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New York's rent stabilization laws were enacted during a period of housing shortages in order to shield tenants from unreasonably high rent payments and to guard them from eviction without just cause.[1] According to New York's Rent Stabilization Code ("RSC"), an owner cannot refuse to renew a tenant's lease if the tenant has consistently paid rent, unless the owner's refusal is based on grounds expressly recognized by the law.[2] One recognized ground for refusing to renew is if the dwelling "is not occupied by the tenant . . . as his or her primary residence."[3] This primary-residence requirement is a fact-sensitive inquiry.[4] While no single fact is dispositive, the RSC delineates four factors to aid the courts in determining whether a tenant is using an apartment as his or her primary residence.[5]

In *TOA Construction Co., Inc. v. Tsitsires*, the New York Appellate Division, First Department, was presented with the question of whether possession of a rent-stabilized apartment should be granted to the landlord on the grounds that a mentally ill tenant did not maintain the apartment as his primary residence.[6] Under the primary-residence requirement, courts typically require the landlord to demonstrate by a preponderance of the evidence that the tenant has not kept "an ongoing, substantial, physical nexus with the [rent-stabilized] premises for actual living purposes."[7] In *TOA Construction,* the First Department granted possession of the apartment to the landlord because it found that the tenant used the apartment merely as a storage facility, which was equivalent to abandonment.[8] However, in arriving at its holding, the First Department failed to apply the four factors enumerated in the RSC. Specifically, the court did not consider whether the tenant: (1) used an address other than the rent-stabilized apartment's address as a place of residence on documents filed with public agencies, (2) used the apartment address as a voting address, (3) occupied the apartment for an aggregate of less than 183 days in the most recent calendar year, or (4) subleased the apartment.[9] This case comment contends that the First Department should not have awarded the landlord possession of the apartment because applying the four factors to the facts of this case tips the balance in favor of the tenant.

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1. Gerald Lebovits & Matthais W. Li, *Nonprimary-Residence Holdover Proceedings*, 34 N.Y. Real Property Law Journal 63, 63 (2006).

2. *See id.*; N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.4(c) (2008); Golub v. Frank, 65 N.Y. 2d 900, 901 (1985).

3. N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.4(c).

4. *See* TOA Constr. Co., Inc. v. Tsitsires, 861 N.Y.S.2d 335, 345 (1st Dep't 2008).

5. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j), 2520.6(u); Chelsmore Apts., L.L.C. v. Garcia, 733 N.Y.S.2d 329 (Civ. Ct. N.Y. County 2001).

6. *TOA Constr. Co.*, 861 N.Y.S.2d at 335.

7. *Id.* at 338; *see also* Glenbriar Co. v Lipsman, 5 N.Y.3d 388, 392 (2005); Katz v. Gelman, 676 N.Y.S.2d 774, 775 (1st Dep't 1998).

8. *TOA Constr. Co.*, 861 N.Y.S.2d at 340.

9. *See* N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j), 2520.6(u).

Defendant Tsitsires was the rent-stabilized tenant of a single-room occupancy ("SRO") building for over 35 years.[10] Tsitsires suffered from a chronic mental illness that involved panic attacks that occurred when he was indoors.[11] His mental disorder forced him to live the lifestyle of a homeless man, spending large amounts of time outside the apartment and sleeping on park benches.[12] Tsitsires kept all of his personal possessions in the apartment and had his mail and telephone bills delivered there.[13] In addition, Tsitsires's girlfriend of almost 35 years possessed the only key to the apartment and frequently used the rent-stabilized apartment as a place to shower and to store her personal belongings.[14] Tsitsires also testified that he "spent seven or eight months out of each year in his apartment."[15]

Plaintiff TOA Construction Co., Inc. is the landlord of the SRO building.[16] TOA Construction's former superintendent, Mr. McBrinn, saw Tsitsires six or seven times in the apartment building lobby from the years 1997 to 2000, but never saw Tsitsires leave or enter the apartment.[17] Mr. McBrinn also testified that during the same period, he knocked on the subject apartment's door eight or ten times and heard voices inside the apartment, although no one answered.[18] During Tsitsires's tenancy, TOA Construction allowed the building to fall into such poor condition that it was almost uninhabitable.[19] Newspapers characterized TOA Construction as a "slumlord," and the court described the landlord as nefarious.[20]

TOA Construction brought a holdover proceeding in the Civil Court, New York County, against Tsitsires for possession of the rent-stabilized apartment on the ground that it was a non-primary residence.[21] TOA Construction argued that Tsitsires spent virtually all of his time away from the apartment and, therefore, had

10. *See TOA Constr. Co.*, 861 N.Y.S.2d at 337 (noting that the tenant lived in the SRO building since 1970).

11. *Id.*

12. *See id.* at 337, 340.

13. *Id.* at 337.

14. *Id.*

15. *Id.* at 346.

16. *Id.* at 336.

17. TOA Constr. Co., Inc. v. Tsitsires, 798 N.Y.S.2d 674, 687 (Civ. Ct. N.Y. County 2005).

18. *Id.* at 680.

19. *TOA Constr. Co.*, 861 N.Y.S.2d at 337.

20. *Id.* at 336–37 (noting that although newspapers characterized the landlord as a notorious slumlord, it was the court's job to "dispassionately apply the law to the facts as found."). *See also*, Anthony Ramirez, *An Epic Landlord-Tenant Fight, Crossing Years and Continents*, N.Y. Times, Oct. 22, 2007, at B1 (a tenant of the TOA Construction building described the landlord as having "turned a blind eye to mice, roaches, water from the ceilings, shattered windows, hallways cold enough in winter to fog the tenants' breath, and pigeons in all seasons flying and defecating indoors.").

21. *TOA Constr. Co.*, 798 N.Y.S.2d at 674.

abandoned it.[22] The court held that Tsitsires did not use the apartment as his primary residence and awarded possession to TOA Construction.[23] Although the Civil Court mentioned the four factors set forth by the RSC to determine if Tsitsires used the apartment as his primary residence, it never applied them to the facts of the case.[24] Tsitsires appealed, and the Appellate Term, First Department, reversed.[25] The majority found that Tsitsires maintained the apartment as his primary residence because he never removed his personal belongings from the apartment and because he received his mail at the apartment.[26] The court concluded that these facts tended to show that Tsitsires had not abandoned the apartment.[27] The dissent argued that Tsitsires did not use the apartment as his primary residence, but rather, used it merely as a storage facility.[28]

TOA Construction appealed to the Appellate Division, First Department.[29] The court reversed and reinstated the judgment of the Civil Court, awarding possession of the rent-stabilized apartment to TOA Construction.[30] The court found that because Tsitsires spent most of his time away from the apartment, he did not have an "ongoing, substantial, physical nexus with the apartment for actual living purposes."[31] According to the court, Tsitsires used the apartment only as a mail drop and a place to store his belongings.[32] In his dissent, Justice Andrias argued that in performing the primary-residence analysis, the majority did not rely on the four factors set forth in the RSC, but only on "documentary evidence of [the tenant's] residence, [such as] his phone bills . . . ."[33]

Although no single factor is dispositive, under New York's RSC, the factors the court must consider include, but are not limited to:[34]

> (1) specification 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; (2)

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22. *See id.* at 676.

23. *Id.* at 692.

24. *Id.* at 689 (explaining that the four factors must be viewed in aggregate and that other factors outside of the four enumerated factors can be considered).

25. TOA Constr. Co., Inc. v. Tsitsires, 830 N.Y.S.2d 16, 18 (1st Dep't 2006).

26. *Id.* at 17.

27. *Id.*

28. *Id.* at 19 (McCooe, J., dissenting) ("The subject premises are not the tenant's primary residence because he does not use it for actual living purposes, only storage. . . . He has lived on the streets for many years.").

29. *See TOA Constr. Co.*, 861 N.Y.S.2d at 335.

30. *Id.* at 341.

31. *Id.* (citing Emay Props. v. Norton, 519 N.Y.S.2d 90, 92 (1st Dep't 1987)).

32. *Id.* at 340.

33. *Id.* at 346.

34. *See id.* at 346.

> use by an occupant of an address other than such housing accommodation as a voting address; (3) occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation . . . ; and (4) subletting of the housing accommodation.[35]

Significantly, although the majority opinion addressed most of the arguments in Justice Andrias's dissent,[36] the majority was silent as to Justice Andrias's argument that the court should have applied the four factors of the RSC.

The Appellate Term correctly concluded that the mentally ill tenant used the rent-stabilized apartment as his primary residence.[37] While Tsitsires's emotional disturbance may have prevented him from being in his apartment every day, he maintained an ongoing, substantial, physical nexus with the apartment because he received his mail and bills there, kept all of his personal possessions in the apartment,[38] and never abandoned the apartment.[39] The Appellate Division should have considered the factors enumerated in the RSC in its primary-residence analysis and granted possession to Tsitsires.

While the four factors listed in the RSC are not exhaustive, the factors are considered the "standard indicia" of primary residency.[40] While courts vary in the amount of weight they give each factor, a unifying theme among New York cases dealing with a tenant's potential eviction from a rent-stabilized apartment is that the courts consider all four factors enumerated by the RSC.[41]

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35. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j), 2520.6(u); *accord TOA Constr. Co.*, 861 N.Y.S.2d at 346; *Glenbriar Co.*, 5 N.Y.3d 388, 393; *Chelsmore Apts.*, 733 N.Y.S.2d at 330; Uptown Realty Group, L.P. v. Buffaloe, 784 N.Y.S.2d 309, 312–13 (N.Y. Civ. Ct. 2004); ST Owner v. Nee-Chan, 2007 WL 2316003, at *2 (Civ. Ct. N.Y. County Aug. 6, 2007); ST Owner v. Bonczek, 2007 WL 5211171, at *1–2 (Civ. Ct. N.Y. County Dec. 13, 2007); 1234 Broadway L.L.C. v. Jing Wu Chen, 2008 WL 2501408, at *2 (Civ. Ct. N.Y. County June 24, 2008).

36. *See TOA Constr. Co.,* 861 N.Y.S.2d at 336 ("However, the tone employed by the dissent, accusing this Court of 'facilitating a notorious slumlord's 20-year effort to empty its building of all tenants by evicting respondent tenant from his rent stabilized apartment,' is misguided."). "[T]he dissent essentially relies on the testimony of respondent and his companion to find, contrary to the trial court's finding, that respondent intends to reside in the premises in the future, and, indeed, that he has resided there since at least 2001." *Id.* at 339. "The dissent's citation to recent newspaper articles to support its assertion of facts regarding respondent's recent residence at the premises should not be countenanced." *Id.*

37. *See TOA Constr. Co.*, 830 N.Y.S.2d at 17.

38. *See TOA Constr. Co.,* 861 N.Y.S.2d at 337.

39. *See TOA Constr. Co.*, 830 N.Y.S.2d at 17.

40. Andrew Scherer, Esq. & Hon. Fern Fisher, Residential Landlord-Tenant Law in New York § 8:211 (2007 ed.).

41. *See, e.g.*, *1234 Broadway L.L.C.*, 2008 WL 2501408, at *2; *Glenbriar Co.*, 5 N.Y.3d at 392–93 (finding that the third factor was dispositive of tenant's primary residency since the tenant spent more than 183 days in the apartment); *Chelsmore Apts.*, 733 N.Y.S.2d at 330, 332 (finding that the first and second factors were dispositive of tenant's primary residency since the tenant specified the apartment's address on her tax return and voting card); *Uptown Realty Group*, 784 N.Y.S.2d at 311–13 (finding that the first factor was dispositive of tenant's primary residence since the tenant specified the apartment's address on her driver's license and tax returns); *Nee-Chan*, 2007 WL 2316003, at *2, *4 (finding that the third factor was dispositive of tenant's non-primary residency since the tenant spent most of her time in her New Jersey

The first factor considers the "specification by an occupant of an address other than [the subject apartment] as a place of residence on a tax return, motor vehicle registration, driver's license or other document filed with a public agency."[42] Courts have used this factor as a way to gauge whether the rent-stabilized tenant actually considers the apartment to be his or her primary residence.[43] For example, in *Chelsmore Apts. L.L.C. v. Garcia*, the landlord argued that rent-stabilized tenants Garcia and Medina[44] did not use an apartment in New York as their primary residence, but rather, primarily resided in their houses in Spain and Florida.[45] Applying the first factor, the court found that Medina listed the apartment on each of her tax returns (except for her 1997 tax return) and her telephone bills.[46] However, Medina used a New York P.O. Box as her mailing address for her bank and credit card accounts and her employment records.[47] The court determined that the first factor weighed in favor of Medina, even though she did not list the address of the rent-stabilized apartment with the post office.[48] The court decided to overlook this fact because Medina's reason for doing so was that she was unsatisfied with the mail delivery system at the apartment building.[49]

In another case, *ST Owner v. Bonczek,* the court found that the tenant, Bonczek, used the apartment's address on documents such as his bank statement, gym membership, cell phone invoices, and a credit card invoice.[50] However, he used the address of his former lover on his driver's license, paychecks, tax returns, car and motorcycle registrations, and insurance and employment records.[51] The court found that the first factor did not weigh in Bonczek's favor because the majority of the documents that he filed with public agencies did not list the rent-stabilized apartment's address.[52]

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apartment); *Bonczek*, 2007 WL 5211171, at *1–2, *5 (finding the third factor dispositive of tenant's primary residence since the tenant only spent three nights a week away from the subject apartment).

42. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j)(1), 2520.6(u)(1).

43. Lesser v. Park 65 Realty Corp., 527 N.Y.S.2d 787, 791 (1st Dep't 1988).

44. *Chelsmore Apts.*, 733 N.Y.S.2d at 329. Garcia and Medina were the tenants of record of the rent-controlled apartment for 40 years. They are married, but live separately. Only Medina claimed the subject premises as her primary residence. *Id.* at 330–31.

45. *Id.* at 330.

46. *Id.* at 332.

47. *Id.*

48. *See id.*

49. *Id.*

50. *Bonczek*, 2007 WL 5211171, at *3.

51. *Id.* at *2 (the complete inventory of documents on which Bonczek did not list the subject apartment's address included: (1) his driver's license; (2) his state and federal tax returns; (3) his health insurance; (4) his car and motorcycle registrations; (5) his car and motorcycle insurance; (6) his psychotherapist state license; (7) his Capital One credit card statements; (8) his Bank of New York statements; (9) his E-ZPass documents; (10) his employment records; and (11) his paychecks).

52. *Id.* at *3.

Similarly, in *ST Owner v. Nee-Chan*, the court found that the first factor favored the landlord because the tenant, Nee-Chan, listed her New Jersey co-op's address rather than the New York City apartment's address on her federal and state income tax returns, credit card statements, and bank statements.[53] In addition, although she listed the apartment's address on her telephone bill, that phone had been disconnected.[54]

Unlike the tenants in *Chelsmore Apts.* and *Bonczek*, however, in *TOA Construction*, Tsitsires had no tax returns or a driver's license.[55] Tsitsires did list the address of the apartment on his telephone bill—as well as with the post office—so that he could receive his mail at the apartment.[56] Significantly, TOA Construction proffered no evidence to show that Tsitsires placed an alternative address on any documents filed with public agencies.[57] Consequently, had the court applied all four factors codified in the RSC to the facts in *TOA Construction*, the first factor would had favored Tsitsires.

The second factor examines "use by an occupant of an address other than [the subject apartment] as a voting address."[58] Courts use this factor—out of convenience and practicality—to determine primary residence because it is likely that a person will choose to register the address of the county where he or she primarily resides.[59] In *Chelsmore Apts.*, the court noted that despite voting by absentee ballot in two elections, Medina listed the rent-stabilized apartment's address on Board of Election records.[60] The court found that the second factor weighed in Medina's favor because it recognized that her job in the Merchant Marines required her to be away at sea for long periods of time, which made voting by absentee ballot acceptable.[61] Similarly, in *Nee-Chan*, the court found that the second factor supported Nee-Chan's primary residency claim because she registered to vote in New York using her New York City apartment's address.[62] In contrast, in *Bonczek*, the court found that Bonczek registered to vote using his former lover's address,[63] and therefore the second factor favored the landlord. If the court in *TOA Construction* had applied the second factor, it would

53. *Nee-Chan*, 2007 WL 2316003, at *1–3.

54. *Id.* at *3.

55. *TOA Constr. Co.*, 798 N.Y.S.2d at 679. S*ee also Bonczek*, 2007 WL 5211171, at *1; *Chelsmore Apts.*, 733 N.Y.S.2d 329.

56. *See TOA Constr. Co.*, 861 N.Y.S2d at 337; *TOA Constr. Co.*, 798 N.Y.S.2d at 679.

57. *See TOA Constr. Co.,* 861 N.Y.S.2d 335 (making no mention that Tsitsires had other documents filed with public agencies).

58. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j)(2), 2520.6(u)(2) (alteration for clarity).

59. *Cf.* Scherer & Fern, supra note 40 (noting when a court finds that the tenant has registered to vote using an address other than the subject apartment, it is logical for the court to conclude that the subject apartment may be a non-primary residence).

60. *Chelsmore Apts.*, 733 N.Y.S.2d at 332.

61. *See id.*

62. *Nee-Chan*, 2007 WL 2316003, at *2.

63. *Bonczek*, 2007 WL 5211171, at *1.

likely have found that because Tsitsires was not registered to vote, the factor favored neither TOA Construction nor Tsitsires.[64]

The third factor requires "occupancy of [the subject apartment] for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation . . . . "[65] Courts use this factor to evaluate whether the tenant has maintained a continuous physical connection with the apartment.[66] In *Bonczek*, the tenant testified that he spent only four nights a week in the rent-stabilized apartment.[67] Despite this, the court found the third factor was satisfied because of the tenant's cumulative occupation of the apartment for four nights a week, which added up to more than 183 days in the most recent calendar year.[68] In contrast, in *Nee-Chan*, the tenant maintained that she lived in her New Jersey co-op only three nights a week, but the court found that this evidence was not credible because telephone records from the New Jersey co-op showed almost daily outgoing calls.[69] In addition, the court found that she kept the bulk of her possessions in the New Jersey co-op, and that she only left family photos and mementos in the rent-stabilized apartment.[70] Consequently, the court found that there was not enough evidence to fulfill the 183-day period required by the third factor.[71]

In *Chelsmore Apts.*, the court found that as a chief steward for the Merchant Marines, Medina spent a substantial amount of time away at sea.[72] However, the court also found that she kept the bulk of her possessions and goods in the apartment and that she occupied the apartment when she was not away at sea.[73] The time that Medina spent away from her apartment for professional reasons qualified under the "temporary periods of relocation" exception to the third factor.[74] Therefore, the court

64. *TOA Constr. Co.*, 798 N.Y.S.2d at 679.

65. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j)(3), 2520.6(u)(3).

66. *See Bonczek*, 2007 WL 5211171, at *4.

67. *See id.* at *3–4.

68. *Id.* at *4. Based on the four-day-week period, tenant would have stayed at the apartment for a total of at least 208 days a year.

69. *Nee-Chan*, 2007 WL 2316003, at *4.

70. *Id.* at *2.

71. *Id.* at *4.

72. *Chelsmore Apts.*, 733 N.Y.S.2d at 330–32.

73. *Id.* at 331–33.

74. A tenant's absence qualifies as a temporary relocation if he:

> (i) is engaged in active military duty; (ii) is enrolled as a full time student; (iii) is not in residence at the housing accommodation pursuant to a court order not involving any term or provision of the lease, and not involving any grounds specified in the Real Property Actions and Proceedings Law; (iv) is engaged in employment requiring temporary relocation from the housing accommodation; (v) is hospitalized for medical treatment; or (vi) has such other reasonable grounds that shall be determined by the city rent agency upon application by such person.

held that "Medina maintained a substantial, physical nexus with the" apartment as her primary residence.[75]

As stated by Justice Andrias in his dissent, the most probative factor in *TOA Construction* should have been the third factor because TOA Construction never proffered evidence concerning this factor.[76] However, the majority did not apply the third factor in its analysis.[77] Instead, it determined that Tsitsires did not primarily reside in the apartment based on evidence such as phone usage and the fact that Tsitsires's girlfriend held the only key to the apartment.[78] However, unlike the tenant in *Nee-Chan*, Tsitsires kept his apartment phone connected and paid his telephone bills.[79] Furthermore, just because he did not use the phone does not mean that he was not in the apartment. Likewise, the fact that Tsitsires's girlfriend possessed the only key to the apartment does not mean that Tsitsires was never in the apartment. There was no evidence to show that he did not spend time in his apartment alone or that he was only in the apartment when his girlfriend was present. However, none of this was considered by the court. Most significantly, the evidence showed that Tsitsires kept all of his personal belongings in the apartment, which the courts in *Chelsmore Apts.* and *Bonczek* found weighed in favor of the tenant on this factor.[80]

At trial, Mr. McBrinn, testified that he rarely saw Tsitsires enter or leave the apartment between December 1, 1998 and November 30, 2000.[81] He also testified that during the same period of time, he knocked on Tsitsires's apartment door eight or ten times and heard a radio and voices inside, but that no one answered.[82] TOA Construction proffered no evidence to show that Tsitsires was not in the apartment during these times.[83] In fact, Tsitsires testified that he "spent seven or eight months out of each year in his apartment."[84] Although there was no direct evidence to prove or disprove Tsitsires's assertion, the court did not attempt to determine whether Tsitsires actually spent 183 days in the apartment during the most recent year.[85] Instead, as discussed in Justice Andrias's dissent, the court simply made a sweeping

N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j)(3), 2204.6(d)(1); *see TOA Constr. Co.*, 861 N.Y.S. 2d. at 338–39 (Tsitsires' periods of absence from the apartment did not qualify as temporary relocations under the statute because he was never hospitalized for treatment of his illness, and he never submitted an application to a city rent agency claiming that his sickness should be a "reasonable ground" for temporary relocation).

75. *Chelsmore Apts.*, 733 N.Y.S.2d at 332–33.

76. *See TOA Constr. Co.,* 861 N.Y.S.2d at 346.

77. *Id.*

78. *See id.* at 337, 339.

79. *See id.* at 339.

80. *Id.* at 337; *see also Chelsmore Apts.*, 733 N.Y.S.2d 329; *Bonczek*, 2007 WL 5211171, at *1.

81. *TOA Constr. Co.*, 798 N.Y.S.2d at 687.

82. *Id.* at 680.

83. *See id.* at 687.

84. *TOA Constr. Co.,* 861 N.Y.S.2d at 346.

85. *See id.*

generalization that Tsitsires did not spend enough time in his apartment based solely on select parts of Mr. McBrinn's testimony.[86]

Because the majority did not apply the third factor in its primary-residence analysis, the analysis is incomplete. Had this factor been considered thoroughly, taking into account Tsitsires's own testimony, the court probably would have found that he had spent at least 183 days in the apartment during the most recent calendar year and, therefore, that he had the requisite continuous, physical connection to the apartment.

Finally, the fourth factor, whether the tenant sublet the rent-stabilized apartment, is significant.[87] When a tenant sublets the apartment to another person and lives elsewhere, the tenant cannot logically claim the apartment as their primary residence. The tenants in *Chelsmore Apts.*, *Bonczek*, and *Nee-Chan* did not sublet their apartments, and thus in each case the court found the fourth factor weighed in favor of the tenant.[88] In *Nee-Chan*, the tenant's son lived in the apartment, but did not pay rent.[89] Similarly, Tsitsires did not sublet his apartment.[90] Like Nee-Chan's son, Tsitsires's girlfriend may have used the apartment, but she never paid rent.[91] Consequently, if the fourth factor had been considered in *TOA Construction*, it would have supported Tsitsires's primary-residence claim.

In *Chelsmore Apts.*, all four factors of the primary-residence analysis weighed in favor of the tenant; thus, the court awarded possession to the tenant.[92] In *Bonczek*, the court found that the third and fourth factors favored the tenant while the first and second factors supported the landlord.[93] The court found "by a slim margin" that the landlord had not proved by a preponderance of the evidence that the apartment was not Bonczek's primary residence.[94] Specifically, the court found that Bonczek's testimonial evidence outweighed the documentary evidence that implied that he lived primarily in his former lover's apartment.[95] In *Nee-Chan,* the court concluded that only the fourth factor favored the tenant, and therefore, awarded possession to the landlord.[96]

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86. *See id.*

87. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2200.3(j)(4), 2520.6(u)(4).

88. *See Chelsmore Apts.*, 733 N.Y.S.2d at 329; *Bonczek*, 2007 WL 5211171, at *4; *Nee-Chan*, 2007 WL 2316003, at *1.

89. *Nee-Chan*, 2007 WL 2316003, at *1.

90. *See TOA Constr. Co.*, 861 N.Y.S.2d at 335.

91. *See id.*

92. *See Chelsmore Apts.*, 733 N.Y.S.2d at 332–34. The court found that documentary evidence such as the tenant's phone bills, tax returns, and voter registration supported primary residency. The tenant also maintained all of her possessions at the subject apartment, and her work at sea allowed her to qualify under the temporary period of relocation exception. She also did not sublet the apartment. *Id.*

93. *See Bonczek*, 2007 WL 5211171, at *4–5. The court found that although documentary evidence did not weigh in the tenant's favor, he kept all of his personal belongings in the rent-stabilized apartment and did satisfy the 183 day requirement. Furthermore, he also did not sublet the apartment. *Id.*

94. *Id.* at *1.

95. *Id.*

96. *See Nee-Chan,* 2007 WL 2316001, at *2–4. The court found that although the evidence showed that the

While the second factor supports neither TOA Construction nor Tsitsires, the first, third and fourth factors weigh in Tsitsires's favor. Tsitsires's documentary evidence, his testimony, and the fact that he did not sublet his apartment lead to the conclusion that the apartment was his primary residence and that he had an "ongoing, substantial and physical nexus with the apartment for actual living purposes."[97]

In addition, from a public policy perspective, evicting Tsitsires would thwart the legislative objective of the RSC. The intent of rent stabilization law is to alleviate housing shortages and to preclude the warehousing of underutilized apartments by those who voluntarily establish primary residence elsewhere.[98] Tsitsires never voluntarily abandoned the apartment. His mental illness may have compelled him to stay away from the apartment at times, but he never established a primary residence elsewhere.[99] It would be ludicrous to suggest that Tsitsires had established a new primary residence on a "park bench" or "on a stoop somewhere."[100] Justice Andrias put it best by recognizing that "awarding possession to a landlord who, the record establishes, allowed the premises to become virtually uninhabitable . . . would be contrary to the overriding public policy 'goal of ensuring an adequate supply of affordable, [livable] housing' embodied in the rent stabilization laws."[101]

The Appellate Division failed to apply the four factors enumerated by the RSC, even though these factors are considered the "standard indicia" when performing the primary-residence analysis.[102] Application of the four factors demonstrates that Tsitsires did not abandon his apartment for another primary residence. He had an "ongoing, substantial and physical nexus with the controlled premises for actual living purposes" for the following reasons: (1) he kept all of his belongings in the apartment; (2) he listed the subject apartment's address on the documents he filed with public agencies; (3) he probably resided in the apartment for more than 183 days during the most recent year; and (4) he did not sublet the apartment. The dissent correctly concluded that the majority's failure to apply the four customary factors resulted in an unjust decision to evict a mentally ill tenant from the apartment in which he had primarily resided for over thirty-five years.[103]

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tenant did not sublet the apartment, she only kept a few personal mementos in the apartment, and the documentary evidence did not support the tenant's primary residence assertion. Additionally, the court found that the tenant did not meet the 183-day requirement because she occupied her New Jersey co-op significantly more than the New York apartment. *Id.*

97. *TOA Constr. Co.*, 861 N.Y.S.2d at 338 (citing Emay Properties v. Norton, 519 N.Y.S.2d 90, 92 (1st Dep't 1987)); *see Glenbriar Co.*, 5 N.Y.3d at 392; *see also Katz*, 676 N.Y.S.2d at 775.

98. *Chelsmore Apts.*, 733 N.Y.S.2d at 333.

99. *TOA Constr. Co.*, 861 N.Y.S.2d at 337.

100. *Id.* at 340.

101. *Id.* at 353; see also *Emay Properties*, 519 N.Y.S.2d at 91; 390 W. End Assoc. v. Harel, 744 N.Y.S.2d 412, 416 (1st Dep't 2002).

102. Scherer, Esq. & Hon. Fern Fisher, *supra* note 40.

103. *See TOA Constr. Co.*, 861 N.Y.S.2d at 341–53 (Andrias, J., dissenting).