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LANDLORD-TENANT

Non-Primary Residence: Tenant Perjury No Longer Permitted


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Until recently, courts in non-primary residence holdover proceedings turned a blind eye in those instances where tenants previously made statements or representations in their tax returns—under penalty of perjury—that directly contradicted their claims of primary residence. That all changed pursuant to the First Department's July 7, 2015 ruling in *Ansonia Assoc. Partnership v. Unwin*,[1] where the court ruled that a tenant who claimed in her tax returns that she used her apartment solely for business purposes would be estopped from claiming in a non-primary residence holdover proceeding that she actually lived in the apartment.

Background

Pursuant to L 1971, ch 373, the New York State Legislature amended the various rent regulatory statutes to exclude from coverage apartments not occupied as the tenant's primary residence. In his memorandum of support of Chapter 373, Governor Nelson Rockefeller stated:

> Thousands of controlled apartments in New York City and elsewhere are rented by people who do not live in them. They use the apartments as a convenience, staying in them occasionally when they come to the city. Some even use them for storage. Continued controls on these apartments, indirectly subsidizing them through reduced real estate taxes, and keeping them off the market, is one of the worst inequities of rent control.[2]

Although non-primary residence cases are litigated in the Civil Court, DHCR's Rent Stabilization Code Section 2520.6(u) sets forth criteria for determining primary residence, listing various factors of which "no single factor shall be solely determinative." One of those factors is "[s]pecification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency." Thus, for example, if a tenant listed a Hamptons address on his or her tax return, that might be indicia of non-primary residence, but would not be dispositive.

An illustrative case is found in *111 Realty v. Sulkowska*, 21 Misc3d 53 (App. Term 1st Dept 2008). There, the tenant designated a West Palm Beach property as her address in order to obtain a Florida homestead exemption. Such exemption can only be claimed where a taxpayer primarily lives in the state of Florida. The Appellate Term affirmed the Civil Court's denial of landlord's motion for summary judgment, holding:

> While tenant readily acknowledges her ownership of two separate residential units in Florida, material issues of fact as to the situs of tenant's primary residence are raised by tenant's deposition testimony indicating her use of the rent stabilized Manhattan apartment here at issue for all but the winter months and ample documentary indicia of tenant's residency in the New York apartment. This is so notwithstanding tenant's designation of a West Palm beach property as her address in successfully applying for a Florida homestead exemption. Tenant's declaration of residence on a tax-related document, while one of many factors to be considered in determining primary residence, it is not 'dispositive as a matter of law, especially in the context of a motion for summary judgment' (citation omitted).[3]

In *West 157th Street Assoc. v. Sassoonian*, 156 AD2d 137 (1st Dept 1989), the tenant took two positions in his 1985 and 1986 tax returns that would be at odds with his later claim of primary residence. First, the tenant declared his residence to be at a different address, i.e., his girlfriend's. Second, he deducted 100 percent of his rent for the subject apartment as a commercial expense. Notwithstanding the tax filings, the tenant asserted that he lived in the subject rent-regulated apartment. As to listing his girlfriend's address, he claimed the address resulted from an accountant's error. As to the business deductions, he admitted that he "may have erred by deducting too much."[4]

In non-primary residence cases, tenants are on notice that no matter where they do or do not live, the position they took on a prior tax filing may well be dispositive as to primary residence.

The First Department affirmed the denial of landlord's motion for summary judgment, writing:

> The tenant's allegations in the present case raise a sufficient factual dispute to warrant denial of the motion for summary judgment, notwithstanding his filing of his

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local tax returns from a different residence for 1985 and 1986, and that he sought to deduct his entire rent as a commercial expense. It cannot be said that the landlord has carried his burden of establishing 'a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case' (citation omitted).[5]

See also *Village Dev. Assoc. v. Walker*, 282 AD2d 369 (1st Dept 2001) (tax return filed from New Jersey address "is merely one of many factors to be considered in determining primary residence"); *Surrey Hotel v. Talukder*, 11 Misc3d 133(A) (App. Term 1st Dept 2006) (tenant's filing of joint tax return listing a New Jersey address "is not fatal to tenant's primary residence claim").

In *Chelsmore Apts. v. Garcia*, 189 Misc2d 542 (Civ. Ct. N.Y. Co. 2001), Civil Court, summarizing the prevailing case law, wrote that tenant's out-of-state tax filing appeared to be "an aberration," and that in any event, "'the consequences of such filing is a matter for tax authorities, not this court.'" Thus, a tenant would prevail if he or she primarily resided in an apartment, irrespective of false or perjurious statements to the contrary made by the tenant in a tax filing.

'Katz Park Ave. v. Jagger'

The tide began to turn in *Katz Park Ave. Corp. v. Jagger*, 11 NY3d 314 (2008). There, the landlord sought to evict Bianca Jagger based on non-primary residence. The landlord moved for summary judgment on the ground that Jagger was a British citizen and was living in the United States on a "B-2" visa. Such a visa requires the visa holder to have a "principal, actual dwelling place" outside the United States. Thus, the visa was inconsistent with Jagger's claim that she used her Park Avenue apartment as her primary residence.

The Court of Appeals, affirming the First Department, sustained a grant of summary judgment in the landlord's favor, holding:

> Thus, if her B-2 visa is valid, defendant has a 'principal, actual dwelling place in fact' outside the United States. How she could at the same time have a 'primary residence' in New York City is something she has not explained.
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> ***
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> We conclude that, at least absent some unusual circumstance, a primary residence in New York and a B-2 visa are logically incompatible.[6]

Although *Katz Park Ave.* did not involve a tax filing, the case nevertheless stands for the proposition that where a tenant makes a representation on a governmental filing that is logically incompatible with a subsequent claim of primary residence, the court will estop the tenant from claiming primary residence in a subsequent proceeding, irrespective of the true facts. Thus, the Court of Appeals was not concerned about whether Jagger actually lived in her apartment; it simply declared that irrespective of where she lived, she was estopped from asserting a contrary claim.

In 'Ansonia,' the court ruled that a tenant who claimed in her tax returns that she used her apartment solely for business purposes would be estopped from claiming in a non-primary residence holdover proceeding that she actually lived in the apartment.

'Mahoney-Buntzman'

The divorce case of *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415 (2009), is the next case in the logical progression culminating in *Ansonia*. In *Mahoney-Buntzman*, the husband asserted in a prior tax filing that certain monies qualified as business income. The Court of Appeals held that such filing estopped the husband from making a contrary claim in the divorce litigation:

> Similarly, the trial court properly exercised its discretion when it classified the money received by husband pursuant to the settlement agreement as marital property, given the fact that husband made representations that the money was business income for tax purposes. A party to litigation may not take a position contrary to a position taken in an income tax return. Here, husband does not dispute that, in accordance with his settlement agreement, he reported the $1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it were true. We cannot, as a matter of public policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.[7] (Citations omitted).

'Ansonia'

In *Ansonia*, the tenant filed federal income tax returns for the years 2009 through 2011 in which she deducted the entire rent for the apartment as an expense for her S Corporation. In the subsequent non-primary residence litigation, the landlord moved for summary judgment, arguing that the position taken by the tenant in the tax filings was inconsistent with her claim of primary residence. The First Department, reversing Appellate Term, agreed:

> The instructions for the federal income tax return for an S Corporation (Form 1120S) disallow the deduction of rent 'for a dwelling unit occupied by any shareholder for personal use.' Thus, respondent's position that the apartment is her primary residence is 'contrary to declarations made under the penalty of perjury on income tax returns,' i.e. that she does not occupy the apartment for personal use.
>
> Respondent argues that her tax returns are not dispositive because the Rent Stabilization Code states that in determining primary residence 'no single factor shall be solely determinative.' However, we conclude that respondent may not claim primary residence because that claim is 'logically incompatible with the position she asserted on her tax returns. (Citations omitted).[8]

See also *Goldman v. Davis*, 2015 WL 5313645 (App. Term 1st Dept).

Accordingly, in non-primary residence cases, tenants are on notice that no matter where they do or do not live, the position they took on a prior tax filing may well be dispositive as to primary residence. As Ms. Jagger's former husband once famously observed, you can't always get what you want.

1. 130 AD3d 453 (1st Dept. 2015).
2. N.Y. Leg. Ann. 1971, p. 562.
3. 21 Misc3d at 54.
4. 156 AD2d at 138.
5. Id. at 139.
6. 11 NY3d at 317.
7. 12 NY3d at 427.
8. 130 AD3d at 454.