

**138-140 Vil. Owners Corp. v Dillard**

2007 NY Slip Op 52498(U)

Decided on December 28, 2007

Civil Court Of The City Of New York, New York County

Cohen, J.

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Decided on December 28, 2007

**Civil Court of the City of New York, New York County**

**138-140 Village Owners Corp., Petitioner Landlord,**

**against**

**Patricia Dillard, Respondent-Tenants "John Doe" and/or  
"Jane Doe," Respondent-Undertenants.**

L & T 066410/2004

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David B. Cohen, J.

### ***Introduction***

In this residential holdover proceeding, this court must decide whether respondent, Patricia Dillard, is using rent-controlled Apartment 3RE, located at 140 West 10th Street, New York, New York 10014, along with the next door apartment, 3RW, as a single primary residence. This court conducted a trial over a period of three days. Respondent, Patricia Dillard, building superintendent, James Ward, a member of petitioner's board, Jerome Reed, and building resident, Timothy Moore, testified at trial. This court credits the testimony of Ms. Dillard, Mr. Reed, Mr. Ward, and Mr. Moore and makes the following findings of fact and conclusions of law.

### ***Findings of Fact***

Respondent testified that in or around 1950, she and her husband began living in apartment 3RW. In 1960, her husband and the prior landlord signed the lease for apartment 3RE, a separate unit located next door to apartment 3RW. They expanded into apartment 3RE because they wanted extra space. Upon occupying 3RE, respondent built shelves and closets and moved her art supplies into the new apartment. Respondent's husband passed away in 1968. In December 1989, the

building converted to a cooperative but respondent did not purchase her apartments.

### ***I. Apartment 3RE***

Apartment 3RE has its own entrance separate from 3RW and has its own door and mailbox keys. It has a kitchen, bedroom, and living room, and is furnished with a drawing table, easel, chest, chairs, closets, shelves, cabinetry, mirrors, and a double bed. There is a toaster oven, portable hot [\*2]plate, slow cooker, mini-refrigerator, desktop computer with a printer, [FN1] television, phone, and multiple radios and lamps throughout the apartment. The kitchen contains pots, pans, cups, saucers, dishes and bowls, among other kitchen-related utensils. Apartment 3RE has a toilet and deep double sink, but lacks a shower and bathtub. [FN2] Since 1997, when respondent got a toaster-oven, the stove and gas service in 3RE have been disconnected.

### ***II. Apartment 3RW***

Like 3RE, 3RW contains a kitchen, bedroom, and living room, and is furnished with tables, chest, chairs, closets, shelves, cabinetry, mirrors, and a double bed. There is a toaster oven, television, phone, and multiple radios. The kitchen contains pots, pans, cups, saucers, dishes and bowls, and other kitchen-related utensils. However, only 3RW is outfitted with a bathtub, full-sized refrigerator, operational stove, and gas service. Other items which are specific to 3RW include an answering machine, sofa-bed and perhaps a dining table. [FN3]

### ***III. Respondent's Daily Activities***

Respondent is an eight-one year old widow and a "semi-retired" school teacher of art and reading. At trial, she testified to being an artist who earned two Bachelor of Fine Arts degrees and whose silkscreen prints were exhibited at various prominent

museums including The Smithsonian and Brooklyn museums, and the National Academy Museum and School of Fine Arts in New York. Respondent also owns real property in Massachusetts, from which she receives rental income. Respondent claims to have utilized both apartments, 3RW and 3RE, during the relevant period, [\[FN4\]](#) in a way that constitutes a single primary residence.

On a typical day, the respondent dresses in 3RW and then travels to one or more of the various nearby senior centers [\[FN5\]](#) where she eats breakfast and lunch, showers, socializes, attends classes, and uses the computer to practice programs and access the internet for sending e-mails, checking current events, and perusing websites. She neither showers nor bathes in 3RW or 3RE, but instead showers at the Carmine Recreation Center.

Respondent returns home to either 3RW or 3RE by one o'clock in the afternoon and usually remains indoors for the rest of the day and evening. At home, respondent travels between 3RW and 3RE. Dinner is eaten in either 3RE or 3RW, usually consisting of meals left over from the senior [\[\\*3\]](#) center, and respondent spends her evenings alone, usually mending cloths, listening to the radio, talking on the telephone, or performing "evening chores" in both apartments. Respondent testified that she has not had any visitors or guests for "quite a few years." On this point, the superintendent testified that respondent can be found more often than not in 3RW, that he visits 3RW whenever he wishes to speak to respondent and that he occasionally heard the radio playing in 3RE when he came to knock at 3RW. He also saw respondent enter apartment 3RE numerous times.

According to respondent, 3RW is where she regularly sleeps, [\[FN6\]](#) eats, brushes her teeth, watches television, and cooks using the operational stove, although she testified to having hardly cooked for over twenty years. Respondent reads, watches

occasional programs on the television, makes coffee on the hotplate, and uses her toaster oven in 3RE. When working in 3RE, respondent eats foods that do not require heating, such as yogurt, which are kept in her mini-fridge. Respondent manually washes her clothes in 3RE using its large double sink.

Respondent also works at obtaining freelance employment from 3RE, preparing her resume and job responses on the 3RE computer, and subsequently sending them via the internet from the senior center computers. She uses the computer in 3RE to edit resumes and create pamphlets for others. Respondent has been writing a novel, an activity she performs several hours per day, at least two to three times per week - "heavy on Saturdays" - in 3RE.<sup>[EN7]</sup> Respondent also uses 3RE for her artistic projects. For example, respondent has created her own holiday cards in 3RE for many years and sews in 3RE, an activity for which she has expressed a particular fondness and talent.

Respondent keeps things in 3RE that are not of imminent need, such as her seasonal and regular wardrobe, including winter clothes, raincoats, blouses, skirts, dresses and scarves. Walls are lined with shelves upon which rest art supplies, such as paint brushes, acrylic and oil paint, watercolor, ink, reams of art paper, sewing fabrics, thread, yarn and other "collectibles" accumulated throughout the years. In the bedroom is an assortment of raw wood intended for use as shelves. The building superintendent added to this list, which he characterized as "clutter," such things as newspapers, books, empty furniture, mattresses, artwork, and numerous plastic bags filled with clothing. According to the superintendent, such personal effects accounted for nearly three-quarters of the total space within the apartment. He testified to his belief that respondent maintained her primary residence in 3RW on grounds that it was cleaner and more orderly than 3RE, and from the evidence of food in 3RW. In

2004, following notice of the instant proceeding, the respondent hired "organizers" to remove items from 3RE; the movers were paid approximately \$1,400 for their services.

Respondent has given apartment "3" as her address for many years, without appending a letter. She has maintained electricity in both apartments and phones in both apartments function under a single utility bill.

#### ***[\*4]Conclusions of Law***

In a non-primary residence holdover proceeding, the petitioner has the burden to show that respondent maintains his or her primary residence at a location other than the subject premises (*Sharp v Melendez*, 139 AD2d 262, 264 [1st Dept 1988], *appeal denied* 73 NY2d 707 [1989]). This burden is met if, by a fair preponderance of evidence, it is shown that respondent does not maintain an ongoing, substantial, physical nexus with the subject premises for actual living purposes (*Hudbar Assoc. LLC v Charif*, NYLJ, Feb. 27, 2002, at 18, col 6 [Civ Ct, NY County]). A tenant is permitted to occupy two or more apartments as a single residence and a petitioner will not be able to meet its burden of proof where the tenant maintains both apartments as a single residential unit (*Sharp v Melendez*, 139 AD2d at 265; *Kassell v Bakst*, NYLJ, June 2, 1986 [App Term, 1st Dept]; *Burgess v Campbell*, NYLJ, July 29, 1981, at 7, col 4 [Sup Ct, NY County][four non-contiguous apartments held to be tenants' primary residence]; *9554 NY Apts. Assoc., LLC v Hennessy*, 184 Misc 2d 527, 531 [Civ Ct, NY County 2000] ["neither apartment alone constitutes one complete primary residence. Rather, both apartments together constitute one primary residence."]).

To determine whether or not multiple apartments constitute a single residence,

courts have looked primarily to the tenant's intent, which is manifested in the tenant's use of the apartments, and the landlord's knowledge of, and acquiescence in, the arrangement (*Sharp v Melendez*, 139 AD2d at 265; *C.H. Page Assoc. v Dolan*, NYLJ, Nov. 8, 1984, at 4, col 2 [App Term, 1st Dept])[two non-contiguous apartments "had been treated and utilized by the tenant as a *de facto* single residential unit for many years with the acquiescence of the prior owner"]; *Hennessy*, 184 Misc 2d at 529). A court must determine whether the use is residential in nature (*see 224 East 18th St. Assoc. v Sijacki*, 138 Misc 2d 494, 498 [Sup Ct, NY County 1987]).

Where the regulated apartment is maintained for the "limited purposes of convenience or for consideration of personal gain" it is not a party's primary residence (*Briar Hill Apts. Co. v Teperman*, 165 AD2d 519, 520-521 [1st Dept 1991]). Uses that are not residential in nature include using the apartment "as a vacation residence, week-end retreat, a *pied-a-terre* or a location exclusively or primarily dedicated to some specialized activity e.g. a business or hobby. . . . [or] kept in reserve for special purposes like the reception of overnight guests or as a play area for visiting children" (*Sijacki*, 138 Misc 2d at 498). A tenant who uses an apartment as a place of business and is not using the apartment as a primary residence will not be protected from eviction (*Ter-Arutunian v Stahl Assoc.*, NYLJ, Jan. 23, 1987, at 1, col 2 [Sup Ct, NY County]), however, "[t]he fact that [a tenant] also works [in the second apartment] does not keep both apartments from being one contiguous unit" (*Hennessy* 184 Misc 2d at 531).

The nature of the use is generally not, itself, determinative but rather indicative of whether the two apartments are used by the tenant as a single residential unit (*see Sharp v Melendez*, 139 AD2d at 265; *C.H. Page Assoc. v Dolan*, NYLJ Nov. 8, 1984, at 4, col 2 [two small apartments found to be occupied as a single unit where the

second apartment was leased to provide additional living space and was used as a second bedroom for tenant's nephew]; *Hennesy* 184 Misc 2d at 529; *Billy J. Tracy Assoc. v Faust*, NYLJ, Apr. 15, 1987, at 14, col 2 [Civ Ct, NY County] [two apartments held to be one dwelling unit where respondents received mail, cooked and slept in one apartment and used the other as a study, guest room, and storage area, spending a fair amount of time there)]; *Sijacki*, 138 Misc 2d at 497 [respondent slept in one apartment and used the other to shower, dress, make coffee, prepare work, read, paint, use the phone, as a guest room and to store out of [\*5]season clothes, art supplies, easel, drafting table, and art chair]).

From respondent's description of her daily activities, it is apparent that she uses both 3RE and 3RW as a single primary residence (*Sharp v Melendez*, 139 AD2d at 266). Although respondent sleeps and performs basic hygienic functions in 3RW, she takes meals in both apartments depending on where she is working at the time; she does not cook elaborate meals, but eats already prepared foods that, at most, she needs to heat up in her toaster oven or on her portable hot plate and keeps food in the mini-refrigerator, all of which are available in apartment 3RE. Respondent also washes her clothes by hand in the sink in 3RE. Based upon her testimony, respondent spends a substantial amount of her time in 3RE (see *Billy J. Tracy Assoc. v Faust*, NYLJ, Apr. 15, 1987, at 14, col 2; see e.g. *Briar Hill Apts. Co. v Teperman*, 165 AD2d at 520-521), working on the computer to write her novel, prepare resumes, create pamphlets for others and prepare job related responses. She also sews, mends clothes and engages in various artistic, craft and hobby projects in 3RE, thus, it is only natural that most of her art-related material should be housed in 3RE. She also listens to the radio, talks on the telephone and watches an occasional television show in 3RE. Further, respondent maintains phone and electricity for both apartments under a single

account.

Although some of respondent's activities in the apartment might be considered commercial in nature, she is not using 3RE exclusively as a place of business or as a location used exclusively to pursue hobbies <sup>FN8</sup> (see *Sijacki*, 138 Misc 2d at 498; *Ter-Arutunian v Stahl Assoc.*, NYLJ, Jan. 23, 1987, at 1, col 2; *Hennessy*, 184 Misc 2d at 531). Nor does the partial use of apartment 3RE for storage preclude a finding that it is part of a single primary residence (see *Billy J. Tracy Assoc. v Faust*, NYLJ, Apr. 15, 1987, at 14, col 2 [apartment used a study, guest room, and storage area]), as apartment 3RE is also far more than just a storage area for respondent's clothing and materials. Rather, the amount and consistency of time spent and the variety of activities performed daily in 3RE suggests that 3RE is as integral to respondent's daily lifestyle as 3RW, the apartment where she sleeps (see *Sharp v Melendez*, 139 AD2d at 265 [tenant took daily meals, daily insulin injections and slept in second apartment five to ten times per month]; *Hudbar Assoc. LLC v Charif*, NYLJ, Feb. 27, 2002, at 18, col 6 [tenant slept, cooked and ate in one apartment and used the other apartment for her part-time antiques business and in her activities as a collector and to "putter"]).

Finally, when respondent took possession of 3RE over 45 years ago in order to have more space, she did so with the consent and acquiescence of the predecessor landlord (*Sharp v Melendez*, 139 AD2d at 265-266; *C.H. Page Assoc. v Dolan*, NYLJ Nov. 8, 1984, at 4, col 2).

Thus, respondent has maintained an ongoing, substantial, physical nexus with apartment 3RE such that 3RE, together with 3RW, constitute a combined primary residence and petitioner has not met its burden, by a fair preponderance of evidence (*Hudbar Assoc. LLC v Charif*, NYLJ, Feb. 27, 2002, at 18, col 6). Accordingly, this

proceeding is dismissed.

This constitutes the decision and order of the court. [\*6]

Dated: December 28, 2007

New York, New York

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DAVID B. COHEN, J.H.C.

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### Footnotes

**Footnote 1:** At trial, respondent testified that she has had the printer in 3RE for five years, however at her deposition taken in December 2, 2005, respondent testified that she "just" received the printer.

**Footnote 2:** Respondent requested the installation of a bathtub or shower in 3RE in 1960, but was refused by petitioner's predecessor.

**Footnote 3:** Respondent's trial and deposition testimony appear to conflict on this minor point.

**Footnote 4:** The parties agreed to narrow the proceeding to the period of 2003 and 2004.

**Footnote 5:** Respondent testified to frequenting several senior centers such as the Greenwich House, "20 Washington North," Carmine Recreational Center and the "YW" at 14th Street and First Avenue.

**Footnote 6:** She slept in 3RE at times during 2003 and 2004 when the building was experiencing heating problems, however, respondent concedes that she has consistently slept in 3RW since the problem was corrected.

**Footnote 7:** Respondent has been engaged in this project for the "last few years" thus placing it within the relevant time period. By the time of trial, respondent testified to having written approximately fifty-two thousand words.

**Footnote 8:** A hobby is a "specialized pursuit that is outside one's regular occupation and that one finds particularly interesting and enjoys doing usually in a nonprofessional way as a source of leisure-time relaxation" (Webster's Third New International Dictionary [1st ed. unabridged, 2002])

