To be Argued by:
SETH A. MILLER
(Time Requested: 30 Minutes)

APL-2018-00214
New York County Clerk's Index No. 111725/10

Court of Appeals

of the

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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

COLLINS, DOBKIN & MILLER LLP
Attorneys for Plaintiffs-Appellants
277 Broadway, 14th Floor
New York, New York 10007
Tel.: (212) 587-2400
Fax: (212) 587-2410
smiller@collinsdobkinmiller.com

Date Completed: May 15, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

PRELIMINARY STATEMENT

This Reply Brief is respectfully submitted by Plaintiffs-Appellants JOEL RADEN ("Raden") and ODETTE RADEN ("Appellants") in further support of their appeal from the Decision of the Appellate Division, First Department, entered August 16, 2018 (the "Order Under Review"), affirming a Judgment of the Supreme Court, New York County entered on January 25, 2018 (the "Trial Court Judgment") in the amount of $600.52, and affirming an Order of the same Court, entered March 7, 2016, (Kenney, J., hereinafter referred to as the "Trial Court Order") (A. 7)[1] denying Appellants' motion to reject the July 10, 2015 Report and Recommendation of Special Referee Jeffrey A. Helewitz (the "Referee's Report", A. 8-35), and confirming that Report in its entirety, in this rent overcharge action.

Defendants-Respondents W7879 LLC, et. al.[2] ("Respondents" or "Owners") argue that Appellants' rent stabilized rent is required to be based on the free market

---

[1] References to the Appendix are denominated as "A." followed by the applicable page number.

[2] The other Defendants-Respondents, all of whom jointly own the Building, are: N, K AND S LLC, WEST 79TH LLC, MN BROADWAY LLC, EVELYN NAGEL as co-executor of the Estate of Michael Nagel, and as co-trustee of the Descendants Single Trust u/w Michael Nagel, the Descendants Separate Trust u/w Michael Nagel fbo Steven Nagel, et al., and the Descendants Separate Trust u/w Michael Nagel fbo Evelyn Nagel, et al., ALAN NAGEL as co-trustee of the Descendants Separate Trust u/w Michael Nagel fbo Clair Nagel Jernick, et al., and the Descendants Separate Trust u/w Michael Nagel fbo Alan Nagel, et al., and LISA W. NAGEL IRREVOCABLE T, LLC.

rent that Appellants paid as of the date four years prior to their complaint.[3] Although they make many arguments in their lengthy brief, they nowhere assert any statutory basis for using a free market rent as a base rent from which to calculate overcharges under rent stabilization. The legal principle that prohibits consideration of "rental history" prior to the base date *does not* compel the use of a free market rent as a base rent. Rather, Rent Stabilization Law §§ 26-512(e) and 26-516(a)(i) require that *lawfully registered* rents, registered *as of* the base date and not the product of any fraudulent misstatement of the apartment's status, be used as the base rent.

Contrary to Respondents' argument, in the absence of a reliable registered rent in effect on the base date, the rent is required to be established using the default formula applied by this Court in *Thornton v. Baron,* 5 N.Y.3d 175 (2005). Use of the default formula has never been limited to instances where the owner can be proven to have knowingly and intentionally defrauded the tenant. Rent stabilized rents are not, as a rule, supposed to be higher for honest landlords and lower for dishonest ones. Rather, if the rent cannot be established through the use of a reliable registration in effect on

---

[3] Respondents misstate the base date, disregarding the record. As found by the referee at Supreme Court, the base date was the date four years prior to the May 19, 2010 letter by which Respondents' counsel unconditionally acknowledged having overcharged the Appellants. *See,* A. 33 (finding the four year inquiry period ended May, 2010); General Obligations Law §17-101; *City of New York v. North River Housing Dev. Fund Corp*., 12 A.D.3d 294 (1st Dept., 2004) (letter held unconditional acknowledgment of debt, tolling statute of limitations). Because the letter tolled the statute of limitations, the date of the complaint (September, 2010, not February, 2011 as misstated repeatedly by Respondents' counsel) is irrelevant to the calculation of the base date.

the base date, the default formula must be used. *Levinson v. 390 W. End Assoc. LLC,* 22 A.D.3d 397 (1st Dept., 2005) (*Thornton* default formula "should be used to determine the base rent in an overcharge case where, as here, no valid registration statement was on file as of the base date"); *cited with approval, Grimm v. DHCR,* 15 N.Y.3d 358 at 366 (2010).

In this case, as of the base date the Radens' apartment had not been registered for decades. Since 1995 the Respondents and their predecessor, Dr. Nagel (who first rented the Apartment to the Radens) had issued leases misstating the status of the Apartment, asserting in bold capital letters that "THIS APARTMENT IS NOT SUBJECT TO RENT STABILIZATION." Since the base date they breached their affirmative statutory duty to notify the Radens, with each lease, that their apartment was registered as rent stabilized, and to serve them with a formal rider notifying them of, among other things, their right to file a rent overcharge complaint.

These multiple breaches of Respondents' statutory duty to disclose the facts, establish "a fraudulent scheme to destabilize the apartment [that] tainted the reliability of the rent on the base date" within the meaning of *Grimm, Id* at 367. Contrary to Respondents' argument, a finding that a landlord's repeated misstatements "tainted the reliability of the rent", does not require proof that the misstatements were intentional or malicious. In *Grimm,* this Court found that fraud is sufficiently established by the very items present here: a landlord's failure to file (and therefore to serve the tenant

with) registration forms and failure to provide rights riders. *Grimm* did not suggest that evidence of any intentional misrepresentation was required. The regulatory scheme, after all, requires that landlords provide full disclosure of the facts.

On the facts, Respondents' argument is totally contradicted by the record. Even assuming that the state of Dr. Nagel's mind as of 1995 was relevant, there is simply no support in the record whatsoever for Respondents' claim that Dr. Nagel relied on "prevailing legal authority" (Respondents' Brief, p. 19) when he deregulated the Radens' apartment.[4] Rather, at trial there was no testimony that he "relied" on anything at all, since Respondents' single witness, a lawyer from the law firm representing them on this appeal, disclaimed any direct knowledge of his reason for deregulating the Apartment. (A. 500, 502, 583, and 619). He deregulated the Apartment in disregard,, if not defiance, of the uniform authority that, in 1995, prohibited deregulation.

Similarly, in light of the clear statutory duty to disclose the facts, Dr. Nagel's state of mind is not relevant to the issue of whether his misrepresentations, and those of the Respondents, equitably estop them from reliance upon the statute of limitations.

---

[4] Respondents' Brief contains a remarkably large number of misstatements. Contrary to the statement at Page 6, the Apartment is not on West 81st Street. Contrary to the statements at Page 9 and elsewhere, Appellants commenced this 2010 case in September 2010, not in February 2011, a misstatement that is apparent from glancing at the docket number. The prior tenants' legal rent when they vacated was $2,072.52 (A. 1035), not $2,105.33 as stated on Page 20. The applicable rent guidelines increase for a vacant apartment at that time was 5%, not 14%, under Rent Guidelines Board Order No. 26. These items are in addition to more consequential misstatements, dealt with in the body of this Brief, concerning what was and was not proven at trial about Dr. Nagel's intent when he deregulated the Apartment, and about what arguments were and were not preserved in the proceedings below.

The Radens had the right to rely upon the leases, and upon the fact that they were not served with registration statements or with any DHCR-approved rights rider to any of their renewal leases, in refraining from filing any overcharge complaints. This is especially true in light of Respondents' own assertion (albeit an assertion unsupported by the record), that prevailing DHCR policy entitled them to treat the Apartment as unregulated for over a decade.

The legality of Appellants' base rent does not depend upon Respondents' state of mind or that of their predecessor. It was a free market, unregulated rent, and therefore it cannot serve as a base rent for purposes of rent stabilization. Under *Thornton* if the only available records of an apartment's rent as of the base date are unreliable, the default formula must be used. Therefore, the Order Under Review should be reversed.

ARGUMENT

POINT I: NOTWITHSTANDING RESPONDENTS' EXCUSES, THEIR FAILURE TO REGISTER THE RADENS' RENT, FAILURE TO SERVE THE RADENS WITH REGISTRATION STATEMENTS AND FAILURE TO PROVIDE NOTICE OF THE RADENS' RIGHTS AS STABILIZED TENANTS REQUIRES USE OF THE DEFAULT FORMULA

Respondents' predecessor, Dr. Nagel, deregulated Appellants' apartment in 1995. Respondents argue that, at that time, "prevailing legal authority" permitted deregulation, but they point to no such authority. They argue that Dr. Nagel relied on

such nonexistent authority, but the record on appeal lacks any evidence whatsoever of Dr. Nagel's actual rationale for deregulating the Apartment. Respondents have not provided any real answer to the overwhelming evidence that, as of 1995, it was illegal to deregulate the Radens' apartment.

In contradictory fashion, Respondents claim that the law was unsettled at that time: they say "there was no policy and no consensus in 1995/95 [sic]" (Respondents' Brief, p. 23), while at the same time they open their brief by saying that "Over a twenty-five (25) year period prior to *Roberts* [*v. Tishman Speyer Properties, L.P.*, 15 N.Y.3d 270 (2009)] the [DHCR] had wrongly held that deregulation applied" (Respondents' Brief, p. 2).

The law was not unsettled. It was clear as day. The municipal regulations governing the J-51 program, 28 RCNY §5-03(f)(1), required that as a condition for receiving benefits, "all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to: . . . the Rent Stabilization Law of 1969." Respondents fail to cite these regulations, let alone distinguish them.

Rent Stabilization Law §26-504(c) imposed rent stabilization upon all "[d]welling units located in a building or structure receiving the benefits of section 11-243 or section 11-244 of the [NYC Admin.] code . . . " Respondents do not discuss this statutory language, in effect since 1976. *See,* Local Law 60 (1975) of City of NY. This language was not modified at all when the legislature enacted high rent

deregulation in 1993. As noted in Appellants' opening brief, the central holding of *Roberts* was that the *plain meaning* of the statutory language of RSL §26-504.2 – "exclusion pursuant to this subdivision shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving [J-51] tax benefits" – is that there can be no high rent deregulation in buildings receiving J-51 benefits. *Roberts*, 13 N.Y.3d at 286, 287.

Respondents' argument is that the law was unsettled in 1995 because, in January 1996, after having issued *two* advisory opinions in 1995 to the effect that deregulation was not available in J-51 subsidized buildings, DHCR reversed course. DHCR's reversal does not indicate that the law was anything less than crystal clear before January, 1996. The sequence of events shows that every available legal authority in 1995 was unanimous in prohibiting deregulation. Respondents cannot avoid this conclusion by playing the tape backwards.

Respondents argue that the 1995 opinion letters were not "'official' DHCR policy." (Respondents' Brief, p. 22). Firstly, because they were in harmony with the plain language of every single law and regulation on the subject, it does not matter whether they were official policy: they represented the unanimous view, as of 1995, that deregulation was prohibited. Secondly in *Roberts* the arguments before this Court principally concerned the January 1996 DHCR letter by which the agency changed its policy, and this Court treated it as an authoritative statement of its policy at the time.

Roberts, 13 N.Y.3d at 285 ("PCV/ST and MetLife emphasize that since 1996 DHCR--the state agency entrusted with administering rent stabilization--has interpreted the luxury decontrol provisions in the manner they advocate . . . DHCR's interpretation and the one PCV/ST and MetLife now offer are different.")

Respondents cite the disclaimer that accompanies every DHCR advisory opinion letter, to the effect that it is not a "substitute for a formal agency order." The disclaimer shows that the letters are not *binding.* They are not *adjudications.* That is different from asserting that they are not *policy.* They were official policy and, as shown in *Roberts,* were treated as such by landlords and by the Courts.

Misreading *Grimm,* Respondents argue that neither they nor Dr. Nagel could have engaged in a fraudulent deregulation scheme because they have not been proven to have known the law. *Grimm* does not, however, require any showing of *scienter.* In *Grimm* this Court found that DHCR was obligated to investigate whether a tenant's base rent was reliable, because the combination of an unexplained sharp increase in the rent, the landlord's failure to register the unit (until after the tenant filed an overcharge complaint) and the landlord's failure to serve the tenant with mandatory official DHCR lease riders ("Rights Riders") giving the tenant notice of her rights, raised a colorable claim that the landlord engaged in a fraudulent deregulation scheme that tainted the reliability of the base rent. None of these pieces of evidence proved an intent on the part of the landlord to engage in deceit, as opposed to a disregard of the duty to comply

with the disclosure and rent setting requirements of the RSL. This Court did *not* say that proof of intent was required.

In this case, the Radens amply proved that Dr. Nagel and the Respondents misrepresented the status of their Apartment, and failed to comply with their duty to serve them with rent registrations and with Rights Riders. That proof is undisputed.

Contrary to Respondents' argument, there is no evidence whatsoever in the record that would show Dr. Nagel to have had any good faith basis for deregulating the Apartment. They do not even *cite* to any testimony in the record. As noted in Appellants' opening brief, Respondents' sole witness on this issue was their lawyer, Mr. Marino, who represented Dr. Nagel in 1995 but could not recall any discussions with him about the basis for deregulating units at the Building. (A. 500, 502, 583, and 619).

This case therefore amply satisfies the standard for review of factual material in this Court, cited by Respondents. *See, Humphrey v State,* 60 NY2d 742 (1983). Dr. Nagel and the Respondents misrepresented the status of the Apartment in every lease given to the Radens from 1995 to 2010, and breached their affirmative duty to disclose that the Apartment was rent stabilized. There is no contrary evidence. In particular, the record lacks any evidence whatsoever of Dr. Nagel's excuse for deregulating the Apartment, notwithstanding the statements of Respondents' counsel proclaiming his "good faith." There is no conflicting evidence to weigh, balance or assess. Dr. Nagel

had no excuse for deregulating the Apartment. His misrepresentations and failures to disclose the facts, and those of the Respondents, in breach of their clear statutory duty, constitute fraud within the meaning of *Grimm.*

On this issue, it is irrelevant what "similar landlords" (Respondents' Brief, p. 7) or "many landlords" (Respondents' Brief, p. 24) may or may not have believed. Reliance on supposed industry practice is not a defense to an overcharge claim. *Obiora v. DHCR*, 77 A.D.3d 755 (2nd Dept., 2010) (rejecting a landlord's claim of "good faith" reliance on counsel's advice in deregulating an apartment in a building receiving J-51 subsidies); *Hargrove v. DHCR*, 244 A.D.2d 241 (1st Dept, 1998) (rejecting landlord's claim of "good faith" misinterpretation of J-51 statute).

Therefore, the Order Under Review should be reversed.

POINT II: RESPONDENTS OFFER NO STATUTORY BASIS FOR USING APPELLANTS' FREE MARKET RENT AS THE BASIS FOR CALCULATING THEIR RENT UNDER RENT STABILIZATION

Respondents cite two statutes – CPLR 213-a, and RSL §26-516(a)(2) – in support of their argument that the four year statute of limitations on overcharge cases prohibits the use of rent history, dating before the base date, in calculating Appellants' rent. While these statutes place restrictions on what evidence may be used to calculate a rent stabilized rent, neither of them sets forth any method for performing such calculation. Pointedly, neither of them say what Respondents evidently want them to

say, which is that a free market rent collected on the base date is allowed, let alone required, to be used to calculate a stabilized rent.

The *only* approved statutory method for calculating a rent stabilized rent is the one set forth in RSL §26-512(e) and RSL §26-516(a)(i): the legal rent must be "registered pursuant to section 26-517" and equal to the "rent indicated in the annual registration statement filed four years prior to the most recent registration statement."

The original purpose of the registration system is to establish a means for calculating rents based on widely available public records as opposed to privately held evidence, and to relieve landlords of the burden of keeping records of regulated rents: the rent on file with DHCR, if unchallenged four years after the registration is served on the tenant, becomes the authoritative record of the regulated rent. *Myers v. Frankel*, 184 Misc. 2d 608, 613 (App. Term, 2d & 11th Dists., 2000) ("the [Omnibus Housing] Act gave owners who duly registered the benefit of a methodology which calculated the overcharge in terms of the rent registered in the statement filed four years prior to the most recent registration statement, thus insulating these owners from examination

of the rental history for the period before the filing of that statement"), *reversed on other grounds*, 292 A.D.2d 575 (2d Dept., 2002).[5]

Although CPLR 213-a, and RSL 26-516(a)(2) have been interpreted as prohibiting DHCR from using its records from *before* the base date as a means to

---

[5] Respondents' brief contains a lengthy digression setting forth their response to the dissenting opinions in this case and in *Matter of Regina Metro. Co., LLC v NY State Div. of Hous. & Community Renewal*, 164 A.D.3d 420 (1st Dept, 2018). This Brief responds only to those points that involve Appellants' own legal arguments, which are not entirely congruent with those of the dissenters.

However, Respondents' discussion of the meaning of "rental history" as the term is used in CPLR 213-a, raises issues that overlap with Appellants' arguments about the effect of the registration of stabilized units upon the legality of the base rent.

The *Regina* dissenters argue that the only "rental history" that is barred from consideration in calculating a tenant's rent is the public record of the rents registered with DHCR. The Appellate Term's 2000 opinion in *Myers v. Frankel*, although overruled, argued persuasively for the very opposite rule: taken to its logical conclusion, it argued that a properly-filed registration statement is *not* "rental history" such as would be barred from use as a basis for calculating the rent, because the very design of the registration system demonstrates an intent that rents be calculated using an unbroken chain of public registrations, which after four years substitute for the parties' own private "rental history" and relieve them of the burden of keeping such private records. *See also, Cecilia v. Irizarry*, 189 Misc. 2d 430 (App. Term, 2d Dept., 2001). On this point, the similarity between the reasoning of *Taylor v. 72A Realty Assoc., LP*, 151 A.D.3d 95 (1st Dept., 2017) and the reasoning of the Appellate Term opinion in *Myers v. Frankel* is striking.

As noted in Appellants' opening brief, this Court implicitly rejected that reasoning in *Thornton*, when it affirmed the use by the Appellate Division majority of a default formula to calculate the rent for an apartment that had been illegally deregulated by a collusive scheme between landlord and tenant. By affirming the Appellate Division majority in *Thornton*, this Court rejected the dissenting opinion of Justice Tom, formerly of the Housing Court (joined by Justice Buckley), who would have used the prior valid registration statement as the basis for calculating the rent. *Thornton* therefore can be read as supporting the proposition that the four year rule prohibits the use of public records of rents from before the base date, as a means to set the rent. That aspect of *Thornton* – the apparent holding that DHCR and the Courts must ignore the public record of registered rents more than four years old in the name of relieving landlords of the burden of private record keeping – is a factor that led to the proliferation of four-year-rule cases that have been brought in the years that followed.

calculate rents, this Court has consistently held that the proper registration of the rent *on* the base date is the key factor in determining whether that rent is sufficiently reliable to be used as a basis for establishing subsequent rents.

In *Thornton,* this Court held that an illegal registration statement on file on the base date cannot be used to determine subsequent rents, and therefore that, absent a lawful registration of the base rent, the rent is required to be set in accordance with the default formula:

> because the rent it purported to establish was therefore illegal, the 1996 rent registration statement listing this illegal rent was also a nullity. Under those circumstances, we agree with Supreme Court and the Appellate Division majority that the default formula used by DHCR to set the rent where no reliable rent records are available.

5 N.Y.S.3d at 181. The path that this Court used to get to that conclusion is a rejection of the rent calculation adopted in the Order Under Review. This Court did *not* look to the actual rent *charged*, and did not make the current rent dependent on whether the rent charged on the base date was illegal. Rather, the Court held that the *registration* was "a nullity", and that in the absence of a reliable registration held that the default formula, a calculation based on the lowest stabilized rent for the same sized apartment, was required to be used.

Contrary to Respondents' argument, the default formula does *not* require the use of any evidence from before the base date. Rather, its use is strictly in accordance with

even the narrowest interpretation of the four year rule: it sets the rent based on another registered rent *as of* the base date, not before.

In *Grimm,* as noted above, this Court found the following evidence to be sufficiently strong to warrant an inquiry as to whether the base date was the product of a fraudulent deregulation scheme:

> the tenants immediately preceding petitioner paid significantly more than the previously registered rent, and were not given a rent-stabilized lease rider. Moreover those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense. *Almost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements* (see Rent Stabilization Code [9 NYCRR] § 2528.3 [a] [requiring annual registration statements be filed with DHCR]) *and later filed several years' registration statements retroactively after receiving petitioner's overcharge complaint.* Finally, petitioner's initial lease did not contain a rent-stabilized rider.

(Emphasis supplied). *Grimm,* 15 N.Y.3d at 366. Other than the "bump" in the rent, which *Grimm* holds is not sufficient by itself to trigger any inquiry about the legality of the base rent, the remaining factors (non-registration, lack of a Rights Rider) *all* pertain to the statutory requirements that ensure that current stabilized rents are based on lawful rents charged in the past. In *Grimm* this Court held that a landlord's refusal to register a base rent, and refusal to disclose the basis for calculating the legal rent (a requirement of the Rights Rider) indicates that the base rent is fraudulent and subject to challenge.

In *Matter of Boyd v. DHCR*, 23 N.Y.3d 999 (2014), by contrast, this Court rejected the use of a default formula to calculate a rent that included a large rent increase, in part because the landlord was in compliance with the requirement that the base rent and subsequent rents be registered, thereby putting the tenant on notice of the obligation to file a timely challenge. *Compare, Matter of Boyd v. DHCR*, 110 A.D.3d 594 (1st Dept., 2013) (dissenting opinion at the Appellate Division).

In this case, Respondents' counsel sent the Radens a letter on May 19, 2010, admitting that they had been overcharged. Because that letter was an unconditional acknowledgment of the overcharge, it tolled the statute of limitations. General Obligations Law §17-101; *City of New York v. North River Housing Dev. Fund Corp*., 12 A.D.3d 294, 786 N.Y.S.2d 11 (1st Dept., 2004) (letter held unconditional acknowledgment of debt, tolling statute of limitations). The base date for this action is therefore May, 2006, as found by the referee, a finding never appealed by the Respondents. *See*, A. 33 (finding the four year inquiry period ended May, 2010).

As of May, 2006, the Radens were undisputedly being charged a market rent of $4,000.00 per month, a rent that had never been registered with DHCR. The apartment had not been registered since 1995, over a decade earlier.

Respondents argue that, by belatedly registering, in June, 2010, the free market rent of $4,000.00 that had been charged in May, 2006, that rent became a "registered rent" in compliance with RSL §26-516(a)(i). Those late registrations were not,

however, in effect on the base date, which is the kind of registration that establishes the base rent. The statute requires that the rent be established by "the annual registration statement filed four years prior to the most recent registration statement." The statute requires an unbroken chain of registrations, and imposes a statute of limitations for challenging the rent based on the notice that is given to the tenant by virtue of the service and filing of those registrations. The late registration of a free market rent does not make that rent into a legal stabilized rent.

Contrary to Respondents' argument, RSL §26-517(e), which eliminates the penalty for the late registration of an *otherwise legal* rent, does not turn the Radens free market base rent into a lawful stabilized rent. It provides:

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration.

This statute makes it clear that, when a rent is registered late, it is the "last preceding registration statement" that sets the legal rent. Late registration statements, therefore,

cannot be used as a basis for calculating a base rent. They only lift the rent freeze that would otherwise be imposed by virtue of the failure to register (*compare, 215 W 88th St. Holdings v. DHCR*, 143 A.D.3d 652, 653 (1st Dept., 2016)), and can eliminate any overcharges arising from the rent freeze *if* the belatedly registered rent is, measured by the previously registered rent, otherwise lawful.

This Court has repeatedly expressed its impatience with the argument that a landlord can make an illegal rent into a legal rent by filing a late registration. In *Thornton*, 5 N.Y.3d at 181, the majority characterized the argument in dissent in the following language: "Under the dissent's rule, a landlord whose fraud remains undetected for four years – however willful or egregious the violation – would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases." In *Grimm*, 15 N.Y.3d at 366, this Court cited the belated retroactive registration of several years' worth of rent increases, evidently in reaction to a tenant's overcharge complaint, as evidence tending to establish a fraudulent deregulation scheme.

Under *Thornton*, where there is no reliable registered legal rent on the base date, the default formula must be used to set the rent. 5 N.Y.S.3d at 181. Contrary to Respondents' argument, this rule is not limited to instances where the base rent was the product of fraud, as in *Grimm*, or collusive deregulation, as in *Thornton* itself. The decades-long illegal deregulation of J-51 apartments necessarily means that the base

date rent for those apartments, in most cases, was a free market rent that was not registered. Under *Thornton*, the way to calculate the rent when there was no registration statement in effect on the base date, and the base date rent was an illegal market rent, is to use the default formula. Setting the rent at the level of the lowest stabilized rent from another same-sized apartment in the building avoids the use of rent history from before the base date.

Contrary to the misstatements in Respondents' brief, Appellants have consistently preserved this argument. In their motion in Supreme Court to reject the referee's report, they argued:

> 55. The operative principle is the unreliability of the base rent, whether as a result of misrepresentation (*Grimm*), or mere illegality (*Gordon* [*v. 305 Riverside Corp.*, 93 A.D.3d 590 (1st Dept., 2012)]). *See also, Thornton v. Baron*, 5 N.Y.3d 175, 800 N.Y.S.2d 118 (2005).
>
> 56. In *Thornton* the fact that the base rent was the product of an illusory tenancy scheme made it unreliable as a matter of law, requiring that the rent be set in accordance with the default formula: the illusory lease "was void at its inception. Further, because the rent it purported to establish was therefore illegal, the 1996 rent registration statement listing this illegal rent was also a nullity." *Thornton* recognized that there are circumstances in which the rent actually charged on the Base Date is unlawful on its face, and cannot be used as a basis for future increases. *See also, Partnership 92 LP v. DHCR*, 11 N.Y.3d 859 (2008) (default formula applied because the base date rent was the result of an illusory tenancy); *Levinson v. 390 West End Assoc.*, 22 A.D.3d 397, 802 N.Y.S.2d 659 (1st Dept., 2005) (default

> formula applied because the base date rent was the result of an illegal agreement purporting to deregulate the apartment).
>
> 57. In this case, it is conceded that the Base Date rent was set illegally, on a "free market" basis, that the rent was not registered with DHCR from 1996 until 2010, when the Defendants filed only four years' worth of belated registrations, and that the Plaintiffs were never notified of the manner by which the owner calculated the rent, and never notified that the Building received J-51 benefits. Undisputedly, the owners misrepresented, in the Radens' leases, that their Apartment was unregulated.

This quote appears at A. 123.

Before the Appellate Division, they argued:

> Where an apartment has been deregulated illegally, the "free market" rent paid by the tenant on the date four years before the complaint was interposed (the "Base Date") cannot be used as the base rent, for purposes of calculating the proper current legal rent and any overcharge damages. *72A Realty Associates v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19, 2012 N.Y. Slip Op. 08241 (1st Dept., 2012).
>
> . . .
>
> The unreliability of the base rent, therefore, is the central element of the fraud analysis under *Grimm v. DHCR,* 15 N.Y.3d 358; 362, 912 N.Y.S.2d 491 (2010) and *Conason v. Megan Holding LLC,* 25 N.Y.3d 1; 6 N.Y.S.3d 206 (2015).
>
> In this case, the Referee improperly required Plaintiffs to prove common law fraud, in order to trigger the default formula, citing *Grimm* and *Conason.* Neither case, however, requires a showing of common law fraud.
>
> Rather, *Grimm v. DHCR,* 15 N.Y.3d 358; 362, 912 N.Y.S.2d 491 (2010) and *Conason v. Megan Holding LLC,* 25 N.Y.3d

> 1; 6 N.Y.S.3d 206 (2015) require that the rent be set using the default method if it is "tainted by fraudulent conduct": a misrepresentation of the status of the apartment that renders the rent unreliable. All that is required is a misrepresentation that taints the reliability of the base rent.

In light of these arguments, it is difficult to discern just what part of Appellants' argument Respondents claim was supposedly not preserved. Evidently, Respondents object to Appellants' expanded discussion of the registration requirements of the Rent Stabilization Law, in the context of demonstrating what *Thornton* and *Grimm* mean by an "unreliable" rent. Respondents have no cause for complaint.

A litigant has the right, on appeal, to explain the arguments made at the trial court level. A "a litigant's failure to cite a particular supporting authority when arguing for a position in the trial court does not preclude the litigant's reliance on that authority when arguing for the very same position on appeal. *Blainey v Metro N. Commuter R.R.*, 99 A.D.3d 588 (1st Dept., 2012). To preserve an issue, all that is needed are "arguments . . . sufficient to alert Supreme Court to the relevant question." *Geraci v Probst*, 15 N.Y.3d 336 (2010).

Here, Appellants have consistently argued that the free market rent charged to the Radens on the base date cannot be used to set their stabilized rent, for reasons including the fact that the Apartment had not been registered, and that the default formula must be used. That argument is fully preserved, as is any reference to the registration statutes that prohibit the use of such free market rent.

POINT III: RESPONDENTS FAIL TO SHOW WHY THE STATUTE OF LIMITATIONS SHOULD NOT BE EQUITABLY TOLLED

Respondents argue that the statute of limitations cannot have been tolled by their failure, and that of Dr. Nagel, to comply with the obligation to provide the Radens with rent registrations and Rights Riders, because there was no "intent to mislead." They do not, however, attempt to show that such intent is needed when the misstatements upon which the Radens undisputedly relied were made in violation of a statutory duty to disclose the true facts. *Juman v Louise Wise Servs*., 254 AD2d 72 (1st Dept 1998).

Respondents argue that there could be no equitable tolling as a result of DHCR's adoption of its policy permitting the illegal deregulation of J-51 subsidized apartments, because for a tiny portion of the time when the statute of limitations was running, the policy was not yet in effect. That argument defies logic. The Radens took occupancy in January, 1995. Elsewhere in their brief, Respondents argue that the statute of limitations is four years, which would have expired January, 1999. Here, however, Respondents suggest that the Radens should have challenged the deregulation of their apartment in 1995, prior to DHCR's change of policy. Thus, according to Respondents, the Radens' effectively did not have four years to file. They had only one.

Respondents argue that the equitable tolling argument was not preserved. It is, however, an argument that "is a purely legal one appearing on the face of the record that [Respondents] could not have avoided had it been raised at the proper junctu

Blainey v Metro N. Commuter R.R., 99 A.D.3d at 590. The underlying facts are undisputed: there is no dispute about the contents of any of the misrepresentations in the Radens' leases, or about the owners' failure to provide Rights Riders and to serve the Radens with registration statements prior to 2010. Appellants consistently argued in the courts below that Joel Raden was misled into believing he could not file an overcharge complaint. Indeed, that was his testimony at trial. (A. 152, 180). Because the Radens consistently argued that they were misled, the assertion of the doctrine of equitable tolling should come as no surprise, and is one that cannot be avoided.

POINT IV: RESPONDENTS HAVE NOT DEMONSTRATED THAT THEIR OVERCHARGES WERE NOT WILLFUL

Respondents argue that treble damages cannot be awarded because Dr. Nagel supposedly, in 1995, relied upon DHCR's 1996 change of position, as a justification for deregulating the Radens' apartment. As noted above, there is absolutely no evidence whatsoever as to Dr. Nagel's basis for deregulating the apartment. Respondents offered no evidence on this point. They therefore failed to satisfy their burden to disprove willfulness.

Respondents' re-regulation of the Apartment in 2010, without rolling the rent back to anything resembling a rent stabilized level, does not eliminate Appellants' right to treble damages. The Apartment should not have been deregulated in the first

instance. Respondents did *not* provide a full refund of all overcharges, including those from before the four year period. *Hargrove v. DHCR*, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept, 1998) ("the landlord's refund of the overcharge amount with interest did not rebut the presumption of willfulness, where, as here, the refund was not tendered until after the landlord interposed an answer to the complaint, *and did not cover the period from 1988–1989, which, while outside of the four-year Statute of Limitations, was nonetheless part of the entire overcharge*." (Emphasis supplied).) Instead, Respondents attempted to whitewash their collection of a market rent, asserting all the way up the appellate process that they are entitled to keep the market rents that they had been collecting. Treble damages are therefore appropriate.

POINT V: SINCE RESPONDENTS DID NOT APPEAL, THEY CANNOT SEEK ATTORNEYS' FEES

Respondents did not appeal. They were not awarded attorneys' fees below. They therefore cannot seek them from the Court of Appeals.

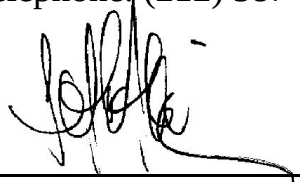
CONCLUSION

For the foregoing reasons, the Order Under Review should be reversed.

Dated: New York, New York
May 14, 2019

Respectfully submitted,

COLLINS DOBKIN & MILLER, LLP
Attorneys for Plaintiffs-Appellants
277 Broadway, Suite 1410
New York, New York 10007
Telephone: (212) 587-2400



By: Seth A. Miller
smiller@collinsdobkinmiller.com

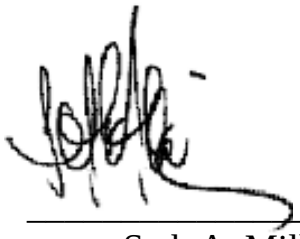
NEW YORK COURT OF APPEALS CERTIFICATE OF COMPLIANCE WITH PRINTING SPECIFICATIONS

SETH A. MILLER, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the truth of the following pursuant to CPLR 2106:

1. I am a member of Collins, Dobkin & Miller, LLP, attorneys for Appellants JOEL RADEN and ODETTE RADEN.

2. This brief is in compliance with 22 N.Y.C.R.R. Part 500.1(j). It is 24 pages long and contains 6,269 words, counting all printed text on each page of the body of the brief. It was prepared on several computers using several versions of Corel WordPerfect. The typeface is Times New Roman, set in 14 point type, double spaced, throughout the body of the brief and in the headings. Footnotes are set in 12 point type, single-spaced.

Dated: New York, New York
May 14, 2019



Seth A. Miller