by preponderant evidence that the tenant has forfeited her principal New York residence of long standing."[11]

The majority found, inter alia, that after having given what the majority considered "due regard" to the views of the trial judge, that "under any fair interpretation of the record, a clear preponderance of the probative and credible evidence supports the conclusion that the tenant was using the New York apartment as her primary residence for a substantial period of time prior to the service of landlord's notice of nonrenewal in September 2006."[12]

Catterson wrote a strongly worded dissenting opinion which was joined by Friedman. At the outset, the dissent criticized the majority for using an incorrect standard of review:

> As a threshold issue, the majority has applied an incorrect standard of review in holding in its opening paragraph that 'the landlord has not established by preponderant evidence' that the tenant did not use the subject apartment as her primary residence. The generally accepted standard for appellate review in a nonprimary residence action is whether 'it is obvious that the [fact-finding] court's conclusions could not be reached under any fair interpretation of the evidence.' Here, the majority's analysis does not depend on showing why it is *obvious* that 'any fair interpretation of the evidence' cannot lead to the determination reached by Civil Court and affirmed by Appellate Term. Instead, it simply substitutes its own *different* interpretation of evidence such as the tenant's credit card transactions in Vermont and 'negligible' electric usage at the subject apartment.[13]

The dissent further stated that in its opinion, "a fair interpretation of the evidence in this case leads to the conclusion that…the tenant…relocated to Vermont after the events of 9-11 in 2001, and thereafter no longer used the New York apartment as her primary residence" and that "the majority…neither attempts to nor does it establish that it is obvious that such conclusion cannot be reached under any fair interpretation of the evidence."[14]

Court of Appeals

Mogi I was appealed to the Court of Appeals. By its decision dated Oct. 10, 2013,[15] the Court of Appeals reversed and remitted the case back to the Appellate Division. The Court of Appeals stated that it agreed with the dissenting opinion in *Mogi I* that the majority had applied an incorrect standard of review:

> We agree with the dissenting opinion that the Appellate Division applied the incorrect standard of review to the Appellate Term order. In primary residence cases, where the Appellate Division acts as the second appellate court, 'the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses' (*Claridge Gardens v. Menotti*, 160 A.D.2d 544, 544-45, 554 N.Y.S.2d 193 [1st Dept. 1990]; see also *Thoreson v. Penthouse Intl.*, 80 N.Y.2d 490, 606 N.E.2d 1369 [1992]).
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> The Appellate Division did not apply this standard of review to this case, instead substituting its own view of the trial evidence. Accordingly, the case needs to be remitted to that Court to apply the appropriate standard of review."[16]

Upon remitter from the Court of Appeals, the Appellate Division issued its Dec. 31, 2013 *Mogi II* decision.[17] In a unanimous, unsigned opinion, the court (Mazzarelli, Friedman, Renwick and Freedman) affirmed the Civil Court's judgment awarding possession to the landlord.

The First Department stated that, in applying the correct standard of review as stated by the Court of Appeals:

> we find that competent evidence in the record supports the trial court's conclusion that the tenant actually resided in a house in Vermont from 2004 to 2006, and that she had not used her New York apartment as her primary residence during that same time. The tenant's attempt to explain away this fact merely raises questions of fact and credibility for the trial court.[18]

Conclusion

When *Mogi I* was issued in October 2012, we were concerned that at least in the Appellate Division, First Department, there were questions as to the level of deference that the appeals court would give to the trial court's factual findings in non-primary residence cases. The Court of Appeals has now put those concerns to rest.

1. 100 A.D.3d 112 (1st Dept. 2012).

2. 112 A.D.3d 558 (1st Dept. 2013).

3. Id. at 511.

4. Id. at 512.

5. Id. at 504.

6. Id. at 504-505.

7. Id. at 505.

8. Id.

9. 27 Misc. 3d 126(A) (App. Term 1st Dept. 2010).

10. Id.

11. 100 A.D.3d at 113.

12. Id. at 121.

13. Id. at 124 (italics and brackets in original; internal citations omitted).

14. Id. at 130 (italics in original).

15. 22 N.Y.3d 875 (2013).

16. Id. at 876-77.

17. 112 A.D.3d 558 (1st Dept. 2013).

18. Id. at 558.

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