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To Be Argued By:
[VICKI RICHMAN](#)

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New York Supreme Court
APPELLATE DIVISION—FIRST DEPARTMENT

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK.

Landlord-Petitioner-Respondent,

—*against*—

VICKI RICHMAN and EILEEN V. CASEY,

Tenants-Respondents-Appellants.

BRIEF FOR APPELLANTS

VICKI RICHMAN
EILEEN V. CASEY
601 West 115th Street, #85
New York, New York 10025
(212)662-4787

Respondents-Appellants Pro Se

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22 NYCRR 600.3(b)(2).

QUESTIONS PRESENTED FOR REVIEW

1. In succession to rent-control tenancy, what is the critical test for satisfying the statutory clause “. . . such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years . . .”? Does common primary residence by both the original tenant and the attempting successors for the time period satisfy that condition? The *nisi prius* court held that the law requires a stricter test. The Appellate Term did not answer that question.
2. In defining the verb phrase “has resided with” as requiring continuous physical presence by the original tenant, but not by the successor, did *nisi prius* go too far in interpreting the intent of the legislators and rewriting law? The Appellate Term did not answer that question.
3. In so defining the phrase, did *nisi prius* in fact rule that the original tenant did not vacate her primary residence until her death? The Appellate Term ruled that the original tenant vacated 28 months earlier than her death.
4. Did the Appellate Term overrule *nisi prius* on primary residence, while affirming its decision to evict? In ruling against the appellants, did the Appellate Term cite case law supporting the appellants? Did the Appellate Term inadvertently overrule an earlier decision supporting the appellants and not in dispute by the respondent?
5. As the landlord’s petition from the earlier case, on primary residence, was an exhibit to the stipulation cited as the only basis for the honorable justices’ decision, was the Appellate Term biased by the omission of documents showing that the petition had been defeated by the tenants? If yes, should the Appellate Term have considered the complete earlier case, in which the landlord failed to prove vacancy by the elder Richman?
6. Does a decision against the appellants establish case law reducing the class of tenants now eligible for rent-control succession?
7. Did the respondent, an eleemosynary institution, violate academic ethics and its own internal rules in bringing this action and in its methods? Did the respondent unlawfully retaliate against the appellants for a complaint to a state senator? In attempting to establish grounds for the case at bar, did the eleemosynary institution commit perjury in the earlier action? These questions were not raised in *nisi prius* or on the earlier appeal.
8. If yes to some or all of Question 7: Should the original court have considered the petitioner’s violations even if not raised as a defense? Did the eleemosynary institution have a moral and legal obligation to call its own errors to the attention of the court even if not challenged by its adversary?

THE NATURE OF THE CASE

“The elder Richman” throughout is C. Lucy Richman, who died on November 4, 1998, at home in this apartment; she is the mother of “the younger Richman,” who, with her domestic partner, Casey, is attempting to succeed to rent-control tenancy.

Events Leading to the Holdover Eviction¹

The appellants began to move in with the elder Richman, their ailing 85-year-old mother, early in 1996. It is difficult to say when our move was complete, as we had lived close enough to transfer our property over several months, but we were living with her full-time by May or June 1996. We kept our earlier residence, in which the heating unit was disabled. Without repairs, it was unlivable, unrentable, and unsalable.

On July 17, 1996, a fuse blew in this apartment, causing the elder Richman’s medical equipment to fail, and she was removed to the emergency room, where she received a tracheotomy and remained in intensive care. After conferring with her physicians, the younger Richman and Casey resolved to dispose of our other apartment, even at the cost of our credit status with the banks, which we did two weeks later.

Paying the rent for August 1996 from our joint bank account, we informed the landlord of our presence. After an exchange of letters, in which we informed the landlord that we had been living here “since the beginning of the year,” the appellants and a Columbia employee agreed to set the date of the disposal of our other residence as the date of our assuming primary residence in this apartment.² The appellants paid the rent for September 1996. Thereafter the landlord demanded that the check be drawn on the elder Richman’s account.

After the elder Richman was out of danger, her physicians determined that she should be weaned from her respirator to restore her quality of life, and sent her to a medical rehabilitation center for that temporary purpose. The patient wrote to the landlord, in her own hand, citing the appellants as her cotenants and her caregivers, reporting on her medical condition, including the identity of her physician, and describing her rehabilitation as temporary.³

¹Cited throughout the Record on Appeal, in exhibits and passages from both the appellants’ and the respondent’s affidavits and affirmations. The respondent often introduced an argument, “By their own admission” See, *inter alia*, pp. 190-226.

²Record, p. 177.

³Record, p. 56 *inter alia*.

Summary of the Facts and Arguments

In June 1997, the landlord brought a nonprimary-residence eviction against the elder Richman, naming the younger Richman, Casey, and “John and/or Jane Doe” as included respondents.⁴ At about that time, the elder Richman’s respiratory therapist determined that she could not be permanently weaned from the respirator. The elder Richman’s professional caregivers, including her physician, her respiratory therapist, and her social worker, wrote to the landlord on her condition and her ability and desire to return home.⁵ Upon inspecting this apartment, the therapist determined that the pre-World War II electrical system would not support the elder Richman’s life-support equipment.⁶

Declining to upgrade the electricity, the landlord instead sought to depose the elder Richman and to subpoena her medical records.⁷ Her social worker and the younger Richman complained to the Hon. David Paterson, state senator for part of the district covering Columbia University. Senator Paterson wrote two protest letters to the president of Columbia University, in June and July 1998.⁸

The landlord then stipulated to upgrade the electrical system on August 6-7, 1998.⁹ Violating its own stipulation, the landlord delayed the electrical work for a month,¹⁰ during which time the elder Richman, begging to return home from the hospital room she called her “jail cell,” suffered a massive stroke. She was discharged from rehabilitation to intensive hospital care, where her physician attempted to improve her condition for her return home.

The landlord completed the electrical upgrade in September 1998, and the elder Richman returned home in October 1998, while the nonprimary eviction remained pending.¹¹ The elder Richman died on November 4, 1998, from complications from the stroke, under the care of the appellants and home-care attendants. In December 1998, the

⁴Record, pp. 23-28.

⁵Record, pp. 75-80 *inter alia*.

⁶Record, pp. 211-214 *inter alia*. Other professional determinations on the elder Richman’s ability to return to the apartment and on the condition of the apartment are cited throughout, in exhibits and affidavits.

⁷Record, pp. 23-33, 59-95, 109-179.

⁸Record, pp. 215-218.

⁹Record, pp. 220-221 The appellants regret that replicative overload has rendered much of the document illegible, but we believe its nature and the crucial dates can be made out.

¹⁰Record, p. 224.

¹¹Cited in several affidavits and affirmations by the respondents throughout the Record. See especially pp. 195-203.

landlord moved to withdraw the nonprimary eviction.¹² In his affirmation, Gregory Vail, Esq., the landlord's litigating attorney, in an apparent attempt to establish grounds for the case against succession, held under penalty of perjury that the electrical work had been completed a month before he stipulated it to be done, and two months before it was actually done.¹³

Appearing *pro se* in the action against her mother, the younger Richman called the perjury to the attention of the court in a cross-motion mistakenly titled "Amendment to Motion."¹⁴ The Hon. Norman C. Ryp dismissed the action against the elder Richman.¹⁵

In January 1999 the younger Richman and Casey sought to succeed the elder Richman as rent-control tenants; the landlord refused to accept their rent payment.¹⁶ That was less than six months¹⁷ after the letters from Senator Paterson to the Columbia president. In March 1999, more than six months after those letters, the landlord began the case at bar, citing "John and/or Jane Doe" as included respondents.¹⁸

In the case at bar, the younger Richman was no longer *pro se*; she and Casey were represented by an attorney provided as a fully paid benefit by Casey's labor union. The landlord and the tenants stipulated to the facts relevant only to the statute on succession, but the landlord attached as exhibits the petition from the earlier case and the ruling upholding the landlord's motion to depose.¹⁹ No pleading presenting the tenants' position was attached. The appellants infer that the attorney, Mr. Vail, had intended to include his motion to dismiss the earlier case, which sought to establish grounds for the later eviction, but forbore after the younger Richman cited his perjury in that document.

The Hon. Brenda Spears ruled against succession by the tenants as a matter of law on September 9, 1999, and ordered their eviction by January 31, 2000.²⁰ Hearing the appeal

¹²Record, pp. 180-187.

¹³Record, p. 184, first paragraph. Compare with p. 220, paragraph 2, for evidence of perjury.

¹⁴Record, pp 188-226. At that time, the younger Richman was better acquainted with *Robert's Rules* than with the CPLR. The former cites an "amendment" as a motion attempting to expand or supersede an earlier motion..

¹⁵Record, p. 229.

¹⁶Cited throughout the respondents' affidavits and affirmations in the Record after that time.

¹⁷See RPL 7 §223-b, on protection of tenants against retaliation by landlords within six months of an official complaint to an enforcement agency.

¹⁸Record, pp. 238-242.

¹⁹Record, p. 288-289, citing pp. 88-95. The stipulation is on p.282-287 of the Record.

²⁰Record, pp. 7-10.

by the younger Richman and Casey, then represented by a privately retained attorney, the Appellate Term overruled original jurisdiction on fact and law, but, on December 19, 2000, upheld its eviction for different cause.

On February 20, 2001, with the appellants acting *pro se*, the Appellate Term denied the motion for leave to appeal to the Appellate Division.²¹ On March 24, 2001, the Appellate Division granted the same motion. The appellants filed our Preargument Statement and the Notice of Entry on May 14, 2001.²²

Stays of Execution

In a summary ruling from the bench on the holdover eviction, the Hon. Brenda Spears held that the appellants failed to satisfy the statutory condition for succession to rent-control tenancy and ordered our removal from the apartment by January 31, 2000. The appellants' attorney filed a notice of appeal, which stayed that order until any ruling by the Appellate Term against the appellants.

The eviction was upheld by the Hon. Stanley Parness, Principal Justice, and the Hon. William J. Davis and the Hon. Phyllis Gangel-Jacob, Justices, on December 14, 2000. Execution was again stayed while the Appellate Term considered the appellants' *pro se* motion for leave.

After the Appellate Term denied the motion, effectively ordering our immediate removal, the Hon. Peter Tom, Justice, stayed execution on March 12, 2001, pending consideration of the appellants' motion for leave to this court. On April 24, 2001, this court granted the appellants' motion to leave, continuing the stay pending perfection of the appeal and a decision.²³

Note on the Record on Appeal

The honorable Appellate Term justices rule that "... the aged rent controlled tenant must be deemed to have vacated the premises upon her hospitalization on July 17, 1996."²⁴ That ruling reopens a case closed over two years earlier in favor of the appellants, in which the landlord admitted, on December 7, 1998, that the elder Richman vacated the apartment on her death, and no earlier.²⁵

²¹Record, pp. 11-13.

²²Record, pp. 3-6.

²³Record, p. 13. None of the other orders of stay is included in the Record.

²⁴Record on Appeal, p. 12.

²⁵Record, pp. 182-187.

The Appellate Term decision therefore extends the background of this appeal from the case at bar to the earlier one.

The earlier case was on primary residence by the elder Richman. Certain documents favoring the landlord from that case, without the tenants' replies, were included as exhibits to the stipulation before *nisi prius*.²⁶ The honorable justices cite that stipulation as the sole basis of their decision.

It is reasonable to infer that the Appellate Term's decision on the date of the vacancy was influenced by the landlord's petition in the earlier case. It is reasonable to infer that the Hon. Spears, in refraining to cite a date of vacancy, researched other pleadings in the earlier case.

Therefore the appellants have included the complete pleadings from both the earlier and the immediate case in the Record on Appeal.

²⁶Record, p. 288-289, citing pp. 88-95.

INTRODUCTION TO THE AFFIRMATIVE ARGUMENTS

Our case to the Appellate Division has two broad parts:

- a) errors and misinterpretations of the law and the facts by *nisi prius* and by the earlier appeals court, which we hold justify a reversal of the decisions and a dismissal of the complaint (Points 1-3); and
- b) failure by *nisi prius* and by the respondent to note the respondent's violations of ethics and law, which we hold supports at least a new trial, if not a dismissal, even if the defense did not earlier raise the issues (Point 4).

The former is clearly a more conventional appeal, which, if upheld, would lead to a stronger verdict for the appellants. The latter is not only more troublesome — to what extent can we raise arguments not previously heard? — but also less definitive, possibly leading to further litigation rather than a swift ending. Why then raise the respondent's conduct at all? Is a backup issue really that necessary? Isn't our primary case strong enough. Does the backup issue in fact do us more harm than good?

As moderate-income tenants facing homelessness, the appellants seek to stop this attempt to eviscerate rent-control protection. We urge a reversal of the original ruling on the critical test for succession and of the appellate decision on the primary residence of an "aged rent controlled tenant." We hold that the earlier courts' errors thwart legislative intent and threaten the safety and security of a large class of New York tenants, including ourselves.

However, while we are loath to tread too closely to the border of acceptable appellate procedure, as individual tenants of a particular eleemosynary institution, we are hard put to sit on its abuse of our 88-year-old mother solely to prepare itself for a holdover action seeking to stop us from succeeding to rent-control tenancy.

The Court of Appeals has written, upholding this division's decision in a landlord-tenant case:

Although these simple affirmed findings of fact warrant the relief requested, the Appellate Division has reversed a judgment for plaintiff and dismissed the complaint on the theory of "unclean hands"

On this record, we should not permit concepts of technical law, which are limited in their scope and application, to obscure the overriding considerations of fundamental honesty, morality, fair play and public policy.²⁷

Our adversary has argued that our backup argument is grounds for a new petition, and we agree to that extent. However, we ask the court to consider which better serves the

²⁷*Seagirt Realty Corp. v. Chazanof*, Court of Appeals of the State of New York (December 30, 1963); 13 N.Y.2d 282 (1963), 246 N.Y.S.2d 613, 196 N.E.2d 254.

judicial system: dispensing justice or seeking redress for injustice after the fact. In *Parras*, after the court — “on its own initiative,” as the tenant had presented no defense — found that the landlord’s “Rambo-like” attorney had concealed evidence that might have helped the tenant, the court dismissed the case, arguing that proceeding with it

would only subject the landlord to potential claims for, *inter alia*, possession, wrongful eviction and property damage

Thus, the petitioner's attorney not only has a moral obligation to inform the Court, he has a legal obligation. In addition, proceeding in the face of potential claims against his client, the landlord, could subject the attorney to a suit by his client.²⁸

The profit-seeking landlord’s attorney had both “a moral” and “a legal obligation” to call its errors to the court’s attention, even in the absence of a defense, and even if it meant losing the case. Can that principle be less true for an eleemosynary institution chartered by an act of the state legislature and granted rights and privileges denied to other landlords?

Nevertheless, our appeal relies primarily on errors in *nisi prius* and in the Appellate Term, and we begin with those points.

²⁸*Parras v. Ricciardi*, 185 Misc.2d 209 (2000), 710 N.Y.S.2d 792.

POINTS OF THE AFFIRMATIVE ARGUMENTS

Point 1 — Conflict Between the Appellate Term and *Nisi Prius*

The actual decision by the Hon. Brenda Spears, in original jurisdiction, has not yet received full review by a higher court. Ignoring the original decision against the appellants, the honorable Appellate Term justices in fact contradict its findings.

The Hon. Spears goes to great length to attempt definitions of “with” and “reside.” In so doing she effectively rules that the facts show that the elder Richman vacated this apartment no earlier than on her death, on November 4, 1998, at least 28 months after the *pro se* appellants moved in with her, and as many as 32 months. If the elder Richman had vacated earlier, there would be no reason to define the statutory verb phrase “has resided with,” as the attempting successors would simply fail the two-year test as a matter of fact. The Hon. Spears agrees that the facts show that the elder Richman and the attempting successors maintained the premises as their common primary residence for over two years prior to the elder Richman’s permanent vacancy by death at home in this apartment, but the Hon. Spears holds that the statute requires a stricter test.

The honorable Appellate Term justices ignore that question of law — the definition of “has resided with” — but rule that, as a matter of fact or law, “the aged rent controlled tenant” vacated on her “hospitalization,” July 17, 1996, over two years before the time that we infer was held by *nisi prius*. The justices either are unaware that the elder Richman returned home from respiratory rehabilitation, with the approval and assistance of the landlord, and finally died at home, or refuse to take notice of those facts.

In her ruling, the Hon. Spears acknowledges consideration of the stipulation to the facts and the other documents submitted for the summary decision. As exhibits to the stipulation, the landlord’s attorney, Gregory Vail, Esq., appended two documents from the nonprimary holdover against the elder Richman: the landlord’s petition and the court’s favorable ruling on a motion for discovery. Omitted from the exhibits to the stipulation were replies to the petition and other pleadings by the elder Richman and the appellants, the two protest letters from State Senator David Paterson to the president of Columbia, the stipulation by Mr. Vail that the electrical system in the apartment shall be upgraded to accommodate the elder Richman’s medical equipment, Mr. Vail’s motion to dismiss the nonprimary holdover, the younger Richman’s cross-motion (erroneously called “Amendment”), and the final decision.

Case law holds that, in order to gain eviction of the attempting successor, the landlord must successfully prove that the tenant had vacated:

The distinction which plaintiff is endeavoring to make between an action to recover possession for non-primary residence and one for a declaration that

defendant may not succeed to the rent-controlled tenancy as a result of non-primary residency is mere semantics and without substance.²⁹

In that case, the original tenant had been living in Texas for “many years” prior to his death, and his daughter sought to succeed to rent-control tenancy in Manhattan. The landlord argued that the statute requiring two years of co-residence was not satisfied. This court unanimously ruled in favor of succession on the landlord’s failure to prove the original tenant’s nonprimary residence.

In *The Nature of the Case*, “Summary of the Facts and Arguments,” we document our presumption of perjury by the landlord’s attorney in his motion to dismiss the case against the elder Richman. We discuss our inference more fully in Point 4, but we cite it here to suggest how it influenced the decision by the Hon. Spears and led to the conflicting ruling by the Appellate Term.

Louis has been repeatedly upheld in the case law.³⁰ It is reasonable to infer that *Louis* led the landlord’s attorney, upon learning of the appellants’ intention to succeed, to launch the nonprimary holdover against our mother, at least seventeen months before her death at home. But, by calling attention to the perjured motion in her cross-motion (“Amendment”), the younger Richman had sought to defeat Mr. Vail’s presumed intent to satisfy *Louis*. Unwilling then to attach the tainted document to the succession stipulation, Mr. Vail hoped the nonprimary petition against the elder Richman and the decision for discovery might suffice to convince the court that the original tenant had vacated before her death. But, of course, he omitted the bulk of the earlier case, showing that the petition had been effectively defeated, that the landlord had admitted error, and that the elder Richman had returned home.

Supporting our inference is his calling the younger Richman and Casey “squatters” and users of “fictitious” names in the case at bar, although both Richmans and Casey had identified the appellants to the landlord, although the appellants had written rent checks on their joint account to the landlord, and although the landlord had negotiated and cooperated with the appellants in managing the premises.³¹ Why claim that we are unknown intruders if we fail the two-year test for succession as a matter of fact?

²⁹*Louis v. Barthelme*, 179 A.D.2d 604 [1st Dept 1992], 579 N.Y.S.2d 656.

³⁰*Rakoff v. Hebert*, NYLJ, June 5, 1998, p. 29, c. 3; the very department of the Appellate Term that denied us leave to appeal ruled that a granddaughter could succeed under rent control although the grandmother spent most of the two years of co-residence in Florida. The critical test was the landlord’s failure to prove nonprimary residence by the grandmother prior to seeking eviction of her successor.

³¹See the Record, pp.73-74 *inter alia*. It is difficult for the landlord to claim the appellants are squatting and using phony names after having filed court stipulations, with our signatures, on managing the property and paying rent.

Perhaps researching more of the case against the elder Richman, the Hon. Spears recognized that the elder Richman had remained a primary resident until her death. However, although the appellants had apparently satisfied the letter of the law, the Hon. Spears still questioned whether we had followed legislative intent. The statute 9 NYCRR 2204.6(d) says nothing about motive, but the Hon. Spears may have believed that case law requires the intending successors to have a stronger familial cause to reside with the original tenant than merely a desire to take possession.³² The stipulated date of the appellants' primary residence, August 1, 1996, for example, was later than the elder Richman's emergency-room visit on July 17, 1996.

While the Hon. Spears acknowledged that the appellants may have taken residence as early as June 1996, she apparently still could not see our compliance with legislative intent, regardless of legislative language. Aware that the landlord had failed the *Louis* test for a case against succession,³³ the Hon. Spears noted that 9 NYCRR 2204.6(d), while citing valid reasons for the attempting successors' physical absence, is silent on how or why the original tenant might temporarily leave the premises.

Nisi prius then ruled that it was "tolling the statute" to hold that either the original tenant or the attempting successors might be physically absent for an acceptable reason. The Hon. Spears insisted that the statute's silence on the original tenant's exceptional and temporary absence absolutely required the physical presence of the elder Richman for two years prior to her death or permanent vacancy.

In holding succession to be apart and distinct from the original tenant's primary residence, the Hon. Spears overruled this court.³⁴ In reviewing her decision, the Appellate Term agreed with the eviction of the appellants, but sought to mitigate the conflict with case law by simply citing a date of vacancy that would deny succession. The honorable justices therefore took no notice of the Hon. Spears's attempt to define "has resided with," the core issue of the case. Considering only the stipulation, ignoring the other documents, including the landlord's failure to gain a nonprimary eviction against the elder Richman, they simply ruled summarily that "the aged rent-controlled tenant" had vacated on her "hospitalization."

³²We hesitate to cite *Westbeth Corporation v. Castagna* (NYLJ, June 19, 1996, p. 28, c. 6), in which a young woman succeeded a senior citizen who died thirteen days after she married him. But the court clearly held that the language of the law must prevail over the court's suspicions of manipulative, self-interested motive.

³³*Op. cit.*

³⁴*Louis, ibid.*

The *pro se* appellants acknowledge that both the Hon. Spears and the honorable Appellate Term justices may have been misled by our earlier attorneys' errors. We do not mean to challenge their competence or lack of bias.

Our original attorney failed to gain the stipulation that we had taken residence with our mother early in 1996, and that August 1, 1996, was the date only when we had given up our other residence. He allowed the landlord's attorney to attach earlier pleadings supporting only the adversary, and failed to attach documents favorable to our case. He ignored our instructions to raise the "dirty hands" issues, presented in Point 4. In ghostwriting our affidavits, our attorney further failed to suggest the emotional bond we had maintained with our mother, and prevented our raising the landlord's abuse of our mother. Finally, in the pleadings he personally affirmed, our attorney insisted on placing the word "home" in single quotes throughout — 'home' — pointedly refusing our instruction to remove the bizarre punctuation. As he otherwise used typical double quotes for direct quotations, the Hon. Spears could infer only that our own attorney did not himself believe that this apartment was the elder Richman's home.

Our appeal attorney's major point, properly, was that *nisi prius*, in failing to cite a date of permanent vacancy for the elder Richman, conflicted with *Louis*.³⁵ However, rather than infer the correct date from the *nisi prius* attempt to define statutory language, our attorney gave the Appellate Term three possible dates to correct the omission. After conversations with our appeal attorney, we infer that her multiple-choice argument was purely rhetorical, intended to highlight the folly of choosing any date earlier than the day the elder Richman died, at home. However, the honorable justices appear to have missed our attorney's irony; they took the three choices at face value and selected the earliest, thus avoiding the need to challenge the Hon. Spears on case law, legislative intent, and her definition of the statutory verb phrase "has resided with."

Our earlier attorneys gave the courts reason to see lack of conviction in their arguments for our rent-control succession.³⁶ However, we hold that the merit of our arguments in no way relies on the errors of our attorneys. We present them only to suggest a plausible reason for the court errors. Our reading of case law finds that the Appellate

³⁵*Op. cit.*

³⁶And indeed both courts may have been correct in so inferring. The younger Richman is transgendered, living with her lesbian partner of 25 years. Believing in the plausibility of an interactive emotional bond between the appellants and the mother of one of us is presumably difficult. It surely was difficult for certain Columbia employees. So many attorneys have a problem with such clients that a law-practice specialty in representing litigants of our class has emerged. Neither of our attorneys claimed such a specialty, although our appeal attorney called herself an "environmental feminist." Our earlier attorney in fact speculated that it would be impossible to find an unbiased jury, even in Manhattan with shrewd selection.

To be fair to our original attorney, we should note that he was so sure that the letter of the law would prevail over the landlord's interpretation of it that he saw need to go further than the simplest stipulation for summary judgment.

Division may consider court errors on their face value, rather than on their presumptive cause.³⁷

Finding that the “majority opinion left undisturbed Civil Court's findings,” this court has reversed the Appellate Term.³⁸ In the case at bar, the Appellate Term did not so much leave the *nisi prius* findings undisturbed as ignore them completely and find something completely different. We urge the Appellate Division to consider the errors that the Appellate Term overlooked in the case at bar.

Point 2 — *Nisi Prius* Errors

In considering whether the appellants satisfied the statutory condition that they have “resided with” the original tenant, the Hon. Spears erred in introducing the concepts of simultaneity, contemporaneity, and concurrence — that is, continuous physical presence — into the definition of the word “with.” Case law posits “ongoing, substantial, physical nexus” as the test of primary residence.³⁹ *Nisi prius* appears to presume that the word “nexus” is a synonym for “presence,” but no dictionary so defines.⁴⁰

The legislature uses the adverbial clause or phrase “as a primary residence” to qualify the verb phrase “has resided with” in 9 NYCRR 2104.6(d)(1).⁴¹ The legislature has refrained from inserting the concept of physical presence into that paragraph, but the Hon. Spears seeks to squeeze physical presence out of the word “with.” Both the statute and case law⁴² agree that primary residence, not physical presence, is crucial to a succession case.

The very Appellate Term that affirmed *nisi prius* in the case at bar and denied us leave to appeal has held, in what has come to be known as the *Sommer* test, that physical presence is neither sufficient nor necessary to demonstrate primary residence:

... we think it incorrect to decide these cases by equating primary residence with the concept of domicile. The two are not synonymous. Thus, one may be

³⁷See, *inter alia*, *Cappadona v. State*, 154 A.D.2d 498, 546 N.Y.S.2d (2d Dep't 1989): “. . . this court may weigh the evidence and grant the judgment that should have been granted by the trial court.”

³⁸*300 E. 34th St. Co. v. Habeeb*. 248 A.D.2d 50 [1st Dept 1997], 667 N.Y.S.2d 16.

³⁹*Ema Properties Corp. v. Norton*, 136 Misc.2d 127 (1987), 519 N.Y.S.2d 90.

⁴⁰*Merriam-Webster's Tenth* defines “nexus” as a “connection,” a “link,” a “center,” or a “focus.” *Black's Sixth* defines “nexus” only regarding “a multistate corporation's taxable income,” and so is not relevant to the case at bar.

⁴¹It's a subordinate clause if you see ellipsis of a presumed subject or predicate. It's a phrase if you find that “as” can be a preposition like “like.”

⁴²*Louis, op. cit.*

domiciled in another State, reside predominantly in a New York City apartment, and be viewed as a primary resident of that apartment.⁴³

Black's Law Dictionary agrees: "Residence implies something more than mere physical presence and something less than domicile."⁴⁴ The legislature has defined loss of primary residence as requiring evidence that "the tenant maintains his" [sic] "primary residence at some place other than" the apartment in dispute.⁴⁵ The *pro se* appellants conclude that the elder Richman's mere physical presence in a respiratory-rehabilitation facility was insufficient to establish residence there, and that her temporary absence from domicile in this apartment fails to vacate her residence in this apartment. The elder Richman, who called her hospital room "my jail cell," had never moved from this apartment in forty years, until she died.

Earlier this year, this court used the *Emay*⁴⁶ test to find that ". . . documentary proof of respondent's voter registration, bank accounts, and mail received at the apartment, demonstrated that respondent maintained a substantial physical nexus with the apartment for actual living purposes."⁴⁷ Despite the Hon. Spears's positing physical presence as the crucial test for succession, the case law does equate "nexus" with "presence."

The Hon. Spears holds that the meaning of the preposition "with" is "clear and definite." No contemporary American dictionary known to the appellants includes any inflection of "simultaneous," "contemporaneous," or "concurrent" in its definition of the preposition "with." *Merriam-Webster's Collegiate*, Tenth Edition, defines "with" as implying no more than "a close association in time"; that is consistent with the case law term "ongoing, substantial, physical nexus."⁴⁸

In no fewer than six pages on "with," the *OED* uses the word "simultaneous" once, but only for instantaneous events or actions of very short duration. The most recent citation of that usage, from the *London Times* of 1926, is: "With his death, the younger brother . . .

⁴³*Sommer v. Turkel, Inc.*, 137 Misc.2d 7 (1987), 522 N.Y.S.2d 765.

⁴⁴Sixth Edition (St. Paul: West Group, 1990), p. 1309. We willfully eschew the Seventh Edition, which is a rewriting of *Black's* by Bryan Garner, Esq., to the extent that is no longer the same dictionary. In any case the Sixth is closer in time to the legislation governing the case at bar. There is nothing in the Seventh to contradict our argument; the more recent one simply is less complete and less precise.

⁴⁵9 NYCRR 2100.18. Note that 9 NYCRR 2200 fails to amend that paragraph, but provides in 2200.2(f)(18) that primary residence shall be determined "by a court of competent jurisdiction," suggesting that the court shall use 2100.18 as its guide.

⁴⁶*Op. cit.*

⁴⁷*Village Development Associates LLC v. Walker*, A.D.2d [1st Dept 2001] N.Y.S.2d.

⁴⁸*Emay, op. cit.*

becomes heir to the barony.”⁴⁹ That meaning sheds no light on the legislature’s “has resided with.” The very fact that the *OED* needs over six pages to document the word shows there is nothing “clear and definite” about “with,” contrary to the Hon. Spears’s assertion.

The Hon. Spears holds, “Respondents further claim that nothing in the language of 9 NYCRR §2204.6(d) requires co-occupancy” If our attorney so claimed, he was wrong.⁵⁰ The *pro se* appellants hold that the cited statute does not require continuous physical presence; it requires that the tenant and the successor both maintain the premises as their common primary residence or occupancy. The intent of at least one legislator is demonstrated by the two letters from State Senator David Paterson to the Columbia president protesting the landlord’s obstructing the elder Richman’s discharge from respiratory rehabilitation and return to her primary residence.

In supporting succession, this very court has upheld the decision that evidence of “. . . a nurturing and stimulating family relationship . . .” that was “. . . not in furtherance of some nefarious scheme to succeed to the apartment . . .” places the attempting successor under “the protective aegis” of the law.⁵¹ In the case at bar, the Hon. Spears rejected such evidence and, apparently believing the appellants were using the letter of the law in such a scheme to defeat legislative intent, came up with unsupported meanings for “has resided with” and “nexus” to rule against the appellants.

The Hon. Spears seems unaware that the legislature had quite a different motive for confining the exceptions only to family members in 9 NYCRR §2204.6(d). The earlier statutes 9 NYCRR 1727-8.2(a)(5) and 1727-8.3 posit a far stricter test of primary residence for a family member of the tenant; those paragraphs exclude long absences, even for hospitalization. In the paragraph cited by the Hon. Spears, the legislature sought to amend the earlier test of a family member’s primary residence as unreasonably strict.

However, in 9 NYCRR 2100.18, the legislature had defined the tenant’s loss of primary residence as the establishment of primary residence elsewhere, and the lawmakers saw no reason to change that test in the statute cited by Hon. Spears. Therefore the legislators restricted themselves to defining only the family member’s primary residence.

⁴⁹Entry 16.

⁵⁰The text of the Local Emergency Housing Rent Control Act §5, as enacted in 1962, reads “occupies the dwelling with,” but that language has evolved into “has resided with” over the years of case law and amendments. *Black’s Sixth* posits that continuous physical presence is not necessary to the definitions of either “occupant” or “resident.” In fact, *Black’s* sees those two words as virtual synonyms.

If the appellants wished to be fussily technical on judicial error, we would note that the Hon. Spears seems unaware that the legislature went to the trouble of amending the original act to replace “occupy” with “reside.” But we do not believe the legislature was attempting to draw a distinction between the two words; inflections of each appear next to each other throughout, including in 9 NYCRR §2204.

⁵¹300 E. 34th St. Co., *op.cit.*

Like the appellants, an attempting successor to rent-control claimed that his 81-old-mother had sought only temporary treatment in a nursing home and would soon return home. He produced a note from the doctor to that effect. However, believing that the tenant was misrepresenting his mother's condition, the landlord entered the premises and found that the apartment was "totally vacant; and that all furniture had been removed and no phones were on the wall." It was that evidence, and only that evidence, that led the court to rule for the landlord.⁵² Exactly the opposite is true in the case at bar; all the elder Richman's furniture and her valued possessions remained in her home while she was temporarily domiciled in a tiny hospital room undergoing respiratory rehabilitation and waiting for repairs to the electrical wiring in her home.

That finding would lead to the *Sommer* Test, setting the precise standard for holding primary residence apart and distinct from domicile,⁵³ and the court would later find that tenants reside with each other if they share the same primary residence.⁵⁴ Case law has already ruled to some extent on legislative intent. "The purpose of the primary residence decontrol law was to alleviate the shortage of housing in New York City by returning underutilized apartments to the market place," the court ruled in upholding succession.⁵⁵ The elder Richman had used this apartment until her death in it, at least 28 months after the appellants had moved in with her to enable her to continue using this apartment.

In considering the meaning of "reside with," case law finds a close-knit family relationship and an ongoing connection to the apartment to be crucial.⁵⁶ The appellants met that standard. Since 1977 they were in this apartment every week and often for extended visits. The younger Richman grew up in this building and went to college from this apartment. Most of her treasured youthful possessions remained in this apartment under the care of her mother. The appellants monitored the elder Richman's health and finally moved in with her completely when her osteoporosis left her a virtual paraplegic. The Court of Appeals defines the "reside with" condition:

⁵²*L.J.M. Venture No. 1 v. Joy*, 105 Misc.2d 291 (1980), 432 N.Y.S.2d 58.

⁵³*Op. cit.*

⁵⁴*Brusco v. Rivera*, NYLJ, September 9, 1999, p. 26, c. 1. The appellants believe the Appellate Term decision in that case, supporting this appeal, stands. The tenants in that case were temporarily absent for reasons other than age or health. Has this court ruled in that case? Is the landlord's appeal yet to be decided? A ruling upholding succession in *Brusco* supports this appeal. A ruling for the landlord, however, leaves unanswered the question whether the facts in this case are sufficiently exceptional to merit a ruling for the appellants.

⁵⁵*Herzog v. Joy*, 74 A.D.2d 372 [1st Dept 1980], 428 N.Y.S.2d 1

⁵⁶See *Classic Props. v. Martinez*, 168 Misc.2d 514 (1996), 646 N.Y.S.2d 755;

Thus the “living with” requirement must be read to mean living with such statutory tenant in a family unit, which in turn connotes an arrangement, whatever its duration,⁵⁷ bearing some indicia of permanence and continuity.⁵⁸

Guided by that test, we hold that the Hon. Spears should have concluded that the younger Richman and Casey were residing with the elder Richman even while she sought respiratory rehabilitation under advice of her physician.

The landlord had attempted to evict the elder Richman for nonprimary residence and failed. The landlord had initially refused to make the apartment habitable for her, and finally, after discovery, a subpoena of medical records, and protest letters from a state senator, stipulated to upgrade the electrical wiring to support the elder Richman’s respirator. The elder Richman returned home to the appellants’ care upon completion of the work, maintaining her primary residence.

The elder Richman did not establish primary residence in respiratory rehabilitation. The documentary evidence, from such professionals as a social worker, a respiratory therapist, and a physician, confirms that, aside from the osteoporosis that rendered her a virtual paraplegic, the elder Richman was healthy, mentally alert, and ready, willing, and able to return home.

The proximate cause of the elder Richman’s death was an unpredictable massive stroke, which occurred immediately after the landlord reneged on the stipulation to upgrade the electrical system; nevertheless, she survived weakened but in good spirits for three months after the onset of the stroke.

The elder Richman returned to her primary residence, with the long-sought approval and assistance of the landlord, and died here, cared for by her only family, the younger Richman and Casey, at least 28 months after the appellants moved in with her to care for her. Case law holds that “the intended purposes of the rent stabilization and rent control succession provisions” are “to prevent the eviction of individuals with substantial ties to their home-apartment and to the former tenant of record.”⁵⁹

There is no evidence that the legislature intended simultaneity, contemporaneity, and concurrence to be the critical test of “has resided with.” On the contrary, as the Hon. Spears acknowledges, the legislature provided that the succeeding tenant could be absent for

⁵⁷Of course the law has since been amended to make the duration two years. However, even with the present legislation, we believe that the deliberate insertion of that phrase shows that the majority held that the quality of the relationship should prevail over physical proximity.

⁵⁸829 *Seventh Avenue Company v. Reider*, 67N.Y.2d 930 (1986), 502 N.Y.S.2d 715, 493 N.E.2d 939.

⁵⁹*Rent Association v. Higgins*, 164 A.D.2d 283 [1st Dept 1990] 562 N.Y.S.2d 962. The two-year co-residence rule was enacted after this decision, but the judges’ words prevail only with that legislative qualification.

hospitalization, for attendance at school, for military service, and for other reasons. But the *nisi prius* ruling could be used to deny succession to a hospitalized family member, as the original tenant and the attempting successor do not satisfy the Hon. Spears's definition of "with," even though the family member's temporary absence is permitted by statute.

The *nisi prius* definition of "with" was created only for the case at bar. It is otherwise meaningless. In positing an *ad hoc* definition of statutory language to evict the appellants, the Hon. Spears overrules case law, speculates on legislative intent without evidence, and rewrites and violates statute. Her decision has not yet been reviewed.

Point 3 — Appellate Term Errors

The honorable justices are correct in finding that succession cannot be denied without a prior decision on primary residence. They are correct in refusing to uphold the relevance of the Hon. Spears's definition of "has resided with." They are correct in requiring a date for the vacancy of the original tenant.

However, the justices, by their own words, considered only the *nisi prius* stipulation, which included the landlord's petition to evict the elder Richman for nonprimary residence, but nothing to show that the landlord failed and admitted that she did not vacate until her death. In fact they seem completely unaware that the elder Richman returned home and died at home; or, if they are aware of it, they appear to find that they may take no judicial notice of it on appeal.

The Appellate Term then renders what amounts to a *nunc pro tunc* summary judgment: "... the aged rent controlled tenant must be deemed to have permanently vacated the apartment premises upon her hospitalization on July 17, 1996."

An adversarial dispute on primary residence, especially one concerning medical treatment for a senior citizen, may be decided only by an evidentiary trial, according to case law, never by summary judgment. The court must hear such evidence as the "patient's ability to leave" the medical facility, her "intent to return to the apartment," whether "the apartment still contained the tenant's possessions," and where she "had filed income tax returns." Those issues cannot be decided without a evidence and a hearing.⁶⁰ But that is precisely what the Appellate Term does in their decision.

In fact there was such a hearing on the elder Richman's primary residence, with precisely such evidence presented. By stipulating to the electrical upgrade and moving for dismissal, the landlord finally conceded that she had not vacated. The elder Richman returned home and died at home. After 17 months of discovery, deposition, and delay, the court dismissed the case.

⁶⁰65 *Central Park West, Inc., v. Greenwald*, 127 Misc.2d 547 (1985), 486 N.Y.S.2d 668.

But the honorable justices rule that the elder Richman vacated when she went to the emergency room after a fuse blew in this apartment, causing her medical equipment to fail. The Hon. Spears was aware that the elder Richman did not vacate until death, and attempted to find another reason to evict the appellants. Uncomfortable with the *nisi prius* rewriting of case law, the Appellate Term simply issues an edict overruling a case closed over two years earlier, a case supporting the appellants and not in dispute by the respondents.

The Appellate Term decision appears to make this ruling of law on primary residence: an “aged rent controlled tenant” has less right to primary residence than a younger tenant. While there may be limited support for such a ruling in the case law — the court scrutinizes a nursing-home resident far more closely than a student or a member of the military — there is at least as strong condemnation of such a judicial strike against the elderly.⁶¹ The honorable Appellate Term justices’ ruling is challenged by the immortal words of the Hon. Kibbe Payne: “. . . hospitals and nursing homes are not places where rational tenants establish primary residence.”⁶² Our mother was rational enough to have called her tiny room in respiratory rehabilitation “my jail cell.”

Case law on an “ongoing, substantial, physical nexus” is the critical test for maintaining primary residence.⁶³ Is the Appellate Term ruling that the elder Richman was as good as dead upon her “hospitalization”? Would the justices have decided differently had a young tenant been hospitalized? The honorable justices’ decision invites landlords to ignore the *Emay* test and bring eviction against any senior citizen who seeks medical treatment, however temporary, at a remote facility, however close to home and however strong the ongoing physical nexus to home.

The honorable justices cite case law that does not support their opinion, and in fact rebuts it.⁶⁴ *Shadick* ruled in favor of the tenant seeking succession, and the appellants are grateful to the justices for calling our attention to it.

The *Shadick* landlord apparently argued that the attempting successor failed the two-year test because the tenant was too feeble and mentally incompetent to be considered a resident for all of the two years after the defendant moved in. Agreeing that the two-year test is necessary, but denying the plaintiff’s interpretation of it, the court ruled: the attempting successor “must show a two-year period of primary residence immediately prior

⁶¹*Parras, op. cit.* The judge urges attorneys reading the opinion to understand the court’s “ire” by remembering “their grandparents.”

⁶²*Lewis v. Katzev, NYLJ*, December 11, 1996, p. 29, c. 2.

⁶³*Emay Properties Corp., op. cit.*

⁶⁴*Shadick v. 430 Realty Co.*, 250 A.D.2d 417 [1st Dept 1998], 673 N.Y.S.2d 3.

to the tenants vacating of the apartment *regardless of whether the tenant is a senior citizen*” [emphasis added by appellants].

Ignoring the very ruling they cite, by the Appellate Division, the Appellate Term justices suggest a different standard on primary residence for the “aged.” Case law has determined that mere hospitalization, for however long, is not sufficient to affect a tenant’s primary residence. In fact the very court that denied us leave to appeal has found no reason to infer vacancy from even physical absence for a warmer climate; the attempting successor prevailed.⁶⁵

The court has held that a tenant “institutionalized” for depression and drug addiction retained primary residence in his rent-control apartment. In that case, the court wrote, “This tenant was residing in transitional homes designed to prepare patients for a return to independent living.” The evidence shows that was precisely the elder Richman’s purpose in seeking respiratory rehabilitation, and the appellants’ purpose in sharing her primary residence was fulfillment of her goal of a full life, regardless of her age.

The court continues:

We view this absence as excusable, for purposes of nonprimary residence, where the institutionalization was transitory, not permanent in nature; where there was no abandonment of the premises or establishing of any new residence; and where a resumption of occupancy has taken place.⁶⁶

The elder Richman satisfied that condition. In fact she returned home to the care of the appellants. In fact the landlord conceded her primary residence and upgraded the electrical wiring in this apartment, after long delays and stalls, and after two protest letters from State Senator David Paterson to the president of Columbia.⁶⁷ The sole purpose of the electrical work was to support the elder Richman’s use of a medical respirator, pursuant to statutes protecting the disabled. The vacancy date cited by the honorable justices was the date when a fuse blew in this apartment, causing the elder Richman’s oxygen to fail.

The Appellate Term justices seem to be relying only on this phrase in *Shadick*: “We find that such two-year period ended . . . when plaintiff’s grandmother moved into a nursing home” That is a finding of fact, and it is a fact asserted by the tenant and contested by

⁶⁵*Rakoff, op. cit.*

⁶⁶*Katz v. Gelman*, 177 Misc.2d 83 (1998), 676 N.Y.S.2d 774. In the interest of full disclosure, we must also cite this qualification by the court: “Unlike cases involving aged tenants confined in a nursing home facility who are *unable to demonstrate an ability to return* to the regulated premises” [emphasis added]. However the elder Richman was confined to a respiratory-rehabilitation facility that took patients of all ages; it was a specialized hospital. As the plaintiff’s acknowledged by stipulating to the electrical work, she proved that she was ready, willing, and able to return home.

⁶⁷Those letters may be taken as evidence of legislative intent in defining primary residence.

the landlord. A fact in one case is not a fact in another case. The appellants do not dispute that some people who move into nursing homes sometimes vacate their apartments; we dispute only that the elder Richman vacated her home on her “hospitalization.”

Even when sentenced to prison, the tenant remains a primary resident for the length of his incarceration.⁶⁸ Perhaps the honorable justices would have ruled differently had the elder Richman’s reference to her “jail cell” not been metaphorical.

There is nothing in *Shadick* to support the decision by Appellate Term justices.

The Appellate Term further ignores case law immediately preceding the case at bar, in which that very court ruled that primary residence by both the tenant and the successor in the same apartment is sufficient to satisfy two years of co-residence.⁶⁹ Did the court regret its decision in *Brusco*? Did the court believe that the standard for an “aged,” disabled tenant should be different than that for young tenants voluntarily absent to pursue their careers and interests? Was the court simply unaware that the elder Richman returned home on the electrical upgrade, finally dying at home at least 28 months after the appellants moved in to care for her? Or did the court hold that it could take no judicial notice of those facts on our appeal?

The honorable justices support our contention that the Hon. Spears was wrong to separate our succession from our mother’s primary residence and to decide the question solely on an *ad hoc* definition of the verb phrase “has resided with.” Their decision in the case at bar restores the correct judicial test in deciding succession: When did the original tenant vacate?

But their answer to that question is contrary to the facts in this case. The justices ignore the cause of the elder Richman’s hospitalization. They ignore the landlord’s upgrading the electrical system, allowing her to return home. They ignore that she died at home. To the extent that their answer is a matter of law, their answer rejects case law, some of which was set by that very court, raises age-discrimination issues, and makes it easier to evict senior citizens who rent their only home.

Point 4 — Plaintiff Errors Ignored by the Court

Our adversary has held that the arguments under this Point may be grounds for a new action by the appellants, and of course we agree. However we don’t agree that these arguments are beyond the scope of this court. We seek to forestall further litigation by gaining a just resolution to the case at bar. The dirty-hands case law cited in the Introduction

⁶⁸1665-75 *Bryant Avenue Redevelopment Associates v. Montgomery*, NYLJ, February 24, 1998, p. 25, c. 3.

⁶⁹*Brusco*, *op. cit.*

backs us up in asserting that the Appellate Division may hold that *nisi prius* should have considered plaintiff errors even if not cited by the defense.

This section presents arguments less likely to support reversal than a new trial in *nisi prius*. We believe we have already set forth strong grounds for a reversal. However, this court may see disputed issues resolvable only by an evidentiary hearing. Case law shows that sending a case back to the trial judge occurs with some regularity in landlord-tenant cases, especially on succession and primary residence.

A landlord gained a new trial in Housing Court against a tenant who had won rent-control succession.⁷⁰ Another rent-control landlord, whose nonprimary petition was dismissed by original jurisdiction, had the petition reinstated by the Appellate Division.⁷¹ A rent-control tenant, whose charges of retaliation, harassment, and unlivable conditions against the landlord were dismissed in original jurisdiction, successfully gained an Appellate Division order sending the case back to civil court.⁷² Citing the Emergency Tenant Protection Act, the Appellate Division overruled the Appellate Term in a rent-control case.⁷³ There are other civil cases sent back to original jurisdiction, one as recently as last year.⁷⁴

The eleemosynary institution had an obligation to refrain from hiding its errors and using them to win its case, even if not challenged by the defense. The *Parras* ruling held that true for a profit-seeking landlord.⁷⁵ Columbia University is further bound by its own academic ethics, the ethics of its officers, its *Charter and Statutes*, which is a compendium of acts of the state legislature, and the by-laws of its trustees.

Parras went even further for errors by the landlord's attorney. If uncorrected, they subject the landlord to a wrongful-eviction action by the former tenant. Therefore the court has an obligation to prevent those errors from prevailing, even without assistance from the defense, not merely to protect the tenant from an unjust eviction, but also to protect the landlord from being forced to redress the negligence of an officer of the court.

⁷⁰*Bromer v. Rosensweig*, 166 Misc.2d 201 (1995), 634 N.Y.S.2d 43.

⁷¹*White v. Joy*, 116 A.D.2d 466 [1st Dept 1986].

⁷²*Salvan v. 127 Management Corp.*, 101 A.D.2d 721 [1st Dept 1984].

⁷³*McDermott v. Pinto*, 101 A.D.2d 224 [1st Dept 1984], 475 N.Y.S.2d 15.

⁷⁴*Rodriguez v. Triborough Bridge*, A.D.2d [2d Dept 2000]; *Feger v. Goldberg*, 250 A.D.2d 727 [2d Dept 1998], 673 N.Y.S.2d 194; *Stay v. Horvath*, 177 A.D.2d 897 [3d Dept 1991], 576 N.Y.S.2d 908; *Freidus v. Eisenberg*, 123 A.D.2d 174 [2d Dept 1986], 510 N.Y.S.2d 139.

⁷⁵*Op. cit.*

As documented in Point I, the landlord's attorney, hoped to satisfy the *Louis* test for succession⁷⁶ by seeking to evict the elder Richman for nonprimary residence. But Mr. Vail, would see a problem with his stipulation to upgrade the electricity solely to accommodate the elder Richman and with his motion to dismiss after she had returned home. The landlord so stipulated after discovery and subpoenaing her medical records. It would be evidence that the landlord had acknowledged that the original tenant had not vacated.

Ignoring his stipulation to do the electrical work on August 6-7, 1998, Mr. Vail affirmed under penalty of perjury that the electrical system had been upgraded in July 1998, a month earlier than stipulated.⁷⁷ His pleading was verified by Elizabeth (Liz) Baum, the same Columbia employee whom Senator Paterson cited as saying that Columbia "had canceled the appointment" for the electrical work in July 1998.⁷⁸ Mr. Vail's motive was to establish that the elder Richman was neither able nor willing to return home, and that the request for the electrical upgrade was a ruse.

In fact the landlord had failed to comply with the stipulation, further delaying the elder Richman's return. Upon learning that she couldn't return on schedule, she suffered a stroke. The landlord finally did the electrical work in September, over a month after stipulated, and the elder Richman returned home, her quality of life considerably impaired after the delay.

From Mr. Vail's affirmation that the electrical work had been completed a month earlier than stipulated in writing, and two months earlier than it was actually accomplished, the appellants infer that Mr. Vail had intended to attach his perjured motion to a pleading in the later action to prevent succession by the appellants. But the younger Richman had thwarted that purpose, leading Mr. Vail to attach instead the original petition and a nonfinal decision, without the tenants' replies and the final determination in favor of the tenants.

From the end of March through the end of July 1998, the landlord refused to upgrade the electrical wiring to support the elder Richman's medical equipment. Instead the landlord deposed the elderly Richman, subpoenaed her medical records, and sifted through the results methodically. Failing to dig up any evidence that she could not return home, the landlord finally stipulated to do the work on August 6-7, 1998, but further delayed the work another month. For the sole purpose of preventing us from succeeding, a harmless old lady, who had peacefully made her home in this building for 60 years, remained confined to what she called "my jail cell" for at least three months longer than necessary, and as many as seven months.

⁷⁶*Op. cit.*

⁷⁷*Record on Appeal*, pp. 180-187, 220-221. Compare p. 184, first 4 lines, with p. 220, paragraph 2.

⁷⁸*Record*, p. 218.

The landlord's attorney then committed *prima facie* perjury to accomplish what he failed to do with his abuse of the elder Richman — establish grounds for denying succession by the appellants.

In pleading both cases before original jurisdiction, the landlord's attorney cited "John and/or Jane Doe" as included respondents, in violation of CPLR 1024, and called the appellants "squatters" using "fictitious" names. The elder Richman and both the younger Richman and Casey had identified the appellants to the landlord in writing a year before the landlord began the earlier eviction. The landlord deposited rent checks drawn on the appellants' joint account. The landlord signed a stipulation agreeing to accept those checks and to cooperate with the appellants in maintaining the premises.

It's true that "John and/or Jane Doe," and the words "fictitious" and "squatters" appear in some printed boilerplates used by marshals and other legal functionaries. Clerks frequently neglect to redact the inappropriate terms. But Gregory Vail, Esq., was not executing boilerplates. He was filing original pleadings under penalty of perjury on behalf of a major academic institution, whose officers are bound by academic ethics somewhat as lawyers are by legal ethics.

Case law has ruled against the gratuitous use of "Doe," when the landlord knows who is residing in the apartment: "It is clear, indeed undisputed, that petitioner knew" the respondent's "name and identity prior to the initiation of this proceeding. It therefore follows that the petitioner misused the statutory authority for resort to CPLR 1024."⁷⁹

"John and/or Jane" is virtually unique in the annals, begging for review.⁸⁰ Such usage suggests to the court that the respondents are impostors and liars. Such usage is also evidence of an attempt to use sexual orientation to deny the respondents equal protection.⁸¹ Such usage is perjury hiding behind boilerplate language.

Immediately after moving to withdraw the action against the elder Richman, five months after the later of Senator Paterson's two protest letters to the Columbia president, the landlord refused the rent payment, for January 1999, by the younger Richman and Casey.

⁷⁹*Capital Resources V. Doe*, 154 Misc.2d 864 (1992), 586 N.Y.S.2d 706. The landlord initially used "John Doe and Jane Doe" to cite a man and a woman. The woman later dropped out of the case, leaving only "John Doe" as the respondent. See also *Crooks v. Holcomb*, *NYLJ*, February 28, 1996, p. 29, c. 4.

⁸⁰"John and/or Jane Doe one through five" were developmentally disabled subtenants, unknown to the landlord even as to gender, in *DiScala v. Facilities Development Corporation for the Office of Mental Retardation & Developmental Disabilities Staten Island Developmental Center* (Misc.2d [1998]N.Y.S.2d). The "and/or" usage appears nowhere else, but in the case at bar, in the case law known to the appellants.

⁸¹In 1977, the law firm Borah Goldstein represented the landlord in successfully evicting the younger Richman from her rent-controlled apartment for taking Casey as her live-in partner (*West 82nd Street Associates v. Richman*). At that time, case law and statute protected neither roommates nor domestic partners.

But the landlord did not send the predicate notice launching the case at bar until March 1999, two months after refusing the payment and seven months after the senator's action. RPL7 §223-b cites presumption of the landlord's retaliation in any holdover within six months of a lawful complaint by the tenant. It is reasonable to infer that the delay of two months between refusal of rent and service of the predicate notice was an attempt by the landlord to evade the presumption of retaliation within six months.

The statute on the landlord's retaliation has been well, consistently, and quite liberally, upheld by case law.⁸²

We complained to State Senator David Paterson of the landlord's delaying and stalling the electrical work. We held that the pre-World War II electrical wiring endangered the elder Richman's health and safety, as it would not support her respirator, and we cited statutory protection for the disabled. The senator sent two letters of protest to the Columbia president, before the landlord finally stipulated to the court the date of the work's completion.

The retaliation statute cites complaint of "the landlord's alleged violation of any health or safety law, regulation, code, or ordinance" to a "governmental authority." We acknowledge that the state senator is not an executive or enforcement agency, but the statute also cites "actions taken in good faith, by or in behalf of the tenant" and "the tenant's participation in the activities of a tenant's organization," which the court has interpreted to mean broad political action, including seeking legislative reform.⁸³ Furthermore, it is a legislator's duty to hear constituents' grievances and refer them to the appropriate enforcement agency. To Senator Paterson, that agency was the Office of the President, Columbia University.

But, unlike the landlord in *Parras*, Columbia was not a trusting, unsuspecting client, betrayed by an attorney evading ethics and law. Columbia University violated its own by-laws, its own internal rules, and the academic ethics of its president, in its selective actions against the two Richmans and Casey. The Columbia University *Charter and Statutes* is an act of the New York State legislature of 1784, repealed and re-enacted in 1787, amended in 1810 and several times through 1916.⁸⁴ The *By-Laws and Rules of Order of the Trustees*, enacted under the *Charters and Statutes*, mandate a "Committee on Finance" to evict only for nonpayment, but otherwise "to nominate . . . a fair and impartial person, duly qualified" to

⁸²*Adar Co. LLC v. Snyder*, NYLJ, July 9, 1997, p. 34, c. 6. *Samuel v. Villafane*, NYLJ, July 29, 1998, p. 24, c. 5.

⁸³*Raderman v. Talia Management Co.*, 170 Misc.2d 622 (1996), 651 N.Y.S.2d 850.

⁸⁴*With Amendments to April 3, 1916* (New York: Columbia, 1916).

resolve other rental disputes with tenants.⁸⁵ That section was no joke; the boilerplate lease used by Columbia in the early half of the twentieth century appears to have mandated both parties “to nominate fair and impartial auditors” to resolve disputes.⁸⁶

Without a subpoena or discovery, Columbia believes it is not compelled to make any amendment or change to the by-laws available to the general public. Or so the younger Richman believes after an exchange of e-mail and a voice call with the Office of the Secretary.

The trustees’ resolution designating the employee to evict tenants appears to violate the by-laws.⁸⁷ It is not an amendment. It was enacted before the present officers took office, about twelve years earlier than its citation in this case. We don’t know the context or how the vote went. The person signing it was no longer employed by Columbia when it sought our eviction. The resolution seems to violate statute on corporate pleadings.⁸⁸

Columbia seems to have abandoned the “fair and impartial person” rule shortly after World War II, when New York City enacted what has come to be known as rent control, but the bulk of its residential holdovers spanned 1974 to 1985, before creation of the Office of Institutional Real Estate and before President George Rupp assumed office. At that time Columbia engaged in massive acquisition of property, hoping to stop the decline of Morningside Heights and to raise the quality of life in this neighborhood to attract qualified faculty and students.

In one eviction Columbia holds that it is not subject to rent stabilization as an “eleemosynary institution.”⁸⁹ In each of four others, the landlord sought to deny the tenant a rent-stabilization lease “because the premises were rented by a non-profit educational institution to a member of its staff or a student as an incident of said affiliation,” and the

⁸⁵*As Adopted March 7, 1892, with Amendments* (New York: Columbia, 1899), ch. V §2(a), p. 10.. The New York Public Library has no later edition.

⁸⁶In *Trustees of Columbia University v. Kalvin*, 132 Misc. 601 (1928), 230 N.Y.S. 386, Columbia petitioned the court only after the failure of “an impartial person to act” within the time cited by the lease.

⁸⁷Record, p. 27, 241.

⁸⁸CPLR 3020(d)1: “. . . if the party is a domestic corporation, the verification shall be made by an officer thereof and shall be deemed a verification by the party” Note that “The Trustees of Columbia University in the City of New York” is the corporate name. *It is* evicting us; *they are not* evicting us.

⁸⁹*Trustees of Columbia University v. James*, 127 Misc.2d 81 (1985), 489 N.Y.S.2d 669.

tenant failed to meet those conditions.⁹⁰ In those cases, Columbia is seeking to establish its privilege as a nonprofit, educational institution.

In two cases, Columbia appears to be protecting itself against fraud. On discovering that the occupants of a newly acquired building were not tenants, but illegal subtenants, Columbia gives notice to the tenant to cure. The tenant fails to appear, but the subtenants appeal their eviction, not on the facts, but on the landlord's failure to give ten-day notice.⁹¹ After demolishing a building soon after acquiring it, Columbia gives a tenant a month-to-month lease in another building. Columbia has reason to believe the tenant was not protected by rent control prior to Columbia's ownership and refuses the tenant a rent-stabilized lease. The court places the tenant under protection of rent stabilization.⁹²

Columbia has never, to the appellants' knowledge, sought to shrink the class of persons protected from eviction under rent-control or to evict for no other reason than to increase its income from the apartment.

On the contrary, President Rupp has written:

At the Law School, many members of the Class of 1997—the second graduating class subject to a 40-hour minimum pro bono requirement—did far more than the minimum. Several logged over 100 hours in the School clinics that provide free legal services to residents of Harlem and Morningside Heights. Students also worked with Legal Aid lawyers to assist tenant groups and community development associations in the neighborhood. In support of this endeavor, the School's Center for Public Interest Law joined with the Legal Aid Society to establish a new formal connection, the Community Lawyering Project.⁹³

President Rupp was aware that the Legal Aid Society was representing the elder Richman in Columbia's nonprimary holdover, just two or three months after he delivered that annual report, but made no effort to withdraw the action.

The respondent is arguing, or at least agreeing with the Appellate Term, that the elder Richman could not have maintained primary residence while in the hospital. The respondent is further arguing that the appellants could not have achieved primary residence earlier than the disposal of their other residence.

⁹⁰*Trustees of Columbia University v. Lefkowitz*, 126 Misc.2d 319 (1984) 482 N.Y.S.2d 669. *William Harris, appellant, v. Trustees of Columbia University*, respondents [sic](1983), 470 N.Y.S.2d 368. *Trustees of Columbia University v. Sperling*, 44 A.D.2d 819 [1st Dept 1974], N.Y.S.2d. *Trustees of Columbia University v. Levin*, 71 Misc.2d 356 (1972), 336 N.Y.S.2d 154.

⁹¹*Trustees of Columbia University V. Bruncati*, respondent, and *Alexander et. al.*, appellants, 77 Misc.2d 547 (1974), 356 N.Y.S.2d 158.

⁹²*Trustees of Columbia University v. Griffiths*, 43 A.D.2d 924 [1st Dept 1974].

⁹³"Our Neighbors," *President's Report 96-97*, <http://www.columbia.edu/cu/president/report97/>.

As the Appellate Division considers this case, the United States Court of Appeals, Second Circuit, is hearing the vice dean of the Columbia Law School argue that a person may have simultaneous primary residence in two separate locations and vote in both locations. According to the tertiary source, Professor Richard Briffault is arguing that primary residence is “a significant and continuing attachment to the community” and a citizen may have such attachment to more than one community.⁹⁴

At the same time the respondent is asking this court to uphold decisions that continuous physical presence is necessary for family members to have “resided with” each other, and that hospitalization of an “aged” tenant deprives her of primary residence.

The appellants don’t know whether a state-court ruling on local housing law is subject to a federal decision on voting law, but we suspect that Professor Briffault’s case is strong reason to refrain from a hasty decision for the landlord. At least it is reason to send the case back to *nisi prius*, where the younger Richman could present evidence of her lifelong attachment to this community and this apartment, by treasured possessions having remained here in her mother’s care, by her visits never more than a week apart, and by her intimate attachment to the tenant.

However, we don’t so argue. We don’t agree with the professor’s arguments as explained by the tertiary source. Although his case has the support of migrant farm workers, we suspect that its success will tend to amplify the voting strength of property owners at the expense of renters.

We argue academic ethics. Professor Briffault is not in private practice. He has not taken this case solely for the income. Even though Columbia is not a litigant, as vice dean of its Law School, Professor Briffault believes he is acting in the interest of the university — or, at least, not acting contrary to its interest. In his self-interest, he is not seeking income from his client so much as advancement of his academic career, by establishing case law before, eventually, the United States Supreme Court. Certainly he would not advance his academic career by seeking a ruling contrary to the university’s interest.

At the same time, the nonacademic employees of the university are evicting us on whatever legal technicality they can mine from the statutes, for no other reason than to remove the apartment from rent-control protection by rendering us homeless. The employees are not arguing against the politics or philosophy of rent-control, which would surely have academic merit in the legal community. They are using specious interpretations of the law to get this particular apartment off rent control. That of course would be in the best interest of a profit-seeking landlord. But, as Professor Briffault demonstrates, it is not in the best

⁹⁴Harden, Blaine, “Summer Owner Wants a Vote in Both Houses.” *The New York Times*, June 1, 2001, p. B1. See also “Who Rules at Home?: One Person/One Vote and Local Governments,” by Richard Briffault (60 *U. Chi. L. Rev.* [1993]).

interest of an eleemosynary, academic institution chartered by the state legislature and restrained by academic ethics.

Columbia has self-interest far beyond its real-estate holdings: charitable contributions from alums, for example. Professor Briffault's case will surely gain the approving pride of lawyers educated by Columbia, as well as many other contributors. What will our eviction gain in voluntary donations from proud alums?

In a book published shortly before assuming office at Columbia, President Rupp held that the values of the "academic community" must remain separate from and independent of the values of the "marketplace community."⁹⁵

In a watershed decision, the New York State Court of Appeals has ruled that a professional code of ethics supersedes a contract and some aspects of law. A law firm terminated an attorney's employment for citing a coworker's misconduct to the Bar Association. Despite a fire-at-will contract, the attorney petitioned for damages, claiming that his professional code of ethics mandated his whistle-blowing. With the Bar Association filing an *amicus curiae* pleading in support of the plaintiff, the Court of Appeals ruled that the attorney must act like an attorney, regardless of his contract.⁹⁶ Does that decision apply equally to an academic code of ethics? Must a scholar, licensed to practice by a nonprofit educational institution chartered by the state legislature, act like a scholar, regardless of pecuniary interest?⁹⁷

President Rupp holds that Columbia's role is to protect tenants who do not compromise the university. The appellants were not committing fraud against the university. The case at bar achieves nothing to protect Columbia as a nonprofit educational institution. It may in fact be injuring Columbia's ability to raise voluntary donations. The vice dean of the law school sees arguing for simultaneous primary residence in two separate locations as consistent with his university's interest.

At the same time, the real-estate employees sift through the local housing law for whatever technicality they can find, regardless of its merit to the academic community, to deny primary residence, to gain possession of a single apartment protected by rent control, and to shrink the class of tenants eligible for succession under rent control. And they use, with a hired gun's help, unethical and unlawful methods to achieve that end.

⁹⁵*Commitment and Community* (Minneapolis: Fortress Press, 1989).

⁹⁶*Wieder, appellant, v. Skala, et al., respondents, and Lubin, defendant*, New York State Court of Appeals, 1 No. 25, December 22, 1992; 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992).

⁹⁷After a professor learned that a student had lied about his brother's death to get more time to complete the course of study, Columbia drove the student to suicide by denying him a degree. Should the president of the university be held the same standards as the university holds its students? Should the vice dean of the law school?

CONCLUSION

Until now this case has been heard strictly as a matter of property law. The tenant has possession of the landlord's property. The landlord wants it back. The tenant claims protection of law superseding ownership.

On those terms, we believe we have demonstrated court errors and the conflict between the Appellate Term and *nisi prius*. The Hon. Spears improvised an *ad hoc* definition of the statutory words "has resided with" simply to suit what she perceived to be the facts in this particular case. The Appellate Term ignored the *nisi prius* ruling on law, but simply issued the *nunc pro tunc* decree on a date of vacancy, overruling a case closed over two years earlier in the appellants' favor and not in dispute by the respondent. The two courts arrived at the same decision on contradictory, mutually exclusive grounds.

In bluntest effect, the Appellate Term ruled that *nisi prius* should have ruled in favor the appellants on the facts it found. Finding different facts, the honorable justices then proceeded to overrule the decision that the Hon. Spears should have made.

Those errors, we hold, are sufficient to reverse the earlier rulings.

But we believe the Appellate Division can go beyond mere property to consider the nature of the landlord. Surely the court would treat an eviction by, say, the City of New York, differently from one by a profit-seeking landlord. Civil rights, executive restraint, ethics, the environment, and public interest eclipse ownership. The landlord evicting us is a historic institution chartered by acts of legislature in the interest of the community. It claims such protection from housing law as is not enjoyed by ordinary, profit-seeking landlords. With privilege comes responsibility.

Columbia University has significant sources of income apart from real estate. It owns property not primarily for income, but to maintain an attractive environment for faculty and students, and, by enlightened extension, the entire community. It owns property also to provide housing for faculty and students, but it is contrary to its primary interest in a healthy neighborhood to gain homes for a few professors by wresting apartments from longtime residents with evictions on a case-by-case basis for whatever reason, however technical, however hostile to what President Rupp calls "the academic community,"⁹⁸ it can mine from the law books.

The head of the Columbia University Office of Institutional Real Estate, Deputy Vice President Bill Scott, told *The New York Times*, "We don't replace our 46-year-old tenants that fast," referring to the voluntary removal of a commercial tenant.⁹⁹ That was after Columbia had sought the eviction of the elder Richman, a tenant for 60 years, while she lay

⁹⁸*Commitment and Community, op. cit.*

⁹⁹May 7, 2000, City Section.

in her sickbed. Other statements to *The Times* by both Mr. Scott and Executive Vice President for Administration Emily Lloyd show that a mission of Institutional Real Estate is to maintain “affordable rent” and “diversity” in Morningside Heights. That mission was thwarted by the two holdovers against the elder and the younger Richman and Casey.

Columbia evicts only to secure its protection as an eleemosynary institution from some aspects of housing law, and to protect itself against fraud. In the latter case, Columbia will indeed brandish every weapon in the landlord’s arsenal, not to increase income, but to deter future attempts to violate the integrity of the historic institution.

The Columbia employee Elizabeth Baum believed we had lied when we said we had a familial bond with the elder Richman and that we had long relationship to this apartment. She believed we had lied about the elder Richman’s medical condition. She was not alone. It’s possible that our own attorneys did not believe us. It’s possible that such suspicions by the plaintiff and our own counsel informed the *ad hoc* definition of “has resided with” by the Hon. Spears in *nisi prius*.

In protecting her employer against our presumed lies, Ms. Baum unilaterally “canceled,” according to Senator Paterson, an appointment to repair the electricity in July 1998. She later verified a pleading, under penalty of perjury, that the work had been completed in that month. The attorney who executed that perjurious pleading called us “squatters” and users of “fictitious” names, although we had repeatedly communicated with Columbia employees, although we had signed stipulations with Columbia on paying rent and managing the property, and although Columbia had deposited rent payments drawn on our joint bank account. As the case developed, Columbia officers began to see that the only lies about this apartment and its tenants were told not by the appellants, but by university employees and their advocate.

No officer, however, had the courage to stop the abuse of tenants faithfully paying their rent and peacefully conforming to the rent-control statute on succession, as well as the academic code of ethics on lying. Believing we were liars, the university had poured vast resources and effort into putting the appellants on the street. Later learning we had told only the truth, who among the university officers would step forward and say, “Never mind”? Better to let the case drag on, better to let the appellants languish in limbo, better to look the other way as we are forced out of our home, better to ignore the perjury and bully-boy tactics — which would have surely gained an F in Professor Briffault’s class, if not expulsion from the Law School — than admit error.

The appellants hold that we have shown this court ample cause to do what the Columbia officers lacked the courage to do, and to spare us from groping for legal redress against injustice after we are put on the street. There are grounds for a reversal; there remain grounds to designate a jurisdiction to try the evidence and arguments that *nisi prius* should have heard originally.

New York, New York
July 25, 2001

Respectfully submitted,

Vicki Richman
Appellant, *pro se*

Eileen V. Casey
Appellant, *pro se*

To: Clerk
Appellate Division, First Department
Supreme Court, State of New York
26 Madison Avenue
New York, New York 10010

STEVEN L. SCHULTZ, Esq.
Attorney for respondent
BORAH, GOLDSTEIN, ALTSCHULER & SCHWARTZ, P.C.
377 Broadway
New York, New York 10013
(212)431-1300