*To Be Argued By:*
Kevin D. Cullen
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APL-2019-00132

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# Court of Appeals

STATE OF NEW YORK

LAURA DILORENZO,

*Plaintiff-Appellant,*

*against*

WINDERMERE OWNERS LLC and
WINDEMERE CHATEAU, INC.,

*Defendants-Respondents.*

## BRIEF FOR DEFENDANTS-RESPONDENTS

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## PRELIMINARY STATEMENT

The Appellate Division, First Department was correct in its application of the uncontroverted facts to the relevant law. In seeking reversal of that Decision and Order, Plaintiff has intentionally misstated the law and referred to incomplete and thus misleading snippets of the record. Worse yet, plaintiff seeks judicial sanction of her sharp practice in engaging in a trial by ambush, conduct which the Appellate Division did not countenance.

In determining that Defendants had met their burden of proving that a sufficient amount had been spent on improvements to the apartment in 2009 to qualify for a permanent exemption from rent regulation, the Appellate Division focused on and considered documentary evidence in the form of: (a) authenticated invoices from the contractors, (b) payments and the timing of such payments made by the Defendant Owner to these contractors effectuated by cancelled checks, and

(c) photographs of the apartment taken by the Plaintiff evidencing that the work set forth in the invoices had been performed. Arguing against the heavy weight of this accumulated evidence, Plaintiff resorts to an argument it presented for the first time at trial and almost five years after it had commenced this action -- that Defendants are not entitled to their statutory right to certain rent increases, thus not reaching the threshold for permanent exemption, because they had received rent increases for unspecified improvements made in 1995 and 1998.

This argument is unavailing because it misstates the law and the facts. Moreover, to hold otherwise would reward Plaintiff for its sharp practice in concealing the main issue in dispute until the trial, a practice long since derided as contrary to acceptable norms of New York litigants.

## COUNTERSTATEMENT OF FACTS

At the trial of this rent overcharge case in January 2016, Defendants presented evidence of expenditures made in 2009 that were well in excess of those required for Plaintiff's apartment to qualify for permanent exemption from rent regulation prior to occupancy by Plaintiff. Based upon the then existing formula, and as stipulated to by the parties, Defendants were required to prove their expenditure in the amount of $21,972 on qualified improvements and upon proof of such expenditures the premises would qualify for permanent exemption from rent regulation. Instead, Defendants presented evidence of expenditures of $82,015.27,

of which the Appellate Division accepted $78,901.95 as qualifying for permanent rent increases. In its extremely careful review of the record, the Appellate Division did not accept one invoice of Mike Lorenz Corp. (the plumber) for $3,133.32 as a qualified individual apartment improvement ("IAI") since the work reflected in that invoice was not performed solely for the benefit of Plaintiff's apartment 4K.

The Appellate Division accepted all of the other expenditures holding that Defendants had proved by a preponderance of the evidence the expenditure of $78,901.95 on qualified improvements. Below is a discussion of each of the contractors, the improvements completed and the issues considered and resolved by the Appellate Division.

**H.F.M. Company, Inc. Invoice (A622)**

H.F.M. Company, Inc. ("HFM") was the general contractor for the 2009 project for apartment 4K. Presented at trial was their invoice which was authenticated by HFM's owner and president, Howard Molen ("Molen"), and offered and ultimately accepted by the trial court as a business record pursuant to CPLR Rule 4518(a). (A622) The invoice set forth in detail the items of work performed in Plaintiff's apartment. The invoice on its face presents the scope of work as being a gut renovation, meaning that the work encompassed the demolition and replacement of the floors, rewiring the electrical and repiping plumbing.

**Floors**

The entries in the invoice evidencing the demolition, removal and replacement of the floors were:

> Demolish Designated Areas of the Unit && the Removal of Resulting Debris
> Installed new underlayment/plywood thru*out the Suite**including new select oak flooring &&& all moldings. [sic] ** Wood.
> Replaced all designated wood mouldings, sills/skirts.
> Select Oak Floorings
>
> * * *
>
> Wonderboard/concrete floors/slab/new wall ** Floor tiles/grouting/marble saddle/&& all necessary finishes.
>
> * * *
>
> Poured a new concrete floor/slab * Kitchen; ceramic tiles/grout were installed after the concrete slab had cured.

**Walls**

The entries in the invoice evidencing the wall improvements were:

> Replaced interior doors//hardware//&& installed new metal frames.
>
> Prepared/Plastered/skim coated/&& oil based primed the suite * complete erection/construction of a new bathroom; new framing/studding, wonderboard, concrete floor/slab/new wall
>
> * * *
>
> Installation of new hardware throughout the suite * complete

erection /construction of a new bathroom; new framing/studding/wonderboard, concrete floor/slab/new wall closet ** including interior shelf * pole

Pictures of the apartment taken by the Plaintiff in 2015 in preparation for trial and admitted into evidence were scrutinized by the Appellate Division to ascertain whether they supported Defendants' contentions as to the work performed. Even though taken in 2015, over five years after the work was completed in 2009, the pictures demonstrated that the HFM invoice was accurate and reliable in its description of the scope of work.

The floors depicted in these pictures were obviously wooden and uniform in their appearance. (A541, 553, 555, 557, 559). All of these pictures matched and confirmed the demolishing and replacement of wood floors throughout Plaintiff's apartment as described in the HFM invoice. The tiles installed in the bathroom were depicted in the picture shown on A565. The installation of the closet was evidenced by the pictures A535 and 537. The plastering, skimming and painting of the walls was evidenced by A541, 551, 553, 555, 557 and 559.

The HFM invoice and the pictures also reflected that there were no charges for the installation of an older stove (A561) or an older refrigerator (A563).

The HFM invoice for $60,000.00 was dated October 14, 2009. (A622) A check from Windemere Chateau, Inc. for $63,097.81 was dated December 18, 2009 (A623). The Appellate Division reviewed the amount and timing of the invoice and the check tendered and negotiated in determining that the check was in payment of that invoice.

Significantly, the HFM invoice, the check in payment of that invoice and the pictures, all acted singly and in the aggregate as independent corroboration of this work. The Appellate Division determined that due to this type of incontrovertible evidence, it could infer facts from these documents. The credibility of witnesses was not at issue. Thus, the general rule of deference to trial court determinations of facts based upon witness credibility could and did give way in this circumstance.

**Contractors Electrical Service, Inc. Invoice (A625)**

The invoice from Contractors Electrical Service, Inc. for $5,650.00 (A625) was admitted into evidence without objection (A248). The work described therein is consistent with and corroborates the work described in the HFM invoice. For example, the electrician's invoice describes supply and installation of receptacles in walls via channeling in the living room, channeling and installing receptacles in the bedroom, new wiring in the bathroom. Two pipes in the floor needed to be rerouted, one pipe in wall and one pipe in ceiling soffit.

The pictures taken by the Plaintiff showed smooth walls and floors. Obviously, the installation of the floors and walls were staged and had to be scheduled after the electrician had completed his installations. Together the scope of work performed by the electrician and the general contractor evidenced the gut renovation of Apartment 4K.

**Mike Lorenz Corp. Certificate of Capital Improvement and Invoice**.

As the Appellate Division held, the trial court improperly excluded from evidence the invoice from Mike Lorenz Corp. in the amount of $13,251.95. (AA19). The invoice was annexed as an exhibit to the defendant's motion for summary judgment dated August 7, 2012, thus Plaintiff's objection that he had not seen this invoice until production by Ms. Lorenz immediately before trial was inaccurate. (A644-647.) Plaintiff had been provided with a copy of this invoice over three and one half years before the trial Mr. Baigelman, the former building manager and a part owner of the building at the time of the improvements to Plaintiff's apartment, testified that he had tendered a check in the amount of $16,365.27 in payment of both this invoice (A640) together with a second invoice for $3,113.32 (A641). The Appellate Division did not accept the $3,133.25 as a qualified IAI expense since said invoice was for work affecting several apartments and not exclusively Plaintiff's apartment. In addition to the invoice, Defendant introduced a certificate of capital improvement from Mike Lorenz Corp. The Certificate of Capital Improvement was

properly authenticated by Annette Lorenz, the widow of Mike Lorenz, the owner of Mike Lorenz Corp. (the plumber)(A274-276)(A626). It provides further corroboration that the work performed was an improvement and not repair of apartment 4K. The Certificate indicated that all new waste, vent and water lines had been installed, hallmarks of improvements for a gut rehab and not a repair.

**Building Management's Acceptance of the Contractors' Services**

The Appellate Division searched the record. One significant fact was that the property manager at the time (Mr. Baigelman) testified that it was his practice after work was performed to walk through the apartments, in some cases with a supervisor from the relevant vendor and make certain that the contracted for work was completed in accordance with the relevant scope of work and invoice prior to paying any invoice. He further testified that he considered the HFM invoice involved herein to be for a large sum and that he would not have paid this large invoice without first inspecting the work. (A155.) While he did not recall the specifics of this particular apartment, he certainly recalled his practice and procedures.

Baigelman identified the check to HFM Company as it bore his signature. He testified that this check was in payment of the HFM invoice of $60,000 and payment of an additional unrelated invoice from the same vendor . (A156-157.)

Baigelman's testimony as to the amount of the invoice and the completion of the work corroborates the other documentary evidence adduced by Defendants.

Based upon his practice, he requested the work, inspected the work after it had been completed and issued the check in payment of the invoice. Thus, it cannot seriously be argued that Defendants failed in their proof of the improvements performed, the cost of such improvements and Defendant's entitlement to the corresponding statutory permanent rent increase(s).

## POINT I Standard of Review

Based upon the evidence presented in this case, the Appellate Division determined that the proper standard of review is de novo. (AA8) In reaching that determination, the Appellate Division reviewed the trial court's decision and order and noted there was no evidence that the trial court found any of the Defendants' witnesses less than credible. Instead, the trial court found the evidence to be legally insufficient. The facts in evidence, based upon the invoices, cancelled checks and pictures, were undisputed and the controversy was confined to what legal conclusions would be drawn from that evidence. (AA10)

As a result of this determination, the Appellate Division correctly applied this Court's holding in *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 NY2d 492, 499 (1983) and *Green v. William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570, 571 (1st Dept. 2010)(Saxe, J., concurring), rather than *Thorsesen v. Penthouse Intl.*, 80 NY2d 490 (1992). Based upon its de novo review of the record, the Appellate Division correctly reversed the trial court.

## POINT II Standard of Proof

As stated by the Appellate Division, Defendants had the burden of proving the cost of renovations made to the apartment to justify the rent it charged Plaintiff. *Bradbury v. 342 W. 30th St. Corp.*, 84 AD3d 681, 683 (1st Dept. 2011); *Matter of 985 Fifth Ave. v. State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574 - 575 (1st Dept. 1991), lv denied 78 NY2d 861 (1991). (AA11.) To meet that burden, the owner must present documentary support therefore [including] all relevant invoices, bills, cancelled checks and other material.

Defendants presented competent evidence of expenditures totaling $78,901.95, an amount far in excess of the $21,972 which the parties stipulated was the minimum expenditure required to lawfully and permanently remove the premises from rent regulation. Defendants and the Appellate Division were guided by DHCR Policy Statement 90-10 [June 26, 1990] as to acceptable proof of expenditures [Any "claimed . . . individual apartment improvement cost must be supported by adequate documentation which should include **at least one** of the following: 1) Cancelled check(s) contemporaneous with the completion of the work; 2) Invoice receipt marked paid in full contemporaneous with the completion of the work; 3) Signed contract agreement; 4) Contractor's affidavit indicating that the installation was completed and paid in full." (Emphasis added.) *Matter of 985 Fifth Ave. v. State*

*Div. of Hous. & Community Renewal*, 171 AD2d 572, 574-575 (1st Dept. 1991), *lv denied* 78 NY2d 861 (1991).

**Cumulative Evidence Is Compelling That Sufficient Funds Were Expended**

Defendants met their evidentiary burden by presenting competent evidence that justified the de-regulation of Plaintiff's apartment. Despite the passage of almost six years since the work was performed in 2009 to the trial in January 2016, Defendants presented documentary evidence of the work performed and the cost of such work. The invoices of HFM, Mike Lorenz Corp. and Contractors Electrical Service, Inc. and Mike Lorenz Corp.'s Certificate of Capital Improvement were consistent in their description and evidenced the overlap of their services in performing this gut renovation, especially to the kitchen, living room and bathroom. Moreover, the description of the work was consistent with and corroborated 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, as well as Molen's (the owner of H.F.M. Company, Inc.), testimony that some of the apartments in the building had to undergo a gut renovation.

Plaintiff herself provided the best evidence that the work described in the invoices and in the Certificate of Capital Improvement was performed by way of the photographs taken by Plaintiff and admitted into evidence. The wood floors in the apartment were depicted as uniform and in good shape consistent with having been

installed in 2009. The floors would not have been in such condition had they been installed over a decade earlier in 1995 or 1998. The floors did not show the wear one would have expected of wood floors installed 14 or 11 years earlier than 2009. The same holds true for the walls, kitchen and bathroom.

**POINT III The Useful Life Argument is Unavailing**

The useful life argument does not apply to the facts in this case. The vast majority of the $78,901.95 expended in 2009 as a result of water damage was spent in connection with demolishing and installing the wood floors, walls and installing tiles in the bathroom, as well as new electrical wiring and plumbing routed in the floors and walls of the apartment. Though there is no definition of "equipment" to be found in the Rent Stabilization Law, assuming arguendo, that equipment includes kitchen countertop, sink, faucets, shower body, bathtub and toilet, those items were installed in Plaintiff's apartment as reflected in the invoices and Certificate of Capital Improvement but were obviously de minimus in cost compared with the other work performed and billed.

The invoice of Mike Lorenz Corp. contains labor charges of $13,251.91. (A640); the invoice of Contractors Electrical Service, Inc. (admitted without objection) was for $5,650 (A625). Collectively these two invoices total $18,901.91, which is over 86% of the stipulated minimum required expenditure of $21,972.00. While the HFM invoice for $60,000 is not broken down by line items, the Defendant

only needed $3,070.00 thereof to qualify for IAI in order to meet the $21,972.00 minimum required expenditure. Demolition and replacement of wooden floors, walls and bathroom tiles and construction of a new closet as depicted in the photographs obviously well exceeds the $3,070.00 additionally required qualified expenditure. It does not matter that rent increases based on IAI Improvements were obtained in 1995 and 1998. Those improvements were literally "washed away."

The Rent Stabilization Law, NYC Admin. Code §26-511(c)(13) applies to new equipment, furniture and furnishings; not other improvements as misstated by Plaintiff (Appeal Brief at 11).

Section 2522.4(a)(11) states:

> (11) An owner who is entitled to a rent increased based upon the installation of new equipment, or new furniture or furnishings pursuant to subdivision (1) of this subdivision shall not be entitled to a further 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 work performed in 2009 was a gut renovation that replaced floors, walls and tiles. The work also included electrical and plumbing work that was strung or piped through the walls and floors. It did not include the installation of furniture or furnishings. Not one of the three invoices contained any charges for furniture or furnishings. While some equipment was provided, this Court can take judicial notice that the cost of the kitchen countertop, sink, faucets, shower body, bathtub and toilet

pale in comparison to the actual labor, materials and work performed to Plaintiff's apartment.

The fact that a gut renovation was performed distinguishes this case from an ordinary useful life situation even assuming it applies to IAI rent increases.[1] DHCR permits the waiver of the useful life requirement in certain circumstances in connection with major capital improvements ("MCIs"). As provided in DHCR Fact Sheet #33:

> An owner who wishes to request a waiver of the useful life requirement must apply to DHCR for such waiver prior to the commencement of the work for which he or she will be seeking a major capital improvement rent increase. Notwithstanding this requirement, where the waiver is requested is for an item being replaced because of an emergency, which causes the building or any part thereto be dangerous to human life and safety or detrimental to health, an owner may apply to the DHCR for such waiver at the time he or she submits the major capital improvement rent increase application. One reason why the DHCR may grant a waiver is if the item or equipment cannot be repaired and must be replaced during its useful life because of fire, vandalism or other emergency, or an "act of God" resulting in an emergency.

This right to seek a waiver from DHCR is not present for an owner seeking a rent increase for an IAI since MCI increases require DHCR approval while IAI rent increases do not. Yet, the reasons underpinning an owner's right to apply for a waiver for MCI increases are equally compelling for IAI increases. The right of an

[1] Further, completion of a gut renovation qualifies for IAI certain items of work which otherwise would constitute non-qualified repairs. *Jemrock Realty Co. LLC v. Jay Krugman, 64A.D.3d 290, 880 N.Y.S 2d 233 (1st Dept. 2009)*.

owner to obtain a rent increase for improvements for individual apartment improvements is grounded in the belief that the public good is served by the improvement of housing accommodations subject to rent regulation. To say it differently, the public interest is not served if housing accommodations are allowed to go into a state of disrepair and to be taken out of the rental market because there is no incentive for an owner to restore the apartments and recoup those expenditures on improvements for apartments that are rendered inhabitable due to casualties like fire and flooding.

Owners obtain rent increases for individual apartment improvements without the need or ability to apply to DHCR for a waiver. Given this regulatory scheme, owners must make decisions whether to improve apartments damaged by fire or flooding and restore them to the marketplace without DHCR approval. According to Plaintiff's argument, to the extent that a useful life issue applies to individual apartment improvements, that would mean that Defendant owner would not be eligible to recoup the costs of improvements to Plaintiff's apartment unless such improvements were done no earlier than 2013 (15 years from 1998 being the last date of the prior IAI increase). Thus, this apartment would in all likelihood remain vacant and unimproved for at least 4 years from 2009 when the gut renovation was completed until 2013 when the useful life of the last increase in 1998 expired).

Plaintiff's strained interpretation of the Rent Stabilization Code would exacerbate New York's critical housing shortage.

Even were there prior rent increases granted to an owner for previous improvements to an apartment, the fact that a gut renovation was performed and a complete replacement of walls, floors, tiling and replacement of plumbing and electrical lines militates against a knee-jerk application of the useful life rules. To hold otherwise would send a clear message to owners of apartment buildings in New York and precipitate the removal from the marketplace of apartments that could otherwise be restored, thereby heightening the severe housing shortage that led to the implementation of rent regulation after World War 11 and continues to exist to this day.

As the Appellate Division correctly held:

> Furthermore, it makes no sense that defendants would incur more than $78,000 in contracting expenses if all that was needed was $21,972.00 in IAIs in order to qualify apartment 4K for exemption form rent stabilization, unless the expenses were necessary to address an emergency situation, such as water damage to the apartment. This scenario is consistent with 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)

Aside from the language of the statute and policy considerations, Plaintiff should not be rewarded for concealing its main defense until the eve of trial. The action was commenced on April 25, 2011 (A21) and extensive discovery thereafter

ensued including the exchange of interrogatories (A632). After discovery proceedings were concluded, Defendants moved for summary judgment on August 7, 2012 and again on February 10, 2015, requiring Plaintiff to lay bare its proof and legal theories, (A644 and 650). Plaintiff made no mention of the useful life defense in neither her Complaint nor her opposition to either motion for summary judgment. Instead, Plaintiff waited until the eve of trial to present this argument (A39). At that point, the building had been sold to Defendant Windermere Owners LLC, Baigelman was no longer employed as the building manager, and new ownership had no relationship with prior management's vendors or contractors.

Defendants could not obtain records to refute the useful life argument detailing the equipment installed almost 20 years previously in 1995 and 1998 given Plaintiff's last minute ambush. Plaintiff's delay, whether intentional or inadvertent, caused Defendants prejudice in their ability to come forward with evidence rebutting the useful life argument. Moreover, given the passage of time, Defendants' ability to obtain records that might have been available in 2011 when the action was commenced, or identify witnesses who had knowledge of the improvements in 1995 or 1998 were seriously compromised. Plaintiff never moved to amend her complaint, never presented this issue in opposition to the two motions for summary judgment and the Appellate Division correctly rejected the useful life argument because it was not before them in the context of this appeal. (AA23).

## CONCLUSION

The Appellate Division decision and order should be affirmed in all respects.

Dated: October 3, 2019
New York, New York

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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: October 3, 2019
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