At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on June 11, 2019.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

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**HARWAY TERRACE, INC.,**

**Plaintiff,**

**-against-**

**Index No.: 519328/2018**

**LUDMILLA BOLSON and LEONID BOLSON,**

**DECISION AND ORDER**

Mot Seq # 1

**Defendants.**

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:
1) Defendants Ludmilla Bolson ("Defendant Wife") and Leonid Bolson's ("Defendant Superintendent") (collectively "Defendants" or "Bolsons") Notice of Motion for Summary Judgment Pursuant to *CPLR 3212* and *22 NYCRR Section 130-1.1* with Exhibits and Memorandum of Law, Dismissing the Action with Prejudice on Grounds of No Material Issues of Fact and Granting Sanctions Against Plaintiff's Unnamed Counsel and its President and Chair of the Board of Directors, Nina Shalshina ("Shalshina") Because of the Lawsuit's Complete Lack of Merit and For Such Other Further Just and Proper Relief by the Court, dated November 23, 2018;
2) Plaintiff Harway Terrace, Inc.'s ("Plaintiff" or "Harway") Affirmation in Opposition with Exhibits and Memorandum of Law, dated January 15, 2019;
3) Defendants Bolson's Reply Memorandum of Law, dated January 22, 2019, all of which submitted on January 23, 2019.

| Papers | Numbered |
|---|---|
| Order to Show Cause and Affidavits..... | |
| Notice of Motion ..... | Defendants 1, Exhibits A-B |
| Cross Motion ..... | |
| Answering Affidavit..... | Plaintiff Opposition 3, Exhibits 1-2 |
| Supplemental Affidavits..... | |
| Exhibits..... | |
| Other ..... | Defendants 2 Memorandum of Law<br>Plaintiff 4 Memorandum of Law<br>Defendants 5 Reply Memorandum of Law |

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: This Court denies Defendants Ludmilla Bolson and Leonid Bolson's motion for summary judgment pursuant to *CPLR 3212* and *22 NYCRR Section 130-1.1,* dismissing the action with prejudice and for sanctions against Plaintiff Harway Terrace Inc.'s unnamed counsel and its President and Chair of the Board of Directors, Nina Shalshina [Defendants 1, Exhs.

A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

## BACKGROUND, PROCEDURAL HISTORY AND ARGUMENTS

According to the Affidavit, dated November 21, 2018 of Defendant Leonid Bolson ("Defendant Superintendent"), Defendant Superintendent and his wife, Defendant Ludmilla Bolson ("Defendant Wife") have resided in the building owned by Plaintiff Harway Terrace, Inc. ("Plaintiff" or "Harway") at 2483 West 16 Street, Brooklyn, New York 11214 in Apartment 18C ("Unit 18C") since 2003. In March 2008, he became a full-time employee of Kaled Management, Inc. ("Kaled") as the superintendent of the residential complex at 135-10 and 135-30 Grand Central Parkway in Queens, New York. Because of the law's requirement that a superintendent must reside in a building with more than nine (9) [sic] apartments[1] or within 200 feet of it, Defendant Superintendent was provided with an apartment in the building in Queens. See *Multiple Dwelling Law Section 83; Housing Maintenance Code Section 27-2054*. He has resided there during the week since March 2008. He avers that Defendant Wife sometimes resides with him in the Queens apartment but she also remains from time to time in the Brooklyn apartment during the week. However, nearly every weekend, Defendant Supervisor returns to their Brooklyn apartment where he resides with Defendant Wife [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Due to his required twenty-four (24) hours, seven (7) days a week availability, Defendant Superintendent avers that there have been many occasions, requiring him to travel by car from Brooklyn to Queens to deal with emergencies. He avers that his continuous on-duty employment availability was not concealed from his neighbors and friends in the Brooklyn complex. It was also not hidden from Plaintiff Harway management or its President Nina Shalshina ("Shalshina"). Defendant Superintendent avers that no one else lives in his Brooklyn apartment during the week or at any other time. He avers that Defendants' New York State tax returns always have the

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[1] This Court notes that *Multiple Dwelling Law Section 83 Janitor or Housekeeper* reads: "Whenever there are *thirteen* (emphasis added) or more families occupying any multiple dwelling and the owner does not reside therein, *there shall be a janitor, housekeeper or some other person responsible on behalf of the owner who shall reside in said dwelling, or within a dwelling located within a distance of two hundred feet from said dwelling, and have charge of such dwelling* (emphasis added), except that where two or more multiple dwellings are connected or adjoining, one resident janitor shall be sufficient. In every garden-type maisonette dwelling project erected after April eighteenth, nineteen hundred fifty-four, adequate personnel shall be provided for the lawful care and maintenance of such project."

This Court observes that *Housing Maintenance Code Section 27-2054* states that: "The person who performs janitorial services for a multiple dwelling of *nine or more dwelling units* (emphasis added) *other than where the janitorial services are performed on a 24-hour-a-day basis)* (emphasis added) shall reside in or within distance of one block or two hundred feet from the dwelling, whichever is greater, unless the owner resides in the multiple dwelling". See *Hatcher v. Board of Managers of the 420 West 23 Street Condominium,* 12 Misc.3d 78 (App. Term, 1st Dept., 2006) [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Brooklyn address[2] [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Plaintiff Harway Terrace, Inc., ("Harway") filed a Verified Complaint, dated September 26, 2018, alleging three causes of action against Defendant Superintendent and Defendant Wife for fraud, negligent misrepresentation and declaratory judgment that Defendants are not the valid holders of shares in Plaintiff Harway Terrace Inc. [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

According to its Verified Complaint, dated September 26, 2018, Plaintiff Harway is a market-rate conventional cooperative housing corporation, privatized pursuant to *Article 2, Section 35* of the *Private Housing Finance Law* (the *"Mitchell-Lama Housing Law"*) on December 11, 2015 as a for-profit corporation pursuant to *New York Business Corporation Law* (*"BCL"*). Its principal office is located at 2475 West 16th Street, Brooklyn, New York. Plaintiff Harway is the owner of two (2) large-scale residential buildings located at 2475 and 2483 West 16th Street, Brooklyn, New York 11214. Plaintiff Harway is exclusively managed by and through the Board of Directors of Harvey Terrace, Inc. ("Board"). Although they allegedly reside in the State of New York, County of Queens, Defendant Superintendent and Defendant Wife are purportedly shareholder-tenants of Plaintiff Harway in its 2483 West 16 Street building in Brooklyn [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

According to its Verified Complaint, Defendants acquired 825.214 shares of Plaintiff Harway stock (the "Shares") in 2003 which are appurtenant to residential unit, number 18C ("Unit 18C") located at the 2483 West 16th Street building. At that time Plaintiff Harway and Defendants were governed by the *Mitchell-Lama Housing Law*[3] [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

According to the Verified Complaint, because of a vote by the requisite majority of Plaintiff Harway's *Mitchell-Lama* subsidized shareholders on November 17, 2015, Plaintiff Harway became a private for-profit

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[2] This Court notes that Defendants did not provide copies of their New York State tax returns [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

[3] According to the Verified Complaint, the intent of the law is to assist middle to low-income residents in order for them to obtain affordable housing in New York City. The *Mitchell-Lama Housing Law* was designed and implemented to assist eligible persons with subsidized housing against New York City's increasingly unaffordable housing landscape. Because the waiting list of applicants for *Michell-Lama* housing is long, many persons wait a tremendous amount of time before a residential unit becomes available. Recipients of *Mitchell-Lama* typically pay an average of only thirty percent (30%) of the market-rate value of the residential unit under the *Mitchell-Lama Housing Law*. A fundamental and non-waivable requirement for eligibility to apply for *Mitchell-Lama* housing and to maintain the subsidized housing once received is that the applicant must actually occupy the subsidized residential unit as his or her actual primary residence. Consequently, each applicant must furnish an affidavit, attesting to gross household income for initial admission purposes as well as during their occupancy of the dwelling unit. See *28 RCNY Section 3-02(m)(1)(iv); 28 RCNY Section 3-02(n)(4)* [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

corporation under the *BCL* due to a dissolution and reorganization plan (the "Offering Plan") which was approved by the Office of the Attorney General on December 11, 2015. Only four (4) of Plaintiff Harway's 600(+) residential units were known at the time of its privatization to be non-eligible units due to the fact that they were not occupied by *Mitchell-Lama* recipients. Consequently, no shares were allocated to these units (the "Non-Eligible Dwelling Unit") because the Offering Plan only permitted Plaintiff Harway's *Mitchell-Lama* shareholders to receive either: 1) the cash equity from their initial payment for their subsidized shares in Plaintiff Harway and in return, a lifetime lease for the appurtenant residential unit which they actually occupied as their primary residence; or 2) newly issued for-profit non-subsidized shares in Plaintiff Harway and in return a proprietary lease for the appurtenant residential unit which they actually occupied as their primary residence [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

According to the Verified Complaint, in order to be considered *Mitchell-Lama* shareholder-tenants, a tenant/cooperator must actually occupy the apartment as his or her primary residence from his or her initial occupancy and continue to reside there as his or her primary place of residence. The facts and circumstances to be considered in the determination of whether a tenant/cooperator occupies a dwelling unit as his or her primary residence include whether the tenant/cooperator specifies an address other than the dwelling unit as his or her place of residence or domicile in any document filed with a public agency. Also under review is whether the tenant/cooperator spent less than one hundred eighty-three (183) days in the preceding calendar year at the dwelling unit in the City. See *28 RCNY Section 3-02(m)(1)(vi); 28 RCNY Section 3-02(n)(4); Mitchell Lama Law* [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

According to the Verified Complaint, Plaintiff Harway alleges that Defendants received a fraudulent windfall worth approximately $300,000.00 (Three Hundred Thousand Dollars) to $400,000.00 (Four Hundred Thousand Dollars) in acquired converted shares in the building because Defendants did not primarily reside in Unit 18C in Brooklyn from 2012/2013 or occupy the Unit in 2015 or 2016. Instead they moved to Unit 104 ("Unit 104") at 135-10 Grand Central Parkway, Queens (Jamaica), New York 11435 when Defendant Superintendent became Superintendent in that building, making Unit 104 their primary residence in Queens during 2013 through 2016 and to date. As a result, Plaintiff Harway alleges that Unit 18C in Brooklyn would have been a Non-Eligible Dwelling Unit for which no *Mitchell-Lama* shares would have appertained for purposes of participation in the privatization. Thus, it alleges that Defendants made intentional misrepresentations about their *Mitchell-Lama* subsidy as well as intentional false possession representations to Plaintiff Harway during its privatization of Unit 18C. Defendants offered allegedly false sworn statements from 2012 through 2016 when they averred that they were the sole persons in possession of Unit 18C in Brooklyn in order for them to continue receipt of *Mitchell-Lama* subsidies. According to Plaintiff Harway, a recent investigation by a private investigator revealed that Defendants did not reside in Unit 18C in Brooklyn [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

According to the Verified Complaint, Plaintiff Harway seeks recision of the Converted Shares conveyance to Defendants plus damages for loss of Plaintiff's use of Unit 18C as appurtenant to the fraudulently acquired Converted Shares at market-rate rent from the time of Defendants' fraudulent acquisition in September 2016 to the present. In the alternative, it seeks monetary damages in the amount of the fair market value of the Converted Shares appurtenant to Unit 18C plus damages for loss of use of the residential unit appurtenant to the fraudulently acquired Converted Shares at market-rate rent from the time of their acquisition in September 2016 to the present [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

In their Notice of Motion to Dismiss the Action with Prejudice and to Grant Sanctions pursuant to *CPLR 3212* and *22 NYCRR Section 130-1.1, (1),* dated November 23, 2018, Defendants argue that they should not forfeit their co-operative apartment which was converted from *Mitchell-Lama* housing because it is their primary residence

since 2003. They emphasize that a rent-regulated tenant does not lose the protection of rent laws simply because he is required to live elsewhere as a condition of his employment. Defendants underscore that Defendant Superintendent must comply with the law that a superintendent of a building with more than seven (7) [sic] residential units must live at the building or within 200 feet of it. Thus, they argue that Defendant Superintendent's workday residence in Queens is both mandated as a condition of his employment as well as required by law. See *Multiple Dwelling Law Section 83; Housing Maintenance Code Section 27-2054* [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Defendants have no issue with *Mitchell-Lama* regulations pursuant to *28 RCNY Section 3-02* requiring tenants to occupy their apartments as their primary residences. They acknowledge that the tenant must spend at least 183 days per year in the premises as a general rule for tenants protected by the *Rent Stabilization Code* pursuant to *9 NYCRR Section 2520.6(u)(3)*. However, they emphasize the "safe harbor" protection of *Section 2523.5(b)(2)* against the loss of a primary residence because of absence due to certain conditions such as active military duty, full time studies or hospitalization plus "other reasonable grounds". See *Rent Stabilization Code 2520.6(u)(3); 542 E. 14th Street, LLC v. Lee,* 66 AD3d 18 (1st Dept., 2009). They refer to the "safe harbor" provision which provides that the minimum periods of required residency shall not be deemed interrupted for any period if a tenant is engaged in employment requiring temporary relocation from the housing accommodation. See *Section 2523.5(b)(2)(iv).* Consequently, because Defendant Superintendent must spend five days a week in Queens for his job and thus more than 183 days per year away from his Brooklyn apartment, they argue that Plaintiff's proof of non-residency fails. They point out that Defendant Superintendent: 1) returned to his apartment periodically, 2) never sublet it, 3) did not remove his personal belongings and 4) paid New York City taxes. They reiterate that Defendant Superintendent's Queens apartment was mandated by law since the law requires the owner of any residential building with nine (9) [sic] or more units to have a superintendent available who resides either in the building or within 200 feet of it. Defendants argue that Plaintiff's investigation was conducted by someone who disclosed that he was already aware that Defendant Superintendent was employed at the Queens buildings. See *Multiple Dwelling Law Section 83; Housing Maintenance Code Section 27-2054; Second 82nd Corp., v. Velders,* 146 AD3d 696 (1st Dept., 2017); *Boulder Apts. , LLC v. Raymond,* 59 Misc.3d 141(A) (App. Term, 2nd Dept., 2018) [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Defendants underscore that this action was solely brought in retaliation for Defendant Superintendent's complaints about the building's management and conduct of members of the Board of Directors as well as its President, an attorney. Because the lawsuit lacks merit, containing false statements of material fact, they claim harassment and therefore request sanctions against Plaintiff Harway's unnamed counsel and its President Shalshina pursuant to *22 NYCRR Section 130-1.1(1)* [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

In its Affirmation in Opposition, dated January 15, 2019, Plaintiff Harway argues that Defendants' motion must be denied because a tenant of a rent stabilized apartment, who maintains a primary residence elsewhere while seeking to retain the stabilized apartment simply for convenience and in consideration of personal gain is not one who is a victim of a housing crisis. Instead he is a contributing and exacerbating factor in the continuation of the critical shortage of affordable apartments. See *Cier Indus. Co., v. Hessen,* 136 AD2d 145 (1st Dept., 1988); *Park S. Assoc., v. Mason,* 123 Misc.2d 750 (Civ. Ct., 1984), aff'd 126 Misc.2d 945 (1st Dept., App. Term, 1984); *520 E. 81st Street Assoc., v. Lenox Hill Hosp.,* 77 NY2d 944 (1991); *Briar Hill Apartments Co., v. Teperman,* 165 AD2d 519 (1st Dept., 1991). Because Defendants admittedly live elsewhere, it challenges their argument that the law permits them to maintain a *Mitchell-Lama* subsidized residence (Unit 18C) since they relocated their primary

residence for Defendant Superintendent's full time employment. See *In the Matter of Ellen M. Duffy v. City of New York Department of Preservation and Development and East Midtown Plaza Housing Company, Inc.*, 2015 WL 10760477 (New York Supreme Court). Because the record is lacking any customary indicia of continuous residence for Defendant Wife and/or Defendant Superintendent, it calls for additional discovery. It underscores Defendant Superintendent's clear admission of not residing in Unit 18C. It disputes Defendants' motion for sanctions. See *Waterside Redevelopment Co., LP v. Dept. of Housing Preserv., and Dev., of City of New York*, 270 AD2d 87 (1st Dept., 2000); *RCNY 3-18(b); Waterside Plaza Ground Lessee, LLC v. Rwambuya*, 131 AD3d 867 (1st Dept., 2015); *NYCRR 130-1.1(a); 22 NYCRR 130-1.1(b); Park S. Assoc., v. Mason*, 123 Misc2d 750 (Civ. Ct. 1984), aff'd 126 Misc2d 945 (App Term 1984) [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

In their Reply Memorandum of Law, dated January 22, 2019, Defendants emphasize once again that a rent-regulated tenant does not lose protection of the rent laws if his employment and the law require him to live elsewhere. See *Mitchell-Lama Law, 41 NY Priv. Hous. Fin. Law Section 11; Lower Manhattan Loft Tenants v. New York City Loft Bd.*, 66 NY2d 298 (1985); *BLF Realty Holding Corp., v. Kasher*, 299 AD2d 87 (1st Dept., 2002); *Rent Stabilization Code Section 2520.6(u)*. They dispute Plaintiff's basis for a claim of fraud. See *New York University v. Cont'l Ins. Co.*, 87 NY2d 308 (1995); *Glenbriar Co., v. Lipsman*, 5 NY3d 388 (2005). Because Plaintiff failed to submit any evidence in opposition, Defendants argue that any discovery would be futile since it would only address speculative issues. See *Rodriguez v. Gutierrez*, 138 AD3d 964 (2nd Dept., 2016) [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

## COURT RULINGS

Because issues of fact exist, this Court denies Defendant Ludmilla Bolson and Defendant Leonid Bolson's motion for summary judgment pursuant to *CPLR 3212* and *22 NYCRR Section 130-1.1*, dismissing the action with prejudice and granting sanctions against Plaintiff Harway Terrace, Inc.'s unnamed counsel and its President and Chair of the Board of Directors, Nina Shalshina [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Summary judgment is a drastic remedy which will be granted only when it is clear that there are no triable issues of fact. See *Alvarez v. Prospect Hosp.*, 68 NYS2d 320, 501 NE2d 572, 508 NYS2d 923 (1986); *Andre v. Pomeroy*, 35 NY2d 361, 320 NE2d 853, 362 NYS2d 131 (1974). The party seeking summary judgment must establish prima facie entitlement to judgment as a matter of law. See *Zuckerman v. City of New York*, 49 NYS2d 557, 404 NE2d 718, 427 NYS2d 595 (1980). Once the party seeking summary judgment has made a prima facie case of showing of entitlement to judgment as a matter of law, the burden shifts to the opposing party which must submit evidentiary proof in admissible form sufficient to create an issue of fact. See *Alvarez v. Prospect Hosp., supra*. On a motion for summary judgment, the court's function is to determine if such an issue exists, and in doing so, the court must examine the proof in a light most favorable to the opposing party. Summary judgment may only be granted if the movant provides evidentiary proof in admissible form to demonstrate that there are no material questions of fact or demonstrate an acceptable excuse for failure to submit such proof. See *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985).

As the Appellate Division aptly found in *542 East 14th Street, LLC v. Lee, supra*, the exemption from statutory protection for dwelling units not used by a tenant as a primary residence is a universal feature of the rent regulatory framework. See *Avon Bard Co., v. Aquarian Found.*, 260 AD2d 207, 688 NYS2d 514 (1999), appeal dismissed 93 NY2d 998, 695 NYS2d 743, 717 NE2d 1080 (1999). Thus, the Appellate Division noted that the

governing statute provides that a landlord may recover possession of a rent-stabilized apartment if it is not occupied by the tenant as his or her primary residence. See *Rent Stabilization Code 9 NYCRR Section 2524.4[c].* The Court further observed that "primary residence" is judicially construed as an ongoing, substantial, physical nexus with the premises for actual living purposes. See *Katz Park Ave. Corp., v. Jagger,* 11 NY3d 314, 869 NYS2d 4, 898 NE2d 17 (2008), quoting *Emay Props. Corp., v. Norton,* 136 Misc.3d 127, 519 NYS2d 90 (Appellate Term, 1st Dept., 1987). Although the statutes do not define "primary residence", the Appellate Division found that the *Rent Stabilization Code* does provide that no single factor shall be solely determinative and lists evidence which may be considered in making the determination. See *Rent Stabilization Code 9 NYCRR Section 2520.6[u]. Rent Stabilization Code Section 2520.6(u)(3)* refers to the safe harbor protection of *Section 2523.5(b)(2)* against loss of primary residence by reason of absence due to certain conditions such as active military duty, full time studies or hospitalization plus "other reasonable grounds". Thus, the Appellate Division determined that the *Code* allows the court to apply the flexible definition of *Section 2520.6(u)* or the "other reasonable grounds" clause of *Section 2523.5(b)(2)* in determining primary residence [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Because Defendant Superintendent's required twenty-four (24) hours, seven (7) days a week availability for his job is not listed among the excusable factors (see *Rent Stabilization Code 9 NYCRR Section 2523.5[b][2]),* this Court finds that in order to be a protected absence, it must come within the ambit of the statutory protection afforded to "other reasonable grounds" for alternative residence. See *542 East 14th Street, LLC v. Lee, supra* [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

As the Appellate Division determined in *Cox v. J.D. Realty Assoc.,* 217 AD2d 179, 637 NYS2d 27 (1995), liberal discovery is provided to a landlord in a non-primary residence proceeding. Consequently, this Court finds that there is insufficient evidence to make a determination of whether Defendants' absence from their rent-stabilized apartment for more than 183 days per year during the relevant period was excusable and supported by a fair interpretation of evidence. The record in this case is woefully lacking customary indicia of continuous residence because Defendants only offer the self-serving affidavit of Defendant Leonid Bolson as well as the conclusory affidavits of Jordan Platt, Vice President of Operations of Kaled Management Co. and Defendants' attorney, Richard Altman, Esq., all of which are insufficient as evidence. See *Caraballo v. Kingsbridge Apt., Corp.,* 59 AD3d 270, 873 NYS2d 299 (1st Dept., 2009); *Caramanica v. State Farm Fire and Casualty Company,* 110 AD2d 869, 488 NYS2d 426 (2nd Dept., 1985). Moreover there have been no Examinations Before Trial ("EBT's) of any of the parties or possible non-party witnesses [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Thus, Defendant Superintendent Bolson's alleged relocation of his primary residence to Unit 104 in Queens because of his job's rigorous requirement to be on call twenty-four (24) hours a day, seven (7) days pursuant to *Multiple Dwelling Law Section 83* should be addressed by providing requisite proof. Among those items useful to a determination of this dispute which were not offered are documents relating to: 1) Defendants' telephone records; 2) utility bills; 3) rent statements for the apartment; 4) bank and credit records; 5) motor vehicle registration and drivers' licenses; 6) use of the address of the premises for receipt of mail; 7) address listed by Defendants on any tax returns and W-2's; 8) Defendants' addresses for voter registration; 9) the exact amount of time Defendants occupy the rent regulated apartment, specifically if Defendants occupy the apartment for less than 183 days in the most recent calendar year; 10) any subletting of the apartment; 11) the exact amount of time if Defendants return to the Brooklyn apartment periodically; 12) whether Defendants removed any personal belongings from the Brooklyn apartment or 13) any other documents filed with a public or government agency,

listing Defendants' address. See *Cox v. J.D. Realty Assoc., supra; Briar Hill Apts. Co., v. Teperman, supra; Park S. Assoc., v. Mason, supra; Katz Park Ave. Corp., v. Jagger, supra; 9 NYCRR Section 2520.6[u][1]-[4]; Second 82nd Corp., v. Viders, supra* [Defendants 1, Exhs. A-B; Defendants 2 Memorandum of Law; Plaintiff Opposition 3, Exhs. 1-2; Plaintiff 4 Memorandum of Law; Defendants 5 Reply Memorandum of Law].

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Ludmilla Bolson and Defendant Leonid Bolson's motion for summary judgment pursuant to *CPLR 3212* and *22 NYCRR Section 130-1.1,* dismissing the action with prejudice and granting sanctions against both Plaintiff Harway Terrace, Inc.'s unnamed counsel and its President and Chair of the Board of Directors, Nina Shalshina is DENIED.

This constitutes the Decision and Order of the Court.

Date: June 11, 2019
Harway Terrace, Inc., v. Bolson et al,
(#519328/2018)

**Dawn Jimenez-Salta, J.S.C.**

Hon. Dawn Jimenez-Salta

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