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September 26, 2019

State of New York
Court of Appeals
John P. Asiello, Esq.
Chief Clerk and Legal Counsel
Clerk's Office
10 Eagle Street
Albany, New York 12207-1095

Re: **RADEN V W7879, LLC**

Dear Mr. Asiello:

My firm represents the Respondent-landlord, W7879 LLC (hereafter "Landlord) in the above referenced appeal. This letter is submitted in response to your letter dated September 17, 2019 wherein you state that the Court will accept further argument concerning the effect of the recently enacted (June 14, 2019) Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L of 2019, ch 36) on the issues raised in this appeal and of the propriety and desirability of the Court determining such issues at this time.

Initially, I would state that it would be very desirable for the Court of Appeals to now decide the applicability of the HSTPA to the instant appeal and to the companion pending appeals in *Collazo*, *Regina*, and *Taylor*. There will be no new developments the Law which would affect this Court's decision. If the HSTPA does not apply than there is no purpose in remanding the matter for further proceedings. However, if this Court finds that the HSTPA does apply a remand may be necessary.

This Court's guidance on the applicability of the HSTPA is not only important with respect to the instant appeal but also to a number of matters pending on appeal before the Appellate Division

and the Appellate Term. Moreover, although the instant appeal did not originate before the New York State Division of Housing and Community Renewal (DHCR), that agency has numerous pending administrative appeals and pending Article 78 proceedings and appeals which will also be affected by the application of the HSTPA.

The issue of whether the HSTPA applies to pending matters will be the source of substantial litigation and litigation costs and court time if it is not now resolved by this Court. In the instant matter, if this matter is remanded the parties will not only engage in litigation and appeals concerning whether the HSTPA applies but in addition there will be substantial litigation concerning the consequences of applying the new Law. Such extensive litigation will all be avoided if this Court determines that the HSTPA does not apply to this pending appeal. If this Court determines that the HSTPA does apply than any remand should be limited to the issues raised as a consequence of applying the new Law to the facts in the instant matter.

THE UNDERLYING FACTS IN THIS APPEAL ARE NOT IN DISPUTE BUT THE MANNER OF CALCULATING THE LEGAL RENT AND ANY RENT OVERCHARGE WILL DEPEND UPON WHETHER THE HSTPA APPLIES

With respect to the actual issue raised in this appeal, this matter concerns a *Roberts, et al. v Tishman Speyer Properties, et al.*, 13 NY3d 270, 890 NYS2d 388 (2009), type matter where a stabilized apartment was treated as deregulated beginning in 1995 based upon high rent/vacancy while the Landlord was still receiving J-51 tax benefits.[1] Based upon such deregulation the Landlord began charging market rents for the subject apartment and stopped filing registrations with the DHCR. Following this Court's decision in *Roberts* the Landlord immediately informed the affected tenants in the subject building, including the Appellants-Tenants Raden (hereafter (Tenants"), that their apartments remained rent stabilized and offered them stabilized leases.

The Tenants commenced a proceeding in Supreme Court contending that they were being overcharged. Following a hearing, the Supreme Court found that the Landlord had not committed fraud and was acting in good faith in 1995 when the subject apartment was treated as deregulated. The Supreme Court held that absent a finding of fraud it was prohibited by the Rent Stabilization Law from looking back more than four years to determine the legal rent. Thus, the Supreme Court established the current legal rent based on the amount paid by the Tenants four years prior to their Complaint. The majority of the Appellate Division agreed with the Supreme Court. However, the Appellate Division dissent stated that the legal rent should be determined by looking at all prior leases back to 1995 when the Tenants first took occupancy. The Tenants have appealed to this Court contending, *inter alia*, that the Appellate Division dissent was correct.

If the HSTPA is applied to the instant matter it is unknown how the legal rent will determined. The HSTPA changes the statute of limitations or look back period from four to six years. Such

1 As stated in *Roberts*, the DHCR had for decades wrongly informed landlords that high rent/vacancy deregulation applied even where a landlord was receiving J-51 tax benefits if the building was subject to regulation prior to the tax benefits. Until *Roberts* was issued the Landlord in good faith believed the subject apartment was properly deregulated.

change by itself will not substantially affect the rent calculation if the legal rent is established as the amount paid by the Tenants six years prior to their Complaint. At that time the Tenants were already paying the higher market rents.

The HSTPA, however, also provides that the DHCR and the courts can look back beyond the statute of limitations period to ascertain if the base date rent is "reliable." The HSTPA does not define "reliable" and does not provide a remedy if the DHCR or the court finds that the base date rent is not "reliable." Specifically, the HSTPA does not adopt the solution reached by the Appellate Division dissent in the instant matter, *i.e.*, looking back at all leases executed by the Tenants since 1995 to calculate a "reliable" base date rent.

BASED UPON THE LANGUAGE OF THE STATUTE AND COURT PRECEDENT THE HSTPA SHOULD NOT BE APPLIED TO THIS APPEAL

As stated above, the Landlord requests that this Court now decide whether or not the HSTPA applies. If the HSTPA does not apply, as the Landlord will show below, this Court should decide the issues raised in the appeal in accordance with the Law in effect at the time the Supreme Court's decision and the Appellate Division's decision were rendered.

With respect to the application of the HSTPA[2], Section 1, Part F, § 7 provides in pertinent part that: "[t]his act shall take effect immediately [June 14, 2019] and *shall apply to any claims pending or filed on and after such date.*" [emphasis added] It is relevant that the Legislature expressly provided that the HSTPA applies solely to "*claims* pending" on June 14, 2019 and not to actions already taken for which no claims were filed or to claims already decided and no longer pending.

Even without the express language of the HSTPA, however, it is clear that the new Law should not be applied to the instant appeal which concerns actions and decisions which all took place prior to the Law's enactment on June 14, 2019. As stated in the decisions cited by the Landlord in its previous letter to this Court dated June 26, 2019, this Court and the Appellate Division have repeatedly stated that retroactive application of a new Law, even a remedial statute, was improper where the new Law affected substantial rights or liabilities of the affected parties, unless the Legislature expressly states otherwise in the legislation.

The Supreme Court's decision in *Landgraf v Usi Film Prods*, 511 US 244, 114 S Ct 1483 (1994) is instructive:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of

2 Section 3 of the HSTPA, the last paragraph of the statute, additionally provides that: "This act shall take effect immediately provided, however, that the applicable effective date of Parts A through O of this act shall be as specifically set forth in the last section of such Parts."

> conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."
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> Thus, when a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial default rules. *When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches, that it does not govern absent clear congressional intent favoring such a result.* [emphasis added].

The Appellate Division in *Aquaiza v Vantage Props, LLC*, 69 AD3d 422, 893 NYS2d 19 (1st Dept, 2010), explained the application of these principles in New York State jurisprudence:

> The motion court improperly applied the provisions of Local Law 7 retroactively with respect to the corporate defendants. As a matter of statutory interpretation, "[w]here a statute by its terms directs that it is to take effect immediately, it does not have any retroactive operation or effect" (McKinney's Cons Laws of NY Book 1, Statutes § 51[b], Comment, at 92; *State of New York v Daicel Chem. Indus. Ltd.*, 42 AD3d 301, 302, 840 NYS2d 8 [2007]; Morales v Gross, 230 AD2d 7, 10, 657 NYS2d 711 [1997]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 696 NE2d 978, 673 NYS2d 966 [1998]). Indeed, it has long been a primary rule of statutory construction that a new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduce from its wording. As Judge Cordozo put it, "It takes a clear expression of the legislative purpose to justify a retroactive application" (*Jacobus v Colgage*, 217 NY 235, 240, 111 NE 837 [1916]).
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> Although remedial statutes such as Local Law 7 generally constitute an exception to the general rule that statutes are not to be given retroactive construction, this exception is limited to the extent that any retroactive application must not impair vested rights (Statutes §54[a]; *Dorfman v Leidner*, 150 AD2d 935, 936, 541 NYS2d 278 [1959], affd 76 NY2d 956, 565 NE2d 472, 563 NYS2d 723 [1990]). Stated differently, "Every statute pertaining to a remedy is retroactive in that it operates upon all pending actions unless they

> are expressly excepted, but this does not apply to a statute whereby a new right is established even though it be remedial (Statutes §54[a], Comment, at 109-110; see *Matter of Duell v Condon*, 84 NY2d 773,783, 647 NE2d 96, 622 NYS2d 891 [1995]). For example, a remedial statute is applied to procedural steps in pending actions, and is given retroactive effect only insofar as the statute provides for a change in the form of the remedy or a new remedy or cause of action for an existing wrong (*Shielcrawl v Moffett*, 294 NY 180, 188, 61 NE2d 435 [1945]).
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> Here, the wording of the statute is clear with respect to the timing of the effective date, "immediately" is a term in statutory construction with a precise meaning. Moreover, as Local Law 7 specifically created a new right of action that did not exist prior to the enactment, it should be applied prospectively only (see *Matter of Hays v Ward*, 179 AD2d 427, 426-429, 576 NYS2d 168 [1992], lv denied 80 NY2d 754, 600 NE2d 633, 587 NYS2d 906 [1992]).

As stated above, the HSTPA provides that its provisions should take effect immediately and apply to all "claims pending." As stated in *Aquaiza* such language does not require the retroactive application of the new statute.

THE APPLICATION OF THE HSTPA TO THE INSTANT APPEAL WILL IMPROPERLY IMPOSE NEW LIABILITIES UPON THE LANDLORD AND PROVIDE THE TENANTS WITH NEW RIGHTS

With respect to the instant appeal, as stated above the HSTPA changed the statute of limitations or look back period from four years to six years and also provided that the DHCR and the courts may look beyond the statute of limitations period to determine if the base date rent was "reliable." The HSTPA also increased the application of treble damages from two to six years.

Obviously, the application of the HSTPA to the instant matter would "increase [the Landlord's] liability for past conduct." Prior to the June 14, 2019 enactment of the HSTPA the Rent Stabilization Law (RSL) and the CPLR expressly provided that the Landlord was not required to "maintain or produce" rent records back more than four years and that the DHCR and courts could not examine or base a decision on rent records going back more than four years prior to a tenant's complaint. RSL § 26-516[a](2) provided:

> Except as provided under clauses (i) and (ii) of this paragraph, 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. (i) No penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed or upon an overcharge which occurred prior to April first, nineteen hundred eighty-four. (ii) Any complaint based upon overcharges occurring prior to the date of filing the initial rent registration as provided in section 26-517 of this chapter shall be filed within ninety days of the mailing of notice to the tenant of such registration. The paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision.

CPLR § 213-a provided for a four year statute of limitations:

> 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.

Finally, RSL § 26-516[g] provided:

> Any owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation. [emphasis added]

As this Court stated in *Thornton v Baron*, 5 NY3d 175, 800 NYS2d 118 (2005) the purpose of the four-year look back period was "to alleviate the burden on honest landlords to retain rent records indefinitely." In the instant matter both the Supreme Court, following a hearing, and the Appellate Division held that the Landlord herein at all times acted in good faith.

If the HSTPA is applied in the instant matter the Supreme Court will be required to review the rent records for the subject apartment back beyond four years and a new rent will be calculated using rent records going back at least six years. As a result of the application of the HSTPA the Landlord will be exposed to additional liability and treble damages for overcharges occurring six years prior to the Tenants' Complaint. The new liability could be even greater depending on the remedy imposed if the Supreme Court determines that the base rent six years prior to the Tenants' Complaint was not "reliable" as that term is used in the HSTPA.

To summarize, prior to the enactment of the HSTPA on June 14, 2019 the Landlord was not liable for any overcharges charged and paid more than four years prior to the Tenants' Complaint. If the HSTPA is applied to the instant matter the Landlord will be made newly liable for overcharges charged and paid up to six years prior to the Tenants' Complaint. Because it imposes new liability the HSTPA should not be applied to the instant matter. See, *Landgraf, supra.*

Very truly yours,

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