Court of Appeals No. 2018-00214

To be Argued by:
NATIV WINIARSKY
(Time Requested: 30 Minutes)

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.

BRIEF FOR DEFENDANTS-RESPONDENTS

KUCKER & BRUH, LLP
Attorneys for Defendants-Respondents
747 Third Avenue, 12th Floor
New York, New York 10017
Tel: (212) 869-5030
Fax: (212) 944-5818
nwiniarsky@kbllp.com

Dated: April 9, 2019

New York County Clerk's Index No.: 111725/2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Rules, Laws and Statutes:

STATE OF NEW YORK
COURT OF APPEALS

----------X

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.

----------X

PRELIMINARY STATEMENT

This appeal concerns the effect of this Court's decision in *Roberts, et al. v Tishman Speyer Properties, et al*., 13 NY3d 270, 890 NYS2d 388 (2009). In *Roberts*, this Court held that the Rent Stabilization Law (RSL) prohibited the deregulation of a stabilized apartment based upon high rent/vacancy at all times while the landlord

was receiving J-51 tax benefits.[1] Over a twenty-five (25) year period prior to *Roberts* the New York State Division of Housing and Community Renewal (DHCR) had wrongly held that deregulation applied where the landlord was receiving J-51 tax benefits *if* the building was subject to regulation prior to receipt of such benefits.

The issue in the instant appeal concerns the culpability of landlords who followed the DHCR's advice and mistakenly treated stabilized apartments as deregulated based upon high/rent vacancy while receiving J-51 tax benefits. Further, this appeal concerns the proper method to calculate the current legal rent for these apartments where CPLR § 213-a strictly prohibits the review of the rent history of a stabilized apartment back beyond four years from the date of any Complaint.

In *Thornton v Baron*, 5 NY3d 175, 800 NYS2d 118 (2005) this Court addressed the four-year look back provision. In *Thornton* this Court held that the rent history of an apartment can reviewed back beyond four years[2] for the sole purpose of determining if the landlord had engaged in a fraudulent scheme to deregulate the apartment. In *Thornton* this Court made clear that reviewing the rent history of the apartment for any other purpose was prohibited and that even where

---

1. Section J51-2.5 of the Administrative Code of City of New York has since been renumbered as section 11-243. However, these tax benefits have commonly been referred to as "J-51" tax benefits in prior court decisions and will be so referred in this instant appeal.

[2] As explained more fully below, the four-year look back limitation is proscribed by CPLR 213-a and RSL § 26-516[a](2). In *Thornton* this Court relied on the RSL provision.

fraud was found the remedy was to use the DHCR's "default formula" to establish a new base rent for the calculation of the current legal rent.

In its decision below the Appellate Division held that under the plain language of CPLR 213-a and this Court's precedent, courts are prohibited from reviewing the rent history of an apartment back beyond four years to calculate the current rent. The Appellate Division held that, absent a finding of fraud under *Thornton*, the current legal rent must be calculated using the base rent charged and paid four years prior to the Complaint.

In a companion appeal pending before this Court, *Regina Metro Co., LLC v New York State Division of Housing and Community Renewal*, 164 AD3d 420, 184 NYS3d 91 (1st Dept, 2018), the Appellate Division came to the same conclusion in a matter concerning a rent overcharge complaint filed with the DHCR. Applying RSL § 26-516[a](2), a statute imposing the same four-year look back limitation to DHCR proceedings, the Appellate Division held that the agency was prohibited from using the rent history of an apartment back beyond four years.

As with the instant matter, *Regina* also concerns the circumstance where the landlord mistakenly relied on the DHCR's guidance, prior to *Roberts*, and treated an apartment as deregulated based upon high rent/vacancy while receiving J-51 tax benefits. Although the tenants in *Regina* filed their complaint with the DHCR in November, 2009 and there was no finding of fraud under *Thornton*, the DHCR went

back to 2003 to determine the current legal rent. The Appellate Division reversed the DHCR's determination as a violating the four year look-back provision of RSL § 26-516[a](2).

In its appeal in *Regina* the DHCR argues that it should be allowed to go back beyond four years to calculate the current legal rent where it finds that the rent charged on the base date was "illegal". In particular where, prior to *Roberts*, a landlord improperly treated an apartment as deregulated while receiving J-51 tax benefits and started charging market rents, the DHCR argues that it can go back beyond four years to recalculate the current legal rent.

The Appellate Division Dissent in the instant matter and in *Regina* essentially adopts the DHCR's position. Although the Supreme Court and the Appellate Division found that there was no fraud under *Thornton* in the instant matter, the Dissent contends that the current legal rent should be calculated by reviewing the rent history of the subject apartment going back to 1995 when it was first mistakenly treated as deregulated based upon high rent/vacancy.

The Appellants in the instant appeal, Joel and Odette Raden (hereafter "Appellants"), do not adopt the position of either the DHCR or the Appellate Division Dissent in their brief. Instead the Appellants argue that the prior landlord, Dr. Michael Nagel, the predecessor of the Respondents W7879, LLC, et al (listed in the caption and hereafter "Respondents"), committed fraud when he treated the

subject apartment as deregulated in 1995. The Appellants, who filed their Complaint in February, 2011, argue that the base rent should be determined using the DHCR's "default" formula as provided by this Court in *Thornton* where it is found that the landlord engaged in a fraudulent scheme to deregulate a stabilized apartment.

The Respondents do not dispute that Dr. Nagel mistakenly treated the subject apartment as deregulated in 1995. Dr. Nagel was receiving J-51 tax benefits at that time and under this Court's 2009 decision in *Roberts* the apartment remained rent stabilized even though the legal rent exceeded the then threshold amount, $2,000 per month, for high rent/vacancy deregulation.

However, the Appellants strongly dispute the Respondents' argument that Dr. Nagel engaged in a fraudulent scheme to deregulate the subject apartment in 1995. The evidence set forth in the record clearly shows that Dr. Nagel was acting in good faith when he treated the apartment as deregulated and that when this Court issued its decision in *Roberts* he immediately adjusted the rent to the legal amount, provided the Appellants with a rent stabilized lease, and filed rent registrations with the DHCR as required by the agency.

With respect to the DHCR's argument presented in *Regina* and adopted by the Appellate Division Dissent herein, the Respondents may agree with the Appellate Division Majority that going back beyond four years to calculate the legal rent violates the plain language of CPLR 213-a and this Court's decision in *Thornton*.

STATEMENT OF FACTS

The Appellants are the residential tenants of apartment [redacted] in the subject building located at 219 West 81st Street, New York, New York. The Appellants originally took occupancy pursuant to a lease commencing January 15, 1995 and expiring January 31, 1997 at a monthly rent of $2,350.00. (A: 1049-1055) The Appellants have remained in occupancy to date executing several renewal leases. (A: 1056-1105) The Appellants' tenancy was treated as deregulated by the prior landlord, Dr. Nagel, at all times prior to this Court's 2009 decision in *Roberts*.

The subject apartment was previously subject to rent control. Immediately prior to the Appellants' 1995 tenancy the apartment was leased to Laurence and Joanne Gordon pursuant to a two year lease commencing March 1, 1992 at a monthly rent of $1,966.28. (A: 1035) Their rent was increased to $2,105.33 per month pursuant to a one year renewal lease commencing March 1, 1994. (A: 1035) The Gordons' tenancy was registered with the DHCR as rent stabilized. (A: 1035)

There is no dispute that the prior landlord, Dr. Nagel, obtained J-51 tax benefits in 1993 in relation to renovations to the subject building and that he continued to receive such tax benefits until June 30, 2004. Therefore, as determined by this Court in *Roberts*, even though the subject apartment otherwise qualified for high rent/vacancy deregulation when the Appellants took occupancy in 1995, deregulation did not apply because Dr. Nagel was receiving the tax benefits.

However, as with most similarly situated landlords at the time, in 1995 Dr. Nagel believed in good faith that the subject apartment was deregulated because the apartment was subject to regulation prior to his receipt of the J-51 tax benefits. When the Appellants took occupancy in 1995 the legal rent for the subject apartment was $2,105.33 per month for the vacating tenants, the Gordons; an amount above the $2,000 per month threshold for high rent/vacancy deregulation at the time.

Based upon his belief that the subject apartment was deregulated, Dr. Nagel provided the Appellants with a non-stabilized vacancy lease at a market rent of $2,500.00 per month.[3] (A: 1049-1055) The parties agreed to deregulated renewal leases up until this Court's October, 2009 decision in *Roberts*. (A: 1056-1077) Starting in 2010 stabilized renewal leases have been offered and executed. (A: 1078-1105)

Following this Court's decision in *Roberts*, *supra*, Dr. Nagel instructed his counsel to review the rent histories of apartments in the subject building to ascertain if any were improperly deregulated while he was receiving J-51 tax benefits. It was determined that several apartments in the building, including the Appellants' apartment, had been improperly treated as deregulated.

---

[3] Under the RSL Dr. Nagel was entitled to an increase of 14% for a two year vacancy lease pursuant to Rent Guidelines Board Order # 26 which would have resulted in a legal rent of $2,400.08 per month ($2,105.33 + 14% = $2,400.08) if the apartment was treated as stabilized.

On May 19, 2010 the Appellants were informed by Dr. Nagel's counsel that their apartment was subject to rent stabilization due to Dr. Nagel's prior receipt of J-51 tax benefits and that there would be given a rent adjustment and a refund of overcharges and would be offered a stabilized lease. Counsel informed the Appellants that:

> As your tenancy commenced while those tax benefits were still in place, your tenancy is Rent Stabilized. The analysis we have conducted is the same analysis that is directed by Rent Stabilization Code Section 2526.1(a)(3), which is performed to determine if a Rent Stabilized tenant has paid an overcharge. That regulation requires a review from the date four (4) years prior to the filing of a claim of overcharge, using the rent charged on such date as the base date rent, which is then increased by subsequent Stabilized adjustments (such as lease renewal increases). While you have technically not filed such a claim, we are performing our review as if you had presented such claim as of May 1, 2010. The attached chart details the adjustments, as well as the resultant refund. Also enclosed is a check in the amount of the refund, which includes any overpayment made since the base date through May, 2010, and which also includes interest at the statutory amount of % per annum.
>
> Please note that you will be offered a Rent Stabilized lease renewal prior to the expiration of your current lease. Please note also that your apartment and the legal regulated rent that has been calculated for your apartment will shortly be registered with the New York State Division of Housing and Community Renewal ("DHCR").

(A: 1046-1047)

Nearly one year later, in February, 2011, the Appellants commenced the instant action seeking a declaration that their apartment was rent stabilized and claiming a rent overcharge. The Appellants have named Dr. Nagel's heirs and successors as Defendants in the instant matter (listed in the caption above and referred to in this brief as "Respondents"). The Appellants subsequently filed an amended Complaint dated June 28, 2011. (A: 83-94)

By Order dated June 19, 2013 the Supreme Court directed that this matter be referred to a Special Referee "to hear and report on the following issues":

> 1. Calculate the legal rent for the apartment in accordance with applicable DHCR regulations et al;
>
> 2. Calculate the overcharges, if any, attendant to the apt;
>
> 3. Take testimony and evidence in order to be able to recommend, or not, whether defendants willfully registered an illegal rent for the subject apartment;
>
> 4. In the event the Special Referee makes a recommendation that plaintiffs' fraud claim is valid, e.g., the registration was willfully deceptive, the Special Referee shall apply a 6-year statute of limitations to any damages and/or overcharges that may or may not be recommended;
>
> 5. In the event the Special Referee recommends an award of damages for rent overcharge without the presence of fraud, a 4-year statute of limitations is to be applied.

(A: 69-82)

Special Referee Jeffrey A. Helewitz held hearings for eighteen (18) days, from November 3, 2014 through to June 29, 2015, concerning the issues raised in the Appellants' Complaint and similar Complaints filed by three other tenants in the subject building. (A: 129-892) On July 10, 2015 Referee Helewitz issued his Report and Recommendation. (A: 8-35) As relevant to the Appellants' Complaint, Referee Helewitz found:

> 1. *Defendants did not engage in any fraud with respect to deregulating the apartment in question* [emphasis added], thereby limiting the look-back period for any overcharge to four years;
>
> 2. Defendants did not wilfully deregulate the apartment so that *Roberts* is not entitled to treble damages or attorney's fees;
>
> 3. The stabilized rent for Raden is $4,507.18, based on the lease entered into on February 1, 2015;
>
> 4. Raden was overcharged $448.50.

(A: 34)

The Referee's Report was confirmed "in its entirety" and so-ordered by the Supreme Court by Order dated March 2, 2016. (A: 7) The Appellants appealed the Supreme Court's decision to the Appellate Division.

On August 16, 2018 the Appellate Division, First Department, affirmed the Supreme Court's decision with one dissent. According to the Appellate Division:

> As we have explained in *Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community*

> *Renewal* (__AD3d__) [1st Dept 2018] [decided simultaneously herewith), 9 NYCRR 2526.1(2)(ii) and CPLR 213-a are "categorical in barring any examination of a unit's rental history beyond the four-year limitations period," with the sole exception being cases in which there is evidence that the landlord committed fraud in order to avoid the regulatory scheme (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]).
>
> In *Todres v W7879, LLC* (137 AD3d 597 [1st Dept 2016], lv denied 28 NY3d 910 [2016], we considered the very building involved in this case and upheld a determination that this same landlord had not engaged in a fraudulent scheme to remove an apartment from the rent stabilization program and had not acted with willfulness. We therefore modified the ruling of the Supreme Court to deny treble damages and to conclude that CPLR 213-a precluded examination of the rental history before the four-year period immediately preceding the filing of the action to recover overcharges.
>
> The same result should obtain here.

(A: 1197-1201)

The Appellants were subsequently granted permission by the Appellate Division to appeal to this Court. (A: 1203)

ARGUMENT-POINT I

THE LAW PROHIBITS REVIEW OR USE OF THE RENT HISTORY OF A STABILIZED APARTMENT BACK BEYOND FOUR YEARS

Beginning with the Rent Regulation Reform Act of 1993 (RRRA-93) (L 1993, ch 253) the Legislature imposed a limit on tenant overcharge claims and prohibited the courts and the DHCR from reviewing or utilizing the rent history of an apartment back beyond four years from the date of a tenant complaint. CPLR § 213-a provides:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

Similarly, RSL § 26-516[a](2) [4] provides in pertinent part:

> a complaint under this subdivision shall be filed with the state division of housing and community renewal within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed . . . . This paragraph shall preclude examination of the rental history

---

3. See also, RSC § 2526.1(a)(2) which places the restriction in the DHCR's own regulations.

> of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision.

The courts, including this Court, have interpreted CPLR 213-a and RSL § 26-516[a](2) interchangeably.

In 2005 this Court held that a limited review of the rental history of a stabilized apartment back beyond four years was proper where the complaining tenant presents a colorable claim of fraud. In *Thornton v Baron*, 5 NY3d 175, 800 NYS2d 118 (2005)[5] it was clear that the landlord and an "illusory" prime tenant had engaged in a fraudulent scheme for many years with the purpose of evading the provisions of rent stabilization. Both profited from the scheme by charging a string of subtenants rents substantially above the legal amount. The scheme had continued for several years before one of the subtenants, Thornton, commenced a court action claiming an illusory tenancy and rent overcharge.

In *Thornton* it was clear that the tenant named in the lease was "illusory" and that the "sub-tenant" was the actual prime tenant entitled to the protections of rent stabilization. The primary issue in *Thornton* was how to calculate the legal rent where the inflated amounts charged for many years by the landlord and the "illusory"

---

4. This Court in *Thornton* referenced only RSL § 26-516[a] although that matter was commenced in court and not the DHCR. The decision makes clear that both the RSL § 26-516[a] and CPLR § 213-a apply to court proceedings.

prime tenant were illegal. This Court held that the inflated rent charged four years prior to the complaint was fraudulent. This Court's solution was to discard that rent and replace it with a new base rent calculated using the DHCR's "default" formula.[6]

Five years later, in *Grimm v DHCR*, 15 NY3d 358, 912 NYS2d 491 (2010), aff'g 68 AD3d 29, 886 NYS2d 111 (1st Dept, 2009), aff'g 2007 N.Y. Misc. LEXIS 8786 (Supt Ct., NY Co, 2007), this Court returned to the issues raised in *Thornton*.

In *Grimm* the landlord had illegally raised the rent of a stabilized apartment from $578.86 to $2,000 per month following a 1999 vacancy. The landlord treated the apartment as deregulated base on high rent. In 2000 the landlord provided a non-regulated lease to two tenants but reduced their rent to $1,450 per month on condition that they make needed repairs to the apartment.

Sometime in 2004 the next tenant, Grimm, took occupancy and was also given a non-regulated lease at a monthly rent of $1,450. On July 19, 2005 Grimm filed a complaint with the DHCR claiming that the apartment was rent stabilized and that he was being overcharged. Grimm asserted in his complaint that the "owner is

5. Following the decision in *Thornton* the DHCR took steps to codify its "default" formula and added section 2526.1(g) to the Rent Stabilization Code (RSC).

fraudulently renting [the] apartment as a non-rent stabilized unit and raised [the] rent illegally in 2005." [7]

The landlord answered Grimm's complaint by admitting that the apartment was improperly treated as deregulated since 1999. The landlord filed rent registrations back to 2001, four years prior to the complaint, and provided Grimm with a stabilized lease. The landlord calculated the legal rent by using the amount, $1,450 per month, charged four years prior to the complaint. The DHCR agreed with the landlord and stated that it was prohibited by Law from looking back beyond four years to calculate the current legal rent.

In *Grimm* the Supreme Court revoked the DHCR's determination and held that the agency had to examine the rent history of the apartment back beyond four years to determine if the base rent was fraudulent. The Appellate Division affirmed that decision. On appeal this Court also affirmed and held that under *Thornton* the evidence of fraud in the record was sufficient to require the DHCR to investigate further. According to this Court the "DHCR acted arbitrarily and capriciously in failing to meet that obligation *where there existed substantial indicia of fraud on the record*." [emphasis added]

---

[7] The language used by Grimm in his complaint is not directly quoted in any of the court decisions in *Grimm*. This quote is from this Court's subsequent decision in *Conason v Megan Holdings, LLC*, 25 NY3d 1, 6 NYS3d 206 (2015) which discusses *Grimm*.

In *Grimm* this Court further explained that:

> Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. *What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization*. [emphasis added]

Three years after *Grimm*, this Court issued its decision in *Boyd v DHCR*, 23 NY3d 999, 992 NYS2d 764 (2014), rev'g 110 AD3d 594, 973 NYS2d 609 (1st Dept, 2013), rev'g 2012 N.Y. Misc. LEXIS 2315 (NY Sup Ct, 2012). In *Boyd* the tenant had also filed a complaint with the DHCR. The tenant cited a large increase in the rent *five* years prior to her complaint as evidence of fraud. The Supreme Court upheld the DHCR's determination dismissing the complaint. However, the Appellate Division reversed that decision and held that the tenant's allegations were sufficient to require the DHCR to investigate back beyond the four years.

In support of its decision in *Boyd* the Appellate Division explained that the DHCR's registrations records showed that the landlord had increased the rent from $572 to $1,750 per month in July, 2004 based upon apartment improvements. The Appellate Division further stated:

> In a letter to DHCR, petitioner set forth a specific and detailed description of the apartment in 2007, alleging that, based on its condition when she moved in, the owner could not have spent $39,000 for improvements to the building [apartment?], which was constructed in 1932. Among other things, petitioner stated that the hardwood

> floors, bathtub, doors, and fixtures are original to the apartment, and that the kitchen had been updated with low-quality appliances which she estimated cost less than $1,000. She described the kitchen as having "very inexpensive Home Depot cabinets," slat floors, and a used or recycled sink that did not fit in the cutout in the wall. The owner has never submitted any evidence rebutting petitioner's claim that the IAIs were minimal and cost far less than claimed.
>
> Under the standard set forth in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin*. (15 NY3d 358, 938 NE2d 924, 912 NYS2d 491 [2010]) petitioner made a sufficient showing of fraud to require DHCR to investigate the legality of the base date rent (*see also Bogatin v Windermere Owners LLC*, 98 AD3d 896, 950 NYS2d 707 [1st Dept 2012]).

In its decision in *Boyd* this Court reversed the Appellate Division and affirmed the DHCR's determination dismissing the tenant's complaint:

> New York State Division of Housing and Community Renewal's determination denying tenant's petition for administrative review was not arbitrary or capricious, as *tenant failed to set forth sufficient indicia of fraud* to warrant consideration of the rental history beyond the four-year statutory period (see *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367, 938 NE2d 924, 912 NYS2d 491 [2010]). [emphasis added]

See also, *Conason v Megan Holding, LLC*, 25 NY3d 1, 6 NYS2d 206 (2015), aff'g, 109 AD3d 724, 972 NYS2d 223 (1st Dept, 2013).

Thus, this Court has established a limited exception to as four year look back prohibition provided by CPLR 213-a and RSL § 26-516[a](2). According to this

Court, the DHCR and the courts should review the rent history of an apartment back beyond four years *if* the tenant provides sufficient evidence of fraud. Where a "colorable claim of fraud" is presented by the tenant the DHCR and the courts are required to investigate back beyond four years but solely for the purpose of determining if the landlord had engaged in a fraudulent scheme to deregulate the apartment.

Significantly, as stated by this Court in Thornton and Grimm, if such fraudulent scheme is found the solution is to discard the fraudulent base rent and establish a new base rent utilizing the DHCR's "default formula." If, as found in Boyd, there is no fraudulent scheme the legal rent is calculated using the rent charged four years prior to the complaint.

Importantly for the instant appeal, this Court has expressly rejected any attempt to review the rent history of an apartment back beyond four years for any purpose other than determining if the base rent was fraudulent. As stated by this Court in Grimm in discussing Thornton:

> Our ruling was made in connection with a scheme between a landlord and an illusory tenant to agree that an apartment would not be used as the named tenant's primary residence, resulting in the elimination of the rent-stabilized status of the apartment. *Acknowledging that the apartment's prior rental history could not be examined, and that the stabilized rent before the fraudulent scheme was of no relevance*, we nonetheless rejected the owner's contention that "the legal regulated rent should be established by simple reference to the rental history" on

> the date four years prior to the commencement of the overcharge action (*id.* at 180-181). * * * we instructed DHCR to use the so-called default formula to calculate the rent on the base date . . . .

This Court has continued to enforce the four year look back prohibition of CPLR 213-a and RSL § 26-516[a](2) and has refused to allow either the DHCR or the courts to utilize the earlier rent history of the apartment to calculate the legal rent under any circumstances.

ARGUMENT-POINT II

APPELLANTS FAILED TO PROVIDE EVIDENCE OF FRAUD TO JUSTIFY REVIEW OF THE RENT HISTORY OF THE SUBJECT APARTMENT BACK BEYOND FOUR YEARS

Turning to the merits of this appeal, contrary to the Appellants' claims, there is no evidence in the record which shows that either the Respondents, or their predecessor, Dr. Nagel, engaged in a fraudulent scheme to deregulate the subject apartment. The record shows only that in 1995, years prior to this Court's 2009 decision in *Roberts*, Dr. Nagel acted in accordance with the prevailing legal authority in treating the subject apartment as deregulated based upon high rent/vacancy.

In its decision, based upon the Referee's Report which followed a full hearing lasting several days, the Supreme Court made a factual determination that there was no evidence of a fraudulent scheme to deregulate the apartment. Significantly, the entire panel of the Appellate Division agreed with this factual finding in affirming

the Supreme Court's decision. The Appellate Division's Dissent in this matter was limited to the issue of calculating the rent where there was no finding of fraud.

This Court has previously held that it has limited jurisdiction when considering findings of fact. This Court's review is limited to ascertaining if such findings are supported by the evidence of record. As stated in *Humphreys v State of New York*, 60 NY2d 742, 469 NYS2d 661 (1983):

> In a case such as this, with affirmed findings of fact, our scope of review is narrow. This court is without power to review findings of fact if such findings are supported by evidence in the record.

See also, *Congel v Malfitano*, 31 NY3d 272, 76 NYS3d 873 (2018).

The evidence of record in the instant matter clearly supports the unanimous factual finding of the Supreme Court and the Appellate Division that there was no fraudulent scheme to deregulate. There is no dispute that the subject apartment was under the Rent Control Law (RCL) until 1992. According to the DHCR's rent registration records the first stabilized tenants, Laurence and Joanne Gordon, took occupancy in 1992 at a monthly rent of $1,966.28.[8] (A: 1035) The Gordons' rent was increased to $2,105.33 per month for a one year renewal lease commencing March

[8]The initial stabilized rent was subject to challenge by the Gordons or by the Appellants in a Fair Market Rent Appeal (FMRA) but such right expired after four years. See, *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144, 753 NYS2d 1 (2002).

1, 1994. (A: 1035) Thus, the legal rent had reached the then threshold for high rent/vacancy deregulation, $2,000 per month, during the Gordons' tenancy.

The Appellants took occupancy of the subject apartment pursuant to a lease commencing January 15, 1995. (A: 1049) The Appellants' tenancy was treated as deregulated at that time by the Defendants' predecessor, Dr. Nagel, based upon high rent/vacancy. Although he was receiving J-51 tax benefits at the time, Dr. Nagel followed the prevailing view prior to *Roberts* that deregulation still applied because the apartment was subject to regulation prior to his receipt of such benefits.

The Appellants do not dispute that the legal rent for the subject apartment was above $2,000 per month when they took occupancy in 1995 or that the apartment was subject to regulation prior to Dr. Nagel's receipt of J-51 tax benefits in 1993. These undisputed facts place this matter squarely within the parameters of *Roberts*.

In affirming the decision of the Supreme Court dismissing the Appellants' claims of fraud, the Appellate Division stated:

> In *Todres v W7879, LLC* (137 AD3d 597, 26 N.Y.S.3d 698 [1st Dept 2015], lv denied 28 N.Y.3d 910, 47 N.Y.S.3d 226, 59 N.E.3d 1022 [2016]), we considered the very building involved in this case and upheld a determination that this same landlord had not engaged in a fraudulent scheme to remove an apartment from the rent stabilization program and had not acted with willfulness. We therefore modified the ruling of Supreme Court to deny treble damages and to conclude that CPLR 213-a precluded examination of the rental history before the four-year period immediately preceding the filing of the action to recover overcharges.

The same result should obtain here.

Despite this Court's limited jurisdiction to review findings of fact the Appellants have devoted most of their brief to arguing that Dr. Nagel engaged in a fraudulent scheme to deregulate the subject apartment when they took occupancy in 1995. The Appellants cite two letters sent by DHCR's staff to the law firm of Belkin, Burden, Wenig & Goldman, LLP ("Belkin, Burden") on September 28, 1995 and January 16, 1996. (A: 951-952, 953-954)

It should be noted initially that the Appellants' brief is misleading in stating or suggesting that these two letters represented "official" DHCR policy at the time they were written. These letters were sent to the private law firm of Belkin, Burden and there is no evidence that either letter was made public at the time or that they represented anything other than the unofficial opinion of the writer. Both letters end with the warning that "this opinion letter is not a substitute for a formal agency order . . . ." (A: 952, 954)

Neither of the two letters from the DHCR cited by the Appellants were sent to Dr. Nagel or anyone associated with him. There is no evidence in the record that Dr. Nagel had reason to know of these letters or of their reference to the DHCR's "opinion" stated therein.

In fact the two letters from the DHCR, written within a few months of each other, came to completely opposite conclusions and show only that even the agency was confused about the application of high rent/vacancy deregulation where the landlord was receiving J-51 tax benefits. In the January 14, 1996 letter the DHCR's staff member refers to yet a third letter from the agency to Belkin Burden dated October 19, 1995. It is apparent that there was no policy and no consensus in 1995/95 concerning the application of high rent/vacancy deregulation. The fact that such correspondence was even necessary proves the opposite to be true.

Further, as the Appellants admit in their brief, the DHCR issued "Operational Bulletin 94-1" in January, 1994 (A: 918-927) shortly after the RRRA-93 was enacted and "Operational Bulletin 95-3" in December, 1995, one year later. In either Bulletin the DHCR could have clarified its position regarding the application of high rent/vacancy deregulation while the landlord was receiving J-51 tax benefits. Instead, the two Bulletins merely recite the exact text of the RRRA-93 which, prior to *Roberts*, was the source of the confusion.

When the DHCR did amend its Code in 2000, as stated by this Court in *Roberts*, it improperly stated that high rent/vacancy deregulation was available while the landlord was receiving J-51 tax benefits if the apartment was subject to regulation prior to the receipt of such benefits.

This Court in *Roberts* addressed the confusion that existed immediately after the passage of the RRRA-93 and the application of high rent/vacancy deregulation. In *Roberts* this Court found that the DHCR had allowed the landlord in that matter, MetLife, to deregulate apartments based upon high rent/vacancy following the passage of the RRRA-93 despite MetLife's receipt of J-51 tax benefits. According to this Court in *Roberts*: "At some point after the RRRA was enacted, MetLife, *with DHCR's approval*, began charging market-rate rents for those units in the properties where the conditions for high rent/high income luxury decontrol were met."

As noted in *Roberts*, MetLife sold the subject complex in that matter, Peter Cooper Village and Stuyvesant Town, in early 1996 and at that point a significant number of apartments had already been deregulated. So it is clear from *Roberts* that between January 1, 1994 when the deregulation provisions of the RRRA-93 first took effect and early 1996 when the complex was sold the DHCR had allowed MetLife to deregulate numerous apartments based upon high rent/vacancy.

This Court in *Roberts* made clear that immediately following the enactment of the RRRA-93 many landlords believed in good faith, with the DHCR's agreement, that high rent/vacancy deregulation was available where the landlord was receiving J-51 tax benefits if the qualifying apartment was subject to regulation prior to the receipt of such benefits.

To return to the issue in the instant matter, whether the subject apartment was deregulated in 1995 based on a fraudulent scheme to deregulate, it is clear that in this pre-*Roberts* matter Dr. Nagel was not acting pursuant to such scheme. Dr. Nagel treated the subject apartment as deregulated when the Appellants took occupancy because the rent was legally over $2,000 per month and he believed in good faith that high rent/vacancy deregulation applied.

The Appellants had ample opportunity during the Special Referee's eleven day hearing to show that Dr. Nagel had some unique understanding of high rent/vacancy deregulation in 1995 that other landlords did not have at that time. They failed to do so which is why the Special Referee found that Dr. Nagel was acting in good faith in treating the subject apartment as deregulated when the Appellants took occupancy. There was no fraudulent scheme as found by the Supreme Court and the entire panel of the Appellate Division.

Absent evidence of a fraudulent scheme to deregulate the subject apartment, there is no basis for reviewing or utilizing the rent history of the subject apartment back beyond four years. As stated by the Appellate Division in its decision in *Regina Metro Co. LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 84 NYS3d 91 (1st Dept, 2018), decided with and cited by that Court in its decision in the instant matter:

> The Court of Appeals has continued to require a showing of fraud or intentional wrongdoing before courts may

allow any look back at a unit's rental history beyond the four-year limitations period. In *Matter of Boyd v New York State Div. of Hous. & Community Renewal* (23 NY3d 999, 992 N.Y.S.2d 754, 15 N.E.3d 1242 [2014], rev'g 110 AD3d 594, 973 N.Y.S.2d 509 [1st Dept 2013]), a J-51 case, the Court of Appeals reversed this Court's remand to DHCR for a fact-finding hearing regarding potential fraud and the legality of the base date rent. The Court, citing *Grimm*, held that the tenant "failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond four the four-year statutory period" (*id.* at 1000-1001). In *Conason v Megan Holding, Inc*. (25 NY3d 1, f6 N.Y.S.3d 2006, 29 N.E.3d 215 [2015], *supra*), the Court of Appeals found evidence that the landlord engaged in a "stratagem" to remove the tenants from the aegis of rent stabilization, and allowed a look back of more than four years at the unit's rental history (id. at 16).

Following these precedents, in the absence of evidence of fraud, this Court has declined to look back more than four years before the filing of the overcharge complaint to set the base date rent (see *Stulz v 305 Riverside Corp*., 150 AD3d 558, 56 N.Y.S.3d 46 [1st Dept 2017], lv denied 30 N.Y.3d 909, 71 N.Y.S.3d 2, 94 N.E.3d 484 [2018]; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 50 N.Y.S.3d 377 [1st Dept 2017] lv dismissed 30 N.Y.3d 961, 64 N.Y.S.3d 662, 86 N.E.3d 555 [2017]; *Todres v W7879, LLC,* 137 AD3d 597, 26 N.Y.S.3d 698 [1st Dept 2016], lv denied 28 N.Y.3d 910, 47 N.Y.S3d 226, 69 N.E.3d 1022 [2016]; but see *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 53 N.Y.S.3d 309 [1st Dept 2017]; *72A Realty Assoc. v Lucas*, 101 AD3d 401, 955 N.Y.S.2d 19 [1st Dept 2012].

In the case at bar, DHCR was not arbitrary and capricious in finding that landlord did not engage in a fraudulent scheme to evade the Rent Stabilization Law. As a consequence, DHCR was prohibited from looking at the unit's rental history before November 2, 2005.

The Supreme Court and the Appellate Division correctly applied the provisions of CPLR 213-a and this Court's precedent in determining that the current legal rent had to be calculated based upon the rent paid four years prior to the Appellant's Complaint. There was no fraud which would allow a review of the rent history of the subject apartment back beyond four years. See, CPLR 213-a and *Thornton* and *Grimm*.

ARGUMENT-POINT III

THE APPELLANTS IN THEIR BRIEF RAISE NEW ARGUMENTS WHICH WERE NOT RAISED BELOW AND WHICH ARE WITHOUT MERIT

The Appellants raise new issues in Part II of their brief (p 29) which were not raised before either the Supreme Court or the Appellate Division. The first new issue concerns RSL §§ 26-512(e) and 26-516(a)(i) which concern the apartment registrations landlords are required to file with the DHCR. The Appellants erroneously claim that in the instant matter there was no registration on file with the DHCR for the base date four years prior to their Complaint.

Also new is the Appellants' assertion that even if the base rent in this matter is not fraudulent it is still "illegal" and therefore, pursuant to this Court's decision in *Thornton*, a new base rent had to be calculated using the DHCR's "default" formula. Again this issue was not raised by Appellants before the Courts below and was not addressed by the Supreme Court or the Appellate Division.

The failure of the Appellants to raise issues below bars them from raising them for the first time before this Court. See, *e.g.,* Bingham v N.Y. City Transit Auth., 99 NY2d, 756 NYS2d 129 (2003). In any event the Appellants' new arguments have no merit.

With respect to the Appellants' new argument regarding registration requirements, RSL § 26-512(e) provides that the legal rent "shall be the rent registered pursuant to section 26-517" and RSL § 26-516(a)(i) provides that the base rent for determining an overcharge complaint "shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement . . . ." Thus, both sections state that any calculation of the current legal rent should be calculated using the rent stated in the registration filed four years earlier.

To repeat what was said above, the instant matter is subject to the provisions of CPLR 213-a applicable to proceedings commenced in court. CPLR 213-a is not dependent on rent registrations and plainly states that:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

In any event, contrary to the claims of the Appellants, the required registrations were filed with the DHCR prior to the commencement of the Appellants' Complaint. In citing only RSL §§ 26-512(e) and 26-516(a)(i), the Appellants fail to inform this Court that a complimentary provision of the RSL allows landlords to file late registrations with the complete elimination of any penalties. RSL § 26-517(e) expressly provides:

> The failure to file a proper and timely initial or annual 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*. [emphasis added]

As stated above, following this Court's October 22, 2009 *Roberts* decision, the Respondents' predecessor, Dr. Nagel, instructed his counsel to review all tenancies in the subject building to ascertain if they were affected. Following such review, by letter dated May 19, 2010, the Appellants were informed by Dr. Nagel's counsel that their apartment were improperly treated as deregulated. Dr. Nagel's counsel further informed the Appellants that they would be provided a stabilized

lease and that their rent would be adjusted to the legal amount. They were also provided a refund for the rent overcharge from the base date. (A: 1044-1047)

At the same time, in June, 2010, pursuant to RSL § 26-517(e) Dr. Nagel's counsel filed late registrations with the DHCR for the subject apartment back to 2006, the earliest possible base date. The DHCR's registration records clearly show that on June 1, 2010 late registrations were filed for every year back to 2006. (A: 1037) Subsequent registrations for 2011, 2012, and 2013 were filed by the Respondents' managing agent.[9] (A: 1042)

The Appellants initially filed their Complaint in Supreme Court in February, 2011[10] wherein they first contested their stabilized rent. Under CPLR 213-a and RSL § 26-516[a](2) the base date for their Complaint is February, 2007, four years earlier. The record clearly shows that registrations were on file for the subject apartment back to the base date when the Appellants filed their Complaint commencing the instant proceeding.

Thus, even under the provisions of RSL §§ 26-512(e) and 26-516(a)(i) the base rent used by the Supreme Court in calculating the current legal rent was

---

[9] The designation of the subject apartment changed from [redacted] to [redacted] which is why the DHCR's records show separate registrations for the subject apartment.

[10] The February, 2011 Complaint is not in the appellate record. Only the Appellants' amended Complaint filed in June, 2011 is included. However, the Respondents accept for argument that the base date herein is four years prior to the Appellants' initial February, 2011 complaint.

correctly based upon the rent paid and registered four years prior to Appellants' Complaint.

The Appellants are fully aware that all registrations were filed with the DHCR prior to the date they initiated their February, 2011 Complaint. The Appellants argue, however, that the base date was not February, 2007 but rather May 19, 2006 which is four years back from the date "when the Respondents' attorney sent his May 19, 2010 letter" to Appellants. By pushing the base date back to 2006 the Appellants can argue that there was no registration on file at that time.

Of course under the plain language of both CPLR 213-a and RSL § 26-516[a](2) the base date is exactly four years prior to the date the tenant files a complaint and not the date of a letter received from landlord's counsel. In the instant matter there is no dispute that the Appellants filed their complaint initially in February, 2011.

As the Appellants are aware, in his May 19, 2010 letter Dr. Nagel's counsel explained that in calculating the current rent he went back to May 1, 2006 because as of the date of the letter such date was prior to the earliest base date possible. (A: 1044-1047) Of course Dr. Nagel's counsel could have waited till the Appellants filed a complaint before calculating the current legal rent but such course would have been contrary to the good faith intent of Dr. Nagel to comply with this Court's

Roberts decision. The letter, however, cannot change the base date established by law.

The next new argument raised by the Appellants in their brief is a contention that this Court in *Thornton* held that an "illegal" base rent should be discarded even where there was no finding of fraud. The Appellants argue that even if there was no fraud, the "market" rent charged four years prior to their Complaint was clearly "illegal" and cannot be the base rent. The Appellants in their brief completely ignore this Court's decision in *Grimm* wherein *Thornton* was fully explained.

In *Grimm*, as also quoted above, this Court expressly stated that in *Thornton*:

> Our ruling was made in connection with a scheme between a landlord and an illusory tenant to agree that an apartment would not be used as the named tenant's primary residence, resulting in the elimination of the rent-stabilized status of the apartment.

In *Grimm* this Court made clear that the decision in *Thornton* was based upon a finding that the landlord had engaged in a fraudulent "scheme" to eliminate "the rent-stabilized status of the apartment." This Court in *Grimm* made clear that the rent history of an apartment can be reviewed back beyond four years *only* where the tenant makes a "colorable claim of fraud" and that:

> an increase in the rent alone will not be sufficient to establish a colorable claim of fraud, and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. *What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent*

> *stabilization.* As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date. [emphasis added]

As stated in Point I of this brief, this Court in *Thornton* and in *Grimm* made clear that the four year look back prohibitions of CPLR 213-a and RSL § 26-516[a](2) remained fully intact and in the absence of fraud the courts and the DHCR were prohibited from reviewing the rent history back beyond four years. In *Boyd*, which followed *Thornton* and *Grimm*, this Court affirmed the determination of the DHCR which refused to look back beyond four years because the complaining tenant had failed to provide sufficient "indicia of fraud." It was clearly not relevant in *Boyd* that the base rent may have been "illegal."

As stated by this Court in *Thornton* the Legislature's purpose in enacting the four year look back period of the RRRA-93 "was to alleviate the burden on honest landlords to retain rent records indefinitely, not to immunize dishonest ones from compliance with the law." There is no evidence in the instant matter that the Respondents or their predecessor, Dr. Nagel, did anything dishonest in treating the subject apartment as deregulated prior to *Roberts*.

ARGUMENT-POINT IV

THE POSITION OF THE APPELLATE DIVISION DISSENT IS CONTRARY TO THIS COURT'S DECISIONS IN *GRIMM* AND *BOYD* AND CPLR § 213-a

Although the Appellants do not rely on the Appellate Division's Dissent in their brief, the Respondents believe it appropriate to address the position of the Dissent as this Court will surely consider it.

The Dissent in the instant matter cites and relies on the rationale provided by the Dissent in the companion appeal in *Regina* and also on a prior decision of the Appellate Division in *Taylor v 72A Realty Assoc. L.P.*, 151 AD3d 95, 101, 53 NYS3d 309 (1st Dept, 2017). The Appellate Division Majority in the instant matter and in *Regina* held that *Taylor* was wrongly decided with respect to the calculation of the current legal rent. Accordingly, this brief will respond to the Dissent in the instant matter and in *Regina* to the extent it relates to the instant matter.

The Dissent's contention that the prior rent history of the subject apartment back beyond four years should to be utilized to determine the current legal rent contradicts the plain language of CPLR 213-a and RSL § 26-516[a](2). Both Laws end with the clear statement that these Laws "*preclude examination of the rental history of the housing accommodation* prior to the four-year period immediately preceding the commencement of the action" or "the filing of a complaint" [emphasis added].

If the prior rent history of an apartment cannot be examined back beyond four years under the Law it is simply not possible for the court or the DHCR to use prior rents to calculate the current legal rent. In the instant matter, if the rent history of the subject apartment back to 1995 is used to calculate the current legal, as the Dissent states should be done, that would require the examination of the rent history back to that date. Such examination is clearly contrary to CPLR 213-a and is contrary to this Court's precedent in *Thornton*, *Grimm* and *Boyd*.

Facing the unambiguous language of CPLR 213-a, applicable in the instant matter, and RSL § 26-516[a](2), which applies in Regina where the complaint originated before the DHCR, the Dissent states that the plain language of these Laws do not reflect what the Legislature actually intended. The Dissent contends that the only "rent history" barred from review back beyond four years is the DHCR's rent registration records. Accordingly, to the Dissent the review of other documents such as leases, etc. are not prohibited. Thus, according to the Dissent, (stated in *Regina*):

> Although the term "rent history" is not defined in CPLR 213-a, it logically refers to the rental history found in the annual filings with DHCR, given the four-year limitation's purpose, which is to alleviate the burden on honest landlord's retention of rent records indefinitely (*Matter of Cintron v Calogero*, 15 NY3d 347, 354, 936 N.E.2d 831, 912 N.Y.S.2d 498 [2010] [internal citations omitted]; see also *Thornton*, 5 NY3d at 180-181). This interpretation is also evident from Rent Stabilization Law § 26-516[a][2], which defines the trigger for the four-year period within which to challenge a rent-stabilized rent as the rent set forth in the "annual rent registration statement filed four

> years prior to the most recent registered statement." Likewise, Rent Stabilization Law § 26-516(g) provides that any owner that has registered a housing accommodation "shall not be required to maintain or produce any records relating to rentals of such accommodations for more than four years prior to the most recent registration or annual statement for such accommodation." These statutes strongly support an interpretation that the reference in the CPLR to a rental history is a reference to the rental history contained in public filings.

This Dissent's limitation of the term "rent history" solely to rent registrations on file with the DHCR is not logical. Firstly, with respect to the instant matter which originated in Supreme Court, the four-year look back limitation of CPLR 213-a makes no reference to rent registrations or DHCR regulations. As stated above, CPLR 213-a plainly states that any "rent overcharge shall be commenced within four year of the first overcharge alleged" and that the court is "preclude[d]" from the "examination of the rental history" of the apartment back beyond four years.

The Majority in *Regina* rejected the Dissent's interpretation of "rent history" to mean solely rent registration records:

> The dissent attempts to avoid CPLR 213-a's four-year limitation by stating that it is "logical" that CPLR 213-a's reference to the "rental history" means only the rental history found in the annual filings with DHCR. Using this unduly limited definition of "rental history," the dissent then argues that where, as here, there are no recent filings with DHCR (because landlord thought that it had properly deregulated the apartment) courts may look back at evidence concerning rent charged before the base date, and that no predicate showing of fraud is necessary to do so. If

> the legislature had meant "rental history" to mean "rental history found in the annual filings with DHCR," it could have so stated. A far more reasonable interpretation of "rental history" would embrace not just agency records but also the records of the landlord and the tenant, as embodied in ledger books, cancelled checks, rent receipts, expired leases, and the like. Thus, the absence in this case of DHCR rent registrations going back four years does not nullify the temporal strictures of CPLR 213-a.

Further, the Dissent's attempt to limit review of the rent history solely to the DHCR's rent registration records is contrary to the prior decisions of the DHCR and this Court. The DHCR and the courts have long held that a landlord's rent registrations filed with the agency are not reliable evidence of the rent history of a stabilized apartment and have refused to rely on such records to determine the current rent. In *Thornton*, *supra*, this Court affirmed the decision of the Appellate Division which expressly rejected the use of prior registrations as a basis for determining the current legal rent. In *Thornton*, where the landlord had engaged in a fraudulent scheme with the "illusory" prime tenant to circumvent rent stabilization, the Appellate Division rejected the use of prior registrations to establish a new base rent. Instead the Appellate Division that the DHCR's "default formula" should be used:

> The difficulty in setting the legal regulated rent arises from the four-year statute of limitations applicable to residential rent overcharge complaints (CPLR 213-a). Rent was last paid at a lawful rate some eight years before plaintiff tenants commenced this action against the landlord. The statute of limitations contains no provision for a toll while

a dwelling unit is not subject to rent stabilization, either because it is temporarily exempt or because an unlawful rent was being charged. Where, as in the instant matter, such period exceeds four years, there are two available options: (1) ignore the time bar in favor of maintaining the statutory scheme that establishes the initial rent according to what was being charged on July 1, 1984 (Rent Stabilization Law of 1969 [Administrative Code of City of NY] §26-517(a)] or (2) set a new base rent using the default formula employed by the Division of Housing and Community Renewal where no valid rent registration statement is available (*see Matter of Miller v Division of Hous. & Community Renewal*, 289 A.D.2d 20, 21, 733 N.Y.S.2d 860 [2001], lv denied 98 N.Y.2d 604, 773 N.E.2d 1016, 746 N.Y.S.2d [2002].

The identical dilemma was presented in *Matter of Hatanaka v Lynch* (304 A.D.2d 325, 756 N.Y.S.2d 578 [2003]), which is entirely dispositive of the issue. In that case, we noted (at 326) that while the Rent Stabilization Law does not expressly provide for setting a new legal regulated rent, it does contain "an express proscription against applying the rental history reflected in any registration statement filed more than four years before the rent overcharge complaint was brought" (citing Rent Stabilization Law § 26-516[a][2]; see *Zafra v Pikes*, 245 A.D.2d 218, 219, 666 N.Y.S.2d, 633 [1997]). We noted that the proscription applies "even where the prior rental history indicates that an unauthorized rent increase had been imposed (*Matter of Silver v Lynch*, 283 A.D.2d 213, 214, 724 N.Y.S.2d 734 [2001]; *see also Matter of Payne v New York State Div. of Hous. & Community Renewal*, 287 A.D.2d 415, 731 N.Y.S.2d 729 [2001]; *Matter of Marmelstein v New York State Div. of Hous. & Community Renewal*, 292 A.D.2d 207, 739 N.Y.S.2d 143 [2002])" (304 A.D.2d at 326). As the Court of Appeals recently observed, the four-year limitation is applicable whether the relief sought is recovery of an overcharge, adjustment of the legal rent, or, as here, both (*Matter of Gilman v New York State Div. of Hous. & Community Renewal,* 99

N.Y.2d 144, 149, 762 N.E.2d 1137, 753 N.Y.S.2d 1 [2002]).

In affirming the Appellate Division's decision in *Thornton* this Court agreed that the prior registrations could not be utilized to establish the base rent and that instead the DHCR's "default formula" had to be used:

> Here, plaintiffs filed their amended complaint - which named 390 as a defendant for the first time - in November 2000. This is not a situation where an order issued prior to the limitations period imposed a continuing obligation on a landlord to reduce rent, such that the statute of limitations would be no defense to an action based on a breach of that duty occurring within the limitations period. Thus, the apartment's rental history before November 1996 may not be examined, and the $507.85 rent in effect in 1992 is of no relevance. That being so, the owner contends that the legal rent should be established by simple reference to the rental history as of November 1996, by which time an annual registration statement had been filed listing the $2,496 rent charged to Baron. We disagree.
>
> Reflecting an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York, the Baron 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. 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 was the appropriate vehicle for fixing the base date rent here.

In *Grimm* this Court was faced with the opposite circumstance where no registrations were filed by the landlord. Significantly, this Court in *Grimm* did not

hold that in the absence of these registrations is was proper for the DHCR to look at rent records going back beyond four years. Instead, this Court in *Grimm* was careful to state that the DHCR could look back beyond four years *only* where the tenant had presented a colorable claim of fraud and only to determine if the base date rent was fraudulent. If fraud existed then the DHCR was required to utilize the "default" formula to calculate the base date for the current legal rent as provided by *Thornton*.

If CPLR 213-a and RSL § 26-516[a](2) only barred the review of rent registration records and not the prior leases back beyond four years there would have been no point for this Court in *Grimm* to limit the DHCR's review to ascertaining if the landlord had engaged in a fraudulent scheme to deregulate. If, in the absence of registrations, there was no bar to reviewing the prior leases to calculate a new base rent, as the Dissent argues, this Court would have merely directed the DHCR to determine the current rent based upon the prior rental history.

As stated above, on August 18, 2011 the Appellate Division in *Gersten* held that *Roberts* should be applied retroactively. The Dissent in the instant matter and in *Regina* argues that the retroactive application of *Roberts* cannot be effectuated unless the rent is recalculated using the prior rent history of the apartment back to the date the apartment was first treated as deregulated. In the instant matter that would require going back to 1995 when the Appellants first took occupancy. The Dissent contends that looking back beyond four years to calculate the current rent is

only required in *Roberts*' type cases - to effectuate the retroactive application of *Roberts*.

The Dissent's attempt to distinguish *Roberts'* type matters from other matters where rent overcharge is alleged is not logical. This Court's decision in *Roberts* was that the landlord in that matter had improperly treated the apartments as deregulated based upon high rent/vacancy and had improperly charged market rents. In *Roberts* it was found that the apartments were not deregulated by high rent/vacancy because the landlord was receiving J-51 tax benefits and therefore they remained rent stabilized *at all times.*

An overcharge complaint in a *Roberts'* type matter is at its core no different than any other rent overcharge complaint; the tenant is claiming that the landlord is charging more than allowed under the RSL. Sometimes the overcharge is willful but often, as in *Roberts*, the overcharge is simply by mistake.

In the circumstance where a landlord has willfully overcharged a tenant this Court's decisions in *Thornton* and *Grimm* indicate that review of the prior rent history of the apartment may be required but solely to ascertain if the base date rent is fraudulent. Even in that circumstance this Court has made clear that the prior rent history cannot be used to calculate the current rent.

And if an overcharge is simply by mistake, as in *Roberts* and in the instant matter, there is no basis for ignoring the four year look back prohibition of CPLR 213-a.

The Legislature was obviously aware when it enacted CPLR 213-a and RSL § 26-516[a](2) that overcharges occurring prior to four years would no longer be subject to review or correction. The Legislature did not include an exception in either statute for *Roberts*' type matters or similar matters where an overcharge occurs due to the landlord's or the DHCR's mistaken interpretation of the Law. As stated by this Court in *Thornton*, the Legislature's purpose in enacting the four-year look back prohibition was to "alleviate the burden on honest landlords to retain rent records indefinitely." Obviously, a mistaken interpretation of the Law by the DHCR or the landlord by itself will not render the landlord "dishonest."

In the instant matter, as in many *Roberts*' type matters, the prior rent history of the apartment is well known because the affected tenants have remained in occupancy since 1995 when the subject apartment was mistakenly treated as deregulated by the Respondents' predecessor, Dr. Nagel. However, the fact that the prior rent history of the subject apartment back beyond four years is known does not render the four-year look back prohibitions of CPLR 213-a and RSL § 26-516[a](2) inapplicable. Again, the statutes do not provide for an exception where the prior rent history is available.

Finally, the Dissent's contention that *Roberts*' type matters are somehow different when determining a rent overcharge complaint has not been followed by this Court. In *Boyd*, *supra*, a *Roberts*' type matter, this Court affirmed the determination of the DHCR that had refused to review rent history of the apartment going back beyond four years.

In *Boyd* the DHCR found, pursuant to *Roberts*, that the apartment was rent stabilized based upon the landlord's receipt of J-51 tax benefits. However, the DHCR refused to investigate a substantial rental increase occurring *five* years prior to the tenant's complaint because the tenant had failed to allege a "colorable claim of fraud" which would have required the DHCR to investigate back more than four years under *Grimm*. In *Boyd* this Court reversed the decision of the Appellate Division, which had directed the DHCR to investigate that five year old rent increase. This Court held that the "tenant failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period."

This Court in *Boyd* could have held that as it was a *Roberts*' type matter the DHCR was required to look at the rents back beyond four years to calculate the current legal rent. That's the contention made by the Dissent in the instant matter and in *Regina*. However, both the DHCR and this Court rejected such course in *Boyd*.

The Dissent's argument that *Roberts* cannot be applied retroactively unless the current legal rent is calculated by using the rent history of the apartment going back

to 1995 is also incorrect. The retroactive application of *Roberts*, if this Court agrees to such retroactive application, is effectuated by affording the tenants the rights and protections of the RSL. Such rights include (1) the right to challenge the rent going back four years, (2) the right to have stabilized renewal leases with limited rent increases, and (3) the right to have all services maintained at the base date level. These rights are not inconsequential or meaningless as the Dissent contends.

The Dissent would grant the Appellants an additional right not contained in the Law, specifically the right to circumvent the four year look back prohibition of CPLR 213-a and RSL § 26-516[a][2]. Such new "right" is contrary to the plain language of these statutes.

As stated above, this Court has yet to decide whether *Roberts* should be applied retroactively and to what extent. In its decision in *Gersten* the Appellate Division held that *Roberts* should be applied retroactively. In making that determination the Appellate Division relied upon this Court's decision in *Gurnee v Aetna Life & Casualty Co*, 55 NY2d 184, 448 NYS2d 145 (1982), a decision involving the interpretation of an insurance law. *Gurnee* is instructive because while holding that a prior decision of this Court should be applied retroactively, this Court also held that the existing statute of limitations would *still apply* limiting the liability of those adversely affected by the retroactive application of the decision.

In *Gurnee* this Court had to decide if its prior decision in *Kurcsics v Merchants Mut. Ins. Co*, 49 NY2d 451, 426 NYS2d 454 (1980) should be applied retroactively. In *Kurcsics* this Court had interpreted section 671 of the Insurance Law and found that an insurer's liability under the Law was greater than that provided in the insured's policy. In *Gurnee* this Court applied *Kurcsics* retroactively. This Court also expressly held that the applicable statute of limitations remained in effect thus limiting the adverse effect of the decision on insurers. As noted in *Gurnee*: "the applicable six-year Statute of Limitations has already extinguished a portion of the insurer's potential liability."

It follows that under *Gurnee* the four year look back provisions of CPLR 213-a and RSL § 26-516[a][2]) should remain in effect even if *Roberts* is applied retroactively.

One additional point needs to be made with respect to the rationale raised by the Dissent. In *Regina* the Dissent states that the absence of rent registrations during the period the apartment was treated as deregulated in pre-*Roberts* type matters prevented tenants from reviewing the rent history of the apartment over the years to ascertain if there was a basis for filing a complaint. That is not the case in the instant matter.

In the instant matter rent registrations were filed with the DHCR by the Respondents' predecessor, Dr. Nagel, in the years immediately preceding the

Appellants' own December, 1995 tenancy. The tenants preceding the Appellants, the Gordons, were rent stabilized and their leases and rents were properly registered with the DHCR by Dr. Nagel as shown by the DHCR's records. (A: 1035)

The Appellants clearly were not prevented from reviewing the prior rent registration records when they took occupancy. They were not prevented from filing a complaint with the DHCR within the four year period after they took occupancy and contesting the treatment of subject apartment as deregulated by Dr. Nagel.

Further, not only were rent registrations on file with the DHCR for the Appellants to review when they took occupancy in December, 1995, at that time there were no express policy positions issued by the DHCR which told them that a complaint would be futile.

The Majority of the Appellate Division in *Regina* were correct in relying on the policy choice of the Legislature to limit review of the rent history of an apartment to four years. In rejecting the arguments of the Dissent, the Majority in *Regina* stated:

> [T]he legislature has made a different policy determination. It not only set a four-year limitations period, but it also explicitly barred any "examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint" (RSL § 26-516[a][2]). The Court of Appeals has found that the purpose of the four-year limitations period is "to alleviate the burden on honest landlords to retain rent records indefinitely" (*Thornton*, 5 NY3d at 181). The Court of Appeals has made what we have called a "limited exception" to the four-year limitations period in cases where landlords act fraudulently (*Matter of Grimm v State*

of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 68 AD3d 29, 33, 886 N.Y.S.2d 111 [1st Dept 2009]), affd 15 NY3d 358, 938 N.E.2d 924, 912 N.Y.S.2d 491 [2010]). *To expand this exception to landlords who have not engaged in fraud would create a much broader exception that would appear to negate the temporal limits contained in the Rent Stabilization Law and the CPLR.*

ARGUMENT-POINT V

THERE IS NO BASIS TO TOLL, MODIFY OR DELAY THE FOUR YEAR LOOK BACK PERIOD OF CPLR 213-a

The Appellants argue, again for the first time in this appeal, in Point III of their brief (p 44) that the four year look back period provided by CPLR 213-a and RSL § 26-516[a][2]) should be tolled. Alternately, the Appellants argue that the Respondents should be "estopped" from pleading the statute of limitations of CPLR 213-a. Again, these arguments by the Appellant are new and were not raised below and should not be considered by this Court. See, *e.g*., *Bingham v N. Y. City Transit Auth.*, 99 NY2d 355, 756 NYS2d 129 (2003).

Even if timely raised, the Appellants' arguments have no merit. The four-year look back prohibition of CPLR 213-a includes a proscriptive directive to the courts and is not merely a statute of limitation. As stated above, CPLR 213-a ends with the provision that the statute "preclude[s]" the court from "examin[ing] the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action." This is a prohibition directly imposed

on the court and is not contingent upon the landlord's action or inaction or ability or inability to raise the four year statute of limitations.

As stated in *Meyers v Frankel*, 184 Misc 2d 608, 708 NYS2d 566 (AT, 2nd Dept, 2000) in referring to the four-year look back prohibition of CPLR 213-a:

> We incidentally note that this last provision is not a mere Statute of Limitations but is a substantive limit on the overcharges for which recovery can be had. That is, if a claim that an overcharge occurred with the four-year period could only be established by showing that an overcharge existed before the four-year period, the claim could not be made out, irrespective of whether the Statute of Limitations had been pleaded.

It should be noted further that the DHCR in enforcing the provisions of RSL § 26-516[a][2]), applicable to administrative proceedings, does not require the landlord to affirmatively plead the statute as a defense. The DHCR automatically applies the four year limit on itself in all its rent overcharge proceedings. It would lead to inconsistent results if the courts and the DHCR applied the two statutes differently.

Moreover, equitable estoppel does not apply in the instant matter as neither the Respondents nor their predecessor, Dr. Nagel, purposely misled the Appellants concerning the stabilized status of the subject apartment or prevented them from filing a complaint with the DHCR or the courts. The Appellants have provided no evidence showing that Dr. Nagel intentionally misled them when they took occupancy in 1995.

Indeed, the Special Referee Helewitz in his Report to the Court expressly found that Dr. Nagel did not knowingly deceive the Appellants. According to the Special Referee, "based on the interpretation of the J-51 tax benefit law at the time that the [Raden] leases were executed, it has not been demonstrated that defendants knew or should have known that the apartments could not be deregulated." (A: 26-27)

The Special Referee further held:

> In another companion case concerning a different tenant in the same building alleging identical claims, another judge found that these defendants "did not engage in fraud, and any overcharges were based on a good faith belief that they had a right to charge the amounts at issue." *Todres, as Executor of the Estate of Carter v W7879 et al*., Index No.: 108934/10 (Sup Ct, NY County, September 19, 2014).
>
> Specific evidence elicited during the hearing also demonstrated a lack of willfulness on the part of defendants: (1) when Raden was incorrectly charged with an MCI increase, which defendants knew not to be permissible because of the J-51 befefits, defendants immediately removed such increase from the rent bill and credited Raden for that amount, which they did *sua sponte* and not in response to any tenant challenge; and (2) defendants were the ones who contacted their lawyer to see if they had inadvertently overcharged tenants when news of the *Roberts v Tishman Speyer* decision came out.

(A: 31-32)

The findings of the Referee's Report was fully adopted by the Supreme Court in its decision and by the Appellate Division in affirming that decision. Again, even

the Appellate Division Dissent in the instant matter agrees that Dr. Nagel acted in good faith in treating the subject apartment as deregulated when the Appellants took occupancy in 1995.

Absent an intent to mislead there can be no "equitable estoppel". It is well established that "equitable estoppel" requires not only the initial wrongdoing but also subsequent intentional acts to hide the initial wrongdoing from the individual who would be entitled to take action. If Dr. Nagel and the Respondents were not aware of any wrongdoing when they treated the subject apartment as deregulated in 1995 until 1996 based upon high rent/vacancy, they could not have engaged in any subsequent actions as a cover-up or induce the Appellants not to act. See, *e.g.* *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 944 NYS2d 732 (2012).

Similarly without merit is the Appellants' claim (p 46), for the first time in their brief before this Court, that the four year look back prohibition of CPLR 213-a was "tolled" from January, 1996 to October, 2009 by the DHCR's "adoption . . . of a policy that permitted deregulation of apartments in buildings receiving J-51 benefits."

The Appellants cite no statute in support of their claim that the four year look back prohibition of CPLR 213-a was tolled based upon the DHCR's policy position. The one decision cited by the Appellants in their brief, *Roldan v Allstate Ins., Co.*, 149 Ad2d 20 544 NYS2d 359 (2nd Dept, 1989), concerned a prior court decision

effectively prohibiting further action by the party. The Court in *Roldan* held that when this prior decision was found to be erroneous and reversed, the statute of limitations should be tolled for the period when the erroneous decision remained in effect.

According to the Appellate Division in *Roldan*:

> In conclusion, we hold, under the particular facts of this case, that the running of the Statute of Limitations with respect to the plaintiff's cause of action based on bad faith and for indemnification was suspended as soon as the Supreme Court, by erroneously granting Allstate's motion to vacate the judgment in underlying action, in effect extinguished the plaintiff's causes of action at Allstate's request. The running of the Statute of Limitations remained suspended until this court, in February 1986 reversed the order vacating the judgment in the underlying action, thereby reviving the plaintiff's causes of action.

Contrary to the facts in *Roldan* in the instant matter there was no DHCR Order or prior court decision which prevented the Appellants from filing a complaint or commencing a court action in 1995 when they took occupancy. Indeed, as the Appellants show in their own brief, in 1995/1996 the DHCR was not issuing consistent policy positions concerning the application of high rent/vacancy deregulation.

Further, in their brief (pp 19-20) the Appellants strongly contend that DHCR's Operational Bulletins 94-1 and 95-3, which were issued at the time the Appellants took occupancy, provided that high rent/vacancy deregulation was *not* available. If

that is the case then the Appellants would have had every incentive to file rent overcharge complaints in 1995 and at any point up to 2000 when, as the Appellants state in their brief (A: 19), the DHCR issued new Code amendments which officially provided a different rule.

The Appellants' reliance on this Court's decision in *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 998 NYS2d 729 (2014) is also misplaced. In *Borden* this Court held that treble damages were generally unavailable in *Roberts*' type matters because, obviously, the landlord did not willfully overcharge the tenant. There was no issue concerning tolling the statute of limitations in *Borden*.

ARGUMENT-POINT VI

THERE HAS BEEN NO WILLFUL OVERCHARGE IN THIS MATTER AND NO BASIS FOR IMPOSING TREBLE DAMAGES

In point IV of their brief the Appellants argue that they are entitled to treble damages. The Appellants' argument presumes that this Court will reverse the Supreme Court's and the Appellate Division's factual finding that there was no rent overcharge in this matter.

As stated fully above, the instant matter is no different than every other *Roberts'* type matter. The tenants prior to the Appellants, the Gordons, were paying over $2,000 per month when they vacated the subject apartment. The threshold amount for high rent/vacancy deregulation at that time was $2,000 per month. The

Resondents' predecessor, Dr. Nagel, acted in good faith in believing that the subject apartment was deregulated when the Appellants took occupancy in 1995. As stated by this Court in *Borden*:

> As the lower courts noted, treble damages would be unavailable to the tenants because a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*. For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units, so there is little possibility of a finding of willfulness (*Borden*, 23 Misc3d 1202[A], 941 NYS2d 536, 2001 Slip Op. d52322[U] [Sup Ct, NY County 2011]). Only after the *Roberts* decision did the DHCR's guidance become invalid.

Again, before any Court found that *Roberts* should be applied retroactively, the Respondents' predecessor, Dr. Nagel, had the Appellants' rent adjusted to the legal amount and registered the apartment as rent stabilized with the DHCR. The mistake made by Dr. Nagel in 1995 regarding the application of high rent/vacancy deregulation was corrected by him as soon as this Court issued its decision in *Roberts*. There is no basis for finding that Dr. Nagel or the Respondents willfully overcharged the Appellants.

ARGUMENT-POINT VII

AS THE PREVAILING PARTY THE RESPONDENTS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES

As the Appellants state in Point V of their brief (p 52) the parties' lease provides for an award of attorneys' fees to the successful party in a court dispute. If this Court sustains the decisions of the Supreme Court and the Appellate Division, the Respondents should be awarded attorneys' fees.

CONCLUSION

Wherefore, it is respectfully requested that the decision of the Courts below be affirmed and that the Respondents be awarded attorneys' fees and legal costs as the prevailing parties.

Dated: New York, New York
April 5, 2019

Respectfully submitted,

KUCKER & BRUH, LLP
For Defendants-Respondents
747 Third Avenue
New York, New York 10017
(212) 869-5030

PATRICK K MUNSON, ESQ.

NEW YORK COURT OF APPEALS CERTIFICATE OF COMPLIANCE WITH PRINTING SPECIFICATIONS

Patrick K. Munson, an attorney duly admitted to practice law before the Court of the State of New York, affirms the truth of the following pursuant to CPLR 2106:

1. I am a member of Kucker & Bruh, LLP, attorney for Defendants-Respondents.
2. This brief is in compliance with 22 N.Y.C.R.R. Part 500.1(j). It is 60 pages long and contains 13,377 words, counting all printed text on each page of the body of the brief. It was prepared using Microsoft Word. 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, since spaced.

Dated: April 9, 2019

Patrick K. Munson, Esq.