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October 16, 2019

Via Overnight Mail

John P. Asiello, Chief Clerk
State of New York
Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Raden v. W7879 LLC et al.
APL-2018-00214

Dear Mr. Asiello:

This firm represents Plaintiffs-Appellants Joel and Odette Raden.

This letter is respectfully submitted in response to your September 17, 2019 letter inviting the parties to submit further argument on whether Housing Stability and Tenant Protection Act of 2019, L 2019, ch 36 (hereinafter the "HSTPA") governs this appeal and, if so, how it should be applied.

As detailed below, the HSTPA applies by its terms to this appeal, since this appeal involves a "claim pending" on the effective date, within the meaning of HSTPA Part F Sec. 7.

It is appropriate and desirable that this Court reach and decide some of the legal

issues arising from the application of the HSTPA, while remanding other issues.

Specifically, this Court should determine that the 1994 registration statement for Appellant's apartment, registering the last rent paid by the prior tenant as $2,072.52, is the base registration upon which any further rent increases should be calculated. The central requirement of the HSTPA is that rents be set in accordance with the last reliable rent registration on file six years prior to the most recent registration statement. The clarity of the language that has now been enacted would make a remand on this issue unnecessary.

The reason the 1994 registration should be treated as the base registration is because (a) Appellant concedes that it is a "reliable" registration within the meaning of the newly-amended provisions of Rent Stabilization Law 26-516(a)(i); and (b) there can be no controversy that it is the "most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement" within the meaning of those provisions. As of the September, 2010 complaint, the last registrations on file six years prior to the complaint were a registration of Appellant's illegally deregulated initial 1995 rent, and the prior tenant's properly-registered 1994 rent. This court should determine that the illegally-deregulated rent reflected in the 1995 registration is not "reliable", and that the 1994 registration is the base registration for purposes of rent calculation.

The actual calculation of the rent should be remanded, as this Court has done in other cases when deciding on a formula for calculating rents. *See, e.g., Matter of Cintron v Calogero*, 15 NY3d 347 (2010).

Once the Court determines that the basis for calculating the rent is the 1994 registration, the issue of whether the rent freeze provisions of RSL 26-517(e) apply to illegally-deregulated apartments in buildings receiving J-51 subsidies, that went unregistered for long periods of time, should be remanded. This issue divided the lower courts prior to the enactment of the HSTPA (*compare, Taylor v. 72A Realty Assoc., LP,* 151 A.D.3d 95 (1st Dept., 2017), *with 215 W 88th St. Holdings v. DHCR*, 143 A.D.3d 652, 653 (1st Dept., 2016)). It was not briefed by any of the parties to the related cases now before this Court. Now that the HSTPA has restored the central role of reliable rent registrations to the task of rent setting, and repudiated the idea that rents are set based on whatever rent a landlord was charging on a particular date, the consequences of past failures to register, some of which were innocent and some willful, have taken on a new significance. It is appropriate that the lower courts develop the law on that issue before this Court is compelled to decide it.

On the treble damages issue, this Court should reverse the judgment of the Supreme Court, and remand for calculation of treble damages. The HSTPA has eliminated the safe harbor that existed under prior administrative practice, for

landlords who voluntarily return overcharges that had been collected in the face of notice that the collection was illegal. In this case the Referee's report relies heavily upon Respondents' conduct after this Court's decision in *Roberts v. Tishman Speyer Properties, L.P.*, 15 N.Y.3d 270 (2009) ("*Roberts*") in denying treble damages. The only other factor cited in the Referee's report was the demonstrably false claim that Appellants' rent was set in accordance with counsel's advice and prevailing legal opinion. On those issues the law and the record have not changed: there was no evidence that such advice was ever given, the law as of the time that Appellants took occupancy was that deregulation was unambiguously illegal, and bad legal advice is simply not a defense to a claim of treble damages.

These points are made in greater detail, below.

A: The HSTPA Applies

Section 7 of Part F of the HSTPA provides:

> § 7. This act shall take effect immediately and shall apply to any claims pending or filed on and after such date; provided that the amendments to section 26-516 of chapter 4 of title 26 of the administrative code of the city of New York made by sections four and five of this act shall expire on the same date as such law expires and shall not affect the expiration of such law as provided under section 26-520 of such law.

The effective date of the HSTPA was June 14, 2019.

Appellants' overcharge claim is a "clai[m] pending or filed on" the effective date. *See generally, Dugan v London Terrace Gardens, L.P.*, ___AD3d___, 2019 NY Slip Op 06578 (2019) (applying HSTPA on appeal to overcharge class action arising from the illegal deregulation of apartments in buildings receiving J-51 subsidies).

Generally, a claim of a litigant whose case is on appeal is a "pending" claim. *Dugan, Ibid.; Application of Rutherford Estates, Ltd,* 301 NY 767 (1950) (amendment to Commercial Rent Law, applicable to "proceedings pending," applies to cases on appeal); *Pechock v. DHCR,* 253 AD2d 655 (1st Dept., 1998) (same). Therefore, the HSTPA applies by its terms to Appellants' claim; *McDermott v. Pinto,* 101 AD2d 224 (1st Dept., 1984) (same).

The fact that the legislature applied the HSTPA to "claims pending", and did not use the phrase "proceedings pending" or "actions pending", does not support a different result. Obviously the legislature intended the rent calculation rules and six year statute of limitations in the HSTPA to apply to a class of cases. There is no evidence that, by "claims", the legislature meant a narrower class than all of the pending cases involving rent setting under the Rent Stabilization Law.

The "temporal reach" of a change to a given statute of limitations is a matter of legislative intent. *Bros v. Florence,* 95 NY2d 290, 298-99 (2000) (foreshortening

malpractice statute of limitations); *accord, Rothstein v. Tennessee Gas Pipeline Co.*, 87 NY2d 90, 95 (1995) (enacting a discovery rule for toxic torts and reviving certain toxic tort claims).

In discussing legislative changes to statutes of limitations, this Court has itself used the term "claims" to describe the entire set of all cases affected by the change. For example, in *Bros.*, 95 NY2d at 297, the Court opened its opinion by framing the issue as the interpretation of a statute designed to "shorten the limitations period in nonmedical malpractice claims." In *Rothstein,* 87 NY2d at 92, the Court described the statute at issue as providing that "toxic tort claims for latent effects of exposure to harmful substances accrue on the date of reasonable discovery," even though the statute did not contain the word "claims." *See also, Regenbogen v. New York State Willard Psychiatric Ctr.,* 254 AD2d 593 (3rd Dept., 1998) (construing an amendment to the Worker's Compensation Law, in which the Legislature used the word "claims" in exactly this way). As this Court has recognized, the word "claims" in this context simply means the assertions made by a party. "Claims" are "pending" when the case in which the claims appear is before a court.

To construe Appellants' assertions on appeal as anything but "claims pending" before this Court, requires attributing bizzare and inscrutable motivations to the Legislature. In a related case before this Court, *Collazo et al. v. Netherland Property*

Assets LLC, et ano, the landlord Respondents argue that the assertions of a party whose case has been dismissed and then appealed, are not "claims pending" in an appellate court. That theory contradicts not only the plain sense of the phrase "claims pending" but the legislative intent as well. The legislature cannot rationally be assumed to have given a new statute of limitations and new rules for rent calculation only to those who *won* their cases under prior law, but not those who, because of the now-repealed restrictions, lost their cases and then appealed. Why would the legislature have only applied the new rules to those who did not need them?

The HSTPA therefore applies to this appeal.

B: The 1994 Registration is the Base Registration

The HSTPA amended the Rent Stabilization Law so as to provide explicitly that rents are to be determined using prior reliable registration statements, regardless of the amount that a landlord might have charged on any particular date.

Specifically, the law amended Rent Stabilization Law 26-516(a)(i) so that it now provides:

> the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, (or, if more recently filed, the initial

> registration statement) plus in each case any subsequent lawful increases and adjustments.

Under this provision, the legal rent is the rent specified in a reliable registration statement on file with the DHCR as of six years prior to the most recent registration statement, plus lawful increases and adjustments. Here, there is no bona fide controversy about which registration is specified in the statute.

The complaint in this case was filed in September, 2010. As of then, the Respondents had only recently filed a set of four belated registrations (A. 1034-1043), for the years 2006 through 2010, setting forth the deregulated free market rent collected in 2006, and stabilized increases above that 2006 rent for 2007 through 2010. As of *six* years prior to the belated "most recent" registration, Respondent had not registered at all, maintaining instead the illegal position that the apartment could be deregulated while the Building continued to receive J-51 subsidies. The "most recent" registration was the registration that Respondents' predecessor (inexplicably) filed in 1995, when Appellants took occupancy.

The rent registered in that 1995 registration statement was not "reliable," as a matter of law, since it was an unregulated rent bearing no relationship to the prior rent. Appellant was given only a free market lease. (A. 1054). It is undisputed that the 1995 rent was an unregulated free market rent: Joel Raden's testimony on this

point (e.g., A. 151, to the effect that he believed that the landlord had the ability to set the rent as unregulated) was not contradicted.

Appellants concede that the prior registration statement, the 1994 registration statement setting the prior tenants' rent at $2,072.52, is "reliable" under the HSTPA. The prior tenant was the first stabilized tenant after rent control. The HSTPA continues to provide, as did prior law, that the initial registration statement for a newly-stabilized formerly rent controlled apartment (here, the 1992 registration) is deemed reliable, and can only be challenged by means of a fair market rent appeal. (Compare, RSL 26-513(a), not amended by the HSTPA). The 1994 registration reflects only lawful increases above the 1992 registration.

On the undisputed facts, the 1994 registration is the base registration, to which any subsequent lawful increases are to be added, for purposes of determining the legal rent.

On the issue of the method for identifying the base registration for purposes of calculating overcharges, the HSTPA contains plain and unambiguous language that requires no interpretation. Because this legal issue is clear, any remand would be "an exercise in futility" (*Napolitano v. MVAIC,* 21 NY2d 281, 285-6 (1967)) for which "no purpose would be served" (*North Shore Steak House, Inc. v. Board of Appeals,* 30 NY2d 238, 245-246 (1972)). Rather, this Court should find that the HSTPA

requires that the 1994 registration be used as a starting point for the calculation of Appellants' rent.

C: The Impact of the Failure to Register From 1995 to 2010 Should be Decided on Remand

Under the law in effect prior to the HSTPA, which remains unchanged after the HSTPA, the failure of an owner to file registration statements results in a rent freeze. RSL §26-517(e) continues to provide, in pertinent part, that:

> 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.

The lower courts have been divided over the issue of whether the rent freeze provisions of the RSL apply to cases involving the illegal deregulation of apartments in buildings receiving J-51 subsidies. In *Taylor v. 72A Realty Assoc., LP,* 151 A.D.3d

95 (1st Dept., 2017), now before this Court, the Appellate Division, First Department held that imposing a rent freeze on landlords who claim to have relied upon the policy of the DHCR in deregulating such apartments, would be unfair, since the lack of registration in such cases covers many years and could have an enormous impact on the amount of overcharge.[1] The general rule that requires imposing a rent freeze in accordance with the plain command of the statute, however, was applied as written in *215 W 88th St. Holdings v. DHCR*, 143 A.D.3d 652, 653 (1st Dept., 2016).

This Court has held that where an appeal is affected by new legislation that requires the exercise of discretion, the application of the new law should be remanded so that such discretion may be exercised. *Weissblum v. Mostafzafan Foundation of New York*, 60 NY2d 637 (1983) (remanding appeal so that lower courts can apply newly-enacted legal standard for law office failure, where statute applied "to every action or proceeding still pending before a court").

In this case and the related cases before the Court, although the rent freeze

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[1] Generally, so long as a landlord is permitted to belatedly file all missing registrations and to amend all incorrect registrations, the impact of even a long period of non-registration on future rents is nonexistent, since belated filing of correct registrations lifts the freeze. The freeze continues, however, where registrations are false or where some remain missing. *BN Realty Assocs. v. DHCR*, 254 A.D.2d 7, 7, 677 N.Y.S.2d 791, 792 (1st Dept., 1998) (where increases over the legal rent were unlawful late filing of registration did not retroactively validate its prior collection of any rent increases); *Bradbury v. 342 W. 30th St. Corp.*, 84 A.D.3d 681, 924 N.Y.S.2d 349 (1st Dept., 2011) (registration of illegal rent does not lift the rent freeze); *Jazilek v. Abart Holdings, LLC*, 72 AD 3d 529, 899 N.Y.S.2d 198 (1st Dept., 2010) (same).

penalty has not been amended by the HSTPA, there has been a seismic change to the effect of registrations upon the calculation of the rent, and that change includes the restoration of the (pre-1997) requirement that the "look back" period be extended during any period of non-registration. (Setting the rent based on the registration on file six years prior to the most recent registration means that, during a long period of non-registration, the look back period gets extended). By reinstating the requirement that rents be set using a registration that was last on file before any long period of non-registration, the Legislature undermined any claim that rent increases should be permitted when an apartment has not been registered. Rents are once again based on registrations, so there is no longer a basis for finding that rent increases can be taken without registering them.

In *Taylor* the Appellate Division took the position that it had the discretion to set aside the rent freeze requirement, because of the unique circumstances presented by post-*Roberts* J-51 overcharge cases. To the extent that such discretion still exists, the issue of whether the rent freeze should apply in this case should be remanded, under *Weissblum.*

D: Appellants are Entitled to Treble Damages

The HSTPA amended Rent Stabilization Law §26-516(a) to add the following

provision relating to treble damages:

> After a complaint of rent overcharge has been filed and served on an owner, the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered by the division of housing and community renewal or a court of competent jurisdiction as evidence that the overcharge was not willful.

No other changes were made to the treble damages provision of the statute: treble damages are still presumed to be imposed, unless the owner proves a lack of willfulness.

Appellants demonstrated, in their principal and reply briefs, that under prior law they should have been awarded treble damages. When Appellants took occupancy in 1995, there was no authority whatsoever for treating their apartment as deregulated. At trial, Respondents never proved reliance on any particular legal advice: their lawyer testified that he could not recall giving any advice at all on the subject. (A. 500, 502, 583, and 619). In any event, reliance on bad legal advice has never been a basis for avoiding treble damages. Neither a mistake of law nor reliance upon erroneous legal advice is any shield against treble damages. *Obiora v. DHCR*, 77 A.D.3d 755, 909 N.Y.S.2d 119 (2nd Dept., 2010) (imposing treble damages on an owner who deregulated an Apartment while receiving J-51 assistance, rejecting a claim of reliance on the advice of counsel); *Matter of S.E. & K. Corp. v. DHCR,* 239

A.D.2d 123, 657 N.Y.S.2d 601 (1st Dept.,1997) (upholding a treble damages award and rejecting "Petitioner's excuse that its inexperience as a landlord caused it to be misled by the advice of the prior owner that a fair market rent could be charged"); *Hargrove v. DHCR*, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept, 1998) (imposing treble damages on landlord who claimed that its "misinterpretation of the J-51 law was in good faith").

Appellants' entitlement to treble damages has not diminished as a result of the HSTPA. It has arguably strengthened.

The new language revoking the "safe harbor" for voluntary refunds of overcharges undermines one of the two rationales given by the Referee for denying treble damages. See, A. 31-32 (finding "defendants were the ones who contacted their lawyer to see if they had inadvertently overcharged tenants"). Having committed a willful overcharge, the HSTPA no longer treats a voluntary tender of a refund as cancelling the impact of having collected the overcharge in the first instance.

The fact that the new language is limited to refunds given after the commencement of litigation, while the "recalculation" at issue in Appellants' case took place before litigation began, makes no difference at this point. Respondents always insisted that the illegal rent they had been charging was the only basis upon

which Appellants rent could be calculated. That amount was itself the result of willful overcharges, which they and their predecessor began collecting many years before. The refund of an *insufficient* amount has never been a basis to overcome the presumption in favor of treble damages.

This is not an issue that needs to be remanded. There is a full and complete trial record. A new trial would be futile, since there is no new evidence to be introduced, and there are no new issues to decide.

Therefore, the Judgment should be reversed, and treble damages should be awarded.

E: The Amount of Overcharge Should be Calculated on Remand

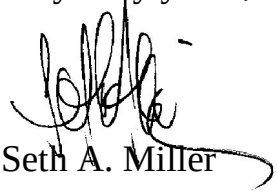
In overcharge cases where a ruling of this Court requires a recalculation of the rent, the Court ordinarily requires that the recalculation be performed on remand, even where the calculation is arguably a matter of simple addition and subtraction. *Matter of Cintron v Calogero*, 15 NY3d 347 (2010) (proceeding remanded to calculate the amount of overcharges collected above a rent that was frozen at the level of a rent reduction order).

This case should therefore be remanded for purposes of calculating the rent in accordance with the foregoing principles. On remand, the 1994 registration statement

should be taken as establishing the base rent. The lower court should decide, on remand, whether any rent freeze is applicable by virtue of Respondents' failure to register, and/or which annual rent increases and other lawful increases should be applied to the 1994 rent. Using the rents that are derived in that way, overcharges should be assessed from May, 2004 through and including the present, based on the May, 2004 rent that results from either freezing, or adding any lawful increases to, the 1994 rent. Treble damages should be applied from May, 2004 through the present.

In this way, the intent of the HSTPA will be implemented.

Very truly yours,



Seth A. Miller

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. § 500.1(j), that the foregoing brief was prepared on a computer using Microsoft Word.

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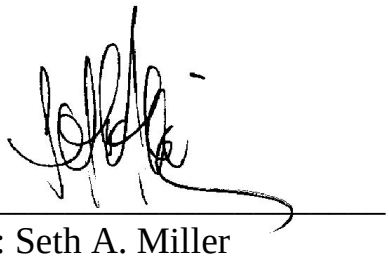
Dated: New York, New York
October 16, 2019

By: _____
Seth A. Miller

CERTIFICATION

Pursuant to 22 N.Y.C.R.R. § 130-1.1a, the undersigned, an attorney duly admitted to practice law before the Courts of the State of New York, certifies that, upon information and belief formed after reasonable inquiry under the circumstances, the contents of the annexed document(s) are not frivolous.

Dated: New York, New York
October 16, 2019



By: Seth A. Miller