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 IN OPPOSITION TO BRIEF BY AMICI CURIAE

KUCKER MARINO WINIARSKY & BITTENS, 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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

STATE OF NEW YORK
COURT OF APPEALS

----------X

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PRELIMINARY STATEMENT

This brief is submitted by the various Defendants-Respondents listed in the heading (hereafter "Landlord") in opposition to the Amici Curiae brief of Jacobus Gomes, Hajera Dehajanzada-Lyle, N. N. Simpson and Jorge A. Nagera Ordonez (hereafter "Amici"). The Amici contend that the Housing Stability and Tenant

Protection Act of 2019 (HSTPA) (L of 2019, ch 36) enacted on June 14, 2019 should be applied retroactive to all matters, including those already decided on the merits.

This appeal was perfected prior to the June, 2019 enactment of the HSTPA. This Court has requested that counsel for the parties submit letters concerning the impact of the HSTPA to the instant proceeding and that has been done. The Respondents' counsel noted in its letter that applying HSTPA to the instant matter would raise significant Constitutional issues. The HSTPA substantially increases not only the period for finding overcharges, extending it back from four years to six years, but it also increases the period when treble damages can be imposed from two years back to six years.

Further, the HSTPA changes the method for determining a rent overcharge by allowing the courts and the DHCR to look at the rent history of the stabilized apartment back to at least 1984. Prior to the HSTPA the courts and the DHCR were prohibited from looking back more than four years. More important, prior to HSTPA landlords were expressly informed by the Rent Stabilization Las (RSL) that they could discard all rent records more than four years old and that they would only be required to prove the legality of the rent charged four years prior to any tenant complaint.

Thus, there are currently no Constitutional issues raised in this appeal. Therefore, there is no requirement the New York State Attorney General be given

notice. However, if this Court determines that HSTPA should be applied then Constitutional issues may be raised depending on how the Court interprets and applies the HSTPA.

STATEMENT OF FACTS

The relevant facts were stated thoroughly in the Respondents' brief in opposition to the Appeal of the Plaintiffs-Appellants Joel and Odette Raden (hereafter "Appellants").

Briefly, this matter concerns a *Roberts, et al. v Tishman Speyer Properties, et al.*, 13 NY3d 270, 890 NYS2d 388 (2009), type circumstance where a stabilized apartment was treated as deregulated beginning in 1995 based upon high rent/vacancy while the Respondents were receiving J-51 tax benefits. As stated in *Roberts*, the New York State Division of Housing and Community Renewal ("DHCR") had for decades erroneously 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 landlord's receipt of such benefits.

Based upon the belief that the subject apartment was properly deregulated based upon high rent/vacancy in 1995, the Appellants were charged market rents at that time and up to 2009. Immediately following this Court's 2009 decision in *Roberts* the Respondents informed the Appellants that their apartment had been improperly treated as deregulated, that they were entitled to a stabilized lease and a

recalculation of the legal rent. Under the then existing four-year statute of limitations provisions of the RSL, the Respondents set the legal rent at the amount paid by Appellants four years earlier.

In its decision below, the Appellate Division, First Department, held that the Respondents had acted properly in setting the legal rent and in refunding the overcharge. The Appellate Division found that as the Respondents had acted in accordance with the DHCR's policies at the time, they committed no fraudulent deregulation. The Appellate Division further found that as there was no basis to look beyond the four year look back limitation the legal rent was properly set at the charged and paid by the Appellants four years earlier.

ARGUMENT

The Amici's contention that the HSTPA needs to be applied retroactively to all matters including pending appeals is contrary to the plain language of the statute. With respect to application Section 1, Part F, § 7 provides 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 to "claims pending" and future claims and not to matters already decided on the merits and no longer "pending."[1]

[1] 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."

Even without the express language of the HSTPA, it is clear that the statute should not be applied to matters decided prior to the Law's June 14, 2019 enactment. U. S. Supreme Court precedent makes clear that the retroactive application of a new law which substantially changes the legality of prior actions would violate the Constitution. As stated by the United States Supreme Court's in *Landgraf v Usi Film Prods*, 511 US 244, 114 S Ct 1483 (1994):

> 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 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.

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

> 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]).
>
> 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]).
>
> 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]).

The Amici in their brief argue that the HSTPA should be applied to pending appeals because the statute provides that it be applied to all "claims pending." However, a claim is not "pending" if it has already been decided on the merits by the Supreme Court even where that decision is being challenged on appeal. However, the application of the HSTPA to the instant matter would clearly "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (*Landgraf*, *supra*)

As stated above, the HSTPA now makes landlords liable for rent overcharges going back six years, an increase of two years over the liability imposed by the RSL prior to HSTPA. Further, the HSTPA now makes landlords liable for the treble damages penalty for the entire six year period of any overcharges whereas previously treble damages could be imposed for only two years.

Finally, there is concern that if the HSTPA is applied retroactive landlords will be further penalized if they fail to provide rent history documentation going back to 1984 proving the legality of all rent increases to date. If there is any gap in the rent records or any failure to provide documentary evidence proving the landlord's entitlement to a rent increase for apartment renovations or improvement such rent increase will be eliminated from the calculation of the legal rent.

Prior to the June 14, 2019 enactment of the HSTPA the RSL and the CPLR expressly provided that landlords would not required to "maintain or produce" rent records back more than four years and that the DHCR and courts could not examine or calculate the legal rent based upon rent records going back more than four years. Thus, RSL § 26-516[a](2) expressly 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.

More important, RSL § 26-516[g] expressly 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]

Finally, CPLR § 213-a also provided for a four year statute of limitations in proceedings commenced in court:

> 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.

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 appeal the Respondents do not have full documentation of substantial apartment renovations made in 1994 prior to the Appellant's tenancy, have occupied the subject apartment back to 1995. Prior to HSTPA the Respondents legally disposed of such documentation long ago. If HSTPA is applied in a manner

penalizing the Respondents for not providing such documentation then the result will be that the Respondents will face a new liability for an action, disposing rent old records, which was expressly lawful at the time it was done.

To summarize, prior to the enactment of the HSTPA on June 14, 2019 the landlords were not liable for any overcharges charged and paid more than four years prior to a tenant's complaint. Moreover, landlords were informed they could dispose of rent records over four years old and could not be penalized for failing to provide such records to the courts or the DHCR. If the HSTPA is applied to the instant matter the Respondents will be made newly liable for overcharges and treble damages going back six years and will be further penalized for failing to provide rent history documentation going back to 1984. Because it imposes new liability the HSTPA should not be applied to the instant matter. See, *Landgraf, supra*.

CONCLUSION

The Amici's brief fails to provide an adequate basis for applying the HSTPA to the instant appeal. By its own terms the HSTPA does not apply to the instant appeal. Moreover, applying the HSTPA retroactively would clearly raise Constitutional issues not contemplated or addressed by the Legislature.

Dated: New York, New York
December 23, 2019

Respectfully submitted,

Kucker Marino Winiarsky & Bittens
For Defendants-Respondents
747 Third Avenue
New York, New York 10017
(212) 869-5030

PATRICK K MUNSON, ESQ.