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Appellate Division Dismisses Trial Court Ruling in 'Mogi'

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It has long been the settled law that on a bench trial, the decision of the trial court is to be given great deference, and should not be disturbed on 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."[1] This rule applies in non-primary residence proceedings.[2] In *409-411 Sixth Street v. Mogi*,[3] however, a three-judge majority of the Appellate Division, First Department, in reversing the Appellate Term and dismissing the landlord's non-primary residence holdover proceeding, appears not to have applied this well-established standard of review, and instead made its own findings based on an independent analysis of the evidence.

Facts of 'Mogi'

The facts as recited by the majority opinion in *Mogi* are as follows. The respondent-tenant, Masako Mogi, occupied a studio apartment at the subject building at 409-411 Sixth St. 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 Mogi 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 Mogi 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 Schneider. At trial, Mogi testified that, inter alia, since about 1990, she owned, in addition to the apartment, a cabin in Westminster, Vermont which she shared with her friend, Noriko 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, Mogi maintained a driver's license issued by Vermont, and co-owned a vehicle (with Isogai) which was registered in Vermont and insured using a Vermont agent.

The landlord presented witnesses who testified about Mogi's utility bills for her New York apartment during the relevant period. One of the landlord's witnesses testified that Mogi'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.[4] The landlord also proffered the testimony of one of tenant's friends and a private investigator. The investigator testified that he was told by the friend that Mogi spent "the majority of her time in Vermont."[5] 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 Mogi "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."[6]

Mogi and three of her friends testified on Mogi's behalf. Her friends testified that Mogi was seen in the building "very frequently," "probably one to two times a week, roughly," and was a "continuing presence."[7] Mogi also countered the landlord's proof concerning the bank and credit card accounts, explaining that both she and her friend Isogai in Vermont made use of the accounts.

Trial Court Ruling

After trial, the Civil Court granted the landlord's petition, finding that the evidence established that Mogi did not have a "substantial nexus" to the New York apartment and thus the apartment was not her primary residence. In making this determination, Civil 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[percent], in New York and 468, or 55[percent] 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.[8]

In addition, while the civil court had "primarily based its determination on the banking and credit card records,"[9] the court also referred to other factors indicating that Mogi'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.'"[10]

Appellate Term Affirms

On appeal, the Appellate Term, First Department affirmed.[11] 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."[12] In so holding, the court found:

Landlord established that there was negligible electricity usage in the apartment for more than two years prior to the commencement of this proceeding, and tenant acknowledged that she spends a substantial amount of time in a house she owns in Westminster, Vermont, an address listed on tenant's driver's license and motor vehicle registration and where tenant's long-time companion admittedly primarily resides. To the extent the trial court, in determining tenant's whereabouts, may have placed undue emphasis on documents reflecting the credit card and bank transactions made by tenant and her companion, any such error does not warrant reversal on this record, which otherwise firmly supports the court's ultimate finding of nonprimary residence.[13]

Appellate Division Reverses

The Appellate Division, First Department granted Mogi leave to appeal. In a 3-2 majority opinion signed by Justice Dianne Renwick and joined by Justices Angela Mazzarelli and Helen Freedman, 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."[14]

The majority found, inter alia, that the "tenant's testimony demonstrated that the New York apartment is fully furnished and she maintained a full-time job in Manhattan during the relevant period" and that Mogi's Vermont house served "not as her primary residence, but as a second residence that she uses on weekends, holidays and vacations."[15] The majority further found that "[w]hat is significant here is that all the tenant's friends and co-tenants consistently testified of the tenant's constant presence in the New York apartment during the relevant period, which is sufficient for the purpose of establishing an ongoing, substantial and physical nexus with the regulated premises" and that there was "no basis to reject the New York tenants' testimonies as incredible."[16]

The majority also found that the credibility of the witnesses, including that of Mogi, was "not seriously undercut by the documentary evidence," including the credit and debit card transactions, the records of electricity usage, and the Vermont driver's license and vehicle registration.[17] With regard to the landlord's evidence, the majority considered it "[i]nconclusive" and "explainable" and "as likely, if not more likely, to support a finding that the tenant occupied the subject apartment as her primary residence."[18]

Significantly, the majority did not mention the long held standard of review that a trial court's findings should not be disturbed on 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."[19] Instead, after having given what the majority considered "due regard" to the views of the trial judge, the majority found 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."[20]

The Dissent

Justice James Catterson wrote a strongly worded dissenting opinion which was joined by Justice David 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.[21]

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."[22] Among other things, the dissent observed:

In addition to the documentary evidence of the tenant's credit card transactions and "negligible" electric usage, two of the four statutory factors that may be weighed as evidence of nonprimary use point in favor of the landlord's position. Moreover, the tenant failed to rebut this documentary evidence with objective, empirical proof that she maintained a "substantial nexus" to the subject premises during the relevant period. Specifically, the testimony of her witnesses, who were other residents of the building, does not comport with the type of testimony that has been accepted by this Court to establish primary residence use of a rent-stabilized apartment. For example, the testimony of a tenant on which the majority relies and which includes the statement that the respondent tenant "would never be away from my purview" cannot be seen as credible, but only as meaningless and useless hyperbole.[23]

Conclusion

Mogi calls into question, at least in the Appellate Division, First Department, the degree of deference that the court will give to the findings of the trial court on a bench trial. It would seem that based on the history of this case and the strong dissent by two justices of the Appellate Division, this matter could very well come before the Court of Appeals.

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Endnotes:

1. *Thoreson v. Penthouse Int'l.*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978 (1992) (internal citation and quotation marks omitted).

2. *Claridge Gardens v. Menotti*, 160 A.D.2d 544, 545, 554 N.Y.S.2d 193 (1st Dept. 1990).

3. —A.D.3d—, 951 N.Y.S.2d 500 (1st Dept. 2012).

4. Id. at 511.

5. Id. at 512.

6. Id. at 504.

7. Id. at 504, 512.

8. Id. at 504-505.

9. Id. at 505.

10. Id.

11. 27 Misc. 3d 126(A), 907 N.Y.S.2d 437 (App. Term 1st Dept. 2010).

12. Id.

13. Id.

14. 951 N.Y.S.2d at 501.

15. Id. at 506.

16. Id. at 507.

17. Id. at 507-508.

18. Id. at 508

19. Thoreson, supra, 80 N.Y.2d at 495.

20. 951 N.Y.S.2d at 506.

21. Id. at 508 (italics and brackets in original; internal citations omitted).

22. Id. at 513 (italics in original).

23. Id. at 509.
