To Be Submitted By:
Roger Sachar

APL-2018-00214

New York County Clerk's Index No. 11725/10

Court of Appeals

STATE OF NEW YORK

JOEL RADEN and ODETTE RADEN,

Plaintiffs-Appellants,

against

W7879, LLC., W79TH LLC., N, K AND S LLC., MN BROADWAY, LLC., LISA W. NAGEL IRREVOCABLE T LLC, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL, Evelyn Nagel and Alan Nagel Trustees, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Steven Nagel, *et al*., Evelyn Nagel and Alan Nagel Trustees, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Evelyn Nagel, *et al.* Evelyn Nagel and Alan Nagel Trustees, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Clair Nagel, *et al*., Clair Nagel Jernick and Alan Nagel Trustees, and DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Alan Nagel, *et al*., Alan Nagel and Steven Nagle Trustees,

Defendants-Respondents.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Jacobus Gomes, Hajera Dehqanzada-Lyle, N.N. Simpson, and Jorge A. Nàjera-Ordòñez (collectively, the "*Amici*") respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellants Joel Raden and Odette Raden ("Appellants"). For the reasons detailed below – in addition to those detailed in Appellants' own briefing – the Order of the Appellate Division, First Department[1] should be reversed.

PRELIMINARY STATEMENT

This action is one of the quintet of currently pending cases which address the intersection of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA,"), various tax benefits programs (such as J-51), and the registration of regulated rent. Each of these cases presents questions that will affect thousands of tenants in currently pending actions before the lower courts. The *Amici* submit their brief to one aspect of those questions directly affecting them: should HSTPA apply retroactively?

The *Amici* are plaintiffs in four (4) rent overcharge class actions. In each of their cases, the landlord-defendants have argued that HSTPA should not be retroactively applied. The language and arguments utilized by those landlords mirror

[1] Sachar Affirmation in Support of Motion for Leave to Appear as *Amici Curiae* ("Sachar Aff.") Ex. A.

those asserted by Defendants-Respondents ("Respondents") in their letter brief of September 26.

On or about June 14, 2019, our state's legislature passed, and Governor Cuomo signed, HSTPA. One of the most significant changes made was the expansion of the statute of limitations for rent overcharges from four (4) to six (6) years, which was to "take effect immediately and [] apply to any claims pending or filed on or after such date."

Despite that clear and unambiguous language, Respondents assert that "it is clear that the new Law should not be applied to the instant appeal which concerns actions and decision which all took place prior to the Law's enactment on June 14, 2019."[2] Respondents further argue that HSTPA should not apply retroactively, because it would "improperly impose new liabilities upon the landlord and provide the tenants with new rights."[3]

As demonstrated below, those contentions are incorrect. The answer to the question "should HSTPA apply retroactively?" is "yes".

INTERESTS OF THE *AMICI*

The *Amici* are each plaintiffs in overcharge class actions currently pending in the New York City courts. Each *Amici* is either rent-stabilized or, at a minimum,

[2] Respondents' correspondence, dated September 26, 2019 ("Sept. 26 Corr.") at 3.
[3] Sept. 26 Corr. at 5.

asserts that their apartment would be rent-stabilized, but for their landlord's misconduct. In each of *Amici*'s cases, the landlord-defendant has insisted that HSTPA does not apply, retroactively.

Gomes is a plaintiff in *Gomes et ano. v Vermyck, LLC* (Index No. 0713219/2018 [Sup. Ct., Queens County]), a J-51 class action. The landlord in that action asserts that HSTPA cannot be applied retroactively. [4] The Justice in that action, the Honorable Richard G. Latin denied Gomes' motion to amend, to reflect HSTPA's changes, without prejudice, pending the outcome of the five appeals pending before this Court.[5]

Hajera Dehqanzada-Lyle ("Lyle") is a plaintiff in *Stafford et al. v A&E Real Estate Holdings, LLC, et ano.* (Index No. 655500/2016 [Sup Ct., NY County]), a class action asserting, *inter alia*, that the landlord inflated costs related to Individual Apartment Improvements. The landlord in that action asserts that HSTPA does not apply retroactively.[6] In denying the landlord's motion to dismiss, the justice in that action, the Honorable Joel M. Cohen, held that HSTPA applied retroactively.[7]

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[4] Sachar Aff. Ex. B at 4-13.
[5] Sachar Aff., Ex. C.
[6] Sachar Aff., Ex. D.
[7] Sachar Aff., Ex. E.

N.N. Simpson ("Simpson") is a plaintiff in *Simpson et al. v 16-26 East 105th LLC, et ano.* (Index No. 160737/2017 [Sup Ct., NY County]), a J-51 class action. The landlord in that action asserts that HSTPA does not apply retroactively.[8]

Nàjera-Ordòñez is a plaintiff in *Nàjera-Ordòñez et ano. v 260 Partners L.P., et ano.* (Index No. 160546/2017 [Sup Ct., NY County]), a J-51 class action. The landlord in that action asserts that HSTPA does not apply retroactively.[9] In granting his amendment motion, the justice in that action, the Honorable Lynn Kotler, held that HSTPA applied retroactively.[10]

ARGUMENT

I. HSTPA APPLIES RETROACTIVELY

HSTPA provides that the legislature intended the change in law to "take effect immediately, and shall apply to any claims pending or filed on or after such date[.]" (Laws 2019, ch 36 at Part A). It has long been understood that our state's legislature may, so long as it expresses such a desire clearly, (as it did here), modify the statute of limitations to revive claims that were previously barred. Section 59 of McKinney's Statutes states, "[w]hen reasonably exercised, the Legislature has the power to change laws relating to limitations of actions as by shortening limitations in pending cases or reviving an action previously barred." (*Id.*; *Commander-Larabee*

[8] Sachar Aff., Ex. F.
[9] Sachar Aff., Ex. G.
[10] Sachar Aff., Ex. H.

Mill Co v Manufacturers & Traders Tr. Co, 61 F Supp 341, 342 [WD NY 1945] ["Under federal or state law the rule is that the lawmaking body may change laws relating to limitation of actions in pending cases."]).

The First Department has already opined on retroactivity, in *Dugan et al. v London Terrace Gardens, et al*, (177 AD3d 1 [1st Dept 2019]). The court held:

> On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA), landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the state.[3] Of relevance to this appeal is part F of the HSTPA, which amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The legislation directed that the statutory amendments contained in part F "shall take effect immediately and shall apply to any claims pending or filed on and after such date" (HSTPA, § 1, part F, § 7). Because plaintiffs' overcharge claims were pending on the effective date of part F of the HSTPA, the changes made therein are applicable here (*see Matter of Kandemir v New York State Div of Hous. & Community Renewal*, 4 AD3d 122 [1st Dept 2004]; *Matter of Pechock v New York State Div. of Hous. & Community Renewal*, 253 AD2d 655 [1st Dept 1998]; *Zafra v Pilkes*, 245 AD2d 218 [1st Dept 1997]).

Dugan at 8. The trial courts have held likewise. (*Nájera-Ordóñez, et ano. v 260 Partners L.P, et ano.*, 2019 WL 5681030 [Sup Ct, NY County 2019]; *Alekna, et al. v 207-217 West 110 Portfolio Owner LLC*, 2019 NY Slip Op. 33256[U], 4 [Sup Ct, NY County], *Stafford et al. v A&E Real Estate Holdings, et al.*, 2019 NY Slip Op. 33039[U], 8 [N.Y. Sup Ct, NY County 2019]; *57 Elmhurst, LLC v Williams, et al.*, 2019 NY Slip Op 51778(U) [Civ Ct 2019]; and *3225 Holdings LLC v Imeraj*, 65 Misc 3d 1219(A) [Civ Ct 2019]).

Nevertheless, in opposition to this authority, Respondents proffer two cases. First, they cite to *Landgraf v USI Film Products*, (511 US 244 [1994]), and call that case, instructive.[11] How *Landgraf* helps Respondents is a mystery. The pertinent language of that opinion states:

> When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf at 280, emphasis added. *Landgraf* posits that retroactive changes are allowable, and our legislature clearly and unequivocally indicated the change was to apply retroactively - it provided "[t]his act shall take effect immediately and shall apply to any claims pending or filed on and after such date[.]" (Laws 2019, ch 36 at Part A.)

The same principle applies to Respondents' second citation, *Aquaiza v Vantage Properties, LLC*, (69 AD3d 422 [1st Dept 2010]).[12] Respondents, quote *Aquaiza* at length for the proposition that retroactive application of HSTPA is inappropriate, but omit the key sentence. In *Aquaiza*, the First Department noted:

> Although the statute is remedial in nature, it specifically provides that its terms are to take effect "immediately" (i.e., March 13, 2008, the date of its enactment) (Local Law No. 7 [2008] of City of NY § 7). No

[11] Sept. 26 Corr. at 3-4.
[12] Sept. 26 Corr. at 4-5.

provision was made in the statute for retroactive application of its terms.

Aquaiza at 423, emphasis added. Here, our legislature expressly provided for retroactive application when it wrote that HSTPA was to apply to any claims "pending."

Contrary to Respondents' position in its letter of September 26, HSTPA applies retroactively if the legislature provides for retroactive application, and it clearly indicated its intent to do so, here.

II. RESPONDENTS' LIABILITY ARGUMENT IS A CONSTITUTIONAL ONE, AND IMPROPERLY BEFORE THE COURT

Respondents' final argument is derivative of their retroactivity argument, and asserts that HSTPA should not apply to them, because it will improperly expand their liability for rent overcharges from four, to six, years. Respondents write that HSTPA should not apply to this action, because "the application of [] HSTPA to this matter would 'increase [the Landlord's] liability for past conduct.'"[13] Why Respondents feel that this expanded liability to procedurally infirm, it does not say, and that failure to elaborate is important.

The language Respondents point to, from *Landgraf*, arises from a constitutional challenge to retroactive legislation – including claims of due process

[13] Sept. 26 Corr. at p. 5. Respondents do not provide a citation for their quote, but the language quoted is lifted from *Landgraf*.

violations, *ex post facto* laws, and bills of attainder. But the reason that Respondents tap-dance around the fact that they make a constitutional challenge, is because they failed to abide by the CPLR and Executive Law § 71.

CPLR 1012(b) provides

> **Notice to attorney-general, city, county, town or village where constitutionality in issue.**
>
> 1. When the constitutionality of a statute of the state, or a rule and regulation adopted pursuant thereto is involved in an action to which the state is not a party, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality.
>
> ***
>
> 3. The court having jurisdiction in an action or proceeding in which the constitutionality of a state statute, local law, ordinance, rule or regulation is challenged shall not consider any challenge to the constitutionality of such state statute, local law, ordinance, rule or regulation unless proof of service of the notice required by this subdivision is filed with such court.

Id., emphasis added. Similarly, Executive Law § 71 provides

> The court having jurisdiction in an action or proceeding in which the constitutionality of a statute, rule or regulation is challenged, shall not consider any challenge to the constitutionality of such statute, rule or regulation unless proof of service of the notice required by this section or required by subdivision (b) of section one thousand twelve of the civil practice law and rules is filed with such court.

Id. Here, Respondents have failed to provide notice to the attorney general. Absent such notice, this Court is barred from considering any question regarding the constitutionality of HSTPA. (*Luthmann v Gulino*, 131 AD3d 636, 637 [2d Dept

2015] [petitioner did not advise Attorney General of constitutional challenge, requiring dismissal of claim of unconstitutionality]; *People v Brown*, 64 AD3d 611 [2d Dept 2009] [appellate court refused to consider constitutional challenge in the absence of demonstrable notice to Attorney General].)

Even if Respondents' constitutional concerns were properly before this Court, they are misplaced. The First Department recently rejected a constitutional challenge to HSTPA in *Dugan*, and noted that "[i]t is well settled that absent deliberate or negligent delay, where a statute has been amended during the pendency of a proceeding, application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem." (*Dugan* at 9; *see also Stafford* at 9-11] [due process rights not impaired by expanded statute of limitations].)

The legislature can expand the statute of limitations, increasing liability, without running afoul of the Constitution. Nevertheless, to the extent that Respondents wishes to raise a constitutional challenge, it should not be allowed to obfuscate, but must abide by the CPLR's notification requirements.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Appellants' own briefing, the Appellate Division's order should be reversed. The *Amici* respectfully request that, when issuing its order in this appeal, this Court make clear that HSTPA applies retroactively.

DATED: 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: November 22, 2019

Respectfully Submitted,

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