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To Be Argued By:
VICKI RICHMAN

New York County Clerk's Index No.: 571041/99

New York Supreme Court
APPELLATE DIVISION — FIRST DEPARTMENT

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK.
Landlord-Petitioner-Respondent,

—against—

VICKI RICHMAN and EILEEN V. CASEY,
Tenants-Respondents-Appellants.

REPLY BRIEF FOR APPELLANTS

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Introduction to the Reply Arguments

From the issues and counter-issues now before this esteemed body, this case appears to have settled on two fundamental, if somewhat compound, questions:

1. What exactly did the courts below decide, and how consistent were they with each other, with statute and rule, and with the case law?
2. Among the reams of archived pleadings, affirmations, affidavits, and statements filed with the courts below, which are properly part of the Record before this court, and which shall be excluded?

But lurking below those abstruse legal quandaries lies this reality: A mentally alert, acutely intelligent 86-year-old woman is unable to move or breathe without human, mechanical, and technological help. The appellants look on helplessly as their paraplegic mother literally gasps for life with every breath forced into her deformed lungs. We give up our home to enable her to keep hers. Driven to the emergency room by a blown electrical fuse, hoping for relief from her condition, she finds herself confined to what she sees as her "jail cell." Certain employees of the landlord, a world-renowned center of the sciences and liberal arts, see the appellants as predatory and possibly perverted scavengers who must be stopped whatever the financial, ethical, or emotional toll on the university or on its desperately disabled tenant struggling to regain some semblance of a normal life. The tenant relies on Legal Aid to fight eviction from her beloved home of 60 years, and she succeeds. She begs her landlord to make her home livable for her. She suffers a debilitating stroke after the landlord fails to observe its court-filed stipulation to do the work. She finally returns home and enjoys her last days on earth as best she can.

That is, from what the appellants have managed to grasp from their brief, sudden, and all too naïve immersion in the esoterica of jurisprudence and litigation, this case is rather typical of what a housing court hears almost every day.

The respondent holds that our underlying reality is not part of the case, which must be judged only on its objective legal merits and the few facts the landlord included in the stipulation for judgment. The respondent holds that the court must not let our *pro se* ignorance gain its sympathy for us. And of course our learned adversary is correct. We are wrong to raise what we call the underlying reality in anything but an adversarial due-process discovery and trial. We are wrong to allege our naïveté and possibly try to hide behind it to evade and distort the hard legalities of property ownership.

But what, then, shall we make of the respondent's use of such code phrases as "disposed of their co-op and moved into the Apartment," suggesting that his client was correct to suspect us of predation and exploitation in trading implied comfort and ease for even greater luxury at the expense of a sick old lady and the landlord's property rights?

Or such omissions and evasions as "Respondents took the position that Lucy continued to maintain the Apartment as a primary residence," when it was "Lucy" herself who was the respondent taking that position?

Or such *non sequiturs* as "Notably Respondents did not defend on the basis that they were entitled to succession rights," in the nonprimary eviction of the elder Richman, over a year before she died at home, over a year before there was any need for us to seek succession?[1]

Is our distinguished adversary trying to argue his side of the due-process discovery and trial that never happened, while at the same time insisting that presenting our side "clutters" our Record with a disingenuous appeal for sympathy beyond the bounds of appellate preservation?

Mindful of the admonition, in 22 NYCRR § 600.10(d)(4), against repeating the arguments of the affirmative brief perfecting this appeal, in this reply brief we shall try to expand our answers to the two questions that we find at the heart of our case.

The respondent's litigators have already offered their answers:

1. The two courts below agree that the appellants, whatever our other merits, failed "simultaneous, concurrent, and contemporaneous' co-occupancy" with the elder Richman for two years prior to her permanent absence from her home.[2] Those decisions are consistent with statute and case law.
2. The only document not *dehors* the Record before this court is the stipulation for judgment from the bench. Even the exhibits to that stipulation, appended by the landlord and citing the case against the elder Richman, immediately preceding this eviction, are *dehors*.

In presenting our somewhat different answers, as well as rebutting those of our adversary, we shall organize this reply brief around two points only touched upon in our affirmative brief: legislative intent and judicial economy.

In our affirmative brief, as well as in our leave motion, we were prudent enough to separate our conventional arguments — the language of the decisions of the courts below, the case law and statutes supporting or rebutting those decisions — from our more troublesome ones — the failed eviction of the elder Richman, errors by the court and the plaintiff, which, we held, expanded the Record and acceptable appellate arguments. If we could possibly prevail on the conventional appeal, the decision to evict might be reversed. But prevailing on the controversial part, we believed, could lead only to a new trial with

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[1]Brief for Petitioner-Landlord-Respondent, p. 2, 3.

[2]Respondent's brief, p. 5, citing the decision by the Hon. Brenda Spears.

discovery, as this court would not resolve a factual dispute in what would amount to a summary judgment.[3]

Therefore, by separating the two approaches, we hoped the court could rule on or discard either as it saw fit, without affecting the integrity of the other. It is, of course, in the respondent's interest to converge the controversial with the conventional. Throwing prudence to the winds, we follow the respondent's example to reply to it.

We spare the court a point-by-point rebuttal, as that would lead to redundancy. We have answered many of our learned adversary's objections in our affirmative brief, and we see no reason to ask the court read our arguments again. However, as certain points in the respondent's insightful brief may have escaped us originally, we do offer short rebuttals to those points only in passing throughout the two major arguments with which this reply proposes to expand our affirmative brief.

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[3] *65 Central Park West, Inc., v. Greenwald*, 127 Misc.2d 547, 550 (1985), 486 N.Y.S.2d 668.

Points of the Reply Arguments

Point 1 — Legislative Intent and the Interests of Justice

In construing a statute, Mr. Justice Holmes has written: "... the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."[4]

Thirty-two years later, the Court of Appeals of this state expanded and more carefully defined the term "general purpose" in ruling:

> In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to . . . ; *all parts of the act must be read and construed together* for the purpose of determining the legislative intent, and if the statute is ambiguous and two constructions can be given, the one must be adopted *which will not cause objectionable results or cause inconvenience, hardship, injustice or mischief or lead to absurdity*.[5] [Emphasis added.]

Nevertheless, in ruling on our eviction, the Hon. Brenda Spears called it "tolling the statute" to read and construe all parts of the rent-control-succession statute together.[6] Isolating the verb phrase "has resided with," and misquoting it as "residing with," she rebuts our assertion that the case law shows that the tenant may be physically absent for a valid reason without vacating the premises. She writes: "Further, 'family member' refers to Respondents, not the rent-controlled tenant C. Lucy Richman,[7] therefore the theory of tolling the statute by the original tenant's absence is novel, but unconvincing."[8]

It may not have convinced the honorable jurist, but it certainly is not novel, as even our adversary acknowledges on pages 9-10 of the respondent's brief, and as we have repeatedly shown in our affirmative brief. We know of no evidence, and the Hon. Spears has cited none, that the legislature intended the phrase "has resided with" to "clearly" mean "simultaneous, concurrent and contemporaneous."[9] The most the Hon. Spears can say is that "with" sometimes means that and sometimes does not. The very existence of exceptions

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[4] *United States v. Whitridge*, 197 U.S. 135 (1905).

[5] *People v. Ryan*, 274 N.Y. 149 (1937).

[6] 9 NYCRR 2204.6(d).

[7] *Sic*. The comma, not the semicolon, is in the text.

[8] Record on Appeal, p. 10.

[9] Record, p. 8-9. The Hon. Spears cites the statute as "2294,6(d)..."; the typist's right hand was a key to the left, apparently.

belies her putative clarity and begs the court to harken to Mr. Justice Holmes's admonition against relying on a language czar.

Ironically, the Hon. Spears herself admits that her interpretation is the unjust one: "While having the utmost sympathy for the Respondents whose actions for the rent-controlled tenant C. Lucy Richman were certainly caring and concerned, the Court concludes that 'residing with' clearly means . . . ."[10]

She ignores the cited admonition to prefer justice over arbitrary construction, by the Court of Appeals, repeated many times since: "But we are not bound to accord a literal interpretation to this language if to do so would lead to an egregiously unjust or unreasonable result."[11] Or: "In construing statutory provisions, the spirit and purpose of the statute and the objectives sought to be accomplished by the legislature must be borne in mind."[12] Or:

> . . . it must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination. . . . The proper procedure now is to examine the treaty as a whole, along with its history, and, in particular, to look into the problems which it was intended to solve.[13]

What problem did the legislature intend to solve by denying the principal tenant's primary residence when physically absent, but allowing the family member to go school or the army or the hospital and retain residence? The Hon. Spears's construction serves only to deny an "aged rent-controlled tenant," in the words of the Appellate Term,[14] the company and support of her family, who would be driven away by the fear of eviction.

Rent-control succession applies to family members, so the legislature promulgated conditions for their absence. There was no reason to cite conditions for the principal tenant's absence, since that is covered elsewhere in the books, as we have argued in our affirmative brief, page 20.

On page 9, the respondent cites a decision from this esteemed court: "The apartment cannot be transferred from one family member to another where there has been no contemporaneous occupancy."[15] The respondent neglects to mention that it was a

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[10]Record, p.9. What is not so clear, however, is what statute she is reading, as she misquotes 22 NYCRR § 2204.6(d)(1) and, on the previous page, misidentifies the clause.

[11]*Petterson v. Daystrom Corp.*, 17 N.Y.2d 32, 38 (1966), 268 N.Y.S.2d 1, 215 N.E.2d 329.

[12]*New York Post Corp. v. Leibowitz*, 2 N.Y.2d 677, 685 (1957), 163 N.Y.S.2d 409, 143 N.E.2d 256.

[13]*Eck v. United Arab Airlines*, 15 N.Y.2d 53, 59 (1964), 255 N.Y.S.2d 249, 203 N.E.2d 640.

[14]Record, p. 12.

[15]*Berwick Land Corporation v. Mucelli*, 249 A.D.2d 18, 18 [1st Dept 1998], 671 N.Y.S.2d 44.

nonprimary case, not succession, and that this court had the wisdom to apply the same Sommer test on which a good portion of our affirmative brief, pages 18-23, relies.[16] The fact that "respondent tenant had not resided in the apartment at all between 1974 and September 1993 and, in particular, had not resided there for the first 16 months of the most recent 24 month renewal period" correctly led the court to find that the tenant failed the Sommer test, and as afterthought, to comment on the possibility of succession, using the words "contemporaneous occupancy."

But, in applying the Sommer test, this court was adhering to our affirmative argument that the word "occupancy" means primary residence, not continuous physical presence. The court was ruling on whether the tenant had established primary residence at another location, and correctly found that he had. But the Hon. Spears never cited the Sommer test, never ruled on the elder Richman's primary residence. *Nisi prius* ruled only on physical presence, using only the Hon. Spears's own *ad hoc* statutory construction, without case law or even a dictionary, and, as she herself admits, without the interests of justice, to back her up.

The Appellate Term did indeed rule on the date of her vacancy, but we are holding that its ruling was not only outside its province, but also contrary to the facts before *nisi prius* and to its own citation. That, we held, justifies "cluttering" our Record with the court-filed documents showing that the landlord had failed to prove vacancy and had in fact stipulated to helping the elder Richman return from medical rehabilitation. In citing *Berwick* the respondent's litigator underscores the propriety of what he calls our "clutter.

"We note only that under the parties' stipulation . . . ," begins the decision upholding our eviction.[17] Why "only"? If intent, purpose, and justice prevail over the mere words of an act or a treaty, which prevail over stipulations, should not intent, purpose, and justice also prevail over stipulations? If the court must go beyond the mere text and examine the full background, always considering the intent of the authors and the interests of justice in divining meaning, is that not equally true of stipulations? Or is the Appellate Term correct to rule, in two sentences, simply that we stipulated to be evicted?

We appeal to intent – not only legislative, but also our own – and the interests of justice not only to rebut the Hon. Spears's *ad hoc* statutory construction, but also to go beyond the stipulation – which our learned adversary asks the court to wear like the blinders on a beast of burden – to the full eviction, which includes the failed action against the elder Richman. The Appellate Term, in its self-imposed restraint, ruled contrary to fact and our intent in executing the stipulation. Shall the truth and fair play take a back seat to rigid observance of arbitrary form?

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[16]*Sommer v. Turkel, Inc.* 137 Misc.2d 7 (1987), 522 N.Y.S.2d 765; *Emay Properties Corp. v. Norton,* 136 Misc.2d 127 (1987), 519 N.Y.S.2d 90.

[17]Record, p. 12.

For, despite the denials of our principal thesis throughout our adversary's text, it is a plain fact that the Appellate Term ruled, for the only time in any court or in any due-process action, that the elder Richman vacated the premises 27 months earlier than her death. Not even the Hon. Spears made that ruling.

In dismissing the nonprimary-residence case against the elder Richman, the Hon. Norman C. Ryp commented, "Seventeen months is a long time for a nonprimary eviction," adding that the evidence presented in the younger Richman's counter-motion[18] was sufficient to enable our succession to rent-control tenancy.[19] But the respondent insists that the Appellate Term was correct to ignore the whole truth and concentrate only on the shred of a fragment that it deemed proper.

Here is how a legal commentator saw the same Appellate Term's ruling ten years earlier, on a tenant who died before returning home:

> Recently, the Appellate Term, New York County, held that a tenant had still maintained her apartment as a primary residence even though she was confined to a nursing home for approximately one year. (Cohen and Zerenowitz Realty Corp. v. Asero, NYLJ, Nov. 21, 1991, p. 26, col.4.).
>
> The tenant died during the pendency of the appeal. The court cited the fact that the tenant kept her furnishings and personal belongings in the apartment and received mail, including bank statements, at the apartment address. Her tax returns reflected her home address, as well. In addition, testimony was provided to show the tenant's intention not to abandon the apartment or relocate permanently to the nursing home.[20]

That decision was reaffirmed as recently as 1998: "We view this absence as excusable, for purposes of nonprimary residence, where the institutionalization was transitory, not permanent in nature; where there was no abandonment of the premises or establishing of any new residence; and where a resumption of occupancy has taken place . . . ," wrote the three justices about a tenant hospitalized for psychiatric reasons.[21]

What happened between then and December 2000, when the same department chose to ignore the elder Richman's "resumption of occupancy" and find that she vacated primary residence 27 months earlier? The stipulation? Was the stipulation, written virtually in its entirety by the landlord, sufficient to overturn statute and several decades of case law, much

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[18]Record, pp. 188-226.

[19]The oral ruling was handed down before the younger Richman, Gregory Vail, Esq., for the landlord, and Steve Falla-Riff, Esq., for the elder Richman.

[20]Bruce Feffer, "When Is a Nursing Home a Primary Residence?" *NYLJ*, March 6, 1992, p. 1, c. 2.

[21]*Katz v. Gelman*, 177 Misc.2d 83, 84 (1998), 676 N.Y.S.2d 774.

of it handed down by the very court that ruled against us? Surely our intent, as well as the landlord's, like that of the legislators, and the interests of justice, must trump mere words. But to accomplish that, the Record must reflect the case — at least, the court-filed pleadings and exhibits — in its entirely.

In discussing a case that our adversary says we have relied on, the respondent's brief, pages 9-10, sees "a unique set of factual circumstances dissimilar to those in the instant case."[22] While our adversary is absolutely correct that there was strong dissent to the decision upholding succession, the only striking dissimilarity was the far younger age of the original tenant, who was absent for nonmedical reasons. Apparently the court has less tolerance for the physical absence of an "aged rent-controlled tenant," in the words of the Appellate Term's ruling against the appellants, than for any other kind.

Well, yes, as Mr. Justice Saxe might have agreed before joining this esteemed body.[23] But, as we note on our page 8, his decision underscores the Appellate Term's error in effectively handing down a summary judgment on a matter that requires an evidentiary due-process trial.

But Mr. Justice Tom might say no, there is no different standard for the elderly:

> The court further finds that the primary residence law was not intended and should not apply to a senior citizen who is confined in a geriatric facility or nursing home and has no intention of abandoning her rent-regulated apartment.[24]

In his decision, appealing to legislative intent and justice, rather than an *ad hoc* statutory construction, the honorable justice found that the tenant's "stay in the geriatric center is based on her need for skilled nursing care and not for any medical reasons." With "temporary respiratory rehabilitation" added to "nursing care," that ruling applies equally to the elder Richman (even if one insists that temporary rehabilitation is a kind of medical reason). And as we have noted on page 24 of our affirmative brief, the very case cited by the Appellate Term against us in fact follows Mr. Justice Tom's reasoning.[25]

Mr. Justice Tom found the patient's intent to be the overriding factor in deciding whether the apartment has been vacated. Mr. Justice Saxe required more: third-party testimony, as from medical professionals, and documentary and physical evidence. In

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[22]*Brusco v. Rivera*, *NYLJ*, September 9, 1999, p. 26, c. 1.

[23]*65 Central Park West, Inc.,* cited on p. 8.

[24]*Soybel v. Gruber*, 136 Misc.2d 430, 434 (1987), 518 N.Y.S.2d 920.

[25]*Shadick v. 430 Realty Co.,* 250 A.D.2d 417 [1st Dept 1998], 673 N.Y.S.2d 3. The respondent discusses this case on pages 8-9 of the brief, and, of course, interprets it quite differently. We believe the respondent asserts the converse only because the litigator implicitly takes "primary residence" to mean physical presence.

principle we side with Mr. Justice Tom — if a paraplegic testifies that she will walk again, does any court of law have the jurisdiction to say no, you never will? — but in a rent-control succession case, we acknowledge Mr. Justice Saxe's practical wisdom, as the patient may say she wants to go home only to be sure that her family will have a home.[26]

Housing law does not define primary residence; it defines only loss of primary residence, as establishment of primary residence elsewhere, which begs the question.[27] Election law is not much more helpful. After two clauses on residence, the section concludes, "The decision of a board to which such application is made shall be presumptive evidence of a person's residence for voting purposes."[28] As an administrative employee's decision is not a due-process hearing, it is neither necessary nor sufficient evidence in a rent-control case.

Only the court may rule, and as Mr. Justice Saxe observes, only after a due-process trial, not by summary judgment. We are asking this esteemed body to see the Appellate Term's decision as no more than a summary judgment on the elder Richman's primary residence, a judgment that it was not asked to make, a judgment that overruled a case not in dispute. We can do that only by including the failed eviction of the elder Richman in our Record. The Appellate Term erred in declining to go beyond the stipulation to the full history of the case and the intent underlying the stipulation.

Contrary to our learned adversary's assertion on page 14, the issue of "whether or not Lucy occupied the Apartment as a primary residence" is indeed the foundation of this case. The Appellate Term made it so, by ruling on the vacancy of the"aged rent-controlled tenant" in its first sentence. But it likewise became an issue by the Hon. Spears's failing to cite a vacancy prior to the elder Richman's death, and in fact suggesting, by setting a stricter test for succession than that established by the case law,[29] that the elder Richman had in fact maintained primary residence throughout her rehabilitation.

In an essay meant to set Constitutional grounds for an eventual challenge to the inflexibility of the U. S. Supreme Court's doctrine of "one person, one vote," the vice-dean of the Columbia Law School argues that the nature of residence varies with time, place, and function:

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[26]In fact it was the landlord's belief that the elder Richman was using her putative deathbed as a platform from which to launch such an attack on its property rights that led the landlord to first evict her and then fudge about making the apartment habitable for her.

[27]9 NYCRR 2100.18.

[28]New York Election Law § 5-104.

[29]*Louis v. Barthelme*, 179 A.D.2d 604 [1st Dept 1992], 579 N.Y.S.2d 656; *Rakoff v. Hebert*, *NYLJ*, June 5, 1998, p. 29, c. 3.

> In its voting cases, the Court has presumed a close nexus of residency within a jurisdiction, the impact of that jurisdiction's government on residents, and the right to equal representation in the jurisdiction's elections and government. But due to the variety of local powers and the complexity of local structures, the effects of local government actions, even on residents, are not a simple binary matter of "impact/no-impact."[30]

Or, as we are arguing, the effects of medical decisions, even on an "aged rent-controlled tenant," are not a simple binary matter of "lives-here/doesn't-live-here." That is, a leading legal scholar employed by the university – although for academic, not real-estate-management, purposes – disputes our adversary's notion of clear-cut, well-defined, indisputable primary residence, both of the elder Richman and of the appellants. For example, as the younger Richman grew up in this building, and went to college from this apartment, and as many of her youthful possessions, including the earliest documentary evidence of her birth and existence, have never left this apartment, she could do worse than retain Professor Briffault to argue that she never really vacated this apartment at all, even when she lived elsewhere. But, alas, the Law School dean works for the other side, which is claiming that the younger Richman's residence here began no earlier than August 1, 1996.

Despite our adversary's denial on pages 7-8, *inter alia*, the Appellate Term did in fact overrule the Hon. Spears on the elder Richman's primary residence. The Appellate Term's two sentences ignored the lengthy statutory construction by the court below. The Appellate Term made no ruling on "contemporaneous" physical presence, contrary to our adversary's assertion on page 8. The only similarity of the decisions, in addition to the bottom lines, is that both ignore intent and motive, either of the legislators or the stipulaters, the full background of the law or of the eviction, and justice, and that both prefer a summary *ad hoc* interpretation of a limited set of words.

The most recent judicial preference for purpose and justice over literalism and grammar was perhaps the most significant in New York City housing case law, as it gave domestic partners of rent-control tenants the same protection as that enjoyed by spouses.[31] What we are asking the honorable justices of this court is to apply the same insight to give an "aged rent-controlled tenant" the same right as that enjoyed by, say, Christopher Reeve or Joe DiMaggio or any homeowner or more youthful renter, to the company and support of her only family, without fear of their eviction, while seeking medical rehabilitation and restoration of her quality of life.

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[30]Richard Briffault, "Who Rules at Home?: One Person/ One Vote and Local Governments," 60 *U. Chi. L. Rev*. 339, *342. Note the professor's use of the word "nexus" to mean an intimate connection, an association, a convergence, a center of orbits. That is precisely the meaning we attach to "nexus" in the case law on primary residence, although our adversary persists in holding it to mean physical presence.

[31]*Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989), 544 N.Y.S.2d 784, 543 N.E.2d 49.

Point 2 — Judicial Economy and Preventing Dilution of Justice

In arguing that much of our brief and Record is restrained by appellate preservation, our adversary perhaps neglects a case his firm won. A tenant was claiming protection from eviction, for having failed to be served with a crucial document from the landlord. The landlord's advocate proved to the satisfaction of the court that he had served the document on the tenant's former attorney. But the tenant insisted that she never got it.[32]

The litigator moved to call the tenant's former attorney to testify against her, but of course, the tenant's new attorney, who just happened to have represented us before the Appellate Term, objected, angrily citing the Code of Professional Responsibility: under almost no circumstances may an attorney violate the confidence of a client.

The Hon. Paul L. Klein ruled that the tenant's "claim to have not received notice of the judgment entered against her obviously raises the possibility that" her former attorney "neglected to carry out a professional responsibility, and triggers his right to voice a defense." Even if not now charged with violations, that very possibility led the judge to allow the lawyer to testify against his former client in the eviction action.[33]

Well, the judge could have ruled for the tenant, advising the landlord to bring up the tenant's former lawyer on ethics charges later, as the landlord would have been the sole victim of the alleged professional misconduct. That would gain the testimony that could be used against the tenant in a later action for fraud and perjury. But the landlord wanted immediate possession of the property, not the hypothetical ability to pursue a different case later. And justice demanded forestalling charges against the accused lawyer rather than requiring him to wait for the sword of Damocles to drop.

Without using the term, the Hon. Klein's decision defines judicial economy – allowing an otherwise technically improper action to proceed to prevent delay, endless repetition in different arenas, needless pain and suffering, and dilution of justice.

Our adversary sets up a straw man on page 20. We are not arguing incompetence of our former counsel. We are arguing: plaintiff errors ignored by the court; substance, intent, and justice over form; and judicial economy to prevent dilution of justice. In our adversary's citation, the court ruled: "Moreover, her allegations of incompetence of counsel at the trial are unsupported by the record and, in any event, cannot serve as the basis to set aside a judgment pursuant to CPLR 5015."[34]

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[32]*General Realty v. Walters*, 136 Misc.2d 1027, 1028 (1987), 519 N.Y.S.2d 530.

[33]*Id,* at 1029.

[34]*Blackman v. Blackman*, 131 A.D.2d 801 [2d Dept 1987], 517 N.Y.S.2d 16.

We agree with that decision: the court considered the allegations of incompetence, and ruled against them, before calling them irrelevant. Although CPLR 5015(a)3 hardly applies to an appeal before this court, we assert its spirit on relief from a judgment gained by "fraud, misrepresentation, or other misconduct of the adverse party," and we thank our adversary for calling our attention to it, if only indirectly. The cited statute supports redress for errors and violations, just as our adversary, on his page 20, endorses an action against our former attorneys. But such actions in future arenas would be only justice diluted; judicial economy asks the court to rule while the ruling still means something.

Likewise, on page 18, our adversary charges that we "pick and choose" from "the record of a separate and distinct proceeding." The eviction of the elder Richman was neither separate nor distinct; it was the basis for this case, continuous and uninterrupted with this case, as attested by the landlord's appending pleadings from the earlier case to the stipulation in this case.[35] We have answered our adversary's citation[36] in our reply to the motion to strike; "separate and distinct" do not describe the eviction of the elder Richman. Further, we included the entire case as archived by the court clerk, refraining from picking and choosing, pursuant to CPLR 2105; it was the landlord who picked and chose in appending only certain pleadings to the stipulation.

If we are evicted after failing to present the landlord's errors, violations, abuses, and offenses against the elder Richman and us, then we assert grounds for an action for wrongful eviction. But we want a home. A future lawsuit means nothing to us. Furthermore, it is in the interest of justice for the court to protect the landlord against liability for wrongful eviction, by not allowing the eviction to proceed.[37] Upholding judicial economy prevents such dilution, or even denial, of justice, and protects the landlord from incurring liability by a decision that rejects content for technical form. This esteemed body ruled for judicial economy three months ago:

> Plaintiff's claim that the hearing court, in effect, entertained a motion for summary judgment made more than 120 days after the filing of the note of issue, and thereby violated CPLR 3212 N.Y.C.P.L.R.(a), is unavailing, considerations of judicial economy providing good cause to dispose of this threshold, potentially determinative issue prior to trial . . . .[38]

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[35]Record, p. 288, citing pp. 88-95, 14-25, 109-110.

[36]*Edison v. Perlbinder*, 271 App. Div. 794 (1946), 65 N.Y.S.2d (2d Dept). This case in fact proceeded to a final judgment, *id* at 933 (1947).

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

[38]*Baijnauth v. City of New York*, ___A.D.2d___ [1st Dept 2001], ___N.Y.S.2d___. See the Table of Authorities, page 1, for a note on citations from this year.

The court repeated that ruling on the same day, in virtually the same language: "In any event, the motion was properly entertained, in the interest of judicial economy, in order to dispose of a threshold, potentially determinative issue prior to trial . . . ."[39]

This court ruled likewise in a co-op succession case this summer.[40] Or several months earlier: " Nevertheless, in the interest of judicial economy, we will decide the matter on its merits . . . ."[41]

In our reply to the motion to strike our appeal, we cited a case on the issue of recovery of property. It could be cited as well on judicial economy:

> However, in furtherance of judicial economy and the expeditious resolution of the parties' dispute and since the matter involves an issue which is fundamental to recovery, this court may properly consider the issue for the first time on appeal . . . .[42]

Between then and now the doctrine has been repeatedly invoked, from land use to medical malpractice.[43] However, judicial economy would be worthless to us if we could not show that the possibility of liability for wrongful eviction has sufficient merit for this court to reverse the eviction and to designate the appropriate *nisi prius* to try the evidence.

In our affirmative brief we have cited: retaliation within six months, in violation of 7 RPL § 223-b; gratuitous, improper, and unprecedented use of "John and/or Jane Doe"; intentionally false citation of "squatters" using "fictitious names"; violations of Columbia's own internal rules and academic ethics; abuse of an elderly tenant; violation of a court-filed stipulation and perjury. We shall not repeat our arguments in this reply brief. They largely rested on the seminal ruling on "dirty hands" by the Court of Appeals[44]

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[39] *Brunetti v. City of New York*, ___A.D.2d___ [1st Dept 2001], ___N.Y.S.2d___. See the Table of Authorities, page 1, for a note on citations from this year.

[40] *McGann-Wayne v. Lippa*, ___A.D.2d___ [1st Dept 2001], ___N.Y.S.2d___.

[41] *Kent Ae. Bk. v. New York C. Bd.*, ___A.D.2d___ [1st Dept 2001], ___N.Y.S.2d___.

[42] *O'Connor v. O'Grady*, 143 A.D.2d 738 [2d Dept 1988].

[43] *Cucci v. Zoning Board of Appeals,* 154 A.D.2d 372 [2d Dept 1989], 545 N.Y.S.2d 850; *Delavore v. Scheyer*, 215 A.D.2d 478 [2d Dept 1995], 626 N.Y.S.2d 260; *Supkis v. Town of Sand Lake Zoning Bd*, 227 A.D.2d 779 [3d Dept 1996], 642 N.Y.S.2d 374; *Goodman v. Gudi*, 264 A.D.2d 758 [2d Dept 1999], 695 N.Y.S.2d 576; *Aikens Construction of Rome, Inc. v. Simons*, ___A.D.2d___ [4th Dept 2001], ___N.Y.S.2d___.

[44] *Seagirt Realty Corp. v. Chazanof*, 13 N.Y.2d 282 (1963), 246 N.Y.S.2d 613, 196 N.E.2d 254.

But fifteen years earlier the Court of Appeals waxed passionately poetic on a similar issue: "For no court should be required to serve as paymaster of the wages of crime . . . ." [45] The honorable court has also written: "We are not working here with narrow questions of technical law. We are applying fundamental concepts of morality and fair dealing not to be weakened by exceptions."[46]

This year, a contractor petitioned to recover funds from Columbia University, including a bribe allegedly received by the defendant's agent. This court cited *McConnell* in ruling against the plaintiff, but absolving the defendant:

> There is a need to explore, after joinder of issue, the "connection" between the bribes and plaintiff's performance, which involves consideration of "fundamental concepts of morality and fair dealing", including, in particular, the extent to which plaintiff is attempting to take advantage of his own wrong . . . . Furthermore, since plaintiff does not allege that the construction manager's demands for the bribes were within the scope of its authority or ratified by defendant, or any circumstances that made it reasonable to believe that such demands were so authorized or ratified, plaintiff cannot recover the value of the bribes from defendant.[47]

Would we fare similarly seeking damages from Columbia for wrongful eviction? Well, Columbia was the plaintiff in both evictions. It could hardly claim ignorance, even of its attorney's perjurious pleading, verified by its employee, not by a mere agent. The president was aware of the perjury before proceeding against us. The verifying employee was transferred from this building, but remains on the Columbia real-estate staff. Furthermore, we are holding that the evictions violated Columbia's own rules and the positions taken, *inter alia*, by its president and by the vice-dean of the Columbia Law School. The Office of Institutional Real Estate, which prosecutes evictions, is a university agency parallel on the official flowchart to any academic department; both academia and real-estate are under the aegis of the vice-president for administration. Rent checks are payable to "Columbia University." The board of trustees, not an agent, is responsible for real-estate management and evictions.

This court has already heard a case involving Columbia, eviction, academic ethics, and this very building. We cited it in our affirmative brief, but only in passing (and not very rigorously, alas), as an example of an action against a tenant who lost employment with the eleemosynary institution. This reply brief shall examine it in greater detail.[48]

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[45] *Stone v. Freeman*, 298 N.Y. 268, 271 (1948), 82 N.E.2d 571.

[46] *McConnell v. Commonwealth Pic.*, 7 N.Y.2d 465 (1960), 199 N.Y.S.2d 483, 166 N.E.2d 494.

[47] *M. Farbman & Sons, v. Columbia University*, ___A.D.2d___ [1st Dept 2001],___N.Y.S.2d___. See the Table of Authorities for a note on citations from this year.

[48] *Harris v. Trustees of Columbia University*, 98 A.D.2d 58 [1st Dept 1983], 470 N.Y.S.2d 368.

When the *Columbia Encyclopedia* was published, around 1975, one of its chief editors, William Harris, was out of a job, and out of his apartment in this building, as his lease, under an "affiliation clause," limited his tenancy only to the duration of his employment by the university. Admittedly to keep his home, Mr. Harris got an honorary position at the library, with the School of International Affairs. Although he received no significant salary, Mr. Harris used the position to renew his annual lease about four times.

Finally, around 1980, he lost even the honorary position, but he presented a letter vouching for him to real-estate management from an alleged employee of the East Asia Division. The real-estate representative rejected the letter as "insufficient," whereby Mr. Harris managed to renew his lease through 1982 by enrolling as a Ph.D. candidate in the Graduate School. However, soon after that lease was executed, Columbia real-estate management informed Mr. Harris's associate dean, Raymond Anderson, that the letter from the East Asia Division was a forgery.

Mr. Harris said that he had obtained the letter properly; if it was a forgery, he insisted, it was the work of "an unknown person." Nevertheless, holding the forgery to be Mr. Harris's work, the associate dean warned Mr. Harris to present better evidence of affiliation to real-estate management or accept termination of the lease. Claiming his lease was based on his Ph.D. candidacy, not on the alleged forgery, Mr. Harris refused to comply with his dean's demand. Due to "a clerical error," real-estate management withdrew a holdover action, and the lease remained in effect through 1982.

Dean Anderson then warned Mr. Harris to leave voluntarily or be expelled for "a flagrant breach of discipline," an action that threatened to destroy his academic career. Mr. Harris kept his home, was expelled "for disciplinary reasons for failure to comply with the prior directive to vacate the apartment," and began a CPLR 78 challenge to the expulsion.[49]

Mr. Justice Asch, writing for the majority, held:

> . . . Columbia University was acting throughout not as an academic aerie of higher education. Dean Anderson appeared primarily concerned with getting petitioner out of a rent-stabilized apartment on behalf of the landlord, Columbia. To that end, he held the threat of Harris' status as a Columbia student as a sword of Damocles over petitioner's head. The issue presented is simply put – was Anderson, acting on behalf of the University, arbitrary when he dismissed Harris for failure to comply with a directive to vacate an apartment to which Harris had a legal right? I note that although the university speaks of Harris' fraud vis-a-vis the letter he submitted, the express reason he was dismissed was his failure to leave his apartment despite his lease . . . .[50]

[49] *Id,* at 58-60.

[50] *Id*, at 62.

This court overruled dismissal of the petition by the court below and reinstated Mr. Harris's Ph.D. candidacy. That looks bad for us. Academic matters and real-estate management, according to the majority of this court, are separate. Mr. Harris's alleged breach of academic ethics should not cost him his home. Therefore Columbia's alleged breach of academic ethics might not protect our home.

However Mr. Justice Kassal dissented, at some length:

> Contrary to the position assumed by the majority, the fraudulent submission, clearly designed to enable petitioner to retain his housing accommodation, was a matter of legitimate concern to the university. It evinced a degree of dishonesty and lack of character, a matter of vital interest to an academic institution, which may reasonably expect honesty and fairness by its students in dealings with the university. In the absence of some affirmative showing of unfairness or that respondent did not act in accordance with published rules or guidelines, the disciplinary action taken was not unreasonable, arbitrary or capricious. To rule otherwise would, indeed, honor form over substance and would amount to unjustifiable interference in academic affairs.[51]

Losing before this court, Columbia appealed to Albany. The Court of Appeals, in a single sentence fragment, upheld the academic expulsion for the purpose of eviction ". . . for reasons stated in the dissenting opinion by Justice Bentley Kassal . . . ."[52]

Now we ask: If the court shall not prefer "form over substance," and if Columbia may evict a tenant for the tenant's breach of academic ethics, may we not go beyond the mere form of appellate preservation and present the substance of our argument that Columbia shall not breach its own academic ethics to evict a tenant? If Columbia may "expect honesty and fairness" from faculty-students-tenants, may not a tenant expect the same honesty and fairness from Columbia?

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[51] *Id.* at 71.

[52] *Harris v. Trustees of Columbia University*, 62 N.Y.2d 956, 959 (1984), 479 N.Y.S.2d 216, 468 N.E.2d 54.

CONCLUSION

The *Harris* case is somewhat typical of the university's style in litigation. Columbia is less like a massive corporation, ready to compromise immediate self-interest for the greatest long-range economic protection and consumer acceptance, than like, say, the *New York Times* arguing a First Amendment issue, or the National Writers Union on copyright law, unyielding in its pursuit of full vindication or vindictiveness, without thought to cost.

Of course, *Harris* may be seen as a personal feud between two sterling academicians, one tottering at the brink of his career and the other trying to push him over. But, whatever our personal biases in the matter, Dean Anderson had several long conferences with Mr. Harris hashing out their differences. They exchanged letters in a reasoned debate. The real-estate management voluntarily withdrew its eviction of Mr. Harris, for a mere technical flaw that might easily have been ignored by the Housing Term. Columbia had no interest in pursuing a profit-seeking eviction, but chose to allow a high-ranking academic dean call the shots, in what, all hoped, would advance the university's legal protections, not as a landlord, but as an eleemosynary institution. Dean Anderson finally gave Mr. Harris a choice: give up your apartment, or your career. Perhaps believing he had no career without his home, Mr. Harris made his choice and lost, but was treated fairly and had all chances to win.

Since that case, George Rupp assumed the presidency, presumably for his thesis that "communities of learning" are like "communities of faith" in that they must remain separate and untouched by the laws and institutions that restrain"communities of commerce."[53] At about the end of the eighties, the Columbia Office of Institutional Real Estate (IRE) was mandated, as an agency parallel to any academic department, not to pursue holdover evictions, but to improve the quality of life in Morningside Heights, by protecting tenants from aggressive landlords, increasing service and protection to its own tenants, and screening commercial use of property owned by the university.[54]

Nevertheless, the action by IRE against us resembled *Harris* in some ways, despite the new administration's new direction against holdover evictions. There was a personal feud between us and at least one IRE employee, leading IRE to act against the elder Richman in a case it could not hope to win against a mentally alert, handicapped tenant, however old. But Columbia did not believe, or want to believe, that the elder Richman was mentally alert; IRE presumed she was effectively brain dead, incapable of defending herself, and that the appellants would abandon the apartment rather than suffer exposure as frauds.[55]

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[53]George Rupp, *Community and Commitment* (Minneapolis: Fortress Press, 1989), pp. 69-81.

[54]See, among numerous media reports and interviews: George Rupp, *President's Report 96-97*, http://www.columbia.edu/cu/president/report97/.

[55]And, of course, despite the university's world-acclaimed medical and academic support of the transgendered, the IRE employee believed the younger Richman could not, or would not, pursue litigation.

But there the similarity to *Harris* ends. There were no conferences, no reasoned debates in our case. Although we sent IRE several letters – which our adversary insists, in note 3 on page 4 of the respondent's brief, are outside the Record – no one from Columbia entered into a reasoned discussion with us, as with Mr. Harris. Even after the elder Richman sent a handwritten note to IRE, no one from Columbia went to her bedside. Not even the social worker, whom IRE keeps on staff to assist elderly and disabled tenants, visited her. Our mother was in despair. Although she was only a rent-control tenant on a fixed income, she saw this apartment as her prized family possession, and herself as its matriarch, with the IRE staff as her strength and support.

But all she got from IRE was a mailbox overflowing with certified letters addressed to "John and/or Jane Doe," which further terrified the elder Richman. Despite our attempts to hide the legalities, the younger Richman repeatedly failed to keep the truth hidden for long at bedside *tête-à-tétes* with her incapacitated mother.

When IRE learned of its mistake in bringing eviction against the elder Richman, rather than back down, it persisted like the most aggressive of profit-seeking landlords, refusing to admit error, doing whatever was necessary to clear out the premises. It turned its back on upgrading the electrical system in this apartment, as requested by the respiratory therapist and the social worker we retained for our mother. When confronted by a representative of State Senator David Paterson, an IRE employee lied about the electrical work. When the elder Richman's Legal Aid lawyer finally gained a stipulation for the work, the IRE employee cancelled the job, and the tenant suffered a stroke. When the work was done, and she finally came home, and she died, the IRE attorney executed a court-filed affirmation, verified by the same IRE employee, that the electrical work had been done a month before stipulated. Then IRE immediately began the action against the appellants, by refusing their first rent payment after their mother's death.

Is it any wonder that our adversary insists, on pages 16-20, *inter alia,* of the brief, that our Record and our additional arguments are restrained by appellate preservation? Nevertheless they are part of the full story, which the case law, since Mr. Justice Holmes, holds part of any treaty or statute, or, perhaps, of any stipulation. But beyond the law and courthouses, the liberal arts thrive only with freedom of speech; the sciences, only with the primacy of evidence over hypothesis.

Shall Columbia be held to the standards established in *Harris*, debated so hotly in this esteemed body, and finally settled in Albany? Or shall the court look the other way as Columbia mines the law books for any technicality, however arbitrary, trivial, and even hostile to academic interests, to silence us, render us homeless, and protect its own errors, violations, and abuse from public scrutiny? Shall a world-acclaimed center for the liberal arts and the sciences choose to suppress full disclosure and investigation of the facts when it is convenient to protect certain employees?

Suppression of facts is suppression of academic freedom.

In our affirmative brief, we have shown grounds for overturning both *nisi prius* and the Appellate Term in evicting us. By arguing for our full Record and our evidence of Columbia's errors and violations, we have also shown grounds for sending this case back to a *nisi prius* of this court's designation. As addenda to those arguments in this reply, we have included legislative intent, the appellants' intent in executing the stipulation, and the interests of justice. Finally, we have shown that judicial economy is a well-used principle preventing dilution of justice.

New York, New York
November 8, 2001

Respectfully submitted,

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