High Tech
(But Not Necessarily Expensive) Ways to Prove Non-Primary Residence In Rent Stabilization Cases

Surveillance Cameras and/or E-Discovery

YOU WANT THAT LIFE-LONG TENANT OUT?

THEN LET THE TECH REMOVE ALL DOUBT!

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I. INTRODUCTION

This article examines some high-tech and, if used correctly, affordable ways to help the landlord prove its case in a Rent Stabilization non-primary residence matter, namely – by using security cameras and/or electronic discovery.

II. UNDERSTANDING NON-PRIMARY RESIDENCE CASES

Before I can talk about sexy ways to prove the landlord's non-primary residence case, I want to first talk about what a non-primary residence case is and how it can be won or lost. I find that landlords often have many misconceptions about this area. Landlords think there is some magic "180 days in the apartment" rule, or that the case all comes down to where the tenant is registered to vote. Such assumptions are incorrect.

Non-primary residence is a very frequently litigated area.[2] The first and most important point to note is that there are no absolute bright line rules when it comes to determining what constitutes a non-primary residence; *the cases are highly fact*

[1] Author acknowledges contributions from Jay. B. Itkowitz, Kesav M. Wable, and Stewart Wolf.

[2] One of the most common reasons that a landlord may refuse to renew a Rent Stabilized lease is that the tenant does not occupy the premises as his primary residence, pursuant to 9 NYCRR § 2524.4.

specific. For example, you can have two separate cases where the tenant is away from the apartment frequently, over a long period of time, to care for sick, elderly parents; in one case a judge will find that the apartment is the tenant's primary residence and in another the court will find that the apartment is not the tenant's primary residence. To reach its conclusion, the court looks at the credibility of the witnesses at trial and the overall totality of circumstances.

In a previous article, I presented synopses of about fifty actual appellate cases (persuasive authority) and demonstrated exactly how courts handle the evidence in a non-primary residence case. That article is over twelve, single-spaced pages, so here I just summarize, in list format, variables that courts consider.

Courts Consider the Following Kinds of Evidence in a Rent Stabilization Non-Primary Residence Case (I will limit myself to twenty items):

(1) Tenant's intention regarding returning to the apartment. (Is it vague or definite?)[3]

(2) Tenant's ability to return to the apartment. (Is he stuck in jail or a nursing home indefinitely? Or will he soon be back?)[4]

(3) The number of days a year the tenant is gone from the apartment. (There is not, however, an absolute requirement that a tenant quantify the numbers of days he or she spends in the apartment each relevant year.)[5]

[3] *Rockledge E v. Michaelson*, 21 HCR 403B, 8/10/93 N.Y.L.J. 21 (col. 2) (1993).

[4] *1286 First Realty v. Malatinsky*, 176 Misc.2d 596, 675 N.Y.S.2d 25 (1st Dept. 1998); *Emay v. Norton*, 136 Misc.2d 127, 519 N.Y.S.2d 90 (1st Dept. 1987); *Katz v. Gelman*, 177 Misc.2d 83, 676 N.Y.S.2d 774 (1st Dept. 1998).

[5] *409-411 Sixth Street, LLC v. Mogi*, 100 A.D.3d 112 (1st Dept. 2012).

(4) The reason the tenant is gone from the apartment. (Is he caring for a relative at the end of the relative's life? Did the relative die a year ago without the tenant returning?)[6]

(5) The tenant's job. (Is she a singer on the road ten month's a year? Or does she have a full time desk job in Minnesota?)[7]

(6) Documents – driver's license, voter registration, tax returns, bank statements (not obtained during the proceeding).[8]

Is your tenant a professional singer legitimately on the road? Or does she really not live in the apartment?

[6] *Lance Realty Co. v. Fefferma*, 5 Misc.3d 134(A), 799 N.Y.S.2d 161 (1st Dept. 2004); *Nussbaum v. Gilmartin*, 2003 WL 262341 (1st Dept. 2003); *Kalimian v. Homberg*, 2001 WL 1530165 (1st Dept. 2001).

[7] *Patchin Place LLC v. Fox*, 3 Misc.3d 127(A), 787 N.Y.S.2d 679 (1st Dept. 2004); *Sommer v. Turkel*, 137 Misc.2d 7, 522 N.Y.S.2d 765 (1st Dept. 1987).

[8] *Bobbyson v. Heilbut*, 2002 WL 825117 (1st Dept. 2002).

(7) Who is actually in the apartment. (Is anyone else living in or using the apartment while the tenant of record is absent? Did the other occupants put the telephone, utility and cable accounts in their names?)[9]

(8) The tenant's degree of convenience or personal gain the apartment affords the tenant. (Is there evidence that the apartment is being used as a pied-a-terre or NYC Office?)[10]

(9) The condition of the apartment. (Was the tenant forced to leave due to asbestos or mold conditions?)[11]

(10) The tenant's immigration status.[12]

(11) How many witnesses the tenant calls on his behalf, and how credible they are. (Neighbors, the superintendent, etc.)[13]

(12) How many witnesses the landlord calls on his behalf and how credible they are. (Neighbors, the superintendent, etc.)[14]

(13) Where the rest of the tenant's immediate family resides. (Although a husband and wife <u>can</u> maintain separate primary residences.)[15]

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[9] *406 W. 47th St. HDFC v. Picot*, 2003 WL 22928570 (1st Dept. 2003); *89 E 3rd v. Lamotta*, 2001 WL 1682424 (1st Dept. 2001).

[10] *Park Towers v. Universal Attractions*, 274 A.D.2d 312, 710 N.Y.S.2d 571 (1st Dept. 2000); *Rocky v. Weston*, 186 Misc.2d 251, 717 N.Y.S.2d 823 (1st Dept. 2000).

[11] *Emel Realty v. Carey*, 288 A.D.2d 163, 733 N.Y.S.2d 188 (1st Dept 2001).

[12] *Katz Park Avenue v. Jagger*, 898 N.E. 2d. 17 (2008).

[13] *409-411 Sixth Street, LLC v. Mogi*, 100 A.D.3d 112 (AD 1st 2012).

[14] *N.Y. Hanover Corp. v. Las Casas*, 2 Misc.3d 140(A), 784 N.Y.S.2d 921 (1st Dept. 2004); *Carmine Ltd. v. Gordon*, 41 A.D.3d 196 (1st Dept., App. Term 2007); *3657 Realty Co., LLC v. Jones*, 18 Misc.3d 82 (1st Dept., App. Term 2007).

(14) Electric and gas usage in the apartment. (Is it sporadic or minimal?)[16]

(15) Whether the tenant has other leases or deeds in her name and how well the tenant explains why he has other leases or deeds in his name.[17]

(16) Benefits received by the tenant as a result of other residences. (Did the tenant claim a homestead exception at his Florida residence?)[18]

(17) Instances where the tenant lists other residences on formal documents. (Did she file bankruptcy claiming her address as New Jersey?)[19]

(18) The amount of furniture and personal items that the tenant has in the apartment.[20]

(19) The location of the tenant's regular place of worship, or his health club.[21]

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[15] *60 West 57 Realty, Inc. v. Durante*, 17 Misc.3d 71 (1st Dept., App. Term 2007).

[16] *Goldman v. Lensky*, 4 Misc.2d 140, 156 N.Y.S.2d 875 (1st Dept. 1956).

[17] *520 E 81st v. Roberts*, 21 HCR §469A, 9/20/93 N.Y.L.J. 22 (col. 4) (1st Dept. 1993).

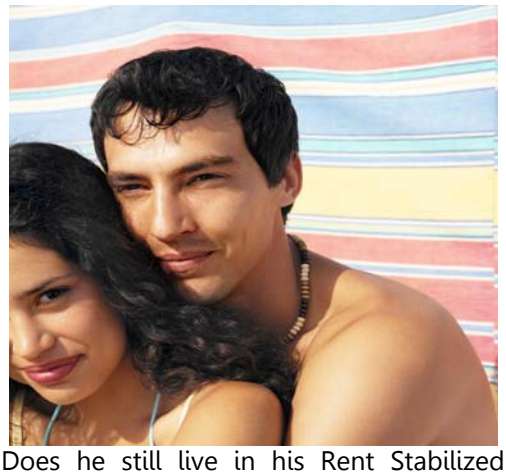
[18] *335-7 LLC v. Tirelli*, 2003 WL 21512452 (1st Dept. 2003); *985-987 First Ave. LLC v. Aretakis*, 25 Misc.3d 62 (1st Dept., App. Term 2009).

[19] *ALH Properties v. Castaldo*, 19 Misc.3d 140(A) (1st Dept., App. Term 2008).

[20] *Glenbriar v. Lipsman*, 5 N.Y.3d 388, 804 N.Y.S.2d 719 (2005).

[21] *422 East 9th LLC v. Patton*, 29 Misc.3d 137(A) (, 1st Dept., App. Term 2010).

(20) One case turned on the fact that the 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.[22]



Does he still live in his Rent Stabilized Apartment or did he move in with her?

The initial burden of proof is the landlord's. In a non-primary residence proceeding, the landlord must establish by a preponderance of the evidence that during the relevant time period, the tenant did not occupy the subject apartment as his or her primary residence. Upon a landlord's prima facie showing of non-primary residence, the tenant may rebut the landlord's proof by establishing a substantial physical nexus to the apartment. The ultimate burden of persuasion remains on the landlord seeking eviction on the basis of non-primary residence.[23]

The takeaway is that these are fact-specific cases. The court knows non-primary residence when it sees it, and the landlord's attorney's job is to make the judge see it. Now let's talk about how surveillance cameras, e-discovery, and other more modern forms of evidence can help the landlord's case.

[22] *Sutton v. Hutton*, 4 Misc.2d 132(A) (1st Dept. 2004).

[23] *409-411 Sixth Street, LLC v. Mogi*, 100 A.D.3d 112 (1st Dept. 2012).

III. NON-PRIMARY RESIDENCE CASES AND SURVEILLANCE CAMERAS

Sometimes, that long list of evidentiary items presented above still leaves the Court on the fence. Maybe the documentary evidence points to the apartment being a primary residence, but the tenant has a deed in his name to a house on western Long Island. Maybe the tenant's friend testifies that the tenant is often in the apartment, but the superintendent testifies to the contrary, and one witness is not that much more credible than the other. In such instances, a picture can be worth a thousand words.

It is permissible to install and utilize video cameras to prove a non-primary residence case under the Rent Stabilization Law. In a case litigated by my firm, Itkowitz PLLC, the First Department Appellate Term held that the evidence uncovered by the video cameras (if done properly) could be considered by the Court, and that the Civil Court judges have no authority to direct the landlord to remove the cameras, despite the tenant's protestations to the contrary.[24]

Cameras provide something more concrete than the superintendent's testimony.

[24] *Broome Realty Assoc. v. Sek Wing Eng*, 182 Misc.2d 917, 918 (, 1st Dept., App. Term 1999); *see also, 521 E.5th LLC v Brandon*, 25 Misc.3d 134(A) (1st Dept., App. Term 2009) ("Landlord presented video surveillance tapes and testimony by the building's resident superintendent tending to establish the tenant's sporadic use of the subject Manhattan apartment and the frequent presence therein of a series of other persons"); *TOA Const. Co., Inc. v Tsitsires*, 54 A.D.3d 109, 113 (1st Dept. 2008) (overturning Appellate Term decision, holding that landlord had sufficiently proven, via the use of surveillance camera footage and testimony from a superintendent, that the premises were being used a non-primary residence).

The landlord's counsel needs to work closely with the surveillance camera technologists to streamline both the technical and legal processes involved with utilizing cameras, or the evidence obtained from the cameras might not be admissible.

A videotape must be "authenticated" before it can be used as evidence in a court proceeding[25]. It is, therefore, often helpful if someone actively monitors the recording, rather than allowing months of footage to build up before reviewing it. As a practical matter, this makes review of the video much more manageable and meaningful. However, it is not absolutely necessary to monitor the video feed. Testimony from a superintendent, or someone else who has knowledge of the circumstances and who actually reviewed the footage, is usually sufficient.[26]

I recently encountered surveillance vendors whose technology may make the whole authentication process easier by utilizing motion-activated cameras. Using motion-activated cameras means there is much less footage to review.

[25] *See, e.g., People v. Fondal*, 154A.D.2d 476 (2d. Dept. 1989). (Holding that there was an adequate foundation for the introduction of a videotape into evidence where an employee observed, through the medium of a closed-circuit television, defendants engaged in the commission of a theft, and testified that the videotape accurately depicted the events which he had observed.)

[26] *See Zegarelli v. Hughes*, 3 N.Y.3d 64, 69 (2004) ("Testimony, expert or otherwise, may also establish that a video tape truly and accurately represents what was before the camera").

Imagine using a motion-activated, *hidden* camera. And the camera reveals that:

- The tenant comes and goes from the apartment much less frequently then the tenant otherwise testifies to;

- Someone else other than the tenant is coming and going from the apartment and the tenant is not there at all, contrary to the tenant's testimony; or

- The people coming and going from the apartment change all the time, stay for the weekend only, and have suitcases! The tenant is in the mini-hotel business making money on your real estate by using it as an "Air B&B"! Hey – it's a hot trend.[27]

Is your Rent Stabilized tenant using the apartment as an "Air B&B"?

[27] http://en.wikipedia.org/wiki/Airbnb.

Moreover, what used to make cameras cost a lot was not so much the camera, but its wiring. Today, there are wireless camera installations available.

I often advise my landlord clients to stop guessing about whether the tenant is really there or not, and simply see for yourself!

IV. NON-PRIMARY RESIDENCE CASES AND ELECTRONIC DISCOVERY

What is Electronic Discovery?

At this point, it is surprising if a whole week goes by without some scandal bursting onto the media scene because a muckraker has unearthed damaging emails, texts, tweets, Facebook posts or any myriad other digital information about a public figure. Welcome to the world of electronic "metadata" evidence and its offspring - the legal process called electronic discovery, or e-discovery. In this new world, anything that someone involved in a lawsuit (or under investigation) ever emailed, texted, revealed in social media, or digitally blurted can be dug up and used against them.

People drop their guard when using email and sending text messages.

Discovery, in traditional legal terms, is the pre-trial stage where litigants must provide the other side with all documents relating to the matter at hand. In the past, this typically meant stacks and boxes of printed material that the opponent reviewed before sending over.

Thanks to recent court rulings and regulations, courts allow high-tech investigators to search the hidden documents and data on any computer used by a litigant or a relevant third-party for a "smoking gun." Moreover, if you are found to have deleted or erased potentially damaging e-mails or other e-data that figure in a case, it can adversely affect the outcome, as much as an outright admission of guilt.

E-discovery is now an element in most large-scale litigations -- real estate, contract disputes, intellectual property cases, personal injury – and it can show up in landlord and tenant cases as well.

People are frequently careful about what they do and do not put into formal writing. Unfortunately, they often drop their guard in informal communications like emails and text messages. This lapse can come back to haunt them. Cases can also be lost when an attorney does not adequately consider or understand these issues. My firm recently handled cases in which defendants who claimed ignorance of a misdeed were shown to have received emails about it, and where litigants were found to have emailed statements totally contradictory to what they testified in court.[28]

Resolving e-discovery issues is a new and complex aspect of law. Navigating it requires new forms of legal expertise and diligence. What an attorney knows and does about e-discovery issues can dramatically affect the outcome and the cost of litigation. Thus a landlord-tenant lawyer should not dismiss the need to educate himself about electronic discovery, notwithstanding that it is a relatively new dimension to consider in non-primary residence cases.[29]

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[28] *Einstein and Boyd v. 357 LLC and the Corcoran Group, et. al.*, (Sup. Ct., N.Y. Cty, 2009).

[29] From http://itkowitzteachingandpublishing.blogspot.com/2010/11/you-must-know-about-electronic-evidence.html

Here are four things every business person needs to know about e-discovery:

(1) Never write or text anything you wouldn't want to have some day surface in a court.

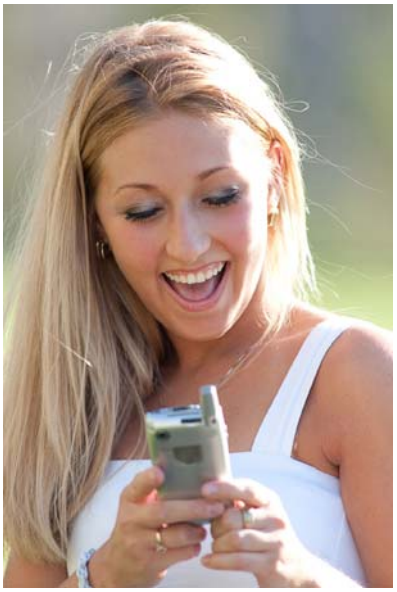
(2) Should you become party to a lawsuit, resist the temptation to delete potentially damaging files from your computer. Cyber-sleuths working under court order can detect such cover-ups, and you will face serious sanctions. *The obligation to preserve begins the minute it becomes apparent that you will be sued or suing.*

(3) Have adequate backup and storage in place for all old files and emails. Neither "auto-deleting" nor "insufficient storage space" is an excuse for failing to preserve your system data, and will be held against you. *Involve legal counsel and senior management when your organization's IT department makes policy decisions on system wide storage and backup.*

(4) Never discuss a pending court matter in writing with employees, vendors, business partners or anyone except your lawyer. Discussions with your attorney are protected by the lawyer-client privilege. *Forwarding a file about that discussion to a third party, absent a privilege, shatters that protection.*

Electronic Discovery and Non-Primary Residence Cases

The prevalence of electronic discovery in present-day litigation and the widespread use of social media stand to drastically change the non-primary residence area of landlord-tenant law. Indeed, even photographs shared on social media platforms can be used to contradict the tenant's testimony that the unit was his/her primary residence.



Is your Rent Stabilized Tenant using the apartment as a pied-a-terre?

A few years back, when Facebook was new and people were not yet making their profiles private, I was prosecuting a non-primary residence case against a tenant in Park Slope, Brooklyn. Right there on the tenant's Facebook page were invitations to friends to come and see her and her new fiancé at their home…in Washington, D.C.! Merely by printing out and mailing those pages to the tenant, I was able to get her to surrender the keys.

Today, most people's social media profiles are private, and attorneys and their agents may not pretend to be "friends" in order to see private profiles.[30] This is where e-discovery comes in.

[30] New York City Bar on Professional Ethics, Formal Opinion 2010-2, says, with respect to prospective jurors that:

> Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney.

Recently an appellate court has held that litigants can get to some aspects of an opponent's private Facebook postings. A personal injury plaintiff commenced an action to recover damages for injuries arising out of an automobile accident. At a deposition, she testified she sustained injuries as a result of the accident, which impaired her ability to play sports, and caused her to suffer pain that was exacerbated in cold weather. In searching portions of her Facebook profile that were not blocked by privacy settings, the defendant's attorneys discovered photographs, dated after the accident, depicting the plaintiff skiing.

The defendant then served a demand for authorizations seeking access to all status reports, emails, photographs, and videos posted on the allegedly injured plaintiff's Facebook profiles since the date of the accident. The allegedly injured plaintiff cross-moved for a protective order striking the demand for authorizations. The defendant demonstrated that the plaintiff's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and the court held that it was reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue. But the court also said that due to the likely presence in the plaintiff's Facebook profile of material of a private nature that was not relevant to the lawsuit, that the court should conduct an *in camera* (only the court can see it) inspection of all status reports, emails, photographs, and videos posted on the plaintiff's Facebook profile to determine which of those materials, if any, were relevant to her alleged injuries[31].

Accordingly, courts are allowing litigants to circumvent claims of privacy to get to the truth. A landlord's motion to compel electronic discovery of the nature described would most likely be successful, considering the presumption in favor of discovery in non-primary residence proceedings.[32]

[31] *Richards v. Hertz Corp*. 100 A.D.3d 728 (2d Dept. 2012).

[32] *Cox v. J.D. Realty Assoc*., 217 A.D.2d 179, 183–84 (1995).

It should be noted that many landlord and tenant attorneys are hesitant to employ e-discovery, since it is not only foreign to them, but potentially expensive to the client, involving the utilization of pricey, third-party vendors to examine the computers at issue. However, sometimes merely the threat of using e-discovery can lead to a swift resolution, even saving the litigants money.

For example, from a strategic perspective, many tenants will be loath to even have the specter hanging over them of possibly having their personal, online lives aired out in a public forum. Instead, they may opt for settling a non-primary residence case before it even goes to trial. Thus, at the very least, e-discovery offers landlords a powerful tool to gain leverage in such matters.

Due to the relative novelty of the issue, there is currently scant case law involving the use of electronic and social media evidence in non-primary residence litigation. That is bound to change soon.

V. CONCLUSION – DO NOT BE AFRAID OF USING TECHNOLOGY TO PROVE YOUR NON-PRIMARY RESIDENCE CASE

Do not be afraid of using technology to prove your non-primary residence case. Technology, when used properly and responsibly by landlords and their counsel in litigation, can be a very powerful thing. Moreover, as demonstrated above, if these technologies are used wisely and strategically, they may not add much to the cost of the law suit.

If you would like to discuss your specific case with me, my contact information can be found on my website, along with tons of other valuable information, at www.itkowitz.com.

MORE INFORMATION

Itkowitz PLLC is a boutique law firm in New York City that serves the commercial real estate and business communities, and our practice encompasses sophisticated commercial litigation, trials and transactions.

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ABOUT THE AUTHOR

Michelle Maratto has been practicing real estate law, specializing in the area of residential and commercial landlord and tenant law in New York City, for twenty years. She is also very experienced in all manner of real estate transactions and in general commercial litigation. She has been with Itkowitz PLLC since 1997.

Michelle publishes and speaks frequently. The groups Michelle has taught for, or presented to, and the publications she has written for include: Lawline.com, Lorman Education Services, The Association of the Bar of the City of New York, The Practising Law Institute, The New York State Bar Association, Real Property Section, Commercial Leasing Committee, Thompson Reuters, The Cooperator, The New York State Bar Association CLE Publications.

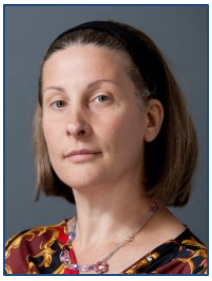
Michelle is currently co-authoring the New York State Bar Association's New York Commercial Landlord and Tenant Law and Procedure Book. Michelle authored a manual on evictions in New York City for Lorman Education Services, and co-authored a chapter on lease remedy clauses for the New York State Bar Association Commercial Leasing Manual.

Michelle's twelve-hour, five-part continuing legal education program for Lawline remains one of that provider's most popular programs. The three most recent classes taught by Michelle were: Document Review and Production Platforms in the Boutique Law Firm Environment, Learning Motion Practice in an Apprentice Profession, and Post-Foreclosure Evictions in New York City.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York.

Michelle is a pioneer of Legal Project Management, a unique and better way for lawyers and clients to work together. Michelle writes and speaks extensively about Legal Project Management. Ask Michelle about our alternative legal fee options! (This is her favorite topic.)

Michelle went to Union College where she received a Bachelor of Arts in Political Science in 1989. She later received her Juris Doctorate from Brooklyn Law School in 1992.



Michelle is also a managing member of an executive office suite company and a founding member of an internet startup company that launched in 2012.

There are lots of ways to keep up with Michelle. Michelle's Legal Project Management blog is becoming very popular. Michelle publishes and speaks frequently. And when Michelle tweets, which is not an obnoxious amount, you can not only actually understand what she is saying, but glean useful stuff about real estate, business, and the legal industry that you might miss between the headlines. Michelle would be happy to speak to you.

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