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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 250 SSM 23
409-411 Sixth Street, LLC,
Appellant,
v.
Masako Mogi,
Respondent.

Submitted by Magda L. Cruz, for appellant.
Submitted by Steven M. DeCastro, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed,
with costs, and the matter remitted to the Appellate Division for
further proceedings in accordance with this memorandum. The
certified question should not be answered upon the ground that it

is unnecessary.

Landlord 409-411 Sixth Street, LLC commenced a holdover proceeding to evict tenant Masako Mogi from her rent-stabilized apartment in New York City on the ground that she was not using the apartment as her primary residence as required by the Rent Stabilization Code (9 NYCRR 2524.4). After a bench trial, New York City Civil Court found in landlord's favor, determining that tenant had not used the apartment as her primary residence. The Appellate Term affirmed the judgment, concluding that a fair interpretation of the evidence supported the Civil Court's determination. In a 3-2 decision, the Appellate Division reversed the Appellate Term order, denied the holdover petition, and dismissed the proceeding.

We agree with the dissenting opinion that the Appellate Division applied the incorrect standard of review to the Appellate Term order. In primary residence cases, where the Appellate Division acts as the second appellate court,

"the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses"

(Claridge Gardens v Menotti, 160 AD2d 544, 544-555 [1st Dept 1990]; see also Thoreson v Penthouse Intl., 80 NY2d 490, 495 [1992]). The Appellate Division did not apply this standard of review to this case, instead substituting its own view of the

trial evidence. Accordingly, the case needs to be remitted to that court to apply the appropriate standard of review.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed, with costs, case remitted to the Appellate Division, First Department, for further proceedings in accordance with the memorandum herein, and certified question not answered upon the ground that it is unnecessary. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided October 10, 2013