SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

AURORA ASSOCIATES LLC, **Petitioner-Appellant,** **-against-** **RAFFAELLO LOCATELLI,** **Respondent-Respondent-Cross-Appellant.**	**REPLY AFFIRMATION IN SUPPORT OF REARGUMENT MOTION AND IN OPPOSITION TO CROSS-MOTION SEEKING LEAVE TO APPEAL** **NY County Clerk's No.: 570235/17** **Index No.: L&T 63292/16**

Eduardo A. Fajardo, an attorney duly admitted to practice before the Courts of this State, affirms as follows under penalty of perjury:

1. I am a member of De Lotto & Fajardo LLP, attorneys for Cross-Appellant Raffaello Locatelli ("Tenant"), and as such, I am familiar with the facts set forth herein.

2. I respectfully submit this reply affirmation in further support of Tenant's motion seeking reargument of this Court's Decision and Order dated June 11, 2020 (the "Order"). Upon granting of reargument, Tenant should be awarded a judgment for rent overcharge and treble damages thereon. This affirmation is also submitted in opposition to the cross-motion of Petitioner-Appellant Aurora Associates LLC ("Landlord"), which seeks leave to appeal to New York State's Court of Appeals. At this juncture, Tenant is not going to burden this Court, or Albany, with a motion seeking leave to appeal that portion of the Order that denied rent overcharge pending a decision on Tenant's reargument motion. Tenant, of course, fully reserves the right to seek leave

to appeal the denial of rent overcharge and treble damages should reargument not be granted.

TENANT IS ENTITLED TO AN AWARD
OF RENT OVERCHARGE AND TREBLE DAMAGES

3. From the onset, it bears repeating that this is not a matter where Regina Metro Co., LLC v. N.Y.S. DHCR, 2020 NY Slip Op 02127 (2020) has any bearing other than limiting Tenant's claim of rent overcharge and treble damages to 4 years back from the time that Tenant's rent overcharge claim was lodged in June 2016. Because of Regina, Tenant is now admittedly only entitled to rent overcharge from June 2012 to date. Notably, Tenant is not looking for any retroactive application of the HSTPA.

4. What this Court missed in improperly denying Tenant's underlying cross-appeal seeking an award of rent overcharge and treble damages is that, as a matter of law, inasmuch as the subject Apartment was found to be Rent Stabilized, then Landlord is guilty of rent overcharge. In this regard, Landlord has failed to ever register the Apartment with DHCR and it has charged and collected illegal rents. For some inexplicable reason, this Court disregarded RSL 26-517(e), which was codified well before Regina and expressly provides that:

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration

> statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee.

5. Thus, Regina simply cannot serve to fully shield Landlord from liability. To the extent that this Court relied upon Regina to deny Tenant's overcharge claim in its entirety, such application was a misapprehension of the law, which should be remedied upon reargument.

6. It is undisputed that Landlord never registered the Apartment with DHCR and thus no baseline for legal rents has ever been established. In a case settled well before Regina, this Court properly ruled that disregarding the registering of rents with DHCR would "render largely meaningless a registration system that requires landlords to substantiate the lawfulness of their rents." Lyndonville Props. Mgmt. v. DHCR, 291 A.D.2d 311, 737 N.Y.S.2d 617 (1st Dep't 2002).

7. Inasmuch as the subject Apartment is Rent Stabilized then Landlord must be found to be engaging in rent overcharge since Landlord has failed to ever register the Apartment with DHCR and Landlord has charged and collected illegal rents. Thus, in Costanzo v. Joseph Rosen Found., Inc., 61 Misc. 3d 730, 83 N.Y.S.3d 830 (N.Y. Sup . Ct. 2018), involving a loft unit where fixtures were purchased, the trial court held:

> Since the unit is subject to rent stabilization, the balance of the cross-motion must also be granted. **The owner of a rent stabilized unit must register the rents with the NYS Division of Housing and Community Renewal (see *NYC Admin.Code § 26-517*; *NYCRR §2528.1*) and it is undisputed that defendant did not**. The legal regulated rent and permitted rent increases remain to be determined. Therefore, plaintiffs have established entitlement to summary judgment on defendant's liability for rent overcharge.

Emphasis added.

8. As demonstrated in Tenant's initial moving papers, all the documentary evidence needed to calculate a rent overcharge and treble damages, as supported by law, was submitted to the Housing Court in the context of the underlying summary judgment motion and cross-motion, namely the relevant leases and controlling statutes.

12. Landlord has never bothered to proffer any viable calculations. Landlord is in sole control of any and all leases pertinent to the Apartment and

Landlord could have made an alleged calculation based on the documentation in its possession but Landlord elected not to do so. Thus, Landlord should not have evaded a summary judgment finding of rent overcharge and liability for treble damages.

13. Landlord's only response to the above arguments is a regurgitation of its faulty position that the Apartment was "temporarily exempt" from Rent Stabilization and that thus rents never had to be registered. Landlord's argument is unsupported by any precedent. Indeed, any apartments that were ever temporarily exempt under Rent Stabilization were registered as temporarily exempt at DHCR.

LANDLORD'S MOTION SEEKING LEAVE TO FURTHER APPEAL SHOULD BE DENIED

14. Landlord's counsel continues to insist that Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dep't 2009) is somehow not applicable to this matter. Landlord further argues that leave to be appeal should be granted based upon an alleged discrepancy between the First and Second Departments as to how Wolinsky v. Kee Yip Realty Corp. (2 NY3d 487, 812 N.E.2d 302, 779 N.Y.S.2d 812 [2004]) is applied. As detailed below, there is no discrepancy caused by the Wolinsky case.

15. Beyond Acevedo, another pertinent case that has been heard by the First Department is Costanzo v. Joseph Rosen Found., Inc., 61 Misc. 3d 730, 83 N.Y.S.3d 830 (N.Y. Sup . Ct. 2018), where the trial court held:

> The court finds that Acevedo is squarely on point. In that case, the plaintiff-tenant was treated by the defendant-owner as an unregulated market rent tenant after the defendant-owner's predecessor-in-interest purchased the Loft Law rights from the tenant's predecessor. The First Department rejected the owner's assertion "that the sale of the Loft Law rights ended the unit's eligibility for rent stabilization", because "zoning expressly allows residential use as of right, and [the subject] apartment can be legalized by the owner filing a certificate of occupancy." In so doing, the First Department declined to follow the Second Department's rulings in Caldwell v American Package Co., Inc., 57 AD3d 15, 866 N.Y.S.2d 275 [2008] and Gloveman Realty; Corp. v Jefferys, 18 AD3d 812, 795 N.Y.S.2d 462 [2005]: "[w]e decline to join the Second Department in reading Wolinsky as providing a blanket prohibition barring ETPA coverage of all loft units not subject to the Loft Law, even where the Zoning Resolution permits residential use as of right."
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> The Acevedo Court reasoned that the owner's position was in contravention to the legislative intent of the Loft Law. The Loft Law was a stopgap protection to occupants of illegal residential units designed to make those units legal for residential occupancy and bring them within the ambit of rent regulation. Indeed, after a sale of Loft Law rights, an owner can either return the unit to commercial use or legalize it for residential use (MDL §286[12]). There is no dispute that since the unit became deregulated under the Loft Law, the unit has

> been used for residential purposes. Nor does defendant represent that it will bring the unit into commercial use.
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> *** *** ***
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> The Acevedo Court noted that the "sole basis for such rent regulation" contained in MDL § 286 [12] necessarily implies that a former Loft Law unit may be covered by rent stabilization because "[t]he only other 'such rent regulation' is ETPA" (Acevedo at 128). This interpretation is in harmony with the broad scope of the ETPA, which offers protection to any housing accommodation not expressly excluded therein (Salvati v Eimicke, 72 NY2d 784, 787, 533 N.E.2d 1045, 537 N.Y.S.2d 16 [1988] [the ETPA is "inclusive, rather than exclusive" and, as such, sweeps within rent stabilization "all housing accommodations which it does not expressly exempt"]; see also Ruskin v. Miller, 172 AD2d 164, 567 N.Y.S.2d 702 [1st Dept 1991]).
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> *** *** ***
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> The Acevedo Court distinguished Wolinsky v. Kee Yip Realty Corp. (2 NY3d 487, 812 N.E.2d 302, 779 N.Y.S.2d 812 [2004]) from the case before it, expressly stating that "*Wolinsky stands for nothing more than the proposition that illegal loft units are not entitled to rent stabilization treatment when the unit is incapable of being legalized*."

affirmed, 178 A.D.3d 501, 114 N.Y.S.3d 336 (1st Dep't 2019). See also, 315 Berry St. Corp. v. Hanson Fine Arts, 39 A.D.3d 656, 835 N.Y.S.2d 261 (2d Dep't 2007), where the Second Department held:

> It is undisputed that the subject premises contain six or more units being used for residential purposes. The petitioner landlord previously procured the deregulation of the premises under the New York City Loft Law (*see* Multiple Dwelling Law art 7-C) by, inter alia, purchasing the improvements and rights to the unit at issue from the former tenants and representing to the New York City

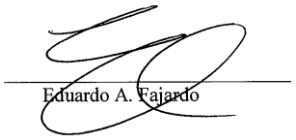
> Loft Board that the unit would be used for nonresidential purposes and would not be reconverted to residential use without first complying with all legal requirements therefor. It is further undisputed that the petitioner nevertheless knew of and acquiesced in the unlawful conversion, at the expense of the occupants, of the unit from commercial to residential use, that the applicable zoning generally permits residential use, and that the petitioner sought legal authorization to convert the premises to such use during the pendency of this proceeding. Under these circumstances, the unit at issue was properly determined to be subject to the rent regulations of the Emergency Tenant Protection Act of 1974 (L 1974, ch 576, § 4; McKinney's Uncons Laws of NY § 8621 *et seq.*) and the New York City Rent Stabilization Law and Code.

16. In our case, it is undisputed that Tenant's Apartment is capable of being legalized into residential housing unit with a valid Certificate of Occupancy. To date, Landlord has simply failed to do what is necessary to obtain a Certificate of Occupancy.

17. Thus, Landlord's cross-motion seeking leave to further appeal should be denied.

WHEREFORE, it is respectfully requested that this Court issue an Order: a) granting Tenant's reargument motion, awarding rent overcharge and treble damages thereon; b) denying Landlord's cross-motion seeking leave to appeal; and c) granting such other and further relief as the Court deems just and proper.

Dated: Rhinebeck, NY
October 30, 2020



Eduardo A. Fajardo