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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

LAURA DiLORENZO

BRIEF COMPLETED:
October 14, 2019

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ARGUMENT

POINT I

DEFENDANT'S ARGUMENT, THAT THE USEFUL LIFE RULE ONLY APPLIES TO "EQUIPMENT," BUT NOT TO ALL IMPROVEMENTS, IS WITHOUT MERIT. IN ADDITION, THIS ARGUMENT WAS NOT RAISED BELOW, AND IS RAISED FOR THE FIRST TIME BEFORE THIS COURT

Defendants' principal argument on this appeal is that, as a matter of statutory construction, the useful life rule only applies to "equipment," and not to "improvements" overall. As is set forth below, this argument, a) was not raised below, and b) is without merit.

A. Defendants did not raise the equipment/improvement argument below.

The argument presented by defendants to this Court—i.e., that the useful life rule only applies to "equipment," and not to "improvements"—was not raised below. Thus, a review of defendant's post-trial submission, A659-70, and oral argument to the trial court, A357-423, will reveal no mention of this argument, and thus no consideration of the argument by the trial court. A5-12. Similarly, defendant did not make this argument to the Appellate Division, and the Appellate Division thus had no occasion to consider this argument in its decision. AA1-54.

The failure of defendants to present their statutory construction argument to the lower courts represents a waiver of such argument. It is of course well settled that arguments not raised, nor passed upon, below, may not be considered for the first time in this Court. *See Bingham v. New York City Transit Authority,* 99 N.Y.2d 355, 359 (2003) ("As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice."); *Hapletah v. Assessor of Towns of Fallsburg*, 79 N.Y.2d 244, 252 (1992); *Gregory v. Board of Appeals of Town of Cambria,* 57 N.Y.2d 865, 867 (1982).

B. The Distinction that Defendants Attempt to Draw Between "Equipment" and "Improvements," Does Not Exist

Initially, it should be noted that defendants do not attempt to defend the blanket holding of the Appellate Division majority that landlords "were not required . . . to adhere to a useful life schedule in performing IAIs." AA25. Defendants implicitly concede that the Appellate Division went too far in eliminating all useful life restrictions from a landlord's ability to obtain an IAI rent increase. Instead of attempting to justify the Appellate Division's removal of all useful life protections from IAI rent increases, defendants argue for a less sweeping restriction of the useful life rule, based on statutory construction. While conceding the existence of useful life limitations upon IAI increases, defendants argue that such limitations only pertain to "equipment," "furniture" and "furnishings," and not to "improvements" overall. Resp. Brief, p. 13.

Based on this attempted distinction between "equipment, furniture and furnishings" and a general category of "improvements," defendants argue that kitchen countertop, sink, faucets, shower body, bathtub and toilet, would be subject to useful life requirements as "equipment," whereas everything else, such as wood floors, walls, bathroom tiles, electric wiring, and plumbing constitute general "improvements," and not equipment, and are thus not subject to useful life restrictions.

Defendants offer no authority whatsoever for their novel, and hyper-technical construction of the useful life rule.

Most significantly, it must be noted that defendant's rather unique and cramped construction of the statute is not shared by DHCR, nor is it shared by the New York legislature. As noted in plaintiff's main brief, pp. 24-25, the useful life rule was enacted in 1993. In a July 7, 1993 Memorandum to the Governor, commenting upon the proposed legislation, DHCR referred favorably to "the provision prohibiting increases for improvements made during the useful life of a similar improvement for which a rent increase was previously granted [which] can be used to carefully scrutinize whether improvements lawfully qualify for an increase." (This memorandum is reproduced as an appendix to plaintiff's main brief.)

If defendant's construction is correct, DHCR would have referred to a useful life for "equipment," and not improvements. DHCR, however, did not draw the distinction between "equipment" and "improvements" that defendants urge. To the contrary, DHCR saw the useful life rule as applying to "improvements" in general without defendant's proposed qualification.

Similarly, the New York legislature does not share defendant's restricted construction of the statute. As noted, in plaintiff's main brief, pp. 25-26, the Housing Stability and Tenant Protection Act of 2019, signed into law June 14,

2019, specifically referenced landlords' duty to maintain "records of the useful life of improvements." NYC Admin. Code § 26-516(g). Just as with the DHCR, the legislature did not limit the operation of the useful life rule to "equipment," but made clear its understanding that the useful life rule extends to all improvements.

Central to defendants' argument on this appeal is that certain items for which defendants obtained IAI increases below—i.e., plumbing, electrical wiring, walls, floors, tiles, etc.—can not be considered "equipment," and thus are mere "improvements," and thus somehow outside the scope of the useful life rule.

Defendant's position is contradicted by the fact that many of the items which defendants claim are outside the scope of useful life as mere improvements, and not "equipment," are expressly cited by the DHCR as "improvements," subject to the useful life schedule promulgated by the DHCR itself.

9 NYCRR § 2522.4(d) is a "Useful Life Schedule for Major Capital Improvements." Included on this schedule as "improvements" subject to the useful life requirement are items "5) Rewiring," and "8) Plumbing/Repiping." Under "Schedule of Major Capital Improvements," appear items "20. Repiping" and "22. Rewiring."

Defendant's attempt to exclude plumbing and electrical work from the reach of the useful life rules is clearly inconsistent with the position of the DHCR in the Rent Stabilization Code.

In sum, defendant's attempt to narrow the reach of the useful life rule so as to cover only an undefined category of "equipment," and not all improvements, represents an artificial and strained interpretation of the useful life rule, not shared by the legislature and the DHCR useful life schedule, and completely lacking in any case law support.

POINT II

EVEN UNDER DEFENDANT'S CRAMPED CONSTRUCTION OF THE USEFUL LIFE RULE, DEFENDANTS DID NOT MEET THEIR BURDEN TO SHOW COMPLIANCE WITH THE RULE

Defendants make two arguments in support of their contention that they complied with the useful life rule, as defendants would re-define and limit the rule.

First, defendants argue that the useful life rule did not apply to the 2009 improvements, because the 1995 and 1998 improvements had suffered severe water damage, requiring their complete replacement. Defendants argue: "It does not matter that rent increases based on IAI improvements were obtained in 1995 and 1998. Those improvements were literally 'washed away.'" Resp. Brief, p. 13. Defendants liken the condition of the apartment to an emergency situation, rendering the apartment uninhabitable due to severe flooding, thereby making the useful life rule moot. Resp. Brief, p. 15.

Defendant's contention that the prior improvements were "washed away" by severe flooding suffers from a major flaw—i.e., it lacks evidentiary support.

Defendants failed to produce evidence for the subject apartment's condition prior to the 2009 improvements. Thus, defendants offered no photographs of the apartment's pre-improvement condition, and offered no testimony concerning the alleged severe flooding to the subject apartment.

Defendants, at p. 11 of Resp. Brief, reference the testimony of building manager Baigelman and contractor Molen as supporting the claim of heavy flood damage. Defendants, however, fail to provide citations to the record for their testimony.

With respect to Baigelman, defendants invoke "Baigelman's testimony that there was extensive water damage to some of the apartments in the building prior to the 2009 renovations of those apartments." Resp. Brief, p. 11. The Appellate Division majority also referenced this same supposed testimony, referring to "Baigelman's testimony that there was extensive water damage to some of the apartments in the building prior to the 2009 renovations of those apartments." AA26.

The problem with these references, however, is that *Baigelman never gave any such testimony*. Baigelman's trial testimony is reproduced in its entirety at pp. A149-205, and certain deposition testimony by Baigelman appears at pp. A592-620. A review of the Baigelman testimony shows that he was never asked about the condition of the subject apartment prior to the 2009 renovations. Baigelman

never offered any testimony concerning water damage to the subject apartment, nor to any other apartment in the building. Baigelman never offered any testimony concerning the massive water damage invoked by defendants in their brief. Baigelman certainly never testified that the earlier 1995 and 1998 renovations had been "washed away," Resp. Brief. P. 13, by subsequent flooding. In any event, Baigelman was not in a position to offer any testimony concerning the "washing away" of earlier renovations, as Baigelman testified that he had no recollection of the earlier renovations. A8, 166, 191-92, 194-95.

A review of the Baigelman testimony will show that both defendants and the Appellate Division majority are mistaken as to what Baigelman actually testified to—he simply offered *no testimony* as to water damage.

In addition to citing non-existent testimony by Baigelman, defendants also cite the testimony of contractor Howard Molen, to support their claim that the earlier renovations were "washed away" by subsequent flooding. Resp. Brief, p. 11. Molen's testimony, however, is not much more helpful to defendants on this point. Molen testified that "some" apartments in the building had experienced water damage. A220. Molen, however, testified that he never personally visited the subject apartment, neither, before, during, or after the renovations. A211-12. Molen was quite clear that he had no personal knowledge of whether or not the subject apartment had itself suffered any water damage. A239-40. Molen's

testimony certainly did not establish the extensive flooding of the subject apartment, and "washing away" of the earlier renovations, which defendants claim in their brief.

Simply put, defendants' claim that an emergency situation, consisting of flood damage, pre-empted the useful life rules in this case, has no support in the trial record.

Related to the "washed away" argument is defendants' claim that the useful life rules can not apply to the instant case, because defendants supposedly performed a "gut renovation," to remedy supposed flood damage. Resp. Brief, pp. 14-16. Defendants argue that where an owner faces an emergency situation, involving "apartments that are rendered inhabitable [sic] due to casualties, like fire and flooding," or that have fallen into "a state of disrepair and [need] to be taken out of the rental market," Resp. Brief, p. 15, the owner will be required to perform a "gut renovation," and the useful life rules will no longer apply.

Whatever the merits of such an argument may be to other cases, such argument does not apply to this case. As discussed above, defendants never presented evidence of any emergency situation below, and certainly did not present evidence that the subject apartment had fallen into a "state of disrepair," or had been rendered "uninhabitable." Baigelman never offered any testimony as to the

condition of the apartment, and Molen never visited the subject apartment, and thus offered no testimony concerning the condition of the apartment.

Defendants' second argument to avoid application of the useful life rule consists of two parts. First, defendants argue that plumbing and electrical work can not be subject to the useful life rule. Resp. Brief, p. 12. As the plumbing ($13,251.91) and electrical ($5,650) total $18,901.91, defendants argue that only an additional $3,070 in qualifying improvements needs to be found in the $60,000 general contractor HFM invoice in order to put defendants over the $21,972 IAI threshold. Resp. Brief, pp. 12-13. Defendants then argue that this Court should take judicial notice of the individual prices of the various different work items set forth on the Molen invoice, A622, which itself is for a flat sum of $60,000, without any price breakdown whatsoever.

Defendant's argument suffers from two major flaws. First, defendants offer no cogent reason why all plumbing and electrical work should be granted a blanket exemption from the useful life rules. As previously noted, the RSC specifically includes plumbing and electrical work within the useful life schedule promulgated by the DHCR. See discussion of 9 NYCRR § 2522.4(a)(2)(i)(d) *supra*, p. 5. Defendants thus do not get an automatic pass from the useful life rules on the first $18,901.91 of their claimed IAI expenditures.

Defendant's claim to cherry pick $3,070 of expenditures from the $60,000 lump sum HFM invoice is equally unavailing. Even assuming that defendant's construction of the useful life rule to include only "equipment," and not all improvements, were correct (which it is not, see Point I *supra*), there is no basis on this record to price out the so-called qualifying improvements, from the non-qualifying "equipment" on the HFM invoice. Defendants chose to present a single page, lump sum $60,000 invoice, without any breakdown in price. A622. There is no way to price the individual components of the $60,000 lump sum from the face of the invoice. Defendants presented the testimony of Howard Molen, president and owner of HFM. A205-41. Defendants could have asked Molen to break out the prices of individual components, but they chose not to.

Having chosen to present a single $60,000 lump sum invoice , and to have foregone the opportunity to provide a price breakdown of the individual components through the testimony of the HFM president, defendants now ask this Court to remedy their evidentiary failing, by taking "judicial notice" of the individual price components of the HFM job. Specifically, defendants ask this Court to take judicial notice of "the cost of the kitchen countertop, sink, faucets, shower body, bathtub and toilet," as well as the other components of the job, including walls, floors and tiles. Resp. Brief, pp. 13-14.

The individual pricing components of an undifferentiated, lump sum $60,000 general contractor's invoice is certainly not a proper subject for judicial notice under New York law.

In New York, "a Court may notice a fact which is 'a matter of common and general knowledge, well-established and authoritatively settled.'" Richardson on Evidence, § 2-201 (Prince 11th Edition) (citation omitted). Judicial notice is proper only where a fact is "common knowledge," *Crater Club, Inc. v. Adirondack Park Agency*, 86 AD2d 714, 715 (3rd Dept. 1982), *aff'd* 57 N.Y.2d 990 (1982), or "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *People v. Jones*, 73 N.Y.2d 427, 431-32 (1989) (citation omitted).

Traditionally, judicially noticed facts consist of such things as government statistical compilations, time of sunset or sunrise, official weather reports, and general historical facts.

The alleged facts urged upon this Court by defendants—i.e., the price of kitchen countertops, bathtubs, tiles, walls, floors, etc.—are in no way subject to judicial notice. The prices at issue are not matters of common knowledge, nor are they easily ascertainable by reference to sources of indisputable accuracy. By asking the Court to take "judicial notice" of the prices of these items, defendants are asking the Court to engage in speculation.

Even if one were to accept defendant's crabbed construction of the statute, and restrict application of the useful life rules to "equipment," defendants still have not met their burden to show compliance with the rule. As to defendant's first argument—i.e., that all prior improvements were "washed away" by flood damage—there was a total failure of proof. As to defendant's second argument—i.e., the disqualifying "equipment" components of the IAI were outweighed by the other "improvements" supposedly exempt from the useful life rule—the trial record fails to provide an evidentiary basis upon which to price the qualifying IAI from the disqualified IAI. Under New York law, this evidentiary failure can not be bridged by defendant's invocation of "judicial notice."

POINT III

DEFENDANT'S CLAIM OF "TRIAL BY AMBUSH" AND PREJUDICE HAS NO SUPPORT IN THE RECORD

Defendants claim that plaintiff engaged in "trial by ambush." Resp. Brief, p. 1. Specifically, defendants claim that, "Defendants could not obtain records to refute the useful life argument detailing the equipment installed almost twenty years previously in 1995 and 1998 given Plaintiff's last minute ambush." Resp. Brief, p. 17. Defendants contend that they were prejudiced, in that their "ability to obtain records" and "identify witnesses," who had knowledge of the improvements in 1995 and 1998 were seriously compromised." Resp. Brief, p. 17. Defendants provide no citations to the Record to support this claim of prejudice. The reason

for this is quite simple: defendants' claim of prejudice is completely unsubstantiated, and devoid of any record support. Thus, defendants did not even attempt below to identify a single document or category of document that had become unavailable to them through the passage of time. Similarly, defendants did not identify a single witness who had become unavailable over time. In fact, defendants did not even raise a claim of prejudice to either the trial court, or the Appellate Division, as set forth in plaintiff's main brief, at p. 30-31.

At p. 17 of their Brief, defendants argue that new owner, defendant Windermere Owners LLC, was somehow prejudiced, because it bought the building from old owner, Windemere Chateau, Inc., and the prior building manager, Simon Baigelman, was no longer employed at the building, as of the time of trial, and new owner lacked a relationship with prior owner's vendors and contractors. This argument, however, is fallacious, as both the old and new owners are defendants in this action, represented by the same counsel, at both the trial and appellate levels. Moreover, the former employee, Baigelman, did in fact testify at trial, on behalf of both defendants. A149-205. Furthermore, the defendants—i.e., the new owner and old owner—called the former owner's vendors and contractors as witnesses, who in fact did testify at trial, on behalf of both defendants. A206-327.

Defendant's claim of alleged lost documents is contradicted not only by their failure to identify any such document, but by the fact that when this action was commenced in 2011, defendants remained in possession of copies of their DHCR registrations for 1995 and 1998 which, by law, were required to have identifying information about the earlier improvements. Defendants did not produce these documents, either in discovery, or at trial. Defendants never offered any explanation for the non-production of these records. The trial court specifically noted defendants' unexplained failure to produce these records in its decision. A8. See discussion of these withheld records at pp. 12-13, 26-27 of plaintiff's main brief.

Without citing any authority, defendants argue that the useful life rule was somehow waived when it was not cited in the complaint. Defendants offer no legal theory under which plaintiff would have been required to cite the useful life rule in the complaint, given that the burden of useful life remained with defendants, and useful life did not form an element of plaintiff's cause of action. See pp. 33-38 of plaintiff's main brief, for a discussion of CPLR 3013 and notice pleading.

Useful life had no significance to this case until defendants raised an affirmative defense that they had lawfully increased the prior regulated rent. (As previously noted, even when defendants raised the affirmative defense of lawful rent increases, they did not specify that they were claiming lawful IAI increases.

Likewise, landlord did not identify IAI as the basis of the rent increase at issue in its DHCR registration, as reflected in the DHCR rent history. See Plaintiff Main Brief, pp. 33-34.)

Defendant's argument, in substance, is that, as defendants raised an affirmative defense of unspecified lawful rent increases, plaintiff was required to either anticipate this defense, by raising useful life in the complaint, or to serve a "reply to affirmative defense." (Of course, no such pleading is provided for in the CPLR.) In making such argument, defendants disregard the long established rule that a plaintiff is not required to "set up in his complaint, or by way of reply, facts in rebuttal or avoidance of an affirmative defense. . . set up in the answer." *Metropolitan Life Insurance Co. v. Meeker,* 85 N.Y. 614, 614 (1881). See discussion in plaintiff's main brief at pp. 39-41.

Citing to the majority's decision, defendants contend that "the Appellate Division correctly rejected the useful life argument because it was not before them in the context of this appeal." Resp. Brief, p. 17. As the useful life issue was raised by plaintiff in her pre-trial memorandum filed below, A 44-46, was addressed by both parties in their post-trial submissions, A660-62, 673-76, was argued to the trial court, A368-75, 391-93, 398-403, 413-14, was addressed by the trial court in its decision, A6-8, and was considered by both the Appellate Division

majority and dissent, AA23-26, 49-52, the useful life issue is most assuredly before the Court in the context of this appeal.

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: October 14, 2019
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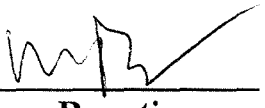
CERTIFICATION: 

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