To be argued by
MARC BOGATIN
(30 Minutes)

APL-2019-00132

New York County Index No.: 110053/2011

COURT OF APPEALS
STATE OF NEW YORK

LAURA DiLORENZO,

Plaintiff-Appellant,

-against-

WINDERMERE OWNERS LLC,
and WINDEMERE CHATEAU, INC.,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

LAURA DiLORENZO

BRIEF COMPLETED:
August 12, 2019

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RELATED LITIGATION

There is no related litigation relating to this appeal.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to CPLR 5601(a). The Appellate Division decision under appeal herein finally determined the action, as it reversed the trial court's decision in favor of plaintiff, vacated the judgment in favor of plaintiff, and dismissed the complaint. The Appellate Division decision contained a two judge dissent in favor of plaintiff on a point of law.

The principal argument advanced on this appeal is that the Appellate Division majority, in holding that defendant landlords did not have to show compliance with the useful life rule of the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC), in order to show an entitlement to a rent increase for Individual Apartment Improvements (IAI), disregarded clear and controlling language of both the RSL and RSC.

This issue was raised by appellant in the trial court at A44-46, 368-76, 391-93, 398-403, 413-14, 673-76. This issue was considered by the trial court at A6-8. This issue was considered by the Appellate Division majority and dissent at AA23-26, 49-52.

PRELIMINARY STATEMENT

In this residential rent overcharge action, plaintiff tenant Laura DiLorenzo alleges that, immediately prior to her tenancy, the landlord had illegally removed her apartment from rent stabilization, based on a claim of high rent vacancy that the landlord was not actually entitled to. As plaintiff brought her action within the four year look back period (recently extended by the legislature to six years), the burden was on the defendants, old owner, Windemere Chateau, Inc., and new owner, Windermere Owners, LLC, to prove that there was a lawful basis to increase the rent from the last stabilized rent of $1,450.70 to $2,000, which at the time was the legal threshold for a high rent vacancy de-stabilization.

To meet this burden, defendants attempted to show at trial that landlord had made qualifying Individual Apartment Improvements (IAI) in an amount that exceeded $21,972, which the parties agreed was the minimum required to have lawfully de-stabilized the apartment.

At a bench trial before the Honorable Lucy Billings, J.S.C., defendants attempted to show that landlord had made just over $82,000 in qualifying IAI. Landlord presented the testimony of four witnesses, consisting of the building's former property manager, and representatives of three contractors.

At trial, plaintiff argued that the evidence presented by defendants was insufficient to meet their IAI burden. For example, the former property manager testified that he had no recollection of what work was actually done on the subject apartment, and two of the three contractor witnesses had no personal knowledge of the work, as they had never visited or inspected the job site, and completely lacked any firsthand knowledge.

In addition, and as a separate and independent ground on which to disallow defendants' IAI claim, plaintiff argued that landlord was prevented from taking any IAI increase in 2009 (the year of the apartment's de-stabilization) by virtue of the fact that landlord's 2009 IAI increase was the third IAI increase taken by landlord within fourteen years, with the landlord having taken prior IAI increases in 1995 and 1998.

As both the Rent Stabilization Law (RSL), NYC Admin. Code, § 26-511(c)(13), and Rent Stabilization Code (RSC), 9 NYCRR § 2522.4(a)(11), provide that a landlord may not take successive IAI increases, where the useful life of the prior improvements has not been exceeded, plaintiff argued that it was incumbent upon landlord to show compliance with the useful life rule in order to show its entitlement to an IAI increase in 2009. Specifically, plaintiff argued that defendant had to show either a) that the 2009 improvements were not duplicative of the earlier improvements, or b) the useful life of the earlier improvements had passed.

In its Decision, the trial court found for plaintiff on both grounds. In light of the deficiencies in proof presented by landlord, including the lack of recollection and/or personal knowledge on the part of the landlord's witnesses, the trial court found that landlord had failed to prove its $82,000 IAI claim. The trial court found that landlord had met its burden with regard to only $5,650 in IAI charges.

In addition to rejecting the landlord's IAI claim on evidentiary grounds, the trial court also found that the landlord was not entitled to an $82,000 IAI increase, due to the landlord's failure to show compliance with the useful life rule. Specifically, the trial court found that there was a total failure of proof by landlord on this issue, as a) the building's property

manager was completely unable to identify the prior improvements, and b) landlord failed to produce its DHCR registration forms for the relevant years 1995 and 1998, which would have contained identifying information about the prior improvements. (It was undisputed that these forms were still in defendant's possession in 2011, which is the year that this action was commenced.)

Based on its rejection of landlord's IAI claim, the trial court found an illegal destabilization. As a result, plaintiff was entitled to a stabilized lease at a rent of $1,591.25, overcharge damages, including treble damages, and statutory attorney fees.

On defendant's appeal, the Appellate Division, First Department, by a divided court, reversed, vacated the judgment, and dismissed the complaint.

The Appellate Division majority rejected both of the grounds for the trial court's decision. After conducting a de novo review of the record, the majority found defendant's proof sufficient to prove a total IAI expenditure of $78,901.95.

With respect to the useful life issue, the majority reversed the trial court's finding of landlord's non-compliance with the useful life rules on both substantive and procedural grounds.

As a substantive matter, the majority held that landlord was under no obligation to show compliance with the useful life rules. Procedurally, the majority held that the useful life issue had been waived by plaintiff, when it was not included in her complaint.

The two judge dissent in the Appellate Division would have affirmed the trial judge in all respects, finding that a) the trial judge's finding of a failure of proof by landlord rested on credibility determinations, and should not have been disturbed on appeal, b) the landlord was required by the clear language of the Rent Stabilization Law and Code to show compliance with the useful life rule in order to claim an entitlement to an IAI rent increase, c) no waiver of the useful life rule occurred.

As is set forth *infra*, the majority's holding that the useful life rules do not apply to a landlord's claim for an IAI rent increase is in direct conflict with clear language of the RSL and RSC, and the finding of waiver is not supported by the record, is in conflict with this state's strong public policy in favor of resolution of cases on the merits, and failed to give due regard to New York's principles of notice pleading.

QUESTIONS PRESENTED

1. Is the holding of the Appellate Division, that a landlord, in establishing its entitlement to a rent increase for Individual Apartment Improvements (IAI), need not show compliance with the useful life rule, in direct conflict with clear language of both the Rent Stabilization Law and Rent Stabilization Code?

2. Was the Appellate Division correct, when it held that the failure of the complaint to reference the useful life rule, relieved the landlord of all obligation to show compliance with the useful life rule in establishing its entitlement to an IAI increase?

3. Given the record evidence that landlord took two prior IAI rent increases, based on total IAI expense of $23,465.60, and that the useful life of these prior improvements had not expired as of the time of the current improvements, did the trial court correctly hold that the prior IAI increases precluded the current IAI increases, where the landlord failed to establish that the current IAI were somehow different from the prior IAI?

4. In the event of reversal, should this case be remanded for the purpose of calculating the amount of statutory attorney fees owed by defendants to plaintiff, for the appellate work in this case?

STATEMENT OF FACTS

In November 2010 defendant Windermere Owners, LLC (Owners, or new owner) purchased from defendant Windemere Chateau, Inc. (Chateau or old owner) a building located at 666 West End Avenue, New York, NY, known as the Windemere. A22-23, 29. (Citations preceded by A or AA are to the Record on Appeal filed in this Court.)

On September 25, 2009 plaintiff Laura DiLorenzo entered into a lease with old owner for rental of apartment 4K at the Windemere. A102-03, 424-25. The lease was a market lease, and landlord represented that the apartment was not subject to rent stabilization. A426.

Immediately prior to DiLorenzo's tenancy, the apartment had been rent stabilized, with a last lawful registered rent in 2009 of $1,450.70. A576. In 2010 landlord registered the apartment as permanently exempt from rent stabilization, based on "high rent vacancy," without any explanation as to how the $1,450.70 rent lawfully increased to above $2,000. A 576.

On August 31, 2011 plaintiff commenced this action, alleging that the subject apartment had not in fact qualified for high rent vacancy, seeking a return of the apartment to stabilization status, a recalculation of the lawful rent, a refund of all overcharges, with treble damages, and an award of statutory attorney fees. A21-28.

On January 19, 2016 trial of this action commenced before the Honorable Lucy Billings, J.S.C., without a jury.

Plaintiff, in her testimony, presented the foundational facts of her claim, A102-09, consisting of the execution of a market lease with old owner, A424-34, 621 and payment of rent, A435-516. The DHCR rent history, A573-77, was admitted. The rent history established that the last registered rent for the apartment was the 2009 rent of $1,450.70. A576. In 2010 the landlord declared the apartment permanently exempt from stabilization, based on "high rent vacancy." A576. The rent history—based on the landlord's DHCR registrations—provided absolutely no explanation of how the landlord had increased the rent from the last stabilized rent of $1,450.70 to above the $2,000 threshold required for a lawful high rent vacancy de-stabilization.

Apart from showing an unexplained rent increase in 2010, the rent history showed that on two earlier occasions the landlord had increased the rent on the basis of claims of Individual Apartment Improvements (IAI). Thus, the rent history showed that, in 1995 and 1998, the landlord took two IAI increases based on IAI claims totaling $23,465.60. A575.

At trial, the landlord attempted to justify the rent increase to above the $2,000 high rent vacancy, by alleging that it had performed a third round of IAI in 2009, sufficient to lawfully increase the rent above $2,000. A660. The landlord alleged that it spent $82,015.27 on IAI in 2009. The parties agreed that, in order for the apartment to have been lawfully destabilized, landlord was required to have spent $21,972 on qualifying improvements. A6, 660, 672.

At trial, plaintiff argued that, as the claimed 2009 improvements followed upon the earlier 1995 and 1998 IAI rent increases—i.e., were within fourteen years and eleven years, respectively, of the earlier IAI increases—landlord was precluded from a third round of IAI rent increases, in 2009, unless the landlord first showed that the "useful life" of the earlier improvements had been exceeded. A44-46.

The useful life rule is set forth in both the Rent Stabilization Law and Rent Stabilization Code.

The Rent Stabilization Law, NYC Admin. Code, § 26-511(c)(13), provides that an owner who takes a rent increase based on installation of new equipment, furniture, furnishings, or other improvements "shall not be entitled to a further rent increase based upon the installation of similar equipment, or new furniture or furnishings within the useful life of such new equipment, or new furniture or furnishings." An identical provision is contained in the Rent Stabilization Code, 9 NYCRR § 2522.4(a)(11).

At trial, defendant attempted to justify the 2009 rent increase through the testimony of four witnesses, consisting of Simon Baigelman, former property manager for the building, and three contractors—a general contractor, plumber and electrician.

Defendant's property manager, Baigelman, when asked about the earlier renovations, from 1995 and 1998, was unable to provide any useful information as to those earlier renovations. With respect to the $19,785 in IAI claimed by the landlord in 1995, Baigelman testified that he could not recall what this consisted of. A191. With respect to the $3,800 in IAI claimed by the landlord in 1998, Baigelman testified that he could not recall what this was spent on. A194. Baigelman was given another chance to

identify the prior IAI, when he was asked if he could tell the Court what the total of $23,585 in IAI, claimed for 1995 and 1998, was spent on. Baigelman again could provide no information. A194. Baigelman confirmed that he had absolutely no recollection of the prior 1995 and 1998 improvements. A194-95.

Baigelman's total failure to identify the earlier improvements was compounded by landlord's failure to produce the DHCR registrations for 1995 and 1998, which would have identified the earlier improvements.

According to the DHCR rent history, in both 1995 and 1998 the landlord represented to DHCR that it had increased the stabilized rent based on improvements. A575. When filing the required yearly registration for the apartment in 1995 and 1998, the landlord was required to identify what improvements it had made to the apartment, and the dollar amounts of the rent increase attributable to each improvement. Thus, placed in evidence were the blank registration forms that a landlord was required to file with DHCR in 1995 and 1998. A141-46, 588-91. These forms required the landlord to identify which improvements it was claiming, including whether or not it had installed new "stove, dishwasher, air conditioners, windows installed in apartment, refrigerator, kitchen improvements, bathroom improvements, other," and to include dollar amounts for each. Since the

DHCR rent history reflects that the landlord claimed improvement increases for both 1995 and 1998, it necessarily follows that the landlord submitted the required registration forms to DHCR in 1995 and 1998, presumably identifying the particular improvements alleged, as the official form requires.

Defendants failed to produce the 1995 and 1998 registration forms, which would have had identifying information about the earlier improvements. A8.

Defendant's failure to produce the 1995 and 1998 registrations was quite significant, as it was undisputed that these forms were still on the premises as of the transfer of ownership from old owner to new owner in November 2010, and were still in defendant's possession as of June 2011. A596-97, 600-03, 606-09. This action was commenced in August 2011. A21.

Following post-trial briefing, in which both sides, inter alia, argued the useful life issue, A661-62, 673-76, the trial court issued a Decision on October 5, 2017. A5-12.

After noting the parties' agreement that landlord was required to show $21,972 in qualifying IAI to establish a lawful de-stabilization, A6, the Court found that, out of a total IAI claim of $82,015.27, defendants had met their burden only with respect to $5,650 in electrical work by Contractors Electrical Service (CES). A9-10. Based on a prior stabilized rent of $1,450, the $5,650 in allowed IAI resulted in a $141.25 rent increase, to a legal rent of $1,591.25. As this was under the legal threshold of $2,000, the trial court found an illegal de-stabilization, and a resulting rent overcharge. The trial court further found that defendants had failed to rebut the presumption that the overcharge was willful, and that plaintiff was therefore entitled to a refund of overcharges, including treble damages, and an award of statutory attorney fees. The Court directed that defendant provide plaintiff with a rent stabilized lease for the subject apartment with a monthly rent of $1,591.25. A12. Pursuant to the Court's decision, a judgment for $234,307.01 was entered in favor of plaintiff on October 26, 2017. A17-18. A separate judgment was subsequently entered in favor of plaintiff for attorney fees.

The trial court's Decision, while allowing the $5,650 electrical invoice, disallowed the two other charges claimed by landlord—i.e., a $60,000 charge from general contractor, H.F.M. Company, Inc., and a $13,251.95 invoice from Mike Lorenz Corp., a plumber.

As to the disallowed invoices, the trial court found that the charges were precluded by defendant's failure to show that the useful life of the prior 1995 and 1998 renovations had been exceeded. The trial court held:

> Defendants further failed to offer any evidence that the IAI work claimed in 2009 did not duplicate the IAI work in 1995 and 1998 or that the work in 1995 and 1998 outlasted its useful life. N.Y.C. Admin. Code § 26-511(c)(3); 9 N.Y.C.R.R. 2522.4(a)(11). Baigelman testified that he did not recall what work was performed to justify the 1995 and 1998 IAIs. Defendants did not offer any DHCR registration forms describing the work performed. Since defendants failed to substantiate that H.F.M. Company's work actually was completed in Apartment 4K, that defendants actually incurred $60,000.00 for work by H.F.M. Company in that apartment, and that this work was not duplicative of previous IAIs, defendants are not entitled to a rent increase for the $60,000.00 billed for improvements.

A8.

The trial court also held: "Defendants also failed to substantiate their claim of plumbing work valued at approximately $13,000." A8.

In addition to disqualifying the general contractor and plumbing charges pursuant to the useful life rules, the trial court also held that defendants had failed to substantiate these charges, in that the witnesses they presented to support these charges lacked a proper evidentiary foundation.

In ruling that defendants had not met their burden to substantiate the general contractor HFM $60,000 charge, the trial court observed: "Defendants' property manager, Simon Baigelman testified that he did not remember what specific work HFM Company performed in Apartment 4K...Howard Molen of HFM Company testified that he was never at the job site, thus never performed a final inspection of the billed work, and prepared the invoice based on information from his employees [who did not testify]" A7-8. With regard to the question of payment of the $60,000 invoice, the Court observed that while a $63,097.81 check was in evidence, A623, and both Baigelman and Molen testified that the check was in payment of the $60,000 invoice, "the check itself does not indicate it was for work in Apartment 4K and is for more than the amount of the invoice, casting doubt as to what work the check covered." A8.

With respect to the plumbing charges, the Court noted that the plumber's certificate of capital improvement, A626, listed no costs or final price. A8-9. As to the check to the plumber, A624, the Court noted that, "Again, Baigelman did not recall what plumbing work, if any, he requested from Mike Lorenz Corporation for Apartment 4K." A9. As to the witness from the plumber, the Court stated: "Annette Lorenz, who is not a plumber, has no personal knowledge of any plumbing work performed in Apartment

4K, never visited the job site, thus never inspected the claimed plumbing work, and played no role in composing the Certificate of Capital Improvement." A9. The Court then held: "Since defendants failed to substantiate that the plumbing work claimed actually was completed in Apartment 4K, and that they actually incurred the costs claimed for that work, defendants were not entitled to a rent increase" for the plumber's charges. A9.

Defendants appealed to the Appellate Division, First Department. On June 13, 2019 a divided First Department issued its Decision, AA1-54, reversing the trial court, vacating the judgment, and dismissing the complaint.

The Appellate Division majority disagreed with the trial court's conclusion that the testimony of Baigelman, Molen and Lorenz was insufficient to validate the $60,000 general contractor invoice, and the $13,251.95 Mike Lorenz plumbing invoice. Conducting a de novo review of the trial record, the majority found that defendant had established a total IAI expenditure of $78,901.95—consisting of the $5,650 in electric work found by the trial court, plus the $60,000 HFM general contractor invoice, and a $13,251.95 Lorenz plumbing invoice. (As to the plumbing charges, the majority found that the $16,365.27 plumbing charge sometimes cited by

defendants was clearly in error, as it agglomerated two different invoices—one for $13,251.95, and one for $3,113.32. The majority found that the $3,113.32 invoice clearly could not qualify as a valid IAI expense for subject apartment 4K, as this invoice was not for work limited to 4K, but actually was for work in two apartments—4K and 5K. AA19, 20. An examination of the invoice itself, moreover, reveals that the work done in apartments 4K and 5K was not for the benefit of apartments 4K or 5K, but was actually for the repair of risers serving an entirely different line of apartments—i.e., the risers for the P line, which happened to pass through the K line closets. A641. The Appellate Division majority was correct that the proper amount of the Lorenz plumbing claim was $13,251.95, and not the sometimes mistakenly cited $16,365.27.)

The majority's holding that landlord had established $78,901.95 in IAI charges, AA20, did not however, end the inquiry. The trial court's Decision in favor of plaintiff rested on two grounds—i.e., in addition to its holding that the landlord failed in its burden to prove the IAIs in the first instance, the trial court also held that defendants had failed to show that its 2009 IAI rent increase was not precluded by the landlord's two prior rounds of IAI increases and the useful life rules. The failure to show compliance

with the useful life rule constituted an independent ground for the trial court's decision in favor of plaintiff.

With respect to the useful life issue, the Appellate Division majority held that the landlord was under no obligation to show compliance with the useful life rule. The Court wrote, "defendants were not required...to adhere to a useful life schedule in performing IAIs." AA25. As is set forth in Point I, *infra*, this holding is in direct conflict with clear language of both the Rent Stabilization Law and the Rent Stabilization Code.

In addition to holding that as a substantive matter the useful life rules do not apply to IAIs, the majority also held that plaintiff had waived the useful life issue by not raising it in her complaint. AA23-25.

The two judge dissent in the Appellate Division would have affirmed the trial court. According to the dissent:

> Here, the trial court conducted a fact-intensive inquiry to determine whether defendants met their burden to establish that they made individual apartment improvements in a sum exceeding $21,972. Supreme Court was in the best position to assess the evidence and credibility of the witnesses. The trial court gave little weight to the testimony of Baigelman, Molen and Lorenz as the witnesses lacked personal knowledge of the work performed in Apt 4K. The trial court properly found that defendants failed to establish that the general contractor and the plumbing contractor actually performed the work in Apt 4K that was referenced in their invoices, and that they

> were paid for the work. Nor did the documentary evidence verify that improvements were made in Apt 4K.
>
> In short, it cannot be said that the trial court's findings are so contrary to the weight of the evidence that "it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Thoreson*, 80 NY2d at 495 [internal quotation marks omitted]).

AA41.

With respect to the useful life issue, the dissent found that, "in order to obtain a rent increase, a defendant bears the burden to demonstrate that the useful life was exceeded for the claimed improvement." AA50. As defendant failed to offer any evidence that the useful life of the prior IAIs had been exceeded, the dissent would have affirmed the trial court decision on this ground alone. AA49-52. According to the dissent, "Supreme Court correctly found that defendants failed to demonstrate that the useful life of the improvements made to Apt. 4K in 1995 and 1998 had been exceeded entitling them to a rent increase for the claimed 2009 improvements." AA52.

As to the procedural waiver found by the majority, the dissent disagreed. According to the dissent, "since plaintiff did not have the burden to establish useful life, she was not required to plead it in her complaint." AA50.

Given the two judge dissent in the Appellate Division on a point of law in favor of plaintiff, this appeal was filed pursuant to CPLR 5601(a).

ARGUMENT

POINT I

THE APPELLATE DIVISION HOLDING, THAT A LANDLORD, IN ESTABLISHING ITS ENTITLEMENT TO AN IAI RENT INCREASE, DOES NOT HAVE TO SHOW COMPLIANCE WITH THE USEFUL LIFE RULE, IS IN DIRECT CONFLICT WITH THE CLEAR LANGUAGE OF THE RENT STABILIZATION LAW AND THE RENT STABILIZATION CODE

The trial court rejected landlord's IAI claim, in part, because defendants "failed to offer any evidence that the IAI work claimed in 2009 did not duplicate the IAI work in 1995 and 1998 or that the work in 1995 and 1998 outlasted its useful life." A8 (Citing to NYC Admin. Code § 26-511(c)(13) and 9 NYCRR § 2522.4(a)(11)).

The Appellate Division majority overruled this holding of the trial court, holding that landlords "were not required...to adhere to a useful life schedule in performing IAIs." AA25.

As support for this ruling, the majority cited to 9 NYCRR § 2522.4(a)(1), the provision of the RSC which entitles an owner who makes improvements to a rent increase. AA25. This subdivision (a)(1) is in fact silent as to any useful life restriction on an IAI increase. This silence, however, does not mean that IAI increases are not subject to a useful life rule, as the majority so held. Only a few subdivisions down from (a)(1) in § 2522.4 is subdivision (a)(11), which very clearly states:

> (11) An owner who is entitled to a rent increase based upon the installation of new equipment, or new furniture or furnishings pursuant to paragraph (1) of this subdivision *shall not be entitled to a further rent increase* based upon the installation of similar equipment, or new furniture or furnishings *within the useful life* of such new equipment, or new furniture or furnishings.

(emphasis added)

9 NYCRR § 2522.4, which the majority cites for the proposition that a landlord seeking an IAI rent increase is not bound by useful life rules, in fact states just *the opposite*, very clearly, in subdivision (a)(11).

In addition to overlooking the clear language of subdivision (a)(11), the majority also overlooked the clear language of the RSL itself, which, in identical terms to the RSC, also codifies the useful life rule as applicable to IAI rent increases. Thus, NYC Admin. Code § 26-511(c)(13), after first

creating an entitlement to a rent increase for improvements, then explicitly limits such increase as follows:

> Provided further that an owner who is entitled to a rent increase pursuant to this paragraph *shall not be entitled* to a further rent increase based upon the installation of similar equipment, or new furniture or furnishings *within the useful life* of such new equipment, or new furniture or furnishings.

(emphasis added)

The majority's holding, that a landlord need not show compliance with the useful life rules in order to obtain an IAI rent increase, is in direct conflict with the clear language of both the RSL and RSC.

The trial judge, and the dissent, which held that, in order to obtain an IAI rent increase, a landlord must first show compliance with the useful life rule, were correct, and correctly applied the clear language of the cited provisions of the RSL and RSC.

The dissent correctly stated the rule as follows:

> A landlord is entitled to a rent increase equal to 1/40th of the total cost of any qualifying improvements made or new furnishings to rent stabilized apartments (9 NYCRR § 2522.4[a][1]; Administrative Code § 26-511(c)(3), but is not entitled to an increase for improvements or replacements to furnishings and equipment that have not yet exceeded their useful life (9 NYCRR 2522.4[a][1]; Administrative Code § 26-511[c][13]. A useful life schedule is provided in 9 NYCRR 2522.4(a)(2)(i)(d), with periods ranging from 15 to 30 years based on the specified improvement. In order to obtain a rent increase, a defendant bears the burden to demonstrate that the useful life was exceeded for the claimed improvement.

AA49-50 (citation omitted)

The majority's holding, that a landlord need not comply with the useful life rule in order to obtain an IAI rent increase, completely eviscerates the rule.

The useful life rule set forth in the Rent Stabilization Law and Code further an important public policy. *SP 141 E 33 LLC v. DHCR*, 2010 WL 5257447 (Sup. Ct. N.Y. Co. 2010), *aff'd* 91 AD3d 575 (1st Dep't 2012). "The useful life schedule is intended to protect tenants from repeated or unnecessary rent increases." *Ghiggeri v. DHCR*, 2009 WL 3730060 (Sup. Ct., N.Y. Co. 2009).

The majority's holding does violence to the important public policy underlying the useful life rule. Under the majority's rule, there are no limits to a landlord's ability to obtain IAI rent increases. Absent a requirement to comply with the useful life rule, a landlord may, with impunity, perform unnecessary and duplicative improvements, thereby increasing the cost of stabilized housing beyond all affordability.

The important purpose that the useful life rule serves in the scheme of rent regulation was articulated by the DHCR in its comments to Chap. 253 of L. 1993 (enacting A8859), which enacted NYC Admin. Code § 26-511(c)(13), which sets forth the IAI useful life rule. In a July 7, 1993

Memorandum to the Governor, DHCR advised: "[T]he provision prohibiting increases for improvements made during the useful life of a similar improvement for which a rent increase was previously granted can be used to carefully scrutinize whether improvements lawfully qualify for an increase." (This DHCR Memorandum is reproduced as an Appendix to this Brief.)

Under the holding of the majority, the "careful scrutiny" contemplated by DHCR would be blocked, as a landlord is no longer under an obligation to comply with the useful life rules set forth in the RSL and RSC.

The New York State Legislature clearly does not agree with the majority below that the useful life rules no longer apply to landlords. Thus, in the Housing Stability and Tenant Protection Act of 2019, signed into law on June 14, 2019, the legislature amended the RSL, NYC Admin. Code § 26-516(g), so as to clarify that landlords are required to maintain "records of the useful life of improvements made to any housing accommodation or any building" for the duration of the applicable useful life period, and not just for the ordinary six (formerly four) year record retention period. Housing Stability and Tenant Protection Act of 2019, S.6458, A. 8281, 2019-2020 Reg. Sessions, Part F, § 5. The State Legislature, unlike the majority below,

continues to recognize the important role that the useful life rule continues to play in New York's scheme of rent regulation.

A further rationale provided by the majority for its decision on the useful life issue merits comment. In the same sentence in which the majority held that defendants were not required to comply with a useful life rule, the majority also held: "defendants were not required to include in their DHCR registrations forms descriptions of any IAIs performed in 1995, 1998 or 2009." AA25. This represents a complete misstatement of both the law, and the record below.

Placed in evidence at trial were the blank registration forms that a landlord was required to file with DHCR in 1995, 1998, and 2010. A141-46, 588-91. As is seen from the blank forms in evidence, a landlord claiming an IAI increase was required to identify which improvements the landlord was claiming, and the dollar amounts corresponding to the particular improvements. A588-91. The majority's statement that a landlord was not required to identify the prior improvements on its DHCR registration forms is simply wrong, and in conflict with the record evidence.

Defendants failed to produce the 1995 and 1998 registration forms, which should have had identifying information about the earlier improvements. A8. Defendant's failure to produce these very important

registration forms was quite telling, as it was undisputed that these forms were still in defendant's possession as of June 2011. A596-97, 600-03, 606-09. This action was commenced in August 2011. A21.

The majority's holding that a landlord may obtain an IAI increase without first showing compliance with the useful life rule is in direct conflict with clear and controlling language of both the RSL and RSC. Moreover, part of its stated rationale—i.e., that the landlord herein was under no obligation to identify the earlier improvements in its DHCR registrations—is just wrong, and at odds with the trial evidence.

The majority's holding does serious harm to the important public policy underlying the useful life rule. The majority's holding, which in effect does away with the useful life rule with respect to IAIs, should be vacated, and the trial court's ruling reinstated.

POINT II

THE USEFUL LIFE RULE WAS NOT WAIVED

In addition to holding that the useful life rules do not apply to a landlord's IAI rent increase, the Appellate Division majority held that plaintiff forfeited any right to raise the useful life issue, by not referencing the useful life rule or the prior improvements in her complaint. AA23-25.

It is respectfully submitted that the majority misconstrued the nature of the burden imposed by the useful life rules, and unfairly placed the burden of establishing compliance—or non-compliance—with the rule on the tenant, instead of the landlord, where it properly belongs. In addition, the majority's holding is inconsistent with the principles of notice pleading followed in this state. In particular, the majority disregarded the long established rule that a plaintiff need not anticipate affirmative defenses in her complaint.

A. The Majority Unfairly Placed the Burden of Proof of Useful Life On Plaintiff

It is well established that in any overcharge proceeding the burden is on the landlord to prove that it made qualifying improvements in an amount sufficient to justify the rent increase imposed by the landlord. *See, Charles Birdoff & Co. v. New York State Div. of Housing and Community Renewal,* 204 A.D.2d 630 (2d Dep't 1994); *985 Fifth Ave. Inc. v. State Div. of Housing and Community Renewal*, 171 A.D.2d 572 (1st Dep't 1991) *lv. to app denied* 78 N.Y.2d 861 (1991); *Waverly Associates v. New York State Div. of Housing and Community Renewal*, 12 AD3d 272 (1st Dep't 2004). This is particularly true where, as in this case, the tenant's complaint is brought within the applicable look back period.

It is not enough for a landlord to show that it did work on an apartment, but it must show that it did work that would qualify as improvements within the meaning of the Rent Stabilization Law and Code. *See, e.g., PWV Acquisition, LLC v. Toscano*, 2003 WL 21499283 (App. Term, 1st Dep't 2003): "...it was landlord's burden in the first instance to establish by credible evidence the existence of improvements justifying the rent increase sought."

The Rent Stabilization Law, by its terms, establishes an "entitlement" on the part of a landlord to a rent increase for IAI. N.Y.C. Admin. Code § 26-511(c)(13) provides that "an owner is entitled to a rent increase where there has been...installation of new equipment or improvements...to a tenant's housing accommodation." The case law is clear that an owner, who seeks to claim this "entitlement" to a rent increase, bears the burden of proof that it in fact qualifies for the rent increase. A landlord does not satisfy this burden merely by showing that it did work in the apartment, but it must show that it performed qualifying improvements and, not, for example, ordinary repairs or maintenance, *Graham Court Owners Corp. v. DHCR*, 71 AD3d 515 (1st Dep't 2010); *212 W. 22 Realty, LLC. v. Fogarty*, 2003 WL 23100903 (Civ. Ct., N.Y. Co. 2003) (landlord claiming IAI rent increase has burden to show it "completed work which constituted 'improvements' and it

did not amount to normal maintenance, ordinary repair and decorating"), or work that merely replaced prior IAIs that had not exceeded their useful life.

The burden of proof with respect to useful life rests with the landlord. *See, e.g., 60 East 12th Street Tenants' Association v. DHCR,* 134 AD3d 586, 589 (1st Dep't 2015) (Feinman, J., dissenting) *aff'd* 28 N.Y.3d 962 (2016): "The DHCR must be satisfied that the legal regulated rent was not previously adjusted for the same work performed within the number of years determined to be the 'useful life' of the particular capital improvement. Work undertaken before the useful life of the original work has expired does not qualify for a rent increase..."

The dissent below correctly stated: "In order to obtain a rent increase, a defendant bears the burden to demonstrate that the useful life was exceeded for the claimed improvement." AA50.

In holding that plaintiff waived the useful life issue by failing to plead it in the complaint, the Appellate Division majority incorrectly shifted the burden on useful life to plaintiff tenant.

B. The Majority Finding of Prejudice Has No Support in the Record

The Appellate Division majority found that defendant was prejudiced by alleged delay in raising the useful life issue. AA25. This finding, however, is completely without any support in the record, and the majority

offered no explanation whatsoever of how it believed defendant was prejudiced. The dissent responded to the finding of prejudice: "We note that the majority's concern that defendants were prejudiced was not raised by defendants at trial, in their post-trial submissions, or even on appeal." AA51.

The dissent was correct, as at no point did defendants make a claim of prejudice from the fact that the useful life rule was not raised in the complaint. Defendants made no claim of prejudice in their post-trial written submissions, A659-70, and made no claim of prejudice when they argued the pleading issue to the trial court. A398-403. In their briefs to the First Department, defendants made no claim of prejudice from the so-called pleading omission.

Plaintiff, in her Pre-Trial Memorandum, A39-70, spelled out her position on the useful life rules. A44-46. The Pre-Trial Memorandum was filed and served on December 9, 2015, A70—i.e., more than a month before the January 19, 2016 start of the trial. A79. At no point did defendants ask for an adjournment of the trial to address the useful life issue. Defendants were of course at all times fully aware of the useful life issue in this case, which was glaringly apparent from the face of the DHCR rent history, A573-77.

C. The Majority Disregarded This State's Strong Public Policy of Deciding Cases on the Merits

The majority's finding of waiver of the useful life rule fails to give proper deference to this state's strong public policy of deciding cases on the merits, and not on the basis of non-prejudicial procedural defaults. *See, e.g. Carlos v. 395 E. 151st St., LLC*, 41 A.D.3d 193, 194 (1st Dep't 2007) ("settled preference for resolving cases on their merits"); *Guzetti v. City of New York*, 32 A.D.3d 234, 234 (1st Dep't 2006) ("This State's public policy favors determinations on the merits."); CPLR 3026 ("Defects shall be ignored if a substantial right of a party is not prejudiced.")

In finding waiver, the majority adopted an unnecessarily formalistic approach. This Court long ago cautioned against such an approach, holding in *Harriss v. Tams*, 258 N.Y. 229, 239-40 (1932): "Forms of pleading and procedure were originally devised as an aid to the administration of justice. They defeat their purpose when they result in an inflexible formalism." *See also Schiavone v. Fortune*, 477 U.S. 21, 32-33 (1986) (Stevens, J., dissenting) (reference to the "sporting theory of justice" condemned by Roscoe Pound in 1906).

D. The Majority Ruling is Inconsistent With This State's Principles of Notice Pleading

In denying defendants' waiver argument, the trial judge ruled that plaintiff satisfied her pleading requirement by simply pleading that the apartment did not qualify for high rent vacancy. Such basic notice pleading put defendants on notice that they would have to prove high rent vacancy through lawful increases provided for under the RSC, which would include qualifying improvements. A398-401.

The Appellate Division majority's finding that any potential useful life issue was waived is particularly misplaced, given the undisputed facts of this case.

The DHCR rent history, A573-77, which was based on the landlord's registrations, was silent as to the reason for the landlord's 2009 rent increase. According to the rent history, in 2010 the landlord removed the apartment from rent stabilization, based on a claim of "high rent vacancy." No other information was provided as the basis for the apartment's removal, and the rent history (again, based solely on the landlord's registrations) made no claim that the 2009 rent had been increased though improvements. A576.

In drafting the complaint, plaintiff had only the landlord's DHCR registration to go on. As the landlord's registrations, as reflected in the rent history, did not claim the benefit of an IAI rent increase, there was simply no reason for plaintiff to raise a useful life claim in the complaint.

Working from the DHCR rent history, plaintiff filed her overcharge complaint which, at ¶ 14, alleged: "As the registered stabilized rent for 4K was $1,450.70 as of June 18, 2009, when the apartment became vacant one year later, it did not qualify for the high rent vacancy threshold of $2,000." A24. In their Answer, defendants raised an affirmative defense: "Prior to the commencement of plaintiff's tenancy, the premises qualified for permanent deregulation pursuant to the applicable provisions of the Rent Stabilization Code." A32. No information was provided as to under which provisions of the RSC the apartment allegedly qualified for de-stabilization, and no claim whatsoever was made of improvements. A29-34. There was no reason for plaintiff to invoke the useful life rule in response to defendant's Answer, which did not include any claim of IAI rent increases.

Plaintiff's complaint fully complied with CPLR 3013 and the modern rules of notice pleading followed in this state.

As set forth in *Rovello v. Orofino Realty Co., Inc.,* 40 N.Y.2d 633, 636 (1976), "Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one." (citation omitted)

CPLR 3013, which adopted notice pleading for New York State in 1962, provides:

> Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

The complaint in this action was more than sufficient under 3013. The complaint put the landlord fully on notice of the transactions at issue. The complaint advised the landlord that plaintiff was challenging landlord's removal of the subject apartment from rent stabilization based on high rent vacancy. Specificially, the complaint stated that the last registered rent was $1,450.70, which was substantially below the $2,000 threshold for high rent vacancy. The complaint alleged that, in light of the last registered rent of $1,450.70, the apartment did not qualify for high rent vacancy. These allegations put the landlord on notice that it would have to justify the increase in rent from $1,450.70 to above $2,000. There was nothing more for plaintiff to allege at this point, particularly given the fact that the

landlord's DHCR rent history provided absolutely no information as to the basis for the increase in rent from $1,450.70 to above $2,000.

The landlord, on notice that its high rent vacancy de-stabilization was under challenge, responded with an affirmative defense, which merely alleged that the premises did in fact qualify for permanent deregulation "pursuant to the applicable provisions of the Rent Stabilization Code." A32 (As stated, landlord did not identify in its Answer which "applicable provisions" of the RSC formed the basis for its rent increase.)

Based on the pleadings, issue was fully joined. The landlord was put on notice that it would have to justify its rent increase under the RSC, and it acknowledged this burden, in its affirmative defense.

Under the case law, see p. 28 *supra*, the landlord had the burden of justifying its rent increase. Landlord could attempt to do this in a variety of ways, and could seek the benefit of various different provisions of the RSC. (For example, landlord could have claimed entitlement to vacancy increases, individual apartment improvement increases, major capital improvement increases, longevity increases, etc.) Plaintiff was not required to anticipate how landlord would seek to justify its rent increase. Plaintiff thus was not required to negate, in advance, every single possible grounds under which landlord could possibly seek to justify a rent increase.

As the landlord failed to allege in its affirmative defense that it had raised the rent based on IAI, there was simply no reason for plaintiff to amend her complaint to raise the useful life issue. AA23.

Under 3013, plaintiff was required to give notice of "the transactions, occurrences . . . intended to be proved." Plaintiff gave notice of the transactions she needed to prove to establish her claim—the most important of which was the apartment's prior stabilized status, and landlord's removal from stabilization based on high rent vacancy. As plaintiff was under no burden to prove landlord's compliance or non-compliance with the useful life rule, plaintiff was under no burden to raise this issue in the complaint, as it was not a matter "intended to be proved" by her.

In addition to giving notice of the relevant transactions, the complaint also complied with 3013 in that it set forth "the material elements of each cause of action."

The elements of plaintiff's overcharge cause of action were simply a) the payment of rent and b) the rent charged by landlord was illegal under the RSC. As to the legality of the rent, the complaint alleged that the apartment had been illegally de-stabilized, because the last legal rent of $1,450.70 was less than the required threshold of $2,000. A24. The above fully satisfied plaintiff's pleading requirement as to the elements of the cause of action.

Defendant's compliance or non-compliance with the useful life rule was not an element of plaintiff's cause of action, but was a matter to be addressed by defendant, when it attempted to prove its affirmative defense of a legal deregulation.

The sufficiency of plaintiff's compliant herein is illustrated by a comparison to the rule in false imprisonment cases. Where a plaintiff alleges false imprisonment based on imprisonment without a warrant, the plaintiff has no burden to allege lack of probable cause. In such a case, the burden of affirmatively pleading and proving justification through probable cause rests with the defendant. *Broughton v. State*, 37 N.Y.2d 451, 458 (1975) *cert. denied* 423 U.S. 929 (1975); *Parvi v. City of Kingston,* 41 N.Y.2d 553, 557-58 (1977).

In a rent overcharge case, the burden of proving entitlement to a rent increase rests with the landlord. Just as a non-warrant false imprisonment plaintiff need not prove lack of probable cause, an overcharge plaintiff need not plead or prove the landlord's non-entitlement to a rent increase. The burden of pleading and proving entitlement to a rent increase—which would of necessity include compliance with the useful life rule—remains with the landlord.

E. The Majority Disregarded the Rule That a Plaintiff Need Not Anticipate Affirmative Defenses in Her Complaint

The majority found waiver, based on plaintiff's failure to reference the useful life rule in her complaint, or to bring a motion based on useful life. AA23. As stated, the useful life rule was not an element of plaintiff's claim of overcharge. Useful life had no relevance to this case, until landlord raised a claim of entitlement to an IAI rent increase. Landlord, even when it raised an affirmative defense of lawful destabilization through permissible rent increases, A32, did not identify any entitlement to an IAI increase.

According to the majority, even though landlord did not include in its pleadings a claim to an IAI increase, plaintiff was nevertheless required to anticipate such a claim, and to invoke the useful life rule in her complaint.

This holding by the majority is in conflict with the long established rule that a plaintiff need not—indeed, should not—anticipate possible affirmative defenses in her complaint. "[I]n order to allege a good cause of action, plaintiff is not required to negative the facts which would constitute a good defense." *Maxwell v. County of Monroe*, 264 AD 820, 820 (4th Dep't 1942). "Defenses should not be anticipated in a complaint." *Toper v. Rotach*, 62 Misc.2d 290, 290-91 (Sup. Ct. Oneida Co. 1970) (Simons, J.).

In 1881 this Court held:

> It is not essential that a plaintiff shall set up in his complaint, or by way of reply, facts in rebuttal or avoidance of an affirmative defense, not a counter-claim, set up in the answer. All that is requisite is that the complaint state facts sufficient to make out a cause of action; and if the answer sets up facts which if true would destroy that cause of action, plaintiff may meet them by proof in rebuttal or avoidance [on the trial].

Metropolitan Life Insurance Co. v. Meeker, 85 N.Y. 614, 614 (1881). *See also Atkins v. Hertz Drivurself Stations, Inc.*, 261 N.Y. 352, 356 (1933), *aff'd* 291 U.S. 641 (1934) (plaintiff under no obligation to file reply to affirmative defense raised by defendant in answer: "Whatever attack he [plaintiff] could make on it [affirmative defense] was open to him without further pleading.")

Under the rule that a plaintiff need not negate possible affirmative defenses in her complaint, plaintiff was not required to provide defendant with notice of the useful life rule in the complaint.

Plaintiff, in briefing the useful life issue in her Pre-Trial Memorandum, A44-46, served more than a month before the start of the trial, provided defendant with more than sufficient notice that useful life would be an issue at trial. The sufficiency of such notice is underscored by

the fact that defendant at no point raised a claim of prejudice based on late notice in the proceedings below. *See* pp. 30-31 *supra.*

It is respectfully submitted that the Appellate Division majority's finding of waiver was in error.

POINT III

THE TRIAL COURT CORRECTLY APPLIED THE USEFUL LIFE RULE IN DISALLOWING THE LANDLORD'S IAI EXPENSES

According to the DHCR rent history, A573-77, the landlord assessed two different IAI rent increases against subject apartment 4K in the 15 years prior to the 2009 IAI increase which resulted in destabilization.

In 1995 the landlord increased the rent, from $683.36 to $1,175, based on improvements. A575. Based on the amount of the rent increase, and the then applicable 1/40 formula, the landlord would have made $19,665.60 in improvements in order to justify this increase. In 1998, the rent history, A575, shows a second IAI rent increase, from $1,175 to $1,270. Under the applicable formula, the rent increase would have been based on an additional $3,800 in improvements.

The two prior IAI rent increases, together, raised the stabilized rent a total of $586.64, based on a combined IAI claim of $23,465.60. Both IAI increases were less than 15 years prior to the 2009 IAI increase at issue herein.

As noted by the dissent, AA49-50, a useful life schedule is provided in 9 NYCRR § 2522.4(a)(2)(i)(d), with periods ranging from fifteen to thirty years based on the specified improvement. As the earlier improvements in this case were both made less than fifteen years prior to the 2009 IAI at issue, the 2009 improvements were clearly within the minimum fifteen year useful life period provided in the RSC schedule. As such, landlord's obligation to show compliance with the useful life rule was clearly triggered.

At trial, the landlord made no attempt whatsoever to show compliance with the useful life rule. Thus, defendants presented no evidence whatsoever that either a) the 2009 improvements were somehow different from the 1995 and 1998 improvements, or b) through ordinary wear and tear the useful life of the earlier improvements had been exceeded.

Baigelman, the property manager who supervised both the earlier 1995 and 1998 renovations, and the 2009 IAI, A149-50, testified that he had no recall whatsoever of the earlier renovations, and could not tell the Court what the earlier IAI expenditure of $23,465.66 was spent on. A8, 166, 191-92, 194-95.

Landlord was required by law to provide information to DHCR as to the prior improvements on the yearly registration forms. A588-90. As noted by the trial court, "Defendants did not offer any DHCR registration forms describing the work performed." A8. The evidence, however, established that those registration forms, which should have contained information as to the prior IAI, but were not produced, were still on the premises as of the November 2010 transfer of ownership from old owner to new owner, and were still in defendant's possession as of June 2011. A596-97, 600-03, 606-09. This action was commenced in August 2011. A21.

In addition to failing to identify the earlier improvements, the landlord also failed to offer any evidence that the 1995 and 1998 improvements had exceeded their useful life, or were otherwise in a state of deterioration requiring replacement.

As defendants offered no evidence that the earlier improvements had outlived their useful life, or were somehow different from the prior improvements, and as the landlord failed to produce evidence that could resolve this issue (i.e., the DHCR registrations) the trial court, and the dissent, correctly found that landlord failed to show compliance with the useful life rules, and therefore failed to show entitlement to the 2009 IAI rent increase.

POINT IV

THE CASE SHOULD BE REMANDED FOR A CALCULATION OF ATTORNEY FEES DUE PLAINTIFF FROM LANDLORD

When a landlord overcharges a tenant, the tenant is entitled to an award of attorney fees from the landlord. 9 NYCRR § 2526.1(d). *See Rosenzweig v. 305 Riverside Corp.*, 2012 WL 2295535 (Sup. Ct. NY Co. 2012); *Conason v. Megan Holding, LLC*, 109 AD3d 724, 972 NYS2d 223 (1st Dep't 2013) (where overcharge is willful, attorney fees must be awarded to prevailing tenant under 9 NYCRR § 2526.1), *aff'd* 25 NY3d 1 (2015).

Plaintiff, as the prevailing party, was awarded attorney fees in the trial court, for work done in that court. A12.

Where a tenant prevails in the lower court, and receives a statutory award of attorney fees, and then is required to defend the award upon appeal, the tenant is entitled to a further award of attorney fees, covering the work involved in successfully defending the lower court decision. *See, e.g., Duell v. Condon*, 200 AD2d 549 (1st Dep't 1994) *aff'd* 84 N.Y.2d 773 (1995); *Washburn v. 166 East 96th Street Owners Corp.*, 166 AD2d 272 (1st Dep't 1990).

The appropriate procedure in such instance is to remand the matter to the lower court solely for the purpose of determining the amount of plaintiff's reasonable attorney fees.

In the event that this Court reverses the Appellate Division, and reinstates the trial court decision in favor of plaintiff, it is respectfully requested that the matter be remanded to the trial court for a determination of the reasonable attorney fees due to plaintiff for the appellate stages of this litigation.

CONCLUSION

The Appellate Division decision should be reversed, and the trial court decision reinstated in all respects, and the matter should be remanded to the trial court for the sole purpose of calculating plaintiff's reasonable attorney fees on appeal, to be assessed against defendants.

Dated: August 12, 2019
New York, NY

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Marc Bogatin

C-250 A.8859

STATE OF NEW YORK
DIVISION OF HOUSING AND
COMMUNITY RENEWAL
38-40 STATE STREET
ALBANY, NEW YORK 12207

RECEIVED AFTER ACTION BY GOVERNOR

MARIO M. CUOMO, GOVERNOR
ANGELO J. APONTE, COMMISSIONER

TO: Elizabeth D. Moore
Counsel to the Governor

FROM: Dennis Saffran DS
Counsel to the Division of Housing

DATE: July 7, 1993

SUBJECT: A.8859
Recommendation: Approve

The Division recommends approval of this bill notwithstanding serious reservations regarding its potential administrative burden. The Division strongly supports the provision of the bill extending the rent regulatory laws for four years rather than two years as in the past. This will create a measure of stability in the rent and coop conversion laws, and will avoid the uncertainty and anxiety attendant with the short term expiration of the laws.

The Division also believes that the bill's luxury decontrol provisions, as limited and narrowed in the legislative negotiations on the original Senate proposal, represent a compromise that removes regulatory protection only from the wealthiest tenants while preserving the affordable housing stock and limiting the intrusions on tenant privacy. The current bill eliminates many of the defects in earlier proposals that would have expansively defined "high-income" in a way that could have included many middle-income tenants, removed moderately priced apartments from regulatory control, and required an intrusive computer search of the tax records of all rent regulated tenants.

Despite these improvements, however, the Division has serious concerns about the potential administrative cost of the luxury decontrol provisions and of other provisions of the bill. The high-income decontrol provisions of the bill could affect between 5,000 and 10,000 apartments, and would require the Division to process verification requests whenever an owner disputed a tenant's certification of income. Processing of verifications for this number of units would require a staff of one supervisor and four processors. The cost could be $250,000 per year in salaries, fringe benefits, computer programming and processing expenses.

In addition, the removal of high rent units from regulation could result in the generation of an additional several thousand rent overcharge complaints, as tenants faced with decontrol will have a great incentive to seek to bring or keep their rents below the $2,000 decontrol threshold. Challenges may also be anticipated

A1

from tenants renting apartments which were previously "high-rent" decontrolled, asking the agency to determine if the apartment was legitimately decontrolled.

Other provisions of the bill could have an even more serious impact on the Division's budget. The provisions granting owners amnesty for late registration and barring awards of treble damages based solely upon an owner's failure to register virtually eliminates any incentive for an owner to register a unit prior to the filing of a rent overcharge complaint. As long as the owner registers after an overcharge complaint is filed, the owner's maximum exposure for prior failure to register is five dollars per unit. This will mean fewer registrations, which in turn will mean fewer fees paid by owners to help defray the cost of administering the system. Currently, these fees represent approximately half of DHCR's operating budget. The loss of revenues could be up to as high as several million dollars.

In addition to these administrative concerns, the Division also has concerns about several other provisions of the bill. The provisions that legislate a 1/40th amortization rate for individual apartment improvements are particularly disturbing, especially coming at a time when the Division has started the process to administratively change the amortization rate to 1/72nd of the cost of the improvement. This change to 1/72nd was predicated on economic studies which indicated that the 1/40th rate is excessive and provides owners with a thirty-three percent rate of return on their expenditures. So generous a rate of return provides a great incentive for owners to provide extensive and sometimes unnecessary renovations, especially on vacant apartments, when tenant consent is not necessary, thus reducing the supply of affordable housing. The negative impact of this change could be ameliorated in a number of ways, however. For example, the provision prohibiting increases for improvements made during the useful life of a similar improvement for which a rent increase was previously granted can be used to carefully scrutinize whether improvements lawfully qualify for an increase. The Division will also conduct a study and issue a schedule indicating what replacement items do not represent apartment improvements qualifying for an increase.

Notwithstanding these concerns, the Division, as noted, considers this bill to be a reasonable compromise that allows for the preservation of the tenant protection laws, and therefore recommends approval.