

# How to Protect Your Rent Stabilized Apartment From a Non-Primary Residence Claim

First Edition



The Tenant Learning Platform

[tenantlearningplatform.com](http://tenantlearningplatform.com)

Let's *learn...* to *live* better

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## I. **INTRODUCTION**

### A. **Welcome to the Tenant Learning Platform.**

- The Tenant Learning Platform delivers on-demand, online classes for all kinds of NYC tenants on specific legal topics, to help tenants prevent and solve problems with their apartments.
- The Tenant Learning Platform is for:
  - Rent Stabilized tenants
  - Free-market tenants
  - Luxury apartment tenants
  - Co-op shareholders
  - Subtenants
  - Roommates
  - Co-livers
  - If you're just sleeping on your cousin Xander's couch in Bushwick, TLP is for you.
- At TLP you will get ACCURATE and ACTIONABLE information on your legal rights as a tenant. We are developing classes like:
  - The Laws About Painting Your NYC Apartment
  - How to Do Airbnb Legally in Your NYC Apartment
  - How to Protect Your NYC Apartment from a Non-Primary Residence Claim
  - How to Get an Emotional Support Animal in a No-Pets Building
  - Best Practices for Breaking Your NYC Lease Early

The problem that we are attempting to tackle at the Tenant Learning Platform, and the solution, as we see it, are as follows:

#### The Problem:

- You have a landlord and tenant problem. For example, maybe you are gone a lot lately from your Rent Stabilized apartment. Maybe you are temporarily absent from the apartment for freelance work and you want to sublet while you are gone. Maybe you are periodically absent from the apartment to stay at your new girlfriend's apartment. Maybe you are temporarily absent from the apartment to be with your mother in another state at the end of her life during palliative care. While any of these situations are going on, you are worried that your landlord might make a non-primary

residence claim against you. You are seeing changes in your building - there is a new landlord, a lot of long-term tenants are moving out, the management is sprucing up the lobby, a representative of the new ownership asked you if you would be interested in moving, you see a handy man tinkering with a smoke detector in the hallway outside your apartment that you suspect is a hidden camera, you have heard rumors that the landlord is buying tenants out and suing others.

- You have looked around for information. You have read a few articles and websites. But the information you are finding isn't very comprehensive and doesn't answer your questions.
- NYC landlord and tenant law is complicated. It just is.
- Your landlord probably has better information than you do because she does housing all day.
- YOU ARE BUSY! You have a job, a business, a project, a family, friends, you are involved in your community...You have a life. You don't have unlimited time to figure this out yourself.
- You make too much money to qualify for a Legal Aid attorney.
- But you can't afford a tenant lawyer you are comfortable with.
- And the last thing you want is a big legal battle.
- You just wish you knew what your rights and responsibilities are.
- You just wish you knew where to start and what, *exactly*, to do.

Here's how you take this class:

- Read this booklet. This booklet is a comprehensive guide on the topic. It will explain, in clear language, WHAT the law is and WHERE to find it. The booklet contains plenty of helpful examples and best practices.
- Watch the video lessons, which are voiced-over slides.
- Take the online quiz. Taking the multiple-choice quiz will be (we hope) fun and it will help make sure that you have learned what we think is most important.

- Complete the online survey that comes at the end. We want your feedback.
- This class will be about three to six hours of work, depending on how fast you read, etc. **Taking this class is NOT a quick fix.** The TLP is teaching you the law and best practices. Those things are not short stories.

## **B. Meet Your Instructor**

So, whose voice are you hearing when you read this booklet, watch the voiced-over slides, etc.? I am Michelle Itkowitz and I have been a landlord and tenant litigator in NYC for over twenty years. I represent tenants AND landlords in residential and commercial landlord and tenant disputes.

I have always marketed my law practice via *Content Marketing* – I never advertise. I write articles about landlord and tenant law in the City of New York and get them out there any way I can – booklets, blogs, email blasts. In 2017 and 2018, I was invited to speak to groups on landlord and tenant law 21 times; 14 of those lectures were for-credit Continuing Legal Education classes where I taught other lawyers about landlord and tenant law in New York City.

Because I have so much content out there, hundreds of residential tenants started finding me and I realized how desperately tenants need practical information about their legal rights. I, however, have a very small firm and I am very expensive at this juncture in my career journey. I cannot be everyone's *lawyer*.

But maybe I can be many people's *teacher*. Maybe I can teach tenants, just as I teach lawyers and real estate professionals.

**Students and potential students of the Tenant Learning Platform - please do NOT contact me.** I am not saying that to be mean. I need to prove (or disprove) the hypothesis that I can teach people to solve the specific problems I present classes on WITHOUT any direct communication between the students and me.

**Nevertheless, I am ethically obligated to remind you that, just because you read this booklet or took this course, doesn't mean that we have a lawyer and client relationship. I am not your lawyer. The whole point is that I do not wish to be your lawyer. This is not legal**

**advice about your particular situation. We at TLP make no representation or guaranty about the outcome of your particular matter.**

The law in this area is evolving. Therefore, this course will be periodically updated.

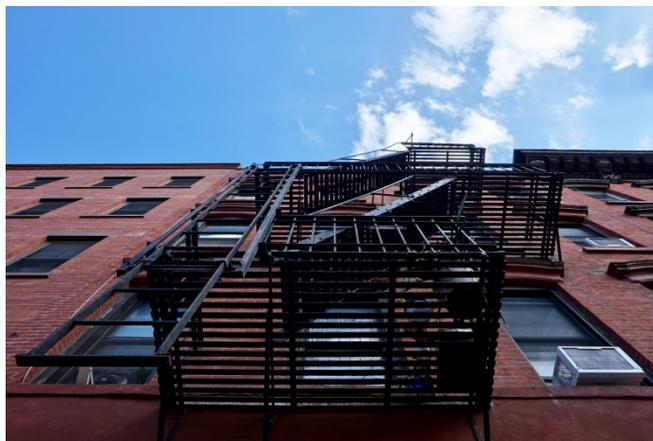
The law belongs to you! But your ownership of the law is only as great as your understanding of it. OK, now let's *learn...to live* better!

**C. This book and the class it goes with are only for New Yorkers who are ACTUALLY using their Rent Stabilized apartments as their primary residences.**

This book and the class it goes with are for New Yorkers who are *actually* using their Rent Stabilized apartments as their primary residences.

This book and this class are *not* for tenants who are not utilizing their Rent Stabilized apartments as their primary residences. This course does not exist to help tenants who are only using their Rent Stabilized apartments as *pied-a-terres*, or who are warehousing an apartment for storage or for someday when their kid moves to NYC, or who are subletting and profiteering. When tenants break the rules this way, they are taking a unit of affordable housing away from people who truly live here in New York. I am not interested in helping those people.

In my law practice, however, I so often see people, who do indeed utilize their Rent Stabilized apartment as their primary residences, but who are unfairly targeted by aggressive landlords, seeking to create vacancies so that they can get a bigger jump in the rent. This class is for those people.



**D. This class is attempting to teach you how to *prevent* a non-primary residence claim; this class is not intended to help you represent yourself in housing court if you get sued for non-primary residence.**

The Tenant Learning Platform is ***NOT***:

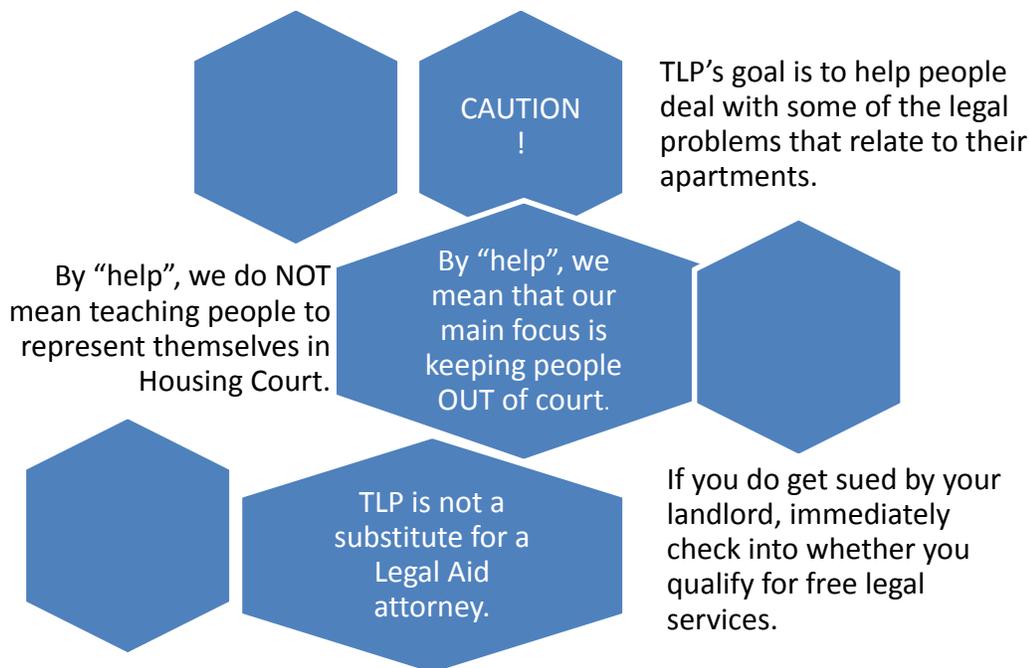
- A legal referral service. You will never be referred to a lawyer by TLP.
- A marketplace for online legal forms.
- A tenant advocacy group. Buying the class does not mean you are joining or supporting anything. You are just taking a class.

The Tenant Learning Platform's goal is to help people deal with some of the legal problems that relate to their apartments. By "help", we mean that our main focus is keeping people OUT of court. By "help", we do NOT mean teaching people to represent themselves in Housing Court.

Therefore, this class is attempting to teach you how to *prevent* a non-primary residence claim by your landlord.

If you are being sued by your landlord on a non-primary residence claim, then taking this class certainly cannot hurt you. **The class, however, must NOT be considered a substitute for representation by competent counsel.**

Housing Court is not a place that a tenant should be without a lawyer, if she or he can help it. If you do get sued by your landlord, immediately check into whether you qualify for free legal services. The Tenant Learning Platform is NOT a substitute for a Legal Aid attorney, if you are lucky enough to be able to get one. The Legal Aid attorneys working in the area of Housing in New York City are some of the best attorneys anyone can ever be represented by. If you qualify for their help, do not decline it.



My grandmother used to say that, “an ounce of prevention is worth a pound of cure.” In law and in life, staving off a problem is often the best solution to the problem. In my 20-plus years working as a landlord and tenant litigator in New York City, I have often noticed that Rent Stabilized tenants fail to prevent problems because they simply do not know the law and best practices. Therefore, this class seeks to teach you the law regarding non-primary residence claims and to suggest best practices for preventing your landlord from bringing one against you.

**E. Merely protecting yourself from non-primary residence claim will not protect you from illegal sublet and/or illegal short-term sublet claims.**

Often, when a tenant is engaged in activity that might be construed as non-primary residence, she is also engaged in activity that might be construed as illegal subletting and/or illegal short-term subletting (like Airbnb). However, illegal subletting and/or illegal short-term subletting claims are completely different from non-primary residence claims.

**Therefore, if you are subletting your apartment without your landlord’s permission, than merely protecting yourself from claims of non-primary residence will not protect you from claims of illegal sublet and/or illegal short-term sublet.**

As of this writing, the Tenant Learning Platform has an in-depth class on How to Do Airbnb (and Other Short-Term Subletting) *Legally* in Your New York City Apartment. A class on subletting is planned for the future.

## **II. RENT STABILIZATION AND THE PRIMARY RESIDENCE REQUIREMENT**

### **A. What Rent Stabilization Means and Why Your Rent Stabilized Apartment Is Valuable**

We are going to assume that the reader of this book and the student of the class that it comes with have a basic understanding of the Rent Stabilization Law in New York City. Nevertheless, this section briefly explains what Rent Stabilization is and why it is so valuable to a tenant.

Rent Stabilization applies to about one million tenancies in New York City.<sup>1</sup> Rent Stabilization limits the rent an owner may charge for an apartment, restricts the right of an owner to evict tenants, and imposes other requirements on landlords and tenants. Rent Stabilization is overseen by the New York State Division of Housing and Community Renewal (“DHCR”).<sup>2</sup>

Rent Stabilized tenants are entitled to leases and lease renewals.<sup>3</sup>

Family members of a Rent Stabilized tenant residing in a Rent Stabilized apartment often have succession rights to the tenancy.<sup>4</sup>

Rent increases for Rent Stabilized tenants are controlled by the New York City Rent Guidelines Board, which sets maximum rates for rent increases once a year, which are effective for leases beginning on or after October 1st.

Owners are required to register all Rent Stabilized apartments initially and then annually with the DHCR and to provide tenants with a copy of the annual registration.<sup>5</sup>

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<sup>1</sup> Selected Initial Findings of the 2014 New York City Housing and Vacancy Survey; <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf>.

<sup>2</sup> Omnibus Housing Act § 3 (L. 1983, c. 403).

<sup>3</sup> 9 NYCRR § 2523.5(a).

<sup>4</sup> 9 NYCRR § 2523.5(b)(1); 9 NYCRR § 2520.6(o).

<sup>5</sup> In New York City, the New York City Rent Stabilization Law governs Rent Stabilized tenancies, and is codified in the New York City Administrative Code (“NYC Admin. Code”) § 26-501 *et seq.* The DHCR has promulgated a set of regulations that also govern Rent Stabilized tenants in New York City known as the Rent Stabilization Code (“RSC”), codified at 9 NYCRR §§ 2520.1 *et seq.* These statutes appear in the Unconsolidated Laws of the State of New York.

Thus, we see that Rent Stabilized tenants have substantial rights and benefits to their tenancies. Eviction from a Rent Stabilized apartment can be a life-changing experience for a tenant.

### **B. What is a Non-Primary Residence Claim?**

One of the most common grounds upon which a landlord attempts to evict a Rent Stabilized tenant is that tenant does not occupy the apartment as her primary residence, pursuant to Rent Stabilization Code § 2524.4.

### **C. Non-primary residence is not curable and you cannot reestablish primary residence upon receiving a notice of non-renewal.**

It is important to note that non-primary residence is not subject to cure and you cannot reestablish primary residence upon receiving a notice of non-renewal.<sup>6</sup> That is why avoiding these types of cases, which are expensive to defend against, is so important.

*EXAMPLE: 45<sup>th</sup> St. Assoc. v. Spence*, 180 Misc.2d 93 (App. Term 1st Dep't 1999). Tenant's attempt to re-establish her residence in Manhattan by returning after service of the notice of non-renewal is unavailing. "It was...not the intent of the Legislature in exempting apartments not used as a primary residence to give the non-primary tenant the opportunity to periodically pose as a primary resident[.]"<sup>7</sup>

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<sup>6</sup> *O'Quinn v. N.Y.C. Dep't of Hous. Pres & Dev*, 248 A.D.2d 211 (1st Dep't 2001).

<sup>7</sup> See *Lufkin v. Drago*, 126 Misc.2d 177 (N.Y. Civ. Ct. 1984), *aff'd*, 129 Misc.2d 1108 (1st Dep't 1985). Tenant moved out of premises pursuant to divorce agreement, wherein his former wife was permitted to continue to reside in the apartment on her own, it being understood that if she were not to use the premises, that he would be able to retake possession for use as his primary residence. This agreement was not adhered to and wife sublet to an unrelated party. The sub-tenancy was created without tenant's consent or knowledge. Tenant sought permission to cross-claim against the sub-tenant, so he could "cure" his non-primary residence. The Court held that tenant's rights to possession against the subtenant are irrelevant. Non-prime is simply not curable. "The disfavor toward forfeitures is balanced by the clear command of the Legislature to stop protecting tenants who fail to maintain their apartments as their primary residences."

### **III. THE IMPORTANT RELATIONSHIP BETWEEN YOUR LEASE AND A POSSIBLE NON-PRIMARY RESIDENCE CLAIM BY YOUR LANDLORD**

In Rent Stabilization, if landlord has not met her legal obligations under the statute, then landlord may not avail herself of the court system for a non-primary residence case. Thus, this is the very first line of defense for a tenant who thinks that her landlord might allege non-primary residence.

#### **A. Rent Stabilized leases must be renewed in a very specific manner.**

Under Rent Stabilization, landlord is required to follow a very specific procedure for Rent Stabilized lease renewals.

Leases must be entered into and renewed for one- or two-year terms, at tenant's choice. Rent Stabilization Code § 2522.5 (Lease agreements) states:

(b) *Renewal lease.* (1) For housing accommodations other than hotels, upon such notice as is required by section 2523.5 of this Title, the tenant shall have the right of selecting at his or her option a renewal of his or her lease for a one- or two-year term; ... The owner shall furnish to the tenant signing a renewal lease form, pursuant to section 2523.5 of this Title, a copy of the fully executed renewal lease form, bearing the signatures of the owner and tenant, and the beginning and ending dates of the lease term, within 30 days from the owner's receipt of the renewal lease form signed by the tenant.

Landlord must send the lease renewal offer between 150 and 90 days before the expiration of the current lease. Rent Stabilization Code § 2523.5 (Notice for renewal of lease and renewal procedure) states:

(a) On a form prescribed or a facsimile of such form approved by the DHCR, dated by the owner, every owner, ..., shall notify the tenant named in the expiring lease not more than 150 days and not less than 90 days prior to the end of the tenant's lease term, by mail or personal delivery, of the expiration of the lease term, and offer to renew the lease or rental agreement at the legal regulated rent

permitted for such renewal lease and otherwise on the same terms and conditions as the expiring lease. The owner shall give such tenant a period of 60 days from the date of service of such notice to accept the offer and renew such lease.

Every lease renewal offer must have a special DHCR rider attached. At the time of this writing, the DHCR rider is 12 pages long.<sup>8</sup> Rent Stabilization Code § 2522.5 (Lease agreements) states:

*(c) Lease rider and notice of rights.* (1) For housing accommodations subject to this code, an owner shall furnish to each tenant signing a vacancy or renewal lease, a rider in a form promulgated or approved by the DHCR, in larger type than the lease, describing the rights and duties of owners and tenants as provided for under the RSL including a detailed description in a format as prescribed by DHCR of how the rent was adjusted from the prior legal rent. ... The rider shall be attached as an addendum to the lease. Upon the face of each lease, in bold print, in English and any other language as required by the DHCR language access plan, shall appear the following: "ATTACHED RIDER SETS FORTH RIGHTS AND OBLIGATIONS OF TENANTS AND LANDLORDS UNDER THE RENT STABILIZATION LAW."...

On the next page is an example of the first page of the current DHCR rider, which you can find in full at the footnote below. If your landlord is not sending this rider along with your lease renewal, then she is not renewing your lease correctly. Read the 12-page DHCR Rider carefully because it is an excellent explanation of your many rights as a Rent Stabilized tenant.

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<sup>8</sup> <http://www.nyshcr.org/Forms/Rent/ralr1.pdf>.



State of New York  
 Division of Housing and Community Renewal  
 Office of Rent Administration  
 Gertz Plaza  
 92-31 Union Hall Street  
 Jamaica, New York 11433  
 Web Site: www.nyshcr.org  
 Email address: rentinfo@nyshcr.org  
**Revision Date: February 2018**

**New York City LEASE Rider For Rent Stabilized Tenants**

**FAILURE BY AN OWNER TO ATTACH A COPY OF THIS RIDER TO THE TENANT'S LEASE WITHOUT CAUSE MAY RESULT IN A FINE OR OTHER SANCTIONS**

**NOTICE**

This Rider, with this Notice, must be attached to all vacancy and renewal leases for rent stabilized apartments. This Rider was prepared pursuant to Section 26-511(d) of the New York City Rent Stabilization Law.

This Rider must be in a print size larger than the print size of the lease to which the Rider is attached. The following language must appear in bold print upon the face of each lease : **"ATTACHED RIDER SETS FORTH RIGHTS AND OBLIGATIONS OF TENANTS AND LANDLORDS UNDER THE RENT STABILIZATION LAW."**

**Section 1 (If this is a renewal lease, do not complete section 1, go to section 2)**

If Box A is checked, the owner **MUST** show how the rental amount provided for in such vacancy lease has been computed above the previous legal regulated rent by completing the following chart. The owner is not entitled to a rent which is more than the legal regulated rent. For additional information see DHCR Fact Sheet #5. In addition, the owner **MUST** complete the Notice To Tenant Disclosure of Bedbug Infestation History, as required by the NYC Housing Maintenance Code Section 27-2018.1, which is required to be served on the tenant with this Lease Rider.

ANY INCREASE ABOVE THE PREVIOUS LEGAL REGULATED RENT MUST BE IN ACCORDANCE WITH ADJUSTMENTS PERMITTED BY THE RENT GUIDELINES BOARD AND THE RENT STABILIZATION CODE.

**VACANCY LEASE RENT CALCULATION**

Status of Apartment and Last Tenant (Owner to Check Appropriate Box - (A), (B), (C), or (D).)

- (A) This apartment was rent stabilized when the last tenant moved out. If the last stabilized tenancy was more than 4 years prior to the signing of this lease see RSC 2526.1(a)(3)(iii) or DHCR Fact Sheet # 5 which may entitle the Owner to additional rent guideline increases over the last stabilized tenancy.

Address: \_\_\_\_\_ Apt.# \_\_\_\_\_

1. Previous Legal Regulated Rent \$ \_\_\_\_\_

(i) Additional Rent Guideline increases, applicable **only**, if the last stabilized tenancy was more than 4 years prior to the signing of this lease. \$ \_\_\_\_\_

2. Statutory Vacancy Increase

(i) Increase based on (1 year) or (2 year) lease or (Preferential Rent Vacancy Limitation). Circle one. (\_\_\_\_%) \$ \_\_\_\_\_

(ii) Increase based on length of time (8 years or more) since last vacancy allowance or if no vacancy allowance has been taken, the number of years that the apartment has been subject to stabilization. (0.6% x number of years) \$ \_\_\_\_\_

(iii) Increase based on low rental amount. If applicable complete (a) or (b), but not both.

(a) Previous legal regulated rent was less than \$300 - additional \$100 increase, enter 100 \$ \_\_\_\_\_

(b) If the previous legal regulated rent was \$300 or more but less than \$500 (1) \$100  
 the sum of (i) and (ii) (2) \_\_\_\_\_  
 (1) minus (2). If less than zero, enter zero (3) \_\_\_\_\_

Amount from line(3) \$ \_\_\_\_\_

3. Vacancy Allowance, if permitted by NYC Rent Guidelines Board (\_\_\_\_%) \$ \_\_\_\_\_

4. Guidelines Supplementary Adjustment, if permitted by NYC Rent Guidelines Board \$ \_\_\_\_\_

A Rent Stabilized lease renewal offer must be on the same terms and conditions as the expired lease. Rent Stabilization Code § 2522.5 (Lease agreements) states:

(g) *Same terms and conditions.* (1) The lease provided to the tenant by the owner pursuant to subdivision (b) of this section shall be on the same terms and conditions as the expired lease, except where the owner can demonstrate that the change is necessary in order to comply with a specific requirement of law or regulation applicable to the building or to leases for housing accommodations subject to the RSL, or with the approval of the DHCR ... the foregoing, the tenant shall have the right to have his or her spouse added to the lease or any renewal thereof as an additional tenant where said spouse resides in the housing accommodation as his or her primary residence.

**B. Non-primary residence is a basis for not renewing a Rent Stabilized lease.**

Non-primary residence is NOT a basis upon which landlord may terminate a Rent Stabilized tenant; rather, non-primary residence is a basis for *not renewing* a Rent Stabilized lease. At first, this might sound like a distinction without a difference, but this fact is actually very important.

Rent Stabilization Code § 2524.4 (Grounds for refusal to renew lease, ... without order of the DHCR) states:

The owner shall not be required to offer a renewal lease to a tenant... and may commence an action or proceeding to recover possession in a court of competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 of this [law], only on one or more of the following grounds:...

(c) *Primary residence.* The housing accommodation is not occupied by the tenant, not including subtenants or occupants, as his or her primary residence, as determined by a court of competent jurisdiction; provided, however, that no action or

proceeding shall be commenced seeking to recover possession on the ground that the housing accommodation is not occupied by the tenant as his or her primary residence.

In order to refuse to renew a Rent Stabilized lease based upon the non-primary residence of tenant, landlord MUST give tenant a special notice during the lease renewal window examined above, between 150 and 90 days of the expiration date of the lease. Rent Stabilization Code § 2524.2 (Termination notices) states:

(a) Except where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in section ... 2524.4 of [this law], unless and until the owner shall have given written notice to such tenant as hereinafter provided...

(c) Every such notice shall be served upon the tenant:

(3) in the case of a notice pursuant to sections 2524.4(a) ... of this [law], at least 90 and not more than 150 days prior to the expiration of the lease term,...

### **C. The importance of the non-renewal window.**

This means that if landlord fails to notify tenant during the 150 to 90 day period before the expiration of tenant's current lease that she is not offering a renewal, then that landlord may not, under any circumstances, maintain a non-primary residence case.<sup>9</sup> "The plain language of the Rent Stabilization Law and its calculation of the effective date of the term of an untimely renewal lease cannot be ignored. It is beyond question that in order to terminate a rent-stabilized tenancy based solely on the allegation of non-primary residence, landlord is required to notify tenant of its intention not to renew the lease within a very specific time period: not more than 150 days nor less than 90 days prior to the expiration of the lease." *Santorini Equities, Inc. v. Picarra*, 72 A.D.3d 73 (1st Dep't 2010).

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<sup>9</sup> *Golub v. Frank*, 65 N.Y.2d 900 (1985).

In *Nachajski v. Siwiec*, 55 Misc.3d 133(A) (App. Term 2nd Dep't 2017), the court found that the lease was not properly renewed, thus the 150 to 90 day renewal window never opened, and no non-renewal notice could be served. The non-renewal notice is a prerequisite to a non-primary residence case, therefore, even though there was evidence that the apartment was not tenant's primary residence, the court found for tenant.

Tenants call me all the time, upset because landlord has let their lease expire with no communication of any kind. However, there is no real reason to worry. Even if your Rent Stabilized lease has not been renewed by your landlord, all your rights remain intact as a Rent Stabilized tenant. Rent Stabilization Code § 2523.5 states:

(d) ... the failure to offer a renewal lease pursuant to this section shall not deprive the tenant of any protections or rights provided by the RSL and this Code and the tenant shall continue to have the same rights as if the expiring lease were still in effect.<sup>10</sup>

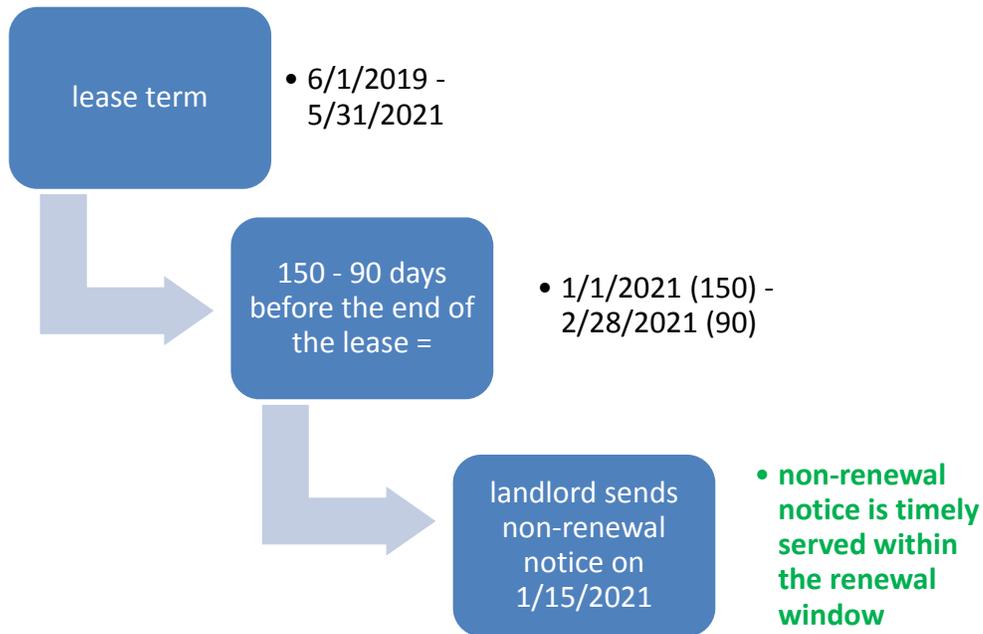
In light of the above, if, within 150 to 90 days before the expiration of your current Rent Stabilized lease, your landlord fails to tender you either a renewal lease offer or a notice of non-renewal of your lease, then you are safe from a non-primary residence claim for approximately the next two years. This is so because if landlord later sends you a proper Rent Stabilized lease renewal offer, you are likely to choose the two-year renewal option, thus holding off the next renewal window until 150 to 90 days from an expiration date approximately two years in the future.

Consider the power of this knowledge. We have not yet had to even consider whether landlord can prove that you are not physically present in the apartment, nor whether there is a good legal reason for you not being present. If landlord fails to communicate with you between 150 and 90 days before the expiration of your current lease, then landlord is not in a legal position to bring a non-primary residence claim against you.

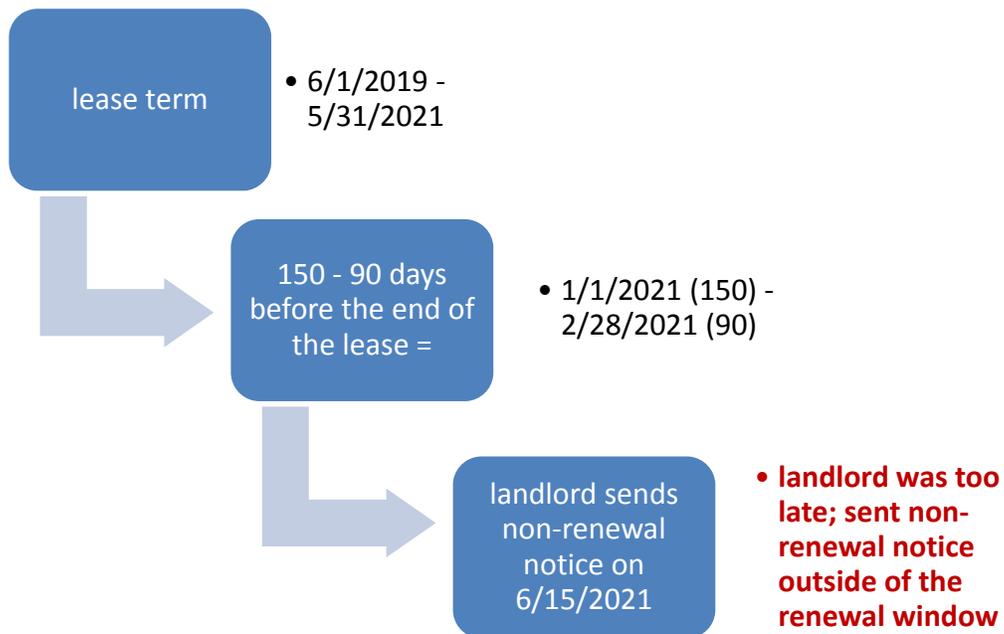
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<sup>10</sup> Moreover, if a Rent Stabilized lease is not properly renewed, landlord cannot sue tenant for the rent. *Paid Enters. v. Gonzalez*, 173 Misc.2d 681, 682 (App. Term 2nd Dep't 1997) ("Rent [S]tabilization is a lease-based regulatory scheme. As such, a tenant's obligation to pay the stabilized rent is dependent on the tenant's agreement to pay it.").

The following example charts may also help to explain this important concept. The first chart demonstrates proper timing of a non-renewal notice:



Contrast the above chart with the next chart, showing improper timing of a non-renewal notice:



## **D. Holding Landlord to Her Legal Obligations for a Lease Renewal**

Often, when a lease has expired without being renewed or non-renewed, eventually landlord wakes up and sends a renewal offer. When landlord tenders you a late lease renewal offer, we suggest that you hold landlord to her legal obligations for a lease renewal. Remember what we discussed above and here is a checklist of things you should look for when landlord is offering you a renewal lease:

### **CHECKLIST OF THINGS YOU SHOULD LOOK FOR WHEN LANDLORD IS OFFERING YOU A RENEWAL LEASE**

<b>Term Choice</b>	The renewal offers me a choice of a one- or a two- year term.
<b>Timing</b>	The new term does not begin until 60 days from the date of service of the offer.
<b>Riders</b>	The DHCR 12-page rider is attached to the renewal offer.
<b>Conditions</b>	The renewal offer does not change any of the terms or conditions of my original lease.
<b>Parties</b>	The renewal offer is in the name of all of the original parties to the lease.

To be sure, there are other ways a Rent Stabilized lease renewal offer can be faulty, but to list any further items would be beyond the scope of this book and the class that it comes with.

Having said all of this, **tenants should never play cat-and-mouse games with a lease renewal offer. If a proper renewal offer has been tendered and tenant refuses to execute the lease renewal, then tenant risks landlord terminating the tenancy for failure to respond to the lease renewal offer.** Remember, the intention of this class is to help you AVOID court. If you have questions about the propriety of a lease renewal offer, contact DHCR, your local Legal Aid office, or consult an attorney.

#### **IV. HOW LANDLORDS DETECT AND PROVE THAT A TENANT IS NOT LIVING IN AN APARTMENT AS HER PRIMARY RESIDENCE**

Many Rent Stabilized tenants make the simple mistake of believing that their landlords have no idea that they are absent from their apartments. They think they are flying under the radar. Your absence from your Rent Stabilized apartment is, however, both detectable and provable in many ways that we will discuss below.

I find that tenants often have many misconceptions about primary residence. They often think there is some magic “180 days in the apartment” rule, or that the case comes down to where tenant has their voter registration card. Such assumptions are incorrect. Let’s look at what the operative statute, Rent Stabilization Code § 2520.6 (u) (Primary residence), specifically tells us about Non-Primary Residence claims:

**Although no single factor shall be solely determinative, evidence which may be considered in determining whether a housing accommodation subject to this Code is occupied as a primary residence shall include, without limitation, such factors as listed below:**

- (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) 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 pursuant to section 2523.5(b)(2) [military duty, full-time student, court-order, temporary employment, hospitalization, etc.] of this Title; and
- (4) subletting of the housing accommodation.

[Emphasis supplied.]

There are no absolute bright line rules when it comes to determining what constitutes a non-primary residence; *the cases are highly fact-specific*.<sup>11</sup> You can have two separate cases where tenant is away from the apartment frequently to care for elderly, sick parents. In one case, a court will find that the apartment is tenant's primary residence, while another court will find that the apartment is not tenant's primary residence. I like to say that non-primary residence cases are like snowflakes, no two are exactly alike.

One non-primary residence case turned on the fact that, "Tenant was always announced from the lobby of his girlfriend's apartment as a visitor." Thus, the court concluded that he hadn't abandoned his Rent Stabilized apartment to live with her.<sup>12</sup>

By studying real-life cases, we can begin to understand how the issue of your primary residence is a question that can only be answered by looking at your life and your living situation holistically. From there, we can develop strategies to avoid such claims.

### **A. Cameras**

A picture (or a video) is worth a thousand words. However, your landlord may not put a camera inside your apartment. Courts in New York have ruled that tenants have an expectation of privacy inside their apartments behind the closed entry door.<sup>13</sup>

Your landlord may, nevertheless, put a camera (including a hidden camera) in the common area directly outside of your apartment door. New York courts have found that residents in multi-family buildings lack a reasonable expectation of privacy in the building's common areas, such as lobbies, stairwells, and hallways because these places are accessible to other persons.<sup>14</sup>

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<sup>11</sup> In *Second 82nd Corp. v. Veiders*, 51 Misc.3d 142(A) (App. Term 1st 2016).

<sup>12</sup> *Sutton Assoc. v. Hutton*, 4 Misc.3d 132(A) (App. Term 1st Dep't 2004).

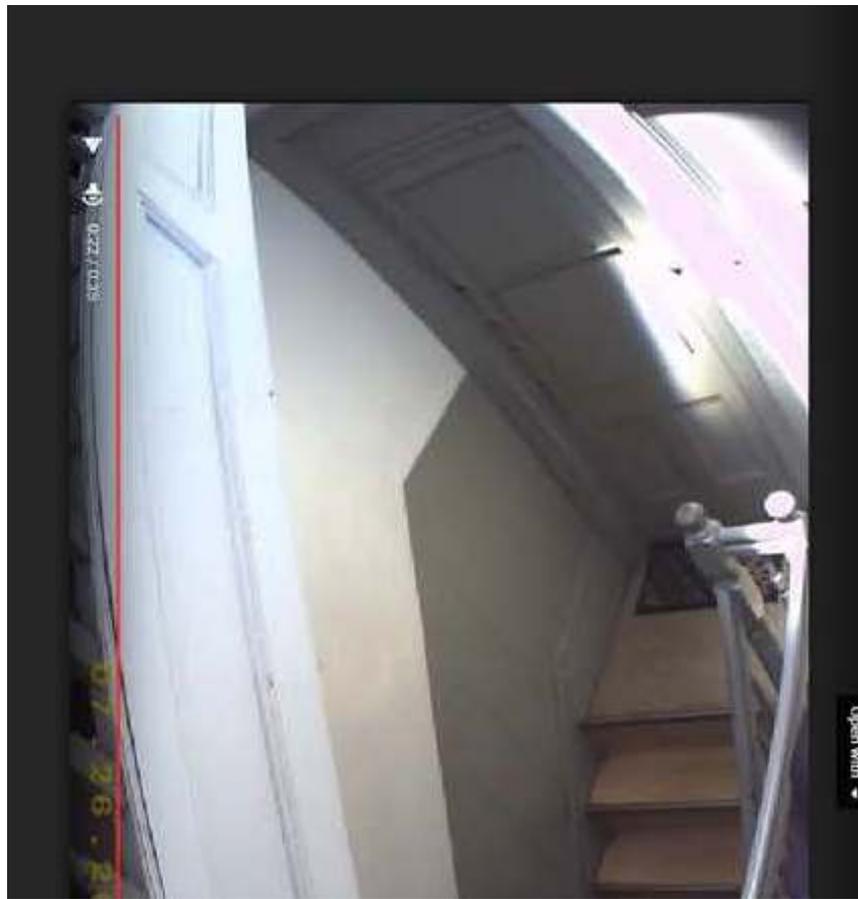
<sup>13</sup> *Otero v. Houston Street Owners Corp.*, 213 A.D.2d 339 (1st Dep't 1995); *see also People v. Mercado*, 68 N.Y.2d 874 (2nd Dep't 1986) ("Once the door is closed, an individual is entitled to assume that while inside he or she will not be viewed by others").

<sup>14</sup> *People v. Funches*, 89 N.Y.2d 1005 (1997).

Landlords often use licensed private investigators and/or security firms to set up such cameras. The cameras are set up inside fake smoke detectors or other wall or ceiling mounted devices.

A videotape must be “authenticated” before it can be used as evidence in a court proceeding. Testimony from someone who has knowledge of the circumstances and who actually reviewed the footage is usually sufficient.<sup>15</sup>

Below is a still from video footage from an actual apartment surveillance in Brooklyn. Notice how quiet the hallway is? That’s because in the eight and one-half months that this camera was looking at this door, no one ever came in or went out!



Contrast the story told by the above-mentioned video tape with the following example.

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<sup>15</sup> See *Zegarelli v. Hughes*, 3 N.Y.3d 64 (2004).

EXAMPLE: A landlord who insisted that a Rent Stabilized tenant of her building did not live in his apartment as his primary residence. She said, “*This guy has not been in the apartment in ages!*” Her lawyer, however, insisted that a surveillance camera be installed in the public hallway outside of this tenant’s apartment door. What did they find? Tenant was, *indeed*, living in his apartment. He was there every single day! He was a quiet person who lived alone and worked the night shift. Most nights he walked out of the apartment around 10:00 p.m. and he returned the following morning around 8:30 a.m. Obviously, no non-primary residence non-renewal notice was sent to tenant. His lease was renewed.

## **B. Public Records and Personal Documents**

As we saw above in the relevant statute, landlord may seek to prove whether tenant is physically present in her apartment via tenant’s, “...tax return[s], motor vehicle registration, driver’s license or other document filed with a public agency”. Landlord may also use evidence of the address from which tenant votes to prove whether tenant is still associated with the apartment. Over the years, courts have allowed landlords to ask for many different documents, which might tend to prove or disprove whether tenant still lives in her apartment.

Below in this section is a list of documents that landlords ask tenants for copies of in non-primary residence cases. Keep in mind, however, that: landlord is only able to ask for this type of information if the court gives it permission to do so;<sup>16</sup> personal information, such as dollar amounts and information which could lead to identity theft, are redacted if and when tenant is ordered by a court to hand over such items; and tenant is typically only required to produce the information for a narrow date range.

Nevertheless, I find that many tenants are surprised in non-primary residence cases by how much data a landlord asks for and how much information the court orders a tenant to hand over. Especially since so much of the business of our daily lives is conducted online, many tenants forget how much of a “paper trail” they are actually creating about their whereabouts. Some of this information is obtainable by landlord, even before she starts a legal case against tenant, via special reporting agencies that private investigators and attorneys have access to.

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<sup>16</sup> See, e.g., CPLR § 408; RPAPL § 701; *NYU v. Farkas*, 121 Misc.2d 643 (Civ. Ct. N.Y. Cty. 1983) (defines “ample need” test for discovery to be allowed in a summary proceeding).

Knowing that this is the scope of what landlords and courts are interested in, can help tenant make decisions that will, hopefully, protect them from a non-primary residence claim.

### **1. Tenant's Vehicles and Driving**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- driver's licenses<sup>17</sup>
- motor vehicle registrations, including but not limited to automobiles, boats, aircraft, motorcycles, for all vehicles owned and/or registered by tenant in New York State, or elsewhere
- motor vehicle insurance policies, including but not limited to automobiles, boats, air crafts, motorcycles
- parking permits issued to tenant
- records, statements and bills in tenant's name from EZ Pass or any similar toll-pass tags from New York or any other state
- purchase, lease or rental agreements and/or bills and records between tenant or any automobile dealer, rental car company or manufacturer



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<sup>17</sup> *Bobbyson 328, Inc. v. Heilbut*, 2002 WL 825117 (App. Term 1st Dep't 2002).

## **2. Tenant's Taxes**

While a court will certainly consider tenant's taxes in a non-primary residence case, the taxes are not dispositive. "[C]ase law precedent in this Department holds that an address designated in a tax return is one of many factors to be considered in determining primary residence." *47 HK Realty, LLC v. O'Leary*, 55 Misc.3d 129(A) (App. Term 1st Dep't 2017). Documents that landlords ask tenants for copies of in non-primary residence cases include:

- federal, state, and city tax returns and all schedules to said returns, including a complete New York City Resident Income schedule
- Internal Revenue Service Forms W-2 and 1099

## **3. Tenant's Telephones and Internet**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- bills for telephone, cable, and/or satellite usage/subscription at the apartment, or at any other residences in which such accounts are in tenant's name, and canceled checks, money orders receipts or cash receipts for payment of said bills
- bills and records for cellular phone service for tenant at the apartment and/or other residences

## **4. Tenant's Utilities**

In a non-primary residence case, courts consider electric and gas usage in the apartment. Is it sporadic or minimal?<sup>18</sup> Documents that landlords ask tenants for copies of in non-primary residence cases include:

- bills for the provision of electricity, gas, and/or oil to the apartment and canceled checks, money order receipts or cash receipts for such usage at the apartment and/or any other residences where such accounts are in tenant's name
- bills for any water usage at apartment and/or any other residences where such accounts are in tenant's name

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<sup>18</sup> *Goldman v. Lensky*, 4 Misc.3d 140(A) (1st Dep't App. Term 2004).

### **5. Tenant's Mail Forwarding**

Documents that landlords ask tenants for copies of in non-primary residence cases include forwarding instructions given by or on behalf of tenant to the U.S. Postal Service for mail deliveries at the apartment and/or other residences.

### **6. Tenant's Voter Registration**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- tenant's voter registration card(s) issued in New York or any other state
- any other document issued by any state demonstrating registration to vote, including the voting district, state senate district, state assembly district, federal congressional district or other political unit that deponent is registered to vote in

### **7. Tenant's Jury Service**

Documents that landlords ask tenants for copies of in non-primary residence cases include records of tenant's jury service and notices.

### **8. Tenant's Education and Career**

In a non-primary residence case, courts consider what tenant's education and/or career indicate about tenant's primary residence during the relevant time period.

Was tenant away because he was a full matriculated student in another state? Is tenant an opera singer on the road ten months a year? Or does tenant have a full-time desk job in Minnesota?<sup>19</sup>

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<sup>19</sup> *Patchin Place LLC v. Fox*, 3 Misc.3d 127(A) (App. Term 1st Dep't 2004); *Sommer v. Ann Turkel, Inc.*, 137 Misc.2d 7 (App. Term. 1st Dep't 1987).

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- if tenant is away from the apartment for educational purposes, records from any school or other institution of learning in tenant's name
- business records for any business in which tenant is or was a principal and/or maintains or maintained any ownership interest, listing tenant's whereabouts for business purposes and/or listing a residence address for tenant
- employment contracts and/or employment applications and/or employment records of tenant for any business through whom tenant was employed, indicating the whereabouts of tenant for business purposes and/or listing a residence address for tenant
- tenant's professional licenses for New York and any other State and copies of records of dues and fees paid for the licenses referred to
- records, statements and bills in tenant's name from any commuter train or bus service
- tenant's records of membership in any professional organizations and associations in New York State, or any other state or country
- tenant's professional insurance policies. including but not limited to, malpractice insurance, in which tenant is named as an insured or beneficiary
- records of continuing education, seminars and lectures in which tenant participated
- business tax returns filed by any business in which tenant is a principal
- pocket or online calendars and/or planners used by tenant with respect to tenant's work and personal schedule indicating whether tenant is traveling for business and where tenant sleeps at night

## **9. Tenant's Immediate Family**

In a non-primary residence case, courts consider where the rest of tenant's immediate family resides.

Although, a husband and wife can maintain separate primary residences.<sup>20</sup> In *Matter of Rose Associates v. DHCR*, 121 A.D.2d 185 (1st Dep't 1986), *lv denied* 69 N.Y.2d 601 (1986), it was found perfectly legal for a husband and a wife to maintain separate primary residences. This applies even if a husband and wife are not estranged.<sup>21</sup>

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- tenant's marriage certificate and/or divorce decree
- certificates of birth for tenant's children, if any, wherever or whenever born
- school records of tenant's children, indicating where such children are enrolled and for what periods



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<sup>20</sup> *60 West 57 Realty, Inc. v. Durante*, 17 Misc.3d 71 (App. Term 1st Dep't 2007).

<sup>21</sup> *Glenbriar Co. v. Lipsman*, 2002 WL 1363398 (App. Term 1st Dep't 2002).

## **10. Real Property in Tenant's Name**

In a non-primary residence case, courts consider whether tenant has other leases or deeds in her name, and how well tenant explains why he has other leases or deeds in her name.<sup>22</sup> Is your home in Florida just a vacation home? Did tenant claim a homestead exemption at his Florida residence?<sup>23</sup> Documents that landlords ask tenants for copies of in non-primary residence cases include:

- deeds or leases or other conveyances of real property now owned or leased by tenant
- rental bills, records, maintenance records and other records relating to any address at which tenant is living or has lived
- insurance policies for all residences leased by tenant
- mortgages, notes, applications for mortgages or other loans, including all relevant riders, affidavits, notices or other documents executed by tenant to secure said mortgages, notes and loans, as collateral
- property tax bills on any property owned, leased or occupied by tenant
- property assessment notices addressed to tenant or property tax challenges filed by or on behalf of tenant

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<sup>22</sup> *520 E 81<sup>st</sup> v. Roberts*, N.Y.L.J. Sept. 20, 1993 at 22, col. 4 (1st Dep't 1993).

<sup>23</sup> *335-7 LLC v. Tirelli*, 2003 WL 21512452 (App. Term 1st Dep't 2003); *985-987 First Ave. LLC v. Aretakis*, 25 Misc.3d 62 (App. Term 1st Dep't 2009).

### **11. Tenant's Finances**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- tenant's checking and savings accounts held in any bank, money market fund or other lending or savings institution
- statements for any charge and/or credit card transactions made in the name of tenant
- brokerage statements relative to brokerage accounts maintained in the name of tenant

### **12. Tenant's Furniture**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- bills and records for tenant's purchase of furniture and furnishings of any kind, including but not limited to computers, desks, bookcases, beds and couches
- bills and records for the delivery or moving of furniture and furnishings of any kind

### **13. Tenant's Estate**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- the last will and testament or health care proxies of tenant
- powers of attorney executed by tenant

### **14. Tenant's Passport**

Documents that landlords ask tenants for copies of in non-primary residence cases include tenant's passport.

### **15. Tenant’s Recreational Activities**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- library cards issued by any entity to tenant
- records of beach passes, pool passes, casino rewards programs or other documents entitling tenant to a recreational benefit, issued by any entity to tenant
- fishing or hunting licenses issued by any entity to tenant
- names and addresses of any health clubs/gyms that tenant was/is a member of and the name, address and telephone number of any personal trainer<sup>24</sup>
- invoices, statements and bills rendered to tenant relating to magazine and newspaper subscriptions

### **16. Tenant’s Social or Religious Organization Memberships**

In a non-primary residence case, courts consider the location of tenant’s regular place of worship or health club.<sup>25</sup> Documents that landlords ask tenants for copies of in non-primary residence cases include tenant’s records of membership in social organizations or clubs, associations, and fraternal orders or similar organizations of any kind.



<sup>24</sup> *422 East 9<sup>th</sup> LLC v. Patton*, 29 Misc.3d 137(A) (App. Term 1st Dep’t 2010).

<sup>25</sup> *Id.*

### **17. Tenant's Insurance**

Documents that landlords ask tenants for copies of in non-primary residence cases include:

- insurance policies maintained by tenant for any reason whatsoever including, but not limited to, life insurance, homeowner's insurance, renter's insurance, coop insurance, automobile insurance and health insurance
- tenant's health, medical and disability insurance policies or plans in which tenant is named as insured or beneficiary

### **18. Tenant's Health Care Professionals**

Documents that landlords ask tenants for copies of in non-primary residence cases include the names and addresses of tenant's health care professionals including, but not limited to, primary care physician, specialist(s), dentist(s), chiropractor, ophthalmologist, masseuse and optician.

### **19. Tenant's Barber Shop and/or Hair Salon**

Documents that landlords ask tenants for copies of in non-primary residence cases include the name(s), address(es), and telephone number(s) of tenant's barber shop and/or hair salon.

### **20. Other Litigation Tenant is Involved In**

Documents that landlords ask tenants for copies of in non-primary residence cases include pleadings, notices and transcripts for any lawsuit, wherein the tenant was a party, whether commenced by tenant or defended by tenant. For example, if tenant filed bankruptcy claiming her address as New Jersey, that tends to prove that her primary residence is not in New York City<sup>26</sup>

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<sup>26</sup> *ALH Prop. Two, LLC. v. Castaldo*, 19 Misc.3d 140(A) (App. Term 1st Dep't 2008).

### C. Subletting

As we saw above, subletting is specifically mentioned in Rent Stabilization Code § 2520.6(u)(Primary residence), as evidence which may be considered in determining whether a housing accommodation is occupied as a tenant's primary residence.

Illegal subletting can easily lead to the inference that tenant is not maintaining the apartment as her primary residence. In a non-primary residence case, courts consider who is *actually* in the apartment Is anyone else living there or using the apartment while tenant is gone? Are the occupants paying tenant? Did the occupants put the telephone and cable accounts in their names?<sup>27</sup>

I have often seen tenants attempt to pass their subtenant off as their "roommate". But subtenants and roommates are legally different concepts. The difference between a roommate (permissible under Real Property Law § 235-f without notice to or permission from a landlord) and a subtenant (whose occupancy is subject to the statutory provisions of Real Property Law § 226-b that we talk about below in the "Tips" section), generally turns on whether tenant contemporaneously occupies the apartment with a tenant.<sup>28</sup>

A sublease is a transfer by a tenant of part of his or her estate or interest in the whole, or in a part, of the leased premises. *BLF Realty Holding Corp. v. Kasher*, 299 A.D.2d 87, 94 n. 4 (1st Dept. 2002), *appeal dismissed*, 100 N.Y.2d 535 (2003). The presence of an unrelated individual in an apartment, coupled with the absence of the tenant of record from that apartment can lead to the conclusion that a sublet has occurred. *27 W. 84th St. Tenants Ass'n v. Knight*, 11 Misc.3d 129(A)(App. Term 1st Dept. 2006).

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<sup>27</sup> *406 W. 47<sup>th</sup> St. HDFC v. Picot*, 2003 WL 22928570 (App. Term 1st Dep't 2003); *89 E. 3<sup>d</sup> St. Tenants Ass'n. v. Lamotta*, 2001 WL 1682424 (App. Term 1st Dep't 2001).

<sup>28</sup> *Fairmont Manor v. Verdicchio*, August 18, 1995 at 21:3 (App. Term 1st Dept.), *Kimmel v. Estate of Ling Kai K'Ung*, N.Y.L.J. August 6, 1993 at 21:5 (App. Term 1st Dept. 1993), *Glick v. Tafaghodi*, N.Y.L.J. March 8, 1993 at 28:2 (App. Term 1st Dept.), *305 East 72<sup>nd</sup> Street Assocs. v. Menocal*, N.Y.L.J. December 29, 1986, at 5:1 (App. Term 1st Dept.).

## **D. Tenant's Public Social Media Data**

A Rent Stabilized tenant's public social media data can be used to support the supposition that she does not maintain her apartment as her primary residence. This author will give you five real-life examples from her own law practice of this phenomenon:

*SOCIAL MEDIA EXAMPLE 1:* A New York City Rent Stabilized tenant, who was an actor and director, wrote and starred in a play in Chicago. He was interviewed by a local paper in Chicago. He tweeted the article. In the article, he told the interviewer how happy he was to have finally moved permanently to Chicago.

*SOCIAL MEDIA EXAMPLE 2:* A New York City Rent Stabilized tenant was a home improvement contractor. On his Instagram account, he posted pictures of the beautiful Swedish cabinetry that he was installing in people's homes. The problem was that all of these homes were in western Pennsylvania.

*SOCIAL MEDIA EXAMPLE 3:* A New York City Rent Stabilized tenant posted on Facebook about all her good work volunteering in a soup kitchen every weekend. She "friended" her landlord. The problem was that the soup kitchen was in Boston.

*SOCIAL MEDIA EXAMPLE 4:* A New York City Rent Stabilized tenant put pictures of her daughter's school play on Instagram. The problem was that her daughter's school was in Eastern Long Island near her summer home, which she just spent \$40k winterizing.

*SOCIAL MEDIA EXAMPLE 5:* A New York City Rent Stabilized tenant was blogging about her upcoming wedding, which was being held in Virginia. One of her posts talked about how she had plenty of room to host out-of-town guests in the pool house of her spacious home in a DC suburb.

While not dispositive, these public social media posts are not consistent with these tenants maintaining their primary residences in New York City.

If your landlord is contemplating a non-primary residence case against you, she will likely attempt to monitor your location through social media.

## **E. Building Personnel and Other Tenants of the Building**

The superintendent, management staff, and door attendants of your building all work for your landlord. These people may be very nice to you and you may tip them at Christmas. But their livelihoods come from your landlord and they will likely inform your landlord if they suspect you are not using your apartment as your primary residence.

Moreover, if you are doing anything that would tend to annoy your neighbors, such as illegal short-term subletting (like Airbnb), then your fellow tenants will not hesitate to toss you under the bus by telling your landlord that you are not residing in your apartment.

## **F. Private Investigators**

A skilled licensed private investigator can sometimes procure evidence that might indicate that a tenant is not using his or her Rent Stabilized apartment as a primary residence.

*EXAMPLE:* I once represented a landlord in a non-primary residence case where tenant owned a house in Queens, under a pseudonym. She was subletting her Rent Stabilized apartment and profiteering thereon. She was also frequently late in paying the rent. Thus, I sued her on landlord's behalf for non-payment of rent. A private investigator working for landlord then followed her home from court, and discovered the house she owned in another name. Thereafter, he delivered a bouquet of roses to her at the house. A videographer was filming her as she came out and confirmed her name and that she lived in the house, while happily accepting the roses from a secret admirer.



## **G. Tenant’s Intention to Return to the Apartment**

In a non-primary residence case, courts consider tenant’s intention regarding the apartment. Is it vague or definite? A vague intention to return is more likely to give rise to a finding of non-primary residence.<sup>29</sup>

Below are some cases that explain the effect of tenant’s intent in non-primary residence cases.

*EXAMPLE: 1286 First Realty Assoc. v. Malatinsky*, 176 Misc.2d 596 (App. Term 1st Dep’t 1998). Found for Landlord. Tenant was in a health care facility for a year. Tenant made no representation as to his intention or ability to resume occupancy. The court held: “Where there has been a prolonged absence from the apartment, a vaguely articulated intent to return at some unspecified time in the future is insufficient to defend a non-primary residence claim.”

*EXAMPLE: Sommer v. Ann Turkel, Inc*, 137 Misc.2d 7 (App. Term 1st Dep’t 1987). The court found for landlord where tenant worked extensively as a model and actress in California and she rented a house there for several years. Tenant testified to being in New York 60-75 days per year but claimed the New York apartment was more furnished than the California house; tenant “regards New York as her home and intends to return when her work permits her to do so.” Tenant paid New York State and City income taxes, had a California driver’s license, and did not sublet the premises. The court held that:

**We take primary residence to mean an ongoing, substantial, physical nexus with the controlled premises for actual living purposes—which can be demonstrated by objective, empirical evidence...**to the extent that tenant may honestly intend to return to New York at some indeterminate time in the future, that is not sufficient to maintain stabilization rights in the face of evidentiary proof that primary residence is lacking. An acknowledged purpose of the Rent Stabilization law is to secure from eviction, during a period of

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<sup>29</sup> *Rockledge Equities v. Michaelson*, N.Y.L.J., Aug. 10, 1993 at 21, col. 2 (App. Term 1st Dep’t 1993).

scarcity in rental accommodations, those tenants who actively require and actively use their apartments for dwelling purposes. Persons such as tenant herein, who live outside New York but who reserve a New York address for secondary purposes of convenience and occasional use when they visit the city, cannot fairly cloak themselves with the protections of extended stabilized status.

[Emphasis supplied.]

## **H. Tenant's Ability to Return to the Apartment**

In a non-primary residence case, courts consider tenant's ability to return to the apartment. Is he stuck in jail or at a nursing home indefinitely? Or will he be back soon?<sup>30</sup>

*EXAMPLE: Emay Prop. Corp. v. Norton*, 136 Misc.2d 127 (App. Term 1st Dep't 1987). The court held for landlord where tenant was convicted of murder and sentenced to fifteen years to life with the Premises not occupied by anyone, reasoning that "an overriding purpose of [the non-primary residence law] was to ensure that those New Yorkers using their apartments as their primary residences would reap the benefits of the status" and to alleviate the shortage of housing in New York City by returning underutilized apartments to the marketplace. "These legislative objectives will not be served by simply permitting the apartment to remain vacant while the tenant serves a lengthy indeterminate sentence. . . That the tenant may subjectively intend to return to the premises if and when he is released, is not the determinative consideration."

In the context of a non-primary residence case, courts will consider a tenant's immigration status. A foreign national who is in the United States on a tourist visa cannot meet the primary residence requirement of New York City's rent regulations.<sup>31</sup>

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<sup>30</sup> *1286 First Realty Assoc. v. Malatinsky*, 176 Misc.2d 596 (App. Term 1st Dep't 1998); *Emay Prop. Corp. v. Norton*, 136 Misc.2d 127 (App. Term 1st Dep't 1987); *Katz v. Gelman*, 177 Misc.2d 83 (App. Term 1st Dep't 1998).

<sup>31</sup> *Katz Park Ave. Corp. v. Jagger*, 11 N.Y.3d 314 (2008).

EXAMPLE: In *Toa Construction v. Tsitsires*, 54 A.D.3d. 109 (1st Dep’t 2008), Tenant suffered from a mental illness that resulted in him feeling compelled to spend virtually all his time away from the subject apartment. Tenant lived the life of a homeless person, in the vicinity of the apartment, but rarely going in. He kept his personal belongings in the apartment and received mail in the apartment. Because there was no showing that Tenant would ever return to the apartment, eviction was warranted.

### **I. Longevity of the Absence**

In a non-primary residence case, courts consider the number of days a year tenant is gone from the apartment. There is not, however, an absolute requirement that tenant quantify the numbers of days he or she spent in the apartment for each relevant year.<sup>32</sup>

### **J. Reason for the Absence**

In a non-primary residence case, courts consider the reason tenant is gone from the apartment. Is he caring for a dying relative? But did the relative die a year ago without tenant returning?<sup>33</sup>

EXAMPLE: My law firm once won a case where we represented a tenant being sued for non-primary residence. Tenant was a tenured professor at a university in New York City. His wife was suffering from a terminal illness. Their son was a doctor in Texas. The wife went to Texas to be with their son for the end of her life. Tenant followed and was gone from the apartment for nearly two years. But the apartment was never sublet. Tenant resumed his teaching job at the university when he returned to New York, which was shortly after his wife’s death.

### **K. The Condition of the Apartment**

In a non-primary residence case, courts consider the condition of the apartment. Was tenant forced to leave due to asbestos or mold?<sup>34</sup>

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<sup>32</sup> *409-411 Sixth Street, LLC v. Mogi*, 100 A.D.3d 112 (1st Dep’t 2012), reversed on other grounds, *see* 22 N.Y.3d 875.

<sup>33</sup> *Lance Realty Co. v. Fefferma*, 5 Misc.3d 134(A) (App. Term 1st Dep’t 2004); *Kalimian v. Homberg*, 2001 WL 1530165 (App. Term 1st Dep’t 2001).

<sup>34</sup> *Emel Realty Corp. v. Carey*, 288 A.D.2d 163 (1st Dep’t 2001).

## **L. Contents of the Apartment**

In a non-primary residence case, courts consider the amount of furniture and personal items tenant has in the apartment.<sup>35</sup>

## **M. The Entire History of the Tenancy**

In a non-primary residence case, courts consider the entire history of tenancy, not just recent absences from the premises.<sup>36</sup>

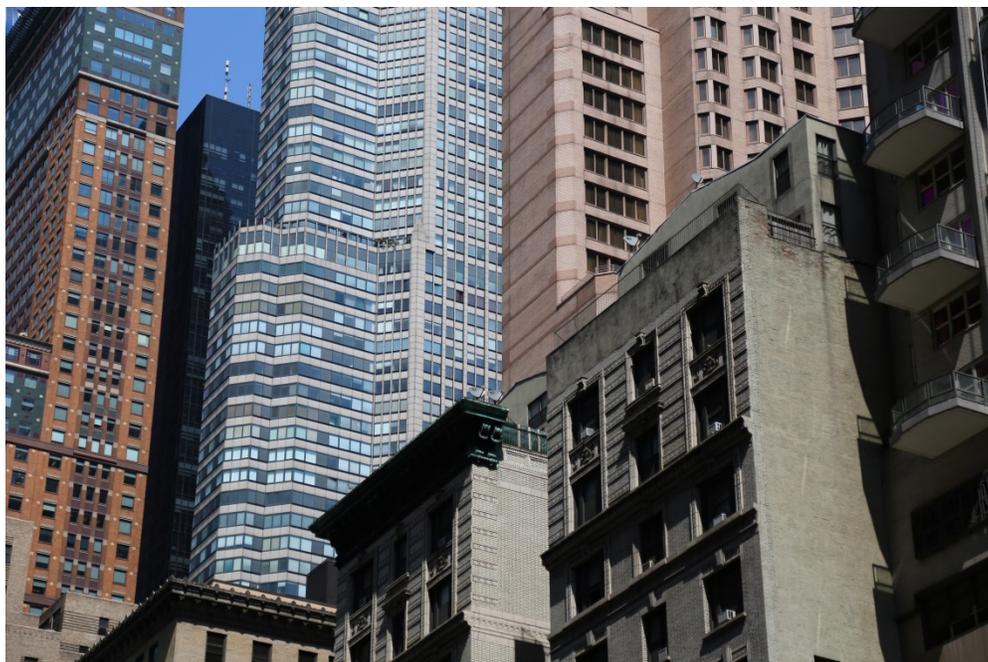
*EXAMPLE: Houston Street Management Co. v. La Croix, 54 Misc.3d 130(A) (App. Term 1st Dep't 2017).* In this case, the Court was interested in the fact that it was undisputed that tenant lived in Florida from 2005 to 2007. In an earlier case between the landlord and the tenant, the evidence showed, and the trial court found, that tenant left for Barbados on July 24, 2009, one day after a prior non-primary residence proceeding was resolved, and she “never returned to or visited the subject premises at any time” until after the commencement of this proceeding.



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<sup>35</sup> *Glenbriar v. Lipsman*, 5 N.Y.3d 388 719 (2005).

<sup>36</sup>



#### **N. Warehousing; Tenant’s Degree of Personal Convenience or Gain**

In a non-primary residence case, courts consider tenant's degree of convenience or personal gain garnered by the apartment. Is there evidence that the apartment is being used as a pied-a-terre or office for someone who has moved to the suburbs?<sup>37</sup>

“Tenants who maintain primary residences elsewhere while retaining rent-stabilized apartments for convenience or personal gain are not victims of the housing crisis, and therefore not within the class of who the rent stabilization laws were designed to protect.” *Park Towers S. Co., LLC v. Universal Attractions*, 274 A.D.2d 312 (1st Dep’t 2000).

“The practice of permitting tenants to stockpile rent-stabilized apartments, immune from the requirement of primary residence, should not be rewarded .... Tenants who maintain primary residences elsewhere while retaining rent-stabilized apartments for convenience or personal gain are not victims of the housing crisis, and therefore not within the class of who the rent stabilization laws were designed to protect.” *Rocky 116 LLC. v. Weston*, 186 Misc.2d 251 (App. Term 1st Dep’t 2000), *aff’d*, 284 A.D.2d 139 (2001).

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<sup>37</sup> *Park Towers S. Co., LLC. v. Universal Attractions*, 274 A.D.2d 312 (1st Dep’t 2000); *Rocky 116 LLC. v. Weston*, 186 Misc.2d 251 (App. Term. 1st Dep’t 2000), *aff’d*, 284 A.D.2d 139 (2001).

## V. **FIVE SPECIFIC TIPS TO AVOID A NON-PRIMARY RESIDENCE CLAIM**

There may be times in life when you will be temporarily or periodically absent from your Rent Stabilized apartment, either because you want to because you have to be.

In the last, lengthy section of this book, we considered how landlord determines if you are gone and how a court evaluates whether an apartment is your primary residence. There are certainly a number of things on that long list that you cannot control. For example, if you are not physically present in your apartment, a hidden camera in your hallway will document that fact.

There are, however, many things on the list of items that landlords and courts look at when investigating your primary residence that you *can* control. That is what we are going to examine more closely below. There are no guaranties, but if you do these things, your landlord is less likely to come after you for non-primary residence.<sup>38</sup>

### A. **Be mindful of your personal paper trail.**

Be mindful that almost everything you do in life creates a discoverable “paper trail” regarding your whereabouts. See the extensive section on “Public Records and Personal Documents” above. Knowing that this is the scope of what landlords and courts are interested in can help tenant make decisions that will, hopefully, protect them from a non-primary residence claim.

Therefore, if you are temporarily or periodically absent from the apartment, do not change your driver’s license or voter’s registration.

Do not file tax returns in another jurisdiction, unless legally appropriate to do so. I have seen so many people file taxes in other jurisdictions because they hope to avoid New York City taxes. This might not only amount to cheating on one’s taxes, but it also gives landlord major ammunition against you in a non-primary residence case.

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<sup>38</sup> If you follow this advice and your landlord still comes after you for non-primary residence, then your lawyer will have an easier time defending against the non-primary residence case, than she would otherwise.

Do not put the utilities of an apartment, other than your Rent Stabilized apartment, in your name.

Do not forward your mail away from your Rent Stabilized apartment.

Do not sign a lease for another apartment.

If you buy a summer home and have a deed in your name, then do not file for homestead exemptions in that jurisdiction. If you really live in New York City, then such exemptions are likely undeserved and will tend to establish the summer home as your primary residence. If you finance the summer home with a mortgage, make sure that said mortgage does not require you to live in the summer home as your primary residence (many mortgages do). Again, this would likely be bank fraud and would help to establish the summer home as your primary residence.

**B. Do not sublet; but if you do sublet, do so legally.**

As discussed above in the "Subletting" section, illegal subletting can easily lead to the inference that tenant is not maintaining the apartment as her primary residence.

If you feel you really need to sublet your apartment while you are gone, do so legally. Under New York Real Property Law 226-b, a tenant renting a residence in a building with four or more residential units has a right to sublease the apartment subject to the written consent of landlord in advance of the subletting. Furthermore, landlord is prohibited from unreasonably withholding consent.

The devil is in the details, however, with respect to RPL § 226-b. A tenant does, indeed, have a right to sublet. But it is a lot of work to exercise that right. There is a specific procedure that tenant must follow, which is detailed in RPL § 226-b(2), when requesting landlord's permission to sublet the apartment.

First, tenant must inform landlord of tenant's intent to sublease by mailing a notice of such intent by certified mail, return receipt requested, to landlord **no less than 30 days prior to the proposed subletting** with:

- the term of the proposed sublease
- the name of the proposed subtenant
- the business and home address of the proposed subtenant
- tenant's reason for subletting
- tenant's address for term of the proposed sublease
- written consent of any co-tenant or guarantor of the lease
- a copy of the tenant's lease, where available, attached to a copy of the proposed sublease, acknowledged by the tenant and subtenant as being a true copy of the sublease

Then, **within ten (10) days after the mailing of the request**, landlord may ask tenant for additional information. Any such request for additional information shall not be unduly burdensome.

Within 30 days after the mailing of tenant's request to sublet, or of the additional information reasonably asked for by the owner (whichever is later), the owner must send a reply to tenant consenting to the sublet or indicating the reasons for denial. Failure of the owner to reply to tenant's request within the required 30 days will be considered consent.

If the owner consents, or does not reply to the request within the appropriate 30 day period, the apartment may be sublet. If the owner reasonably withholds consent, tenant may not sublet the apartment.

If the owner unreasonably withholds consent, tenant may sublet the apartment and may also recover court costs and attorney's fees spent on finding that the owner acted in bad faith by withholding consent. Whether landlord's withholding of consent is "reasonable" is naturally a fact-sensitive question but a court will objectively evaluate the proposed sublet based on the character and financial status of the subtenant as relevant factors.<sup>39</sup>

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<sup>39</sup> See *Vance v. Century Apartments Associates*, 93 A.D.2d 701, 703-04 (1st Dep't 1983) ("Where a lease affords to a tenant a right to assign or sublet subject to the consent of the landlord, the reasonable ground to support a withholding of consent has always been tested by an objective standard, relating to the acceptability of the proposed subtenant or assignee. Thus, among the relevant criteria from the point of view of the landlord is the character and financial responsibility of the proposed tenant and the nature of the occupancy or purposes for which the property is to be used.")

Rent Stabilized tenants have further restrictions on their right to sublet. **A Rent Stabilized tenant may not sublet an apartment for more than two years out of the four-year period before the termination date of the sublease.**<sup>40</sup>

Subletting can never, for a Rent Stabilized tenant, be about making a profit on landlord's real estate. If the prime tenant sublets the apartment fully furnished, the prime tenant may charge an additional rent increase for the use of the furniture. ***This increase may not exceed ten percent of the lawful rent.*** The prime tenant may not demand "key money" or overcharge the subtenant. If the prime tenant overcharges the subtenant, the subtenant may file a *"Tenant's Complaint of Rent Overcharge and/or Excess Security Deposit"* with DHCR. If the DHCR or a court finds that the prime tenant has overcharged the subtenant, the prime tenant will be required to refund to the subtenant three times the overcharge.

It is beyond the scope of this book and the class it accompanies to do an exhaustive treatment here of subletting in New York City. A TLP class on subletting is planned for the future.

### **C. Be careful with your online presence.**

As discussed extensively above in the "Social Media" section, a Rent Stabilized tenant's public social media data can be used to support the supposition that she does not maintain her apartment as her primary residence. I gave you five real-life examples from my own law practice of this phenomenon. Study those examples carefully, and be mindful that, if your landlord is contemplating a non-primary residence case against you, she will likely attempt to watch what you post on social media.

### **D. Do not stay away long.**

The longer you are gone from your apartment, the more likely it is that landlord will bring a claim against you. Therefore, try not to stay away for too long.

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<sup>40</sup> RSC § 2525.6(c).

### **E. Be forthright with your landlord.**

Finally, if you are going to be temporarily or periodically absent from your Rent Stabilized apartment and you are not subletting, then, consider preventing landlord from wondering whether you have changed your primary residence by being proactive and simply sending your landlord a note, telling her you will be away. Here is an example:

Dear Landlord,

I will be temporarily gone from my apartment from June 4, 2019 through September 10, 2019. I am an independent filmmaker, and I have accepted an assignment to do a documentary in Rhodesia [LINK TO PROJECT'S WEBSITE]. If there is an emergency, and you need permission to enter my apartment during that time, please contact me via email at [tenantname@gmail.com](mailto:tenantname@gmail.com).

Sincerely yours,

Tenant