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OVERNIGHT MAIL

October 16, 2019

Mr. Joseph P. Asiello
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: Daniel Collazo et al. v. Netherland Property Assets LLC et ano.
APL 2018-00108
New York County Clerk's Index No. 157486/16

Dear Mr. Asiello:

This firm represents the plaintiffs in this action. We write in response to your letter dated September 17, 2019. In that letter, you stated that the Court will accept further argument, in letter form, addressing whether the Housing Stability and Tenant Protection Act of 2019 (L. 2019, ch 36) ("HSTPA") governs the issues presented on this appeal; and if so, the appropriate application of such law; and addressing the propriety and desirability of this Court determining such questions in the first instance on this appeal.

I. THE HSTPA GOVERNS THE ISSUES PRESENTED ON THIS APPEAL

There can be no doubt that the HSTPA governs the issues presented on this appeal. Part F, §7 of the HSTPA provides, in relevant part: "This act shall take effect immediately and shall apply to any claims pending or filed on and after such date." Plaintiffs' claims were pending in this Court at the time of the enactment of the HSTPA, and therefore, the HSTPA governs in this case. The statutory language could not be clearer or less susceptible to any contrary interpretation.

As this Court stated in *Kuzmich v. 50 Murray St. Acquisition LLC*, ___ N.Y.3d ___, 2019 NY Slip Op 05057 at 3, "The legislature's intention, as reflected in the language of

the statute at issue here, is clear and inescapable." Furthermore, "The statutory language unambiguously establishes the legislature's intent in this case, and the legislative history is not to the contrary." *Kuzmich* at 4. The analysis of this Court in *Kuzmich* is fully applicable to this case which, similarly, involves statutory language that is equally unambiguous.

Plaintiffs fully concur with the position of the DHCR and the Attorney General in their amicus brief,[1] wherein they assert that the HSTPA is fully applicable to this case because it involves a claim that was pending on the effective date of the HSTPA. As correctly noted by the DHCR and the Attorney General, the Court "is required to decide [a case] on the basis of the law as it exists at the time of [its] decision." Amicus Brief at 22, citing *Knapp v. Fasbender*, 1 N.Y.2d 212, 219 (1956).

In a recent unanimous Decision and Order, *Dugan v. London Terrace Gardens L.P.*, ___ A.D.3d ___, 2019 NY Slip Op 06578, the Appellate Division, First Department held the HSTPA fully applicable to an action pending since 2009. The Court in *Dugan* directed that the overcharges be calculated pursuant to the methodology contained in the HSTPA, notwithstanding the fact that, in 2017, the Supreme Court had already issued a detailed ruling on the methodology pursuant to the law in effect prior to the HSTPA:

> "On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36)(HSTPA) landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the State. Of relevance to this appeal is Part F of the HSTPA, which amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The legislation directed that the statutory amendments contained in Part F 'shall take effect immediately and shall apply to any claims pending or filed on or after such date' (HSTPA, Part F § 7) Because plaintiffs' overcharge claims were pending on the effective date of Part F of the HSTPA, the changes made therein are applicable here."

Here, the applicability provision of the HSTPA (Part F § 7) is identical. Plaintiffs herein, who chose to litigate their overcharge and status claims in Supreme Court,

[1] References to the Amicus Brief of the DHCR and the Attorney General will be cited as "Amicus Brief."

rather than DHCR, and have consistently maintained their right to choice of forum are, consistent with *Dugan*, entitled to proceed with their claims in Supreme Court.

A decision which specifically addressed the applicability of the HSTPA's choice-of-forum provisions to a case that was previously dismissed pursuant to the doctrine of primary jurisdiction is *560-568 Audubon Tenants Association, et al. v. 560-568 Audubon Realty, LLC, et al.,* 2019 NY Slip Op 29285 (Sup. Ct. NY Co.) (Jaffe, J.). In *560-568 Audubon,* Justice Jaffe, in a decision dated September 13, 2018, and citing to *Collazo,* dismissed, in its entirety, a multi-plaintiff rent overcharge complaint based on the doctrine of primary jurisdiction. Plaintiffs appealed to the Appellate Division. After enactment of the HSTPA, and while the appeal was pending, plaintiffs moved in Supreme Court to renew and reargue. Supreme Court granted plaintiffs' motion and held: "As plaintiffs' claims remain unresolved until the appeal of the September 13 [2018] decision is decided, they are pending…Consequently, as plaintiffs have chosen to have their rent overcharge claims brought in this court, their action may not be dismissed in favor of the claims being heard by DHCR."

In numerous other cases, the lower courts have upheld the applicability of the HSTPA to pending claims. *See, e.g., SF 878 E. 176th LLC v. Grullon,* 65 Misc.3d 171 (Civ. Ct NY Co. (Garland, J.) (stipulation and judgment entered prior to enactment of HSTPA vacated based on HSTPA); *Fried v. Lopez*, 64 Misc.3d 1025 (Civ. Ct. Kings Co.) (Harris, J.) (court rejects petitioner's retroactivity arguments, applies HSTPA and dismisses owners' use holdover proceeding commenced prior to passage of HSTPA); *Ollie Associates LLC v. Santos*, 64 Misc. 3d 1208 (Civ. Ct. Bronx Co.) (Ibrahim, J.); *Gold Riva 2 LLC v. Rodriguez*, 64 Misc. 3d 1228(A)(Civ. Ct. Bronx Co.) (Bacdayan, J.); *699 Venture Corp. v. Zuniga,* 2019 Slip Op. 2900 (Civ. Ct. Bronx Co.)

In their supplemental brief, defendants advance a number of arguments as to why, somehow, this case is not "pending" and therefore the HSTPA does not apply to this case. All of these arguments are unavailing. For any of these arguments to be accepted, this Court would have to approve the rationale, urged by defendants, that this claim is no longer "pending" because it has been dismissed by a lower court, which dismissal was affirmed by the Appellate Division, even though plaintiffs are now actively pursuing an appeal in this Court. Defendants provide no authority to support the proposition that a claim that has been dismissed by a lower court is no longer pending even though a timely appeal is actively being pursued in a higher court.

Defendants cite to CPLR 5602(a) and argue that plaintiffs' claims are not "pending" under the HSTPA because the Appellate Division's order, affirming the lower court's dismissal, was "final" for the purpose of allowing an appeal to this Court. That argument ignores the obvious fact that this Court could reverse the Appellate Division. Just because the Appellate Division's order was considered "final" for purposes of CPLR

5602(a) does not mean that plaintiffs' claims are no longer pending. Clearly plaintiffs' claims are pending, as this Court has granted leave to appeal.

Defendants also cite to cases that, they claim, distinguish between claims that remain pending and claims that have been dismissed. *See, e.g., Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 738 (2012); *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 482, n. 1 (2004); *Sirlin Plumbing Co. v. Maple Hill Homes, Inc.*, 20 N.Y.2d 401, 403 (1967). Defendants contend, incorrectly, that these cases support their position that the HSTPA does not apply to this case.

However, none of the above decisions hold that a claim that has been dismissed is no longer pending where a timely appeal is being actively pursued. These cases all involved lawsuits where the plaintiffs asserted multiple causes of action, or lawsuits where the defendants interposed counterclaims. The language of those cases cited by defendants is simply explaining that some of the claims remained pending in the lower courts while appeals were being pursued with regard to other claims. These cases in no way stand for the proposition that a claim that has been dismissed is not pending even though an appeal of that dismissal is being pursued.

Defendants also argue that plaintiffs' claims are not "pending" under the HSTPA because plaintiffs have asked this Court to "reinstate" plaintiffs' claims. However, a claim that has been dismissed by a lower court has to be reinstated by this Court so that the case can be remanded to the lower court for the plaintiffs to pursue their claims there. There is no basis whatsoever for the argument that plaintiffs' claim are not "pending" under the HSTPA because plaintiffs are asking this Court to reinstate their claims by remanding their case to the lower court for further proceedings. The case law cited by defendants in this regard is inapposite.

Next, defendants argue that the language of the HSTPA "stands in marked contrast" to the retroactivity provision contained in the Rent Regulation Reform Act of 1997 (L. 1997, ch 116, §46[1]). Under the 1997 provision, the amendments to the rent laws adopted at the time applied "to any action or proceeding pending in any court or any application, complaint or proceeding before an administrative agency on the effective date of this act, as well as any action or proceeding commenced thereafter." Defendants argue that the Legislature chose not to adopt the same language in the HSTPA "against a common-law backdrop in which claims that have been dismissed are not considered pending, even while on appeal." This argument is specious. There is no "common-law backdrop" in which a "claim" that has been dismissed by a lower court is not "pending" even though an appeal is actively being pursued.

There is no evidence whatsoever to support defendants' proposition that, whereas in 1997 the Legislature intended that the amendments to the rent laws would

apply to claims that had been dismissed by lower courts where an active appeal was being pursued, in 2019 the Legislature did not intend that amendments to the rent laws would apply to claims that had been dismissed where an active appeal was being pursued.

Contrary to defendants' argument, there is no legal or meaningful distinction between the term "action or proceeding" in the 1997 provision and the term "claim" in the HSTPA. Just because the Legislature used slightly different words in the 1997 provision than they did in the HSTPA does not mean that the Legislature intended the HSTPA to have any different meaning. The terms mean the same thing. There is no evidence that the Legislature intended that the two provisions be interpreted differently simply because the wording is slightly different.

In summary, defendants' attempts to convince this Court that the HSTPA does not apply to this case are entirely unavailing. Clearly the HSTPA does apply to this case, because the clear statutory language is not susceptible to any other possible interpretation.

II. THE HSTPA REQUIRES THAT THE DECISION AND ORDER OF THE APPELLATE DIVISION BE REVERSED, AND THIS CASE BE REMANDED TO SUPREME COURT FOR FURTHER PROCEEDINGS.

The HSTPA, Part F, §3 states, "The courts and the [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum." The clear meaning of that statutory provision is that, because plaintiffs have elected to pursue their overcharge claims in Supreme Court, the case is not susceptible to dismissal pursuant to the doctrine of primary jurisdiction.

As correctly stated by the DHCR and the Attorney General, the HSTPA's choice-of-forum provisions "simply confirm that the lower courts should have retained the jurisdiction that they always indisputably possessed over timely filed claims." Amicus Brief at 23.

It is noteworthy that the Attorney General and the DHCR acknowledge that the DHCR "has long shared authority to adjudicate [rent overcharge cases] with state courts." Amicus Brief at 7.

The Supreme Court and the Appellate Division gave no weight to plaintiffs' choice to proceed in Supreme Court rather than at the DHCR. Now, with the enactment of the HSTPA, plaintiffs' choice of forum must be honored, and the case must be allowed to proceed in Supreme Court.

Defendants have never articulated any compelling reason as to why this Court should disregard plaintiffs' choice of forum and uphold the dismissal of this case based on the doctrine of primary jurisdiction, notwithstanding the unquestionable authority of the Supreme Court to hear and decide overcharge cases in the first instance, the vast experience of the Supreme Court with overcharge cases, and the unquestioned right (now absolutely clear under the HSTPA) of tenants to choose the forum in which to bring their claims.

Accordingly, it is clear that pursuant to the HSTPA, this case cannot be dismissed pursuant to the doctrine of primary jurisdiction, and that plaintiffs must be permitted to pursue their rent overcharge claims in Supreme Court.

III. IT IS ENTIRELY APPROPRIATE AND DESIRABLE FOR THIS COURT TO APPLY THE HSTPA IN THE FIRST INSTANCE ON THIS APPEAL

There is no reason for this Court not to decide, in the first instance, that the HSTPA applies to this case. The Court has afforded all parties ample opportunity to brief the issue of the applicability of the HSTPA. The issue of the applicability of the HSTPA is purely an issue of law. Justice would not be served by remanding the case for a lower court to decide the applicability of the HSTPA.

In conclusion, because the HSTPA applies to this case, and the HSTPA states that the courts have concurrent jurisdiction with the DHCR over rent overcharge claims subject to the tenant's choice of forum, this Court should find that the doctrine of primary jurisdiction is not a proper basis to dismiss this action; the decision and order of the Appellate Division should be reversed in its entirety; and this case should be remanded to Supreme Court for further proceedings.

Respectfully submitted,

Ronald S. Languedoc
Jesse D. Gribben