To Be Argued By:
Margaret B. Sandercock
Time Requested: 15 Minutes

APL-2020-00127

New York County Clerk's Index Nos. 100873/17 and 156504/17
Appellate Division, First Department Case No. 2018-4179

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

ROBINSON CALLEN, as Trustee of CASPER R. CALLEN TRUST
c/o SALON REALTY CORPORATION,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

NEW YORK CITY LOFT BOARD,

Respondent-Appellant,

and

RICHARD FISCINA, LUKE WEINSTOCK, ZENIA DE LA CRUZ
and MARIA THERESA TOTENGCO,

Respondents-Respondents.

(Additional Caption on the Reverse)

BRIEF FOR RESPONDENTS-RESPONDENTS LUKE WEINSTOCK, ZENIA DE LA CRUZ AND MARIA THERESA TOTENGCO

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Date Completed: February 25, 2021

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QUESTIONS PRESENTED

1. Whether the courts below correctly ruled that parties to litigation cannot be compelled to continue to litigate against their will?

2. Whether the Appellate Division correctly ruled that Loft Law coverage applicants are free to pursue an alternative form of rent regulation, after withdrawing their coverage application?

PRELIMINARY STATEMENT

The City of New York sought leave to appeal in the instant case because it was aggrieved by the decisions below (R 7 and R 731-39) of Supreme Court, New York County and of the Appellate Division, First Department ruling that the New York City Loft Board cannot require Loft Law coverage applicants to continue to litigate coverage applications despite an available settlement with the landlord for an alternate form of rent regulation.

For the reasons set forth herein, it is respectfully submitted that:

1. The decisions below must be affirmed insofar as they rule that Loft Law coverage applicants cannot be compelled to continue litigating their coverage applications against their will; and
2. The decision of the Appellate Division must also be affirmed insofar as it provides tenants the option to pursue alternate rent regulatory schemes, after withdrawing a Loft Law coverage application.

The underlying decisions of the New York City Loft Board, Loft Board Orders 4480 and 4630, are arbitrary, capricious and an abuse of the agency's discretion for the following principal reasons:

1. The Loft Board lacks the authority to require a litigant before it to continue to litigate against his or her will, particularly where, as here, Loft Board regulations do not permit the Loft Board to file or prosecute coverage

applications and allow a coverage applicant to avoid a coverage hearing simply by not attending the hearing;

2. The Loft Board lacks the authority to nullify the established legal doctrine of de facto rent stabilization and to require that any tenant residing in a commercial building of whom the Loft Board becomes aware, must prosecute an application for Loft Law coverage, whether or not he or she qualifies for it;
3. The Loft Board performed no fact finding to determine whether the Tenants in this case are actually in danger due to living in a building registered with rent stabilization but without a residential certificate of occupancy; and
4. The Loft Board does not handle all case settlements consistently as regards its own procedure, nor in accord with other New York City policies which allow tenants to live in other categories of buildings not covered by the Loft Law, which do not have a certificate of occupancy, such as A.I.R. lofts and buildings predating certificate of occupancy requirements.

SUMMARY OF ARGUMENT

CPLR Section 7803 provides a cause of action where a citizen is aggrieved by a governmental act, including acts of governmental departments or agencies such as the New York City Loft Board, where such action is arbitrary (defined as without sound basis in reason and/or without regard to the facts); capricious; an

abuse of discretion; contains an error of law; or is taken without regard to lawful procedure. The Loft Board has arbitrarily forbidden some Loft Law coverage applicants from withdrawing their applications and reaching a settlement with the landlord based on another legally recognized form of rent regulation, regardless of whether or not the applicant can qualify for Loft Law coverage.

The Loft Board incorrectly claims that if it is aware of the situation, the only way a tenant living in a commercial building without a residential certificate of occupancy can continue to do so is by applying for, and obtaining, Loft Law status. The reasoning behind this is that only under the Loft Law can tenants legally and safely live in a building that lacks a residential certificate of occupancy, and only under the Loft Board's supervision can a commercial building get a residential certificate of occupancy. In fact, there are other circumstances under which tenants in New York City live in buildings without a residential certificate of occupancy, and the Loft Board lacks the resources to take enforcement action against landlords who fail to get a residential certificate of occupancy, with the result that most Loft Law tenants live for years and years without a certificate of occupancy.

This policy, which only affects some coverage applicants, because the Loft Board is not aware of all persons living in commercial buildings and because the Loft Board does not handle discontinued cases in a uniform way, is the very

definition of arbitrary. It is completely legal for landlords and tenants to contract to subject a tenancy to rent stabilization. The doctrine of de facto rent stabilization is well established. The Loft Board does not investigate whether tenants who want to choose alternative forms of rent regulation are in any actual danger due to the condition of the building in which they live, without Loft Law status. The Loft Board does not have the authority to bring coverage hearings, and the Loft Board lacks the practical ability to require coverage applicants to complete coverage hearings because, under Loft Board regulations, a coverage applicant can avoid a coverage hearing simply by not attending the hearing, in which case the application will be dismissed. Finally, the Loft Board does not apply the same policy concerning discontinuing applications in all cases.

The result of this policy is an uncomfortable situation in which, if a tenant identifies him or herself to the Loft Board as potentially covered, but the facts later develop such that coverage under the Loft Law is not possible, the tenant will lose his or her rent regulated housing because the Loft Board does not acknowledge other existing rent regulatory schemes. In other words, if a tenant is not absolutely sure that Loft Law coverage can be obtained, best not to contact the Loft Board.

The decisions below acknowledge that a party to litigation cannot be required to continue litigation against his or her will, but do not address the fact that the Loft Board is substantively interfering with settlements and in fact, with

the ability of an experienced lawyer to counsel his or her client that rent regulation other than the Loft Law may be in the best interest of the tenant.

In seeking leave to appeal, the City presumably prefers the result in Matter of Dom Ben Realty Corp. v. New York City Loft Board, 177 AD3d 73 (AD2 2019) in which the appellate court ruled that the Loft Board is free to reject settlements in a broad range of circumstances. It is respectfully submitted that Dom Ben is wrongly decided because the appellate court did not recognize that Loft Law rights, unlike rent stabilization, can be waived nor that under its decision, units would be subject to two forms of rent regulation at the same time, contrary to this Court's decision in Blackgold Realty v. Milne, 119 AD2d 512 (AD1 1986), aff'd 69 NY2d 719 (1987).

In sum, there is a split of authority between the First and Second Departments concerning whether parties to litigation before the Loft Board can be required to continue litigation against their will, which must be resolved by this case. Additionally, it is respectfully suggested that the ruling of this Court reach the continued availability of de facto rent stabilization as an alternative to Loft Law coverage.

COUNTER-STATEMENT OF FACTS

430 and 430 Rear Lafayette Street, New York, New York are two buildings located on the same tax lot (R 230). 430, the front building, is registered as a rent stabilized building (R 22). 430 Rear, the rear building, has a commercial certificate of occupancy but has been occupied for residential purposes by at least four households, one each on floors two, three, four and five, since before 2010.

The front and rear buildings are owned and managed in common. They are connected at the basement level and the residents of the rear building must walk through the front building to get to their building (R 19, 35). The sprinkler and plumbing systems are interconnected and the mailboxes and electric meters for the front and rear buildings are located together in the front building (R 23). In sum, the front and rear buildings constitute a horizontal multiple dwelling both under the Rent Stabilization Code, Section 2520.11(d), and regulations of the New York City Loft Board, 29 RCNY Section 2-08(a)(1)(iii)[1].

The Loft Law, Article 7C of the Multiple Dwelling Law, was amended and extended in 2010, such that the rear building appeared eligible for legal residential conversion under the Loft Law. In March 2014, Richard Fiscina, the residential

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[1] Loft Board regulations are codified in Title 29 of the Rules of the City of New York and may be accessed online at https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-59441.

occupant of unit [redacted], sought coverage for his unit and protected occupancy for himself, under MDL Section 281(5), the 2010 amended Loft Law (R 49). Subsequently, in August 2014, Maria Theresa Totengco and Zenia De la Cruz, [redacted], and Luke Weinstock, [redacted], joined Fiscina's application, seeking protection for themselves and their respective units (R 60). Collectively, Totengco, Weinstock and Fiscina are referred to as the Tenants[2]. Zenia De la Cruz, Ms. Totengco's mother, ultimately discontinued her application, having moved away (R 121).

MDL Section 281(5), the 2010 amended Loft Law, had many requirements and limitations on coverage until further amended in 2019. Among these requirements were that each unit have been residentially occupied for 12 consecutive months in 2008 and 2009; that no unit be in the cellar or basement; that each unit have an entrance from a public hall (not through someone else's residence) and be at least 500 sq. ft. in area; and that each unit have at least one window that opens onto a street or a lawful court or yard. MDL Section 281(5).

At the time the Tenants were seeking coverage and protected occupancy under the Loft Law, the Loft Board, which makes the final determinations on whether buildings and tenancies are under its jurisdiction, was just starting to

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[2] To avoid confusion, Goodfarb & Sandercock, LLP represented Mr. Fiscina from February 2014 until sometime in 2016, when replaced by David Frazer, Esq. Mr. Fiscina is pro se at the time of this appeal. Goodfarb & Sandercock, LLP has represented Weinstock and Totengco from August 2014 to present and represented Zenia De La Cruz from August 2014 to January 2015, when she discontinued her coverage application.

render decisions on cases arising under the 2010 amended Loft Law, and therefore there were few if any precedents as to how the multiple coverage requirements would be interpreted. It was thus difficult to know whether the Tenants would succeed in obtaining Loft Law coverage, given the numerous particular requirements. It is possible that one or more units did not meet required occupancy dates, the private entrance requirement and/or the windows requirement.

An alternative statutory scheme, de facto rent stabilization, was also available to the Tenants[3]. The Court's decision in Wolinsky v. Kee Yip Realty Co., 2 NY3d 487 (2004) prohibited de facto rent stabilization where residential use could not be legalized due to zoning. That is not the case here; residential use is as of right at 430 Rear Lafayette Street.

https://www1.nyc.gov/site/planning/zoning/districts-tools/m1.page

Since Wolinsky, the doctrine of de facto rent stabilization has been applied to tenancies in the First and Second Departments, though each Department imposes different requirements. In the First Department, where this property is located, in order to be covered by de facto stabilization, tenants must show that their building is zoned legal for residence and can otherwise be legalized so that a

[3] One could say that these tenants are actual rent stabilized tenants and not de facto stabilized, because their units are part of a horizontal multiple dwelling and are registered with the Department of Housing & Community Renewal (DHCR) and they received actual rent stabilized leases (R 129-31). As developed in Point I of this brief, tenants in New York can contract for rent stabilization and de facto stabilization is an available option on the present facts.

residential certificate of occupancy can be obtained; that it has no certificate of occupancy or a commercial certificate of occupancy; that it contains six or more residential units; and that the owner permitted residential occupancy or acquiesced in it by "turning a blind eye." E.g., Acevedo v. Piano Building LLC, 70 AD3d 124 (1st Dept. 2009); 142 Fulton St. v. Hegarty, 41 AD3d 286 (1st Dept. 2007); Duane Thomas LLC v. Wallin, 35 AD3d 232 (1st. Dept. 2006)[4]. 430 Rear Lafayette Street meets First Department de facto stabilization requirements to a "T," as the three units that applied for coverage in the rear building and the eight units in the front building (R 46, 357) clearly comprise six or more units; there is no residential certificate of occupancy and residential use is as of right. The owner has never denied the residential history of the rear building. Further, it is much more reasonable for 430 and 430 Rear to be subject to the same regulatory scheme than the chaotic notion of submitting what is legally one building to two different rent regulatory schemes.

[4] The Second Department standard echoes the First Department standard but imposes an additional requirement – tenants must also show that the landlord, while aware the tenants are seeking rent stabilization, took steps to legalize residential occupancy, usually by filing plans for residential conversion with the Department of Buildings. See South Eleventh Street Tenants' Assn. v. Dov Land, LLC, 59 AD3d 426 (2d Dept. 2009); Caldwell v. American Package Co., 57 AD3d 15 (2d Dept. 2008). It will be argued at Point II of this Brief that de facto rent stabilization is good social policy; therefore, the standard should be uniform in the two Departments, and the standard applied in the First Department is the more reasonable to adopt.

Respondent landlord offered the Tenants the opportunity to avoid the cost and uncertainty of a Loft Law coverage hearing and instead, agreed to register the building immediately with the rent stabilization authorities; to give the Tenants rent stabilized leases; and to obtain a residential certificate of occupancy within a timeframe similar to Loft Law properties. Advised by experienced counsel, the Tenants accepted this proposal in January 2015 and withdrew their coverage applications (R 117-20).

The settlement offered many advantages for the Tenants apart from avoiding the cost and uncertainty of a coverage hearing. Loft Law tenants can be required to contribute to costs for obtaining the residential certificate of occupancy for the building but stabilized tenants cannot (R 116). The landlord agreed with the tenants on their base rents which did not involve any rent increase above what the Tenants were paying at the time (R 117). Ms. Totengco was able to have her husband placed on her stabilized lease (R 129), while he could not have become a Loft Law tenant. The tenants also retained the Loft Law right to sell the installations in their lofts that belonged to them (R 121), and avoided luxury decontrol (R 121), which is not presently part of the Loft Law but could be incorporated in future.

The Loft Board rejected the settlement on February 18, 2016 in Loft Board Order No. 4480[5] on the grounds that the settlement was against public policy because the tenants would not be subject to the Loft Law but would continue to occupy their units while certificate of occupancy work is in process. The Loft Board reaffirmed this determination when both the Tenants and respondent landlord sought reconsideration of the Loft Board order (R 146-49; 326; 367). See Applications of Weinstock, et al., Loft Board Order No. 4630 (3/16/17). An Article 78 appeal to Supreme Court, New York County resulted in a ruling against the Loft Board on the grounds that the Tenants could not be forced to litigate Loft Law coverage applications, and that therefore the Loft Board orders were without rational basis. The trial court decision placed its focus on Loft Board regulations which require the Loft Board to dismiss a coverage application if the applicant does not appear at hearing (R 7). The trial court thus acknowledged that the Loft Board as a practical matter lacks the ability to require an applicant to keep litigating.

On appeal by the City to the Appellate Division, First Department, the trial court ruling was affirmed on the grounds that "it was irrational to refuse to allow

[5] Loft Board orders can be researched at https://www.nyls.edu/cityadmin/.

the tenants to withdraw their . . . application because the Loft Law was not the sole basis for legalization . . .” Callen v. New York City Loft Board, 181 AD3d 39 (AD1 2020); (R 734). The Appellate Division acknowledged the continued vitality of de facto rent stabilization, the status of 430 Rear as already part of a horizontal multiple dwelling subject to rent stabilization, as well as the Loft Board’s “unfounded concerns” (R 736) that tenants are in danger living in buildings lacking a residential certificate of occupancy.

ARGUMENT

POINT I

THE DECISIONS BELOW MUST BE AFFIRMED INSOFAR AS THEY RULE THAT PARTIES TO LITIGATION CANNOT BE COMPELLED TO LITIGATE AGAINST THEIR WILL.

A. The Appellate Division Properly Determined that the Loft Board’s Determinations were Arbitrary and Capricious

The Appellate Division properly determined that the Loft Board’s rejection of the parties’ settlement agreement was arbitrary and capricious as it had no rational basis and the settlement agreement met the same public policy objectives of the Loft Law.

An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts and is not supported by substantial evidence. Pell v. Board of Education, 34 NY2d 222 (1974); Matter of Deerpark Farms LLC v Agric. & Farmland Protection Bd., 70 AD3d 1037 (AD2 2010).

The Appellate Division properly determined that Loft Board Orders No. 4480 and 4630 were arbitrary and capricious as they forced the parties to continue litigating coverage applications when they had reached a settlement agreement which provided for the legalization of the building and the protection of the tenants through de facto rent stabilization. The parties' settlement agreement achieves the same effects of the broad, remedial purposes of the Loft Law in that it set forth a framework for the legalization of the building as an interim multiple dwelling and it conferred rent-stabilized status on the tenants. See MDL Section 283, 235, 301; Blackgold Realty Corp. v. Milne, 119 AD2d 512 (AD1 1986), aff'd 69 NY2d 719 (1987). There was no rational basis for the Loft Board's determination that the settlement violated public policy.

The Loft Board's rejection of the parties' settlement agreement was also arbitrary and capricious as it is not subjecting all settlement agreements to the same standard of review. As set forth more completely in Point I(G) herein, the Loft Board picks and chooses which settlement agreements to review and reject, resulting in an arbitrary patchwork of decisions. As a result, tenants have no certainty when entering into a settlement agreement whether the Loft Board will accept it or whether they will be forced to return to OATH to litigate a coverage application which they had previously expected to settle.

B. It is Completely Legal to Contract for a Tenancy to be Governed by Rent Stabilization.

The Tenants contracted to have their tenancy governed by rent stabilization rather than the Loft Law. While both this Court and lower courts have ruled that landlords and tenants cannot contract away benefits of a mandatory rent regulation scheme, e.g., Riverside Syndicate v. Munroe, 10 NY3d 18 (2008); Draper v. Georgia Properties, 94 NY2d 809 (1999); 546 W. 156th HDFC v. Smalls, 43 AD3d 7 (AD1 2007); Drucker v. Mauro, 30 AD3d 37 (AD1 2006), lower courts have often ruled that landlords and tenants can contract that a tenancy is subject to rent stabilization, e.g., Oxford Towers Co. v. Wagner, 58 AD3d 422 (AD1 2009); Carrano v. Castro, 44 AD3d 1038 (AD2 2007).

In the instant case, as developed in Point I(C) of this brief, the Loft Law is not a mandatory rent regulation scheme, as de facto rent stabilization is also available. Nor are the parties deregulating the premises by private agreement. They are simply choosing a different form of rent regulation.

C. Unlike Rent Stabilized Status, Loft Law Protection Can Be Waived.

The Rent Stabilization Code provides that "(a)n agreement by the tenant to waive the benefit of any provision of the Law or this Code is void…" 9 NYCRR Section 2520.13. In contrast, the Loft Law is a transitional statute whose purpose is to funnel tenants into rent stabilization when their landlord has obtained a residential certificate of occupancy. Blackgold Realty v. Milne, supra. Loft Law

status is thus intended to be temporary, and it has always been possible to waive Loft Law rights, provided that such waiver is knowing, intelligent and voluntary and is not entered into before the tenant knew or could have known, about the availability of protection of his tenancy under the Loft Law.

Inherent in the Loft Law is the ability of the Loft Law tenant to sell his Loft Law rights and fixtures as permitted by MDL Sections 286(6) and (12); give up his Loft Law tenancy; and leave the building. This sale of Loft Law rights and fixtures is an example of a permitted waiver of Loft Law rights. Specifically, MDL Section 286(12) provides: "(n)o waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date . . . shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit." The effect of such transactions in most cases is the deregulation of the unit.

A Loft Law tenant who abandons his or her unit has also waived Loft Law rights. Loft Law regulations codified at 29 RCNY Section 2-10 specifically contemplate such waiver.

The case law permits waiver of Loft Law rights beyond sales of rights and fixtures and abandonment. For instance, in Matter of Zabari, Loft Board Order No. 1899 (1/31/96), the Loft Board ruled that the occupant of a former Loft Law unit

abandoned by the protected occupant had waived any rights under the Loft Law that he might have had. On appeal, the Appellate Division, Second Department questioned whether on the facts of that case, there had been a waiver, but did not negate the possibility of a waiver in all circumstances. Matter of Zabari, 245 AD2d 200 (AD1 1997).

Similarly, in Lusker v. City of New York, 194 AD2d 487 (1st Dept. 1993), the Loft Board had found that an intervenor, Marci Zelmanoff, had not waived her Loft Law rights because doubtful or equivocal acts or language cannot create a waiver, a determination that was affirmed on appeal. If Loft Law rights were unwaiveable, neither Zabari nor Lusker would exist.

It makes sense that Loft Law rights would be waiveable but rent stabilized rights would not be, as the requirements for the two programs are somewhat different. Becoming a protected occupant under the Loft Law attaches to a particular tenant and usually requires a tenant to prove primary residence on a statutorily specified prior date[6]. In contrast, rent stabilization attaches to the unit and is not based on occupancy on a statutorily specified prior date. And Loft Law status is specifically intended to be temporary while rent stabilization is much more permanent.

[6] For example, the protected occupancy date for a unit covered under the 1982 Loft Law is 6/21/82, and for a unit covered under the 2010 Loft Law is 6/21/10.

In its brief, the City relies on Matter of Nur Ashki Jerrai Community v. NYC Loft Board, 80 AD3d 323 (AD1 2010) and Matter of Jo-Fra Properties, Inc., 27 AD3d 298 (1st Dept 2006), lv. denied, 8 NY3d 801 (2007). These authorities are also relied on by the Appellate Division, Second Department in Dom Ben, supra. However, when examined closely, neither Nur Ashki Jerrai Community nor Jo-Fra Properties states that Loft Law rights cannot be waived. Instead, both cases hold that on the facts of the particular case, no waiver took place. In Jo-Fra Properties, the tenants had been eligible for Loft Law coverage for many years before the date they filed their application. The landlord attempted to assert that this delay constituted a waiver. The Court ruled that Loft Law rights cannot be waived by delay in applying for Loft Law status, nor by laches. The Court also stated, "(p)etitioner makes no claim of waiver under the Loft Law," which would have been an irrelevancy if no waivers were permitted. In Nur Ashki Jerrai Community, the Court details examples of waiver of Loft Law rights such as sale of rights and/or fixtures and abandonment of the unit, both of which are examples of permitted waiver, but states that neither one occurred in that case. Neither of these cases stand for the proposition that Loft Law rights cannot be waived.

D. Settlement Agreements Are Favored in the Law.

The courts have held that settlement agreements constitute a contract and as such, must be enforced according to their terms. In W.W.W. Assocs. v.

Giancontieri, 77 N.Y.2d 157, (1990), this Court stated, "a familiar and eminently sensible provision of law is that, when parties set down their agreement in a clear, complete document, their writing should be…enforced according to its terms."

Settlement agreements are binding and favored by the courts in order to encourage parties to favorably settle their disputes. Hallock v. State of New York and Power of Authority of the State of New York, 64 N.Y.2d 224 (1984). As a result, courts do not set aside settlement agreements absent fraud, collusion, ignorance, mistake or misrepresentation. 231 5th Ave. HDFC v. Diaz, N.Y.L.J., March 11, 2002, p. 28, col. 3 (App. Term 2d Dep't).

E. The Loft Board Lacked Jurisdiction Over This Agreement.

The building, as a horizontal multiple dwelling, was already subject to rent stabilization before it was even registered with DHCR, and in any case, 430 Rear had already been registered with DHCR for at least a year at the time the Loft Board rejected the settlement. Buildings which are already subject to rent regulation cannot also be covered under the Loft Law. Blackgold Realty v. Milne, supra.

In view of the fact that the building was registered with DHCR at the time the Loft Board rejected the settlement agreement, it is extremely doubtful that the Loft Board had the authority to interfere with the parties' settlement. The case was moot by virtue of the withdrawal of the applications, and, as the doctrine of

mootness is applicable to administrative agencies, Application of Mehta v. NYC Dep't of Consumer Affairs, 162 AD2d 236 (1st Dept. 1990), the Loft Board had no business interfering with a settlement when the coverage applications over which they had jurisdiction had become moot.

F. On These Facts, the Loft Board was Not Free to Reject the Settlement.

The Loft Board's rejection of the settlement agreement also, in effect, required the parties to continue litigation regarding Loft Law coverage despite the available, applicable alternative, de facto rent stabilization. Parties cannot normally be required to continue litigating against their will, Tucker v. Tucker, 55 NY2d 378 (1983); Bank of America v. Douglas, 110 AD3d (1st Dept. 2013); Burnham Service Corp. v. National Council on Comp. Ins., 288 AD2d 31 (1st Dept. 2001), and may chart their own course in litigation. Mill Rock Plaza Assocs. v. Lively, 224 AD2d 301 (AD1 1996); Joe Lebnan, LLV v. Oliva, 26 Misc.2d 1220A (Kings Co. Housing Court 2009). The trial court and the Appellate Division, First Department both correctly determined for these reasons that Loft Board Orders 4480 and 4630 were arbitrary, capricious and an abuse of discretion.

The Loft Board lacks the authority to initiate coverage applications; only tenants can do so. MDL Sections 282 and 282-a(1). Nor can the Loft Board require an unwilling applicant to conduct a hearing. The applicant can avoid this result simply by not appearing for the hearing. Loft Board regulations provide that if an

applicant fails to appear at a hearing or conference marked final, his or her application may be dismissed with prejudice. 29 RCNY Section 1-06(k). Even where the hearing or conference is not marked final, the application may be dismissed without prejudice. 29 RCNY Section 1-06(l)(i). See also, e.g., Matter of Levit, Loft Board Order No. 4740 (2/15/18); Matter of Conrad & Elliott, Loft Board Order No. 4554 (9/15/16); Matter of Jones, Loft Board Order No. 4256 (3/20/14). In each of these cases, the Loft Board dismissed a case because the applicants did not attend their hearing.

In sum, the Loft Board cannot prosecute coverage hearings in situations in which they believe a unit should be covered, and is required to dismiss coverage cases in which the applicants do not attend the hearing. Thus, the Loft Board cannot insist that tenants who qualify for other forms of rent regulation become covered under the Loft Law.

G. The Loft Board Does Not Handle All Settled Cases the Same Way.

When a Loft Board application is settled, the Loft Board proceeds in one of two ways: they either allow the case to be discontinued, but state that no position is taken on the content of the settlement, or they disapprove the settlement. The Loft Board has been in existence since 1982, MDL Section 282, but no settlement was ever disapproved until 2012, in Matter of Parrish, Loft Board Order No. 4027, reconsideration denied Loft Board Order No. 4136, Matter of Parrish v. NYC Loft

Board, 2014 NY Misc. Lexis 1889 (NY Co. 2014), appeal withdrawn, 132 AD3d 443 (AD1 2015).

Apart from the present case and Parrish, the Loft Board disapproved settlements in six cases since 2012. These cases are: Matter of Gonzales and Foster, Loft Board Order No. 4026 (10/12/12); Matter of South Eleventh Street Tenants, Loft Board Order No. 4279 (7/7/14); Matter of Gong, Loft Board Order No. 4710 (10/19/17); Matter of Tenants of 135 Plymouth St., Loft Board Order No. 4362 (2/12/15), reconsideration denied Loft Board Order No. 4416 (7/2/15), reversed, Matter of Dom Ben Realty Corp. v. NYC Loft Board, Index No. 12548/15, modified 177 AD3d 731 (AD 2 2019); Matter of Godward and Pyle, Loft Board Order Nos. 4479 (2/18/16) and 4731 (1/18/18); and Matter of Levit, Loft Board Order Nos. 4361 (2/12/15) and 4563 (10/20/16).

Parrish and Gonzales are completely distinguishable from the present case, as in Parrish the tenant was to be allowed to continue living in the building for four years without legalization and in Gonzales the tenants were allowed to continue living in the building for a year without legalization. South Eleventh Street Tenants involved a situation in which tenants would be treated as if subject to rent stabilization and were given a legalization timetable echoing the Loft Law. Godward and Pyle and Levit both had settlements rejected twice. In Gong the Loft Board waited a year after a settlement, with the tenant in place in an unlegalized

building – exactly the situation disapproved in Gonzales – and then rejected the settlement. Godward and Pyle and Levit are particularly indicative of the fact that some cases have to be settled because the tenants do not meet Loft Law coverage requirements.

It is respectfully suggested that Matter of Dom Ben Realty Corp., supra, was wrongly decided by the Appellate Division, Second Department and therefore, that its reasoning should not be adopted by this Court. In Dom Ben, the tenants applied for Loft Law coverage under MDL Section 281(5), but reached agreement to settle with the landlord by actual registration of their building with DHCR, issuance of rent stabilized leases and a plan to legalize the building on a schedule similar to the Loft Law. First, the Appellate Division, Second Department erred in calling the residential units "uncertain and unregulated" when they were registered with DHCR. Second, the Appellate Division, Second Department appears to have misunderstood Blackgold Realty v. Milne, supra, as under its decision, units already registered with DHCR would have to also be registered with the Loft Board, a result directly contrary to Blackgold. Third, the Appellate Division, Second Department appears to have believed that Loft Law rights cannot be waived, an incorrect conclusion discussed in detail in Point I(C), supra, of this brief.

Far more common in the Loft Board's handling of settled cases is that the Loft Board permits case resolutions without taking a position on the content of the settlement agreement. A number of cases of this type are cited in the Record at pages 600 to 603 and at page 615. Among the many cases decided by the Loft Board in this way are: Matter of Corning, Loft Board Order No. 4985 (6/18/20); Matter of Hurst & McNulty, Loft Board Order No. 4977 (5/21/20); Matter of Dwyer, Loft Board Order No. 4632 (3/28/17); Matter of Schlangen, Loft Board Order No. 4635 (3/16/17); Matter of Loback, Loft Board Order No. 4600 (1/19/17); Matter of Behlke, Loft Board Order No. 4495 (4/21/16); Matter of Fortney, Loft Board Order No. 4455 (1/21/16); Matter of Nesperos, Loft Board Order No. 4318 (10/24/14); Matter of Greene, Loft Board Order No. 4317 (10/24/14); Matter of Silver, Loft Board Order No. 4210 (12/12/13); Matter of Francini and Taylor, Loft Board Order No. 4031 (11/15/12); Matter of Frankel, Loft Board Order No. 3522 (9/17/09); Matter of House of Bowery Corp., Loft Board Order No. 3136 (1/18/07); Matter of Perl, Loft Board Order No. 3039 (4/20/06); and Matter of Frenchman, Loft Board Order No. 2773 (2/21/03). A search of the Loft Board's database for "the loft board neither accepts nor rejects the remaining terms" AND "coverage" results in 114 cases.

https://www.nyls.edu/cityadmin/?Search=Search&q=%22the+loft+board+neither+accepts+nor+rejects+the+remaining+terms%22+AND+coverage&site=LOFT&filter=0&Search=Search&order=relevance.

There is no apparent difference between the above cited cases and the cases in which the Loft Board rejects the settlement altogether. Loft Board action in this regard appears to be completely arbitrary.

H. Alternatively, the Loft Board Rejected the Settlement Without Factual Basis.

Furthermore, the City claims that the Loft Board rejected the settlement agreement because the agreement violates public policy as tenants in an unlegalized residential building are living in unsafe conditions. The Loft Board did not conduct any fact finding, as it was permitted to do pursuant to 29 RCNY Section 1-07(a), based upon which a determination regarding the intent of the parties and its public policy consequences could be determined. Nor was fact finding conducted as to whether the tenants were in fact in danger by continuing to occupy the building. The Loft Board's determination was based on pure speculation, contrary to decisions such as Flacke v. Onondaga Landfill, 69 NY2d 873 (1987).

Assuming for the sake of argument that the Loft Board had jurisdiction over this matter at the time of issuance of Loft Board Orders 4480 and 4630, clearly the Loft Board had no factual basis for concluding that the agreement was against public policy, not only because no fact finding was conducted regarding the parties' intent, but more importantly because of the availability of an alternate form

of rent regulation, de facto rent stabilization, which is discussed in Section II of this brief.

POINT II:

THE DECISION OF THE APPELLATE DIVISION MUST BE AFFIRMED INSOFAR AS IT PERMITS TENANTS WHO HAVE WITHDRAWN A LOFT LAW COVERAGE APPLICATION THE OPTION TO PURSUE AN ALTERNATE RENT REGULATORY SCHEME.

A. De Facto Rent Stabilization Represents Good Social Policy and Must be Continued.

For tenants to be covered under the Loft Law, they are required to prove that their unit was residentially occupied for a period of time before the enactment of the statute, known as "the window period." The tenant seeking coverage may have been the person who lived in the unit during the "window period" or a prior tenant may have lived there. It is typical for a Loft Law applicant to establish residential occupancy by producing personal records of that kind that list one's home address, such as tax returns, voting registration, driving license, credit card bills, banking statements and utility bills. As more time passes since the "window period," it is harder to locate the needed records because companies such as banks, credit card companies and utilities only retain records for a short and finite number of years.

For example, there are many tenants eligible for Loft Law coverage under the 2010 Amendments who did not apply. As the Loft Law is permanent, they are not time barred from applying, but the "window period" is 2008 and 2009. It is

already difficult to get records, especially records for a third party predecessor tenant, from during that "window period." The law was amended and extended in 2019 and some tenants who did not apply under the 2010 law are applying under the 2019 law to use its more recent "window period," 2015 and 2016.

During any protracted period when the Loft Law is not amended and extended with an updating of the "window period," tenants fall back on the de facto stabilization doctrine if they cannot establish coverage under the Loft Law because they cannot prove residential occupancy at an early enough date. For instance, the Loft Law first went into effect in 1982 and was not amended and extended in a way benefitting many eligible tenants until 2010. During the 1990's and the first decade of this century, it was almost impossible to prove new Loft Law coverage cases as the "window period" under the 1982 law was April 1980 to December 1981 and records going back that far were generally unavailable.

Until amended in 2019, the 2010 Loft Law amendment, MDL Section 281(5), included pesky requirements not imposed on other residential tenants, such as the size of the unit, the entrance to the unit, the prohibition against living in a basement and the requirement that each unit have a window, but not a skylight, opening onto the street or a legal court or yard. Tenants who cannot meet the requirements of any Loft Law amendment can fall back on de facto stabilization. Tan Holding Co. v. Wallace, 187 Misc.2d 687 (AT1 2001).

For the majority of rental tenants in New York City, losing reasonably priced housing is a disaster. Providing two ways that tenants living in commercial buildings can keep their housing secure, the Loft Law and de facto stabilization, is a proper recognition that the Loft Law is not "one size fits all," and provides tenants with the opportunity to size up the requirements and decide which program they most likely qualify for, so they can safeguard their right to live in New York City at a rent they can afford. The Legislature has amended the Loft Law several times since the de facto stabilization doctrine came into existence and thus has had the opportunity to abolish it, but has not done so. It thus appears that the Legislature intends de facto stabilization to continue to be available for tenants.

The continued existence of de facto rent stabilization is not unfair to landlords. It is only applicable to commercial buildings in which six or more units are residentially occupied with the knowledge or acquiescence of the landlord. Some landlords of these buildings developed the building for residence but never got around to changing the certificate of occupancy. Other landlords were simply glad to have tenants provide their own residential fixtures and to collect residential rents in areas where the highest and best use was no longer factory or warehouse, but residential housing. In other words, de facto stabilized buildings tend to be larger buildings; it is not unreasonable to expect some measure of housing stability where a landlord is collecting residential rent from six or more households in a

commercial building, and particularly where the tenants paid for and installed their own residential fixtures.

The Second Department de facto stabilization standard, see, e.g., Caldwell v. American Package Co., 57 AD3d 15 (2d Dept. 2008), should not, however, be continued. Nor should tenants living in Brooklyn and Queens be subject to different standards than those in the Bronx and Manhattan. The Second Department standard limits de facto stabilization to those buildings in which 1) the landlord did, is doing, or wants to do, a residential conversion and 2) hired an architect and or filed an application with a City agency, such as the Department of Buildings (DOB) or zoning authorities, to legalize residential use. Few tenants are protected under this standard, as it is difficult to meet its requirements, and it fails to address situations where the residential conversion is unfiled or was done by the tenants. This is particularly unfair to tenants who improve the landlord's building by providing their own residential fixtures at their own cost and expense.

B. Tenants are not Unsafe in De Facto Stabilized Buildings.

The City is very insistent, even strident, in arguing that Loft Law status is the only safe way for residential tenants to live in commercial buildings. The City also attempts to suggest that landlords take advantage of tenants who live in commercial buildings by getting them to enter into agreements to evade the Loft Law that are not in their best interest. On the contrary, there a number of situations

apart from the Loft Law where tenants live in buildings without a residential certificate of occupancy and without apparent bad results. Nor are the tenants in the present case taken advantage of. They are represented by experienced attorneys who counseled them to accept rent stabilization as they might not meet Loft Board coverage requirements and might therefore lose rent regulation altogether.

For instance, an example of legal residential occupancy of buildings without a certificate of occupancy is found in buildings that predate certificate of occupancy requirements. Residential certificates of occupancy were required as of 1929 (MDL Section 301); buildings constructed prior to that date are commonly occupied residentially based on their "history of use" (often as 1, 2 and 3 family homes) and are not required to obtain a certificate of occupancy unless construction is done which requires the owner to obtain a building permit. Id. These buildings are not supervised by the Loft Board nor in detail by any other City agency. Many brownstone buildings are occupied today without a residential certificate of occupancy, and no particular risk is associated with them.

A further example of permitted residential use of buildings lacking a residential certificate of occupancy is the Artist in Residence Lofts ("A.I.R."), created by MDL Section 277. These buildings are occupied residentially by persons engaged in the fine arts, without a residential certificate of occupancy. They must meet certain physical requirements, such as being of fire-proof

construction or not in excess of six stories, but the existence of a residential certificate of occupancy is not one of the requirements. These buildings are not supervised by the Loft Board and no particular risk is associated with them.

By its terms, MDL Section 283 permits Loft Law protected tenants to live in their buildings indefinitely, whether or not the landlord obtains a residential certificate of occupancy: ". . . occupancy for residential purposes of residential units covered by this article (Article 7C, the Loft Law)," italicsne added. In 2012 when Chazon v. Maugenest, 19 NY3d 410 (2012) was before this Court, it was estimated that about a third of buildings covered under the Loft Law in the 1980's and early 1990's had not obtained a residential certificate of occupancy.

The Loft Board has the authority pursuant to 29 RCNY Section 2-01.1(b)(2) to bring cases against building owners who have not obtained the required certificate of occupancy, to enforce their obligation to legalize the building. These cases are docketed by the Loft Board with the prefix BV. A Freedom of Information request to the Loft Board made on January 19, 2021 revealed that the Loft Board did not complete nor decide any BV cases in the past two years, out of 327 buildings in the Loft Board's jurisdiction. Were the Loft Board truly concerned about protected tenants living in unlegalized buildings, one would think it would be bringing many BV cases to require landlords to legalize.

MDL Section 283 does not by its terms permit Loft Board coverage applicants to live in their buildings while their coverage is being determined as it applies to covered units, though it is often interpreted to permit residential occupancy by applicants. However, contested Loft Law coverage applications often take four or five years just from the date of the initial application to the time a Loft Board order is issued. Any appeals can add one to two years to the date of final determination, after an internal appeal at the Loft Board called a reconsideration application; an Article 78 proceeding; and possible Appellate Division filing. The present coverage application, for instance, was filed in March 2014 and the Loft Board did not reject the settlement agreement until February 2016, two years later, and 13 months after the settlement was returned from the Office of Administrative Trials and Hearings (OATH) for confirmation or rejection by the Board.[7] Were the Loft Board truly concerned about, and actually supervising situations in which, residential tenants are living in unlegalized buildings, surely they would decide coverage applications more quickly, as

[7] Further examples of the long pending duration of Loft Law coverage applications are as follows: Matter of Saladino, Loft Board Order No. 4714 (11/30/17), tenants applied for coverage in September 2012 and application was pending for five years; Matter of Tenants of 85 N. 6th St., Loft Board Order No. 4935 (1/24/20), tenants applied for coverage in July 2013 and application was pending for seven years; Matter of 281 N. 7th St., Loft Board Order No. 4959 (3/19/20), tenants applied for coverage in February 2014 and application was pending for six years; Matter of 400 S. Second St. Tenants, Loft Board Order No. 4860 (3/21/19), tenants filed coverage application in July 2015 and application was pending for four years.

legalization typically does not begin until after coverage, and the Loft Board's own delay in deciding applications prolongs the duration of the tenants' residence in unlegalized buildings.

There is at least one more residential unit in 430 Rear, on the second floor, which apparently never applied for Loft Law coverage. The Loft Board is, or should be, aware of this as it was mentioned in the coverage applications (R 48-70). Were the Loft Board truly concerned about residential occupancy of unlegalized buildings, it would presumably have taken some action so that the second floor at 430 Rear would not be residentially occupied.

The recognition of de facto rent stabilization does not leave the City powerless to address housing conditions that are actually dangerous, as notwithstanding the fact that MDL Section 283 allows Loft Law tenants to remain in place during legalization work, it also reserves to the City the ability to issue a vacate order where that action is warranted: "Nothing contained herein shall be construed to limit local authorities from issuing vacate orders for hazardous conditions if appropriate." Accord, Housing Maintenance Code Sections 27-2139 and 27-2140 (applicable generally to housing accommodations other than those subject to the Loft Law).

Nor is a tenant who is subject to de facto rent stabilization powerless to get the landlord to legalize and make repairs. As with any other building that is

residentially occupied without the proper certificate of occupancy, the tenants are not required to pay rent. MDL Sections 301 and 302. This is an effective device to get the landlord to take notice. And all residential tenants are eligible to maintain an HP case for repairs. Civil Court Act Section 110(a).

CONCLUSION

The Loft Board lacks the authority to require parties before it to litigate for Loft Law status against their will, particularly where, as here, the tenants lived in a horizontal multiple dwelling already subject to rent stabilization. The Loft Law is not a mandatory rent regulation where, as here, the tenants qualify for alternative rent regulatory schemes, rent stabilization or de facto rent stabilization.

The Tenants in this case may not have met Loft Law coverage standards and under the guidance of experienced counsel, were free to contract with their landlord for registration with DHCR and the issuance of rent stabilized leases. This permitted the Tenants to retain their rent regulated homes in the event they had not qualified for Loft Law status.

It is arbitrary, capricious and an abuse of discretion for the Loft Board to scrutinize the settlement arrangements of some, but not all, coverage applicants and to determine without factual investigation that absent Loft Law status, some, but not all, of these applicants will be living in dangerous conditions absent Loft Board intervention, particularly where the parties enter into a settlement agreement

that meets the same objectives of the Loft Law—to legalize a building for residential use and to provide the protection of rent stabilization to tenants who qualify. To determine that such an agreement violates public policy is not rational.

In sum, the decisions below must be affirmed insofar as they rule that parties to litigation cannot be compelled to litigate against their will, and the decision of the Appellate Division, First Department must be affirmed insofar as it recognizes the right of Loft Law coverage applicants to withdraw their application and pursue an alternate form of rent regulation.

Dated: February 25, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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