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

Calendar No. 2019-20984

Lower Court Index No. 63292/2016

AURORA ASSOCIATES LLC,

Petitioner-Appellant,

-against-

RAFFAELLO LOCATELLI,

Respondent-Respondent,

-and-

CLEANTECH STRATEGIES LLC, JOHN DOE, and JANE DOE,

Respondents-Respondents.

NOTICE OF CROSS-MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND RESPONSE TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, upon the Affirmation of Joseph Goldsmith, Esq., dated October 13, 2020, the exhibits annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will cross-move this Court, returnable at the Courthouse located at **27 Madison Avenue, New York, New York 10010, on the 19th day of October, 2020, at 10 o'clock in the forenoon of that day**, or as soon thereafter as counsel can be heard, for an Order, as follows:

(a) pursuant to CPLR §§2221, 5602(b), 22 NYCRR §600.4 (a), and 22 NYCRR 1250.16(d)(3), granting Petitioner-Appellant, Aurora Associates LLC, leave to reargue and/or to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, entered May 17, 2020; and

(b) for such other and further relief to Petitioner-Appellant Aurora Associates LLC as this Court deems just and proper.

Dated: New York, New York
October 13, 2020

KOSSOFF, PLLC
Attorneys for Petitioner-Appellant

By: _____

Joseph Goldsmith, Esq.
217 Broadway, Suite 401
New York, New York 10007
Tel.: (212) 267-6364
Email: jgoldsmith@kaulaw.com

To: De Lotto & Fajardo, LLP
Attn: Ed Fajardo, Esq.
Attorneys for Respondents
4 Reeder Road
Rhinebeck, NY 12572
Tel.: (212) 404-7069 ext. 224
Email: efajardo@dfcounsel.com

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AFFIRMATION IN SUPPORT OF CROSS-MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND RESPONSE TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Joseph Goldsmith, Esq., an attorney duly admitted to practice law before the courts of the State of New York, under penalties of perjury, pursuant to the CPLR, hereby affirms as follows:

1. I am a partner of Kossoff, PLLC, attorneys of record for Petitioner-Appellant, Aurora Associates LLC ("Petitioner").

2. I am fully familiar with the facts and circumstances set forth herein. My knowledge is premised upon my office file, my conversations with Petitioner, and my independent research and investigation.

3. This affirmation is submitted in support of the instant cross-motion by Petitioner for an Order: (a) pursuant to CPLR §§2221, 5602(b), 22 NYCRR §600.4 (a), and 22 NYCRR 1250.16(d)(3), granting Aurora Associates LLC leave to reargue and/or to appeal to the Court of Appeals from the Decision and Order of the Appellate Division entered June 11, 2020 ("Subject

Order"). A copy of the Subject Order is annexed as **Exhibit A**[1].

4. This Affirmation is also submitted in opposition to Respondent's motion for leave to reargue the portion of the Subject Order which affirmed the Appellate Court's determination that Respondent is not entitled to an award for rent overcharge and treble damages.

5. In summary, and as shall be discussed, it is respectfully submitted that this Court erred when it held that Loft 3B ("Premises") in 78 Reade Street, New York, New York ("Building") remains subject to the Emergency Tenant Protection Act ("ETPA") after the sale of rights and fixtures pursuant to Multiple Dwelling Law ("MDL") §286(6) and (12) despite the fact that the first rent charged for the Premises after the sale exceeded the statutory threshold for regulation pursuant to the ETPA and the Rent Stabilization Code ("RSC") solely based upon an incorrect interpretation of *Acevedo v Piano Bldg, LLC*, 70 AD3d 124, 891 NYS2d 41 (1st Dept 2009), *appeal withdrawn*, 14. NY3d 884 (2010)[2].

6. Thousands of tenants and building owners across the State are potentially impacted by the uncertainty in the state of the law initiated by the conflicting application of the two regulatory schemes, conflicting rulings by the different departments of the Appellate Divisions, the incorrect interpretation of *Acevedo* and the conflict with the precedential authority from the Court of Appeals in *Wolinsky*. Thus, re-argument should be granted or this is a matter the Court of Appeals can and should resolve.

7. The Subject Order essentially creates a new class of apartments, one that is neither

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[1] The First Department issued the Subject Order on June 11, 2020. Notice of Entry was not served. *See* ***Exhibit A***. Pursuant to CPLR 5513(b), Petitioner is now timely seeking leave to reargue and/or for appeal the Subject Order to the Court of Appeals.

[2] It is particularly noteworthy that this Court granted leave to the parties in *Acevedo* to appeal to the Court of Appeals, though the matter was later withdrawn and discontinued.

completely subject to the Loft Law nor completely subject to the ETPA and the RSC, and one that is not capable of deregulation.

8. The Premises is not and could not be subject to the ETPA after the sale of rights and fixtures pursuant to MDL §286(6) and (12) since the Premises was permanently exempted from coverage pursuant to the very same ETPA and RSC because the Premises became vacant after June 19, 1997 but before the Rent Act of 2019 with an initial legal rent of more than two thousand dollars ($2,000.00) per month. *See*, 9 NYCRR §2520.11(c) and 9 NYCRR §2520.11(r)(4)[3]. The owner was entitled to collect a new "first rent" from an incoming tenant after the sale of rights and fixtures in 1998 pursuant to both MDL §286(6), which provides the owner purchases the improvements permits them to rent the unit at market value, and 9 NYCRR §2526.1(a)(3)(iii)(1997), since the Premises was temporarily exempt from the ETPA for substantially more than four (4) years[4].

9. The courts may not cherry-pick which provisions of the ETPA and RSC to apply to the Premises. If this Court believes *Acevedo* stands for the proposition that all loft units should be re-regulated as of right by virtue of the ETPA after sale of Loft Law rights and improvements from a protected IMD tenant, then it must also allow for them to be exempted from coverage pursuant to relevant provisions of the ETPA and RSC. No explanation was provided why it should not be subject to these provisions of the ETPA and RSC.

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[3] The underlying proceeding in *Acevedo* was decided prior to the RSC amendments allowing for deregulation of an apartment following a four-year exempt period, which is squarely the issue here.

[4] 9 NYCRR §2520.11(c) provides that any building completed prior to January 1, 1974 whose rents were regulated by any State or Federal Law other than the Rent Stabilization Law or the City Rent Law, shall only become subject to the ETPA, the RSL and the Code *after* the termination of such regulation. It is indisputable that the Loft Law is a State law. Here, from 1983 until the sale of rights and fixtures in 1998, the Premises was subject to rent regulation pursuant to the Loft Law. Accordingly, the Premises was temporary exempt from rent regulation from 1983 until through 1998 under the ETPA and Rent Stabilization Law pursuant to 9 NYCRR §2520.11(c).

10. It is respectfully submitted that this Court's misapplication of the ruling in *Acevedo* so as to create an absolute rule mandating re-regulation of a premises under the ETPA would nullify the Loft Law provisions regarding deregulation, the rulings of the New York City Loft Board rulings holding that a premises is deregulated after a sale of rights and improvement, the ETPA provisions regarding the right to charge a first rent after a four-year exemption from Rent Stabilization, and the ETPA provisions regarding the exclusion of high rent accommodations from regulation. Nothing in the *Acevedo* decision indicates that such a result countermanding the Legislature and overturning scores of Loft Board rulings was intended. To the contrary, the plain language of the decision indicates that the Court simply held there is no blanket exclusion from rent regulation pursuant to the ETPA subsequent to a sale of rights and improvements under the Loft Law, and not that there is an absolute rule that these units become permanently and perpetually subject to the ETPA.

11. The Subject Order has resulted in a direct and unresolvable conflict between the laws, regulations, and spirit of the Loft Law on the one hand and the provisions of the ETPA and RSC on the other. If this Court's holding in the Subject Order were to stand, as shall be discussed *infra*, there would be numerous conflicting provisions of the Loft Law, ETPA, and RSC that would apply to the Premises and to units similarly situated.

12. In addition, this Court's interpretation of *Acevedo* is in direct and indisputable conflict between the rulings of the Appellate Division, Second Department, and its lower courts, such as *Meserole A-B 81-93 Equities Corp. v Russo*, 66 Misc 3d 136(A), 120 NYS3d 568 (App. Term. 2d Dept 2020), *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 23 (2d Dept 2009), and *Bennett v Hawthorne Vil., LLC*, 56 AD3d 706 (2d Dept 2008). The application of *Acevedo* to this matter also implicates the improper interpretation by the First Department of the Court of

Appeals' earlier decision in *Wolinsky v Kee Yip Realty Corp.*, 2 NY3d 487, 812 NE2d 302 (2004), which expressly ruled that the ETPA did not serve to regulate units subject to the Loft Law.

13. Accordingly, for the reasons set forth herein, it is respectfully submitted that reargument should be granted or if not granted that this matter merits review by Court of Appeals and this cross-motion should be granted in its entirety.

BACKGROUND

A. Statement of Facts and Procedural History

14. The underlying proceeding before the Civil Court sought to recover possession of the Premises on the grounds that Respondent refused to vacate the Premises after the expiration of the term of the month-to-month tenancy.

15. Petitioner moved before the Civil Court for summary judgment and/or dismissal of Respondent's affirmative defenses. In that application, Petitioner established with admissible evidence that it is the landlord and owner of the Building, that the Building and Premises are an IMD, subject to the Loft Law, and duly registered with the Loft Board. Petitioner also established that in 1998, some fifteen (15) years after the initial IMD registration was filed with the Loft Board, the Premises was rent deregulated pursuant the Loft Law by virtue of the fact that the former protected IMD tenants of the Premises sold all of their rights and fixtures to Petitioner's predecessor-in-interest pursuant to MDL §§286(6) and (12). Petitioner submitted a copy of the record of the sale of rights and improvements pursuant to MDL §§286(6) and (12) in the Premises that was filed with the Loft Board in support of its Civil Court motion. Petitioner's summary judgment motion in the Civil Court sought a judgment of possession as a matter of law predicated on the fact that since there was a sale of the rights and improvements in the Premises pursuant to

MDL §§286(6) and (12) by the IMD tenant, the Premises is not subject to rent regulation pursuant to the Loft Law.

16. After the vacatur of the prior IMD tenants, Petitioner renovated the Premises and then leased it to John Chen, pursuant to a written lease, dated December 16, 1998, with a monthly "first rent" of $4,250.00, which exceeded the $2,000.00 deregulation threshold pursuant to the ETPA. To establish the foregoing in its Civil Court summary judgment motion, Petitioner submitted a copy of Mr. Chen's lease, dated December 16, 1998, together with a rent ledger, several rent checks tendered by Mr. Chen, and an Affidavit from Petitioner.

17. The Civil Court Decision/Order erroneously denied Petitioner's motion for summary judgment and/or dismissal and dismissed the summary holdover proceeding. However, the Civil Court correctly dismissed Respondent's second affirmative defense, first counterclaim for rent overcharge, and second counterclaim for attorneys' fees. A copy of the Civil Court Decision/Order is annexed hereto as **Exhibit B**.

18. An appeal and cross-appeal to the Appellate Term were filed. Predicated upon a misinterpretation of *Acevedo*, the Appellate Term partially affirmed and partially reversed the Civil Court Decision/Order. The Appellate Term incorrectly held that the Premises is subject to rent stabilization by virtue of the ETPA because the Building contains six or more residential units, notwithstanding the sale of Loft Law rights and improvements by a prior occupant pursuant to MDL §§286(6) and 286(12) and despite the fact that the monthly "first rent" charged was $4,250.00, which exceeded the deregulation threshold pursuant to the ETPA. (R. 4-5). The Appellate Term further erred in reversing the Civil Court's dismissal of Respondent's counterclaim for attorneys' fees. A copy of the Appellate Term Decision/Order is annexed hereto as **Exhibit C**.

19. An appeal and cross-appeal of the Appellate Term Order were filed by the parties. However, this Court erroneously affirmed the Appellate Term Order in all respects, similarly relying upon an incorrect and overly expansive interpretation of the import of *Acevedo*. *See* ***Exhibit A***.

ARGUMENT

Point I: This Court should grant leave to reargue and/or to appeal since, if it stands, the instant matter is of a type and nature which the Court of Appeals can and should resolve.

20. It is respectfully submitted that leave to reargue and/or to appeal the Subject Order to the Court of Appeals should be granted because, if the decision was to stand, the questions presented herein are squarely within the type which merit review by the Court of Appeals. *See* 22 NYCRR 500.22(b)(4). Important questions of statutory construction of two major systems of residential rent regulation are implicated. *See e.g. James Howden & Co. of America v American Condenser & Engineering Corporation*, 195 AD 882, 186 NYS 308 (1st Dept 1921). They are also ones that are likely to arise frequently as the interplay of the two statutory schemes affect hundreds of thousands of tenants and landlords across New York State. *See e.g., Wollman v Newark Star Pub. Co.*, 191 AD 881, 180 NYS 513 (1st Dept 1920); *Eastern Steel Co. v Globe Indemnity Co.*, 185 AD 695, 174 NYS 98 (1st Dept 1919). The questions of law presented herein are therefore of significant public importance. *See e.g., Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v Wieder*, 72 NY2d 174, 183 (1988) (granting leave to appeal in light of "novel and significant issues tendered for review"); *Corbett v Scott*, 215 AD 763, 212 NYS 792 (1st Dept 1925), aff'd on other grounds, 243 NY 66, 152 NE 467, 46 A.L.R. 1064 (1926).

21. Given the wide-reaching impact of the two regulatory schemes, the principles at

issue in this matter are important to many others than the parties to the instant litigation. *See e.g., Farish Co. v Phillips-Jones Corporation*, 208 AD 765, 203 NYS 291 (1st Dept 1924). Further, as detailed herein, the Subject Order establishes a direct conflict of decisions between different appellate divisions. *See e.g., Mead v Levitt*, 143 AD2d 560, 561 (1st Dept 1988) (granting leave to appeal where First Department's decision conflicted with Fourth Department authority and another First Department decision); *Middleton v Boardman*, 210 AD 467, 206 NYS 725 (2d Dept 1924).

22. More specifically, the issues involved are novel and of public importance as they involve the propriety of the First Department's interpretation and application of two, major statutory schemes: the Loft Law on the one hand and the ETPA and RSC on the other. The Subject Order also demonstrates the presence of a direct conflict between the departments of the Appellate Divisions as to the application of these statutory schemes and their interplay. The Subject Order also presents a conflict with the prior decision of the Court of Appeals in *Wolinsky v Kee Yip Realty Corp.*, 2 NY3d 487, 812 NE2d 302 (2004). Accordingly, a decision by the Court of Appeals in this matter will settle the state of the law for multitudes of building owners and tenants and ensure that the law is applied evenly and correctly across State of New York. It is therefore respectfully submitted that the questions presented herein merit review by the Court of Appeals. See, 22 NYCRR §500.22(b)(4).

23. Thus, this is a matter the Court of Appeals can and should resolve and Petitioner's cross-motion should be granted.

A. The Subject Order and this Court's interpretation of the ruling in *Acevedo* has resulted in a conflict between Departments which merits adjudication by the Court of Appeals.

24. The First Department's reliance on *Acevedo* has created a direct and indisputable

conflict between the rulings of the Appellate Division courts, which makes the issue appropriate for adjudication by the Court of Appeals. In contrast to the courts in the First Department, the courts of the Second Department have not relied upon *Acevedo* and have consistently held that premises which have been the subject of a sale of rights and fixtures pursuant to the Loft Law are not regulated or re-regulated under the ETPA. This stark divergence between the rulings of the courts of the two downstate Appellate Divisions also makes the matter ripe for adjudication by the Court of Appeals.

25. As recently as this year, in *Meserole A-B 81-93 Equities Corp. v Russo*, 66 Misc 3d 136(A), 120 NYS3d 568 (App. Term. 2d Dept 2020), the court noted that the issue of whether, after a sale of rights, a unit is subject to any regulation under the Loft Law or rent stabilization has been decided by the courts numerous times. The *Meserole* court held that the Second Department's ruling in *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 23 (2d Dept 2009) and *Bennett v Hawthorne Vil., LLC*, 56 AD3d 706 (2d Dept 2008) controlled, notwithstanding the First department's ruling in Acevedo. The *Meserole* court noted that Caldwell held that lofts are not subject to rent stabilization except in very limited circumstances, in part because the "Loft Law would have been unnecessary if protection for the residents of such premises was already available under ETPA." Similarly, with its subsequent ruling in *Bennett*, the Second Department continued to assert the very limited application of the ETPA to former IMDs finding that the purchase of the rights and fixtures exempts a unit from the provisions of the Loft Law providing for rent regulation

26. Likewise, in *New York City Const., Inc. v Morgenstern Bros. Realty Inc.*, 51 Misc 3d 1222(A), 41 NYS3d 450 (Sup Ct, Kings 2016), the court recognized that "rent stabilization coverage under the Loft Law can be extinguished in a number of ways, including … sale of the tenant's fixtures at fair market value, purchase of tenant's rights by landlord … (Andrew Scherer

and Fern Fisher, Residential Landlord–Tenant Law in New York §§ 6:98–6:100[West Practice Guide 2014]; Gerald Lebovits and Linda Rzesniowiecki, The New York Loft Law NYSBA NY Real Prop LJ at 23–24 [Spring 2010])."

27. In *Drye v American Package Co., Inc.*, No. 2019 NY Slip Op 30038(U), 2019 WL 120559, at *3–4 (Sup Ct, Kings County Jan. 07, 2019), the court again noted that the Appellate Division, Second Department has specifically held that an illegally converted commercial premises, such as an IMD, may only become subject to rent stabilization in very limited and narrowly defined circumstances which require, inter alia, a demonstration by the tenant that the owner acquiesced in the unlawful conversion undertaken at the expense of the occupants and that the owner sought to legalize the residential use during the pendency of the proceeding in which the tenants sought Rent Stabilization Law protection. *Id*. (citations omitted). The *Drye* court again noted the unnecessity of the Loft Law if the prior-enacted ETPA already protected illegal residential conversions and noted, "[I]t is evident that the Legislature did not view the ETPA as safeguarding the interests of the 'loft pioneers' " *Id*., citing *Wolinsky*, *supra*.

28. The lower courts in the Second Department likewise follow the precedential authority of *Wolinsky* and its progeny, *Caldwell v American Package Co., Inc., supra*, acknowledging that in *Wolinsky*, the Court of Appeals noted that, as it relates to the Loft Law, the inclusion of one broad statutory scheme implies the exclusion of the other. *Bravo v Marte*, 64 Misc. 3d 1223(A), 117 N.Y.S.3d 441 (Civ Ct, Kings County 2019). "In other words, the legislature knew what it was doing and by narrowly defining which buildings are afforded coverage the exclusion of everything else is construed to be intentional." *Id*. Moreover, another necessary consideration is "to construe statutes so that they do not conflict with one another." *Id*.

29. This limited applicability of the ETPA to illegally converted units is reiterated in

South Eleventh Street Tenants Ass'n v Dov Land, LLC, 59 AD3d 426, 872 NYS2d 514 (2d Dept 2009) and *Malden v R.P.S. Properties, LLC*, No. 510054/17, 2017 WL 5903328, at *4 (Sup. Ct., Kings Nov 30, 2017), albeit in reference to units not subject to the Loft Law. *See also, Bravo v Marte*, *supra*.

B. The Subject Order has created an unresolvable conflict between the Loft Law and the ETPA.

30. The First Department incorrectly held that, pursuant to *Acevedo,* the Premises became subject to rent stabilization despite a sale of rights pursuant to MDL §§286(6) and 286(12) simply because it is located in a pre-1974 building with six (6) or more residential units. In reaching this conclusion, the First Department wholly disregarded the fact that the Premises is exempt from rent stabilization pursuant to the express provisions of the RSC.

31. First, after the sale of rights and fixtures in 1998, the owner was entitled to collect a new "first rent" from an incoming tenant pursuant to both MDL §286(6), which provides the owner purchases the improvements permits them to rent the unit at market value, and 9 NYCRR §2526.1(a)(3)(iii)(1997), since the Premises was temporarily exempt from the ETPA for substantially more than four (4) years. 9 NYCRR §2520.11(c) specifically provides that any building completed prior to January 1, 1974 whose rents were regulated by any State or Federal Law other than the Rent Stabilization Law or the City Rent Law, shall only become subject to the ETPA, the RSL and the Code *after* the termination of such regulation. It is indisputable that the Loft Law is a State law. Here, from 1983 until the sale of rights and fixtures in 1998, the Premises was subject to rent regulation pursuant to the Loft Law. Accordingly, the Premises was temporary exempt from rent regulation from 1983 until through 1998 under the ETPA and Rent Stabilization Law pursuant to 9 NYCRR §2520.11(c).

32. Following the vacancy, the first legal rent for the Premises was $4,250.00, which was far in excess of the $2,000.00 regulation threshold.

33. The Court in *Acevedo* did not discuss the ability to charge a deregulated "first rent" after a four year temporary exemption, which is a critical distinction between the facts here and those in *Acevedo* . In *Acevedo,* the sale of rights and fixtures occurred in 1995, two (2) years prior to the 1997 Rent Stabilization Code amendment which set forth the four year temporary exemption rule. See 9 NYCRR §2526.1(a)(3)(iii)(1997). Thus, the landlord in *Acevedo* did not have the ability in 1995 to set a "first rent" after the temporary exemption at an amount that exceeded the $2,000.00 threshold for deregulation.

34. The *Acevedo* Court never considered this basis for deregulation, nor explicitly referenced a temporary exemption, which is squarely the issue here. Here, the sale of rights and fixtures occurred in 1998, and the "first rent" after the temporary exemption exceeded the $2,000.00 threshold for regulation. Accordingly, this Court's ruling that *Acevedo* provides for automatic regulation of the Premises pursuant to the Rent Stabilization Code is incorrect.

35. And, since the Premises was independently deregulated in accordance with the Rent Stabilization Code, it does not necessarily revert back to Rent Stabilization after the temporary exemption terminated. Since the Premises was exempt from the ETPA for substantially more than four (4) years, the owner was entitled to charge a first rent which then became the legal regulated rent for the Premises. In 1998, the owner collected a new "first rent" from an incoming tenant pursuant to 9 NYCRR §2526.1(a)(3)(iii)(1998), and the first legal rent following the vacancy was $4,250.00, which was far in excess of the $2,000.00 regulation threshold. *See,* 9 NYCRR §2500.9(m), 9 NYCRR §2520.11(r)(4). Accordingly, the Premises is not subject to Rent Stabilization.

36. Here, the Subject Order - and the Appellate Term Order before it - have created a new class of apartments that are neither completely subject to the Loft Law nor completely subject to the ETPA and have been rendered incapable of deregulation. The support for this untenable position is comprised wholly of this Court's reading of their earlier ruling in *Acevedo*. This interpretation by the courts of the First Department, which have been applied to the instant matter, improperly involves an indiscriminate application of the provisions of the Loft Law and the ETPA/RSC.

37. This Court's attempt at the creation of a blanket rule guaranteeing re-regulation of a premises under the ETPA would nullify the Loft Law provisions regarding deregulation, the Loft Board's rulings holding that a premises is deregulated after a sale of rights and improvement, the ETPA's provisions regarding the right to charge a first rent after a four-year exemption from Rent Stabilization, and the ETPA's provisions regarding the exclusion of high rent accommodations from regulation. Nothing in the *Acevedo* decision indicates that such a result was intended. To the contrary, the plain language of the *Acevedo* decision indicates that the issuing court simply held there is no blanket exclusion from rent regulation pursuant to the ETPA subsequent to a sale of rights and improvements under the Loft Law; there was simply no holding that there is a blanket rule that these units become permanently and perpetually subject to the ETPA at the last rent set under the Loft Law.

38. Prior to *Acevedo*, the courts - including the Court of Appeals in *Wolinsky* - held that the prior-enacted ETPA did not apply to IMD units and that if the prior-enacted ETPA already protected IMD units, significant portions of the Loft Law would have been unnecessary. *Id.*, citing e.g. MDL §286(3). Indeed, had the prior-enacted ETPA already protected IMD units, the Loft Law's wholly separate and differentiated rent regulatory scheme would have been unnecessary.

The Loft Law could have simply required legalization for residential use with no mention of or provision for the rents which would have been subject to the already enacted ETPA. This inconsistency between the ruling in *Acevedo* and its progeny vis-à-vis the laws, regulations, and spirit in the enactment of the Loft Law is what compels determination by the Court of Appeals as to the propriety of the First Department's judicial activism in continuing to interpret Acevedo as creating a permanent bar to the deregulation of former IMDs.

39. Notwithstanding the Loft Law's provisions which unequivocally exempt the Premises from rent regulation because of the sale of rights and fixtures pursuant to MDL §286(6) and (12), the Premises is not and could not be subject to the ETPA after the rights and fixtures sale since the Premises was permanently exempted from coverage pursuant to the provisions of very same ETPA and RSC because the Premises became vacant after June 19, 1997 with an initial legal monthly rent of more than $2,000.00. See, 9 NYCRR §2520.11(c) and 9 NYCRR §2520.11(r)(4).

40. Accordingly, by its ruling, the First Department is impermissibly cherry-picking which provisions of the ETPA and RSC to apply to the Premises and disregarding those that it finds inconvenient. If the First Department interprets *Acevedo* as standing for the proposition that all loft units should be re-regulated as of right by virtue of the ETPA after sale of Loft Law rights and improvements from a protected IMD tenant, then it must also allow for them to be exempted from coverage pursuant to those very same terms of the ETPA and RSC. That the First Department has not done so and has conversely opted to engage in judicial activism and indiscriminately select provisions from both regulatory schemes – while ignoring the Legislature's intent in enacting the Loft Law - mandates review by the Court of Appeals.

41. It is respectfully submitted that there are numerous conflicts between the Loft Law and the RSC that cannot be reconciled if *Acevedo* stands for the claimed proposition. For instance,

Rent Stabilization provides protections to tenants including the limitations on the amount of initial rent and the amount of increases to the rent, such as those increases permitted by the guidelines rate of rent adjustments applicable to the new lease and/or upon renewal leases, plus such other rent increases as are authorized pursuant to the RSC. *See e.g.,* 9 NYCRR §2521.1, 9 NYCRR §2522.4, 9 NYCRR §2522.8. By contrast, as stated *supra*, IMDs subject to the Loft Law are subject to a completely different form of rent regulation, where no such increases are allowed and by which the rent may not exceed the rent charged and collected on December 21, 1982 and increases based on the milestones set forth in the legalization plan. *See,* MDL §286(2)(ii); 29 RCNY §2-06(c); 29 RCNY §2-12(b). Had the prior-enacted ETPA already protected IMD units, there would have been no point to the Loft Law's completely different form of rent regulation and the Loft Law could simply have been one which required legalization for residential use and made no mention of the rents which would have been subject to the prior-enacted ETPA. But under the Subject Order and *Acevedo*, *supra* there is a conflict.

42. Another example of an inconsistency is that MDL §286(6) provides where, as here, the owner purchases the improvements, they are permitted to rent the unit at market value, at the same time, if a unit is subject to the ETPA no such rent increase would be allowed since 9 NYCRR §2522.8(a) only allows an increase, if a vacancy lease is for a term of two years, of 20 percent of the previous legal regulated rent and 9 NYCRR §2522.4 only allows an increase if there are increased space and services, new equipment, new furniture or furnishings or major capital improvement. In this scenario, which controls?

43. Similarly, 9 NYCRR §2520.11(e) provides for an exemption from coverage for "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974…" The creation of a residential unit out of a unit previously

required to be used solely for commercial purposes automatically constitutes a substantial rehabilitation of the space in question after the January 1, 1974 effective date such as that the unit would not be subject to the RSL, pursuant to DHCR's Operational Bulletin 95-2. Both the DHCR and Courts have held repeatedly that buildings which were converted to residential use after January 1, 1974 are exempt from Rent Stabilization. *See e.g., Lipkis v. Krugman*, 111 Misc.2d 445, 444 N.Y.S.2d 342 (Civ. Ct., NY County 1981)(*citing, Mayeri Corp. v Teisan*, NYLJ, June 1, 1981, p 7, col 2); *See also, Baxter v. Captain Crow Mgt.*, 128 Misc. 2d 254 (Sup. Ct., NY County, 1985); *81 Russell Street Assoc. v. Scott*, 21 HCR 427A, NYLJ 8/25/93, 24:2 (Civ. Ct. Kings County 1993).

44. Yet, in order to qualify as an IMD building in the first instance, MDL §281 required the building to have been used for manufacturing, commercial or warehousing purposes and to have been lacking a residential certificate of occupancy during a window period of April 1, 1980 and December 31, 1981. In this scenario, would not all IMD buildings be exempted from the RSC by reason of a substantial rehabilitation?

45. As another example of conflicts between the Loft Law and RSC if *Acevedo* stands for the claimed proposition of the Subject Order is 9 NYCRR §2520.11(q), which provides for exemption from Rent Stabilization for housing accommodations which would otherwise be subject to rent regulation solely by reason of the provisions of article 7-C of the MDL requiring rent regulation, but which are exempted from such provisions pursuant to section 286(6) and 286(12) of the MDL. Here, it is undisputed that the Petitioner purchased the rights and fixtures pursuant to section 286(6) and 286(12) of the MDL. However, if *Acevedo* stands for the claimed proposition of the Subject Order, then 9 NYCRR §2520.11(q) is nullified but 9 NYCRR §2520.11(r)(4) then applies which exempts from coverage pursuant to ETPA and RSC units that became vacant after

June 19, 1997 but before June 24, 2011 with an initial legal rent of more than two thousand dollars ($2,000.00) per month.

C. The Subject Order and this Court's interpretation of the ruling in *Acevedo* is contrary to the Loft Board's interpretation of the Loft Law.

46. It is respectfully submitted that this motion should also be granted because this Court's interpretation of the ruling in *Acevedo* appears to run counter to the Loft Board's understanding of that case's import. Although the Loft Board has not taken a direct position against this Court's interpretation of *Acevedo* its submissions to the courts in the wake of the *Acevedo* decision seem to indicate that the agency charged with implementing the Loft Law supports the interpretation that the Loft Law's deregulation provisions should be observed. For example, in *Matter of Fievet*, 150 AD3d 402, 53 NYS3d 292 (1st Dept 2017), the Loft Board again took a position indicating that the Loft Law's deregulation provisions must be observe. In its opposition brief to this Court in in *Matter of Fievet*, *supra*, the Loft Board asserted: "The Loft Law makes no provision for a unit that has been bought out and then rented as residential space to revert to rent regulation and protected occupancy." *Matter of Fievet*., 2016 WL 11543635, at *7. Interestingly, in *Fievet*, this Court agreed with the Loft Board and held that IMDs which were not subject to rent regulation due to a sale of the former tenant's fixtures and rights did not become re-regulated due to the 2010 amendments of the Loft Law and holding that: "nothing in the plain language of Multiple Dwelling Law § 281(5) … suggests a legislative intent to re-regulate units that were properly removed from rent regulation pursuant to Multiple Dwelling Law § 286(6). See, *Fievet v New York City Loft Bd.*, 150 AD3d at 402, 53 NYS3d at 293.

47. Nonetheless, in the ensuing uncertainty that has resulted in the wake of the decision in *Acevedo,* the Loft Board has elected to err on the side of caution in its exit orders and has issued

dozens of decisions carefully noting that that its rulings regarding the lack of rent regulation are "solely with respect to Article 7-C" and the agency takes no position with respect to other regulatory schemes which may be applicable. *See e.g., Matter of 595 Broadway Associates, LLC*, LBO No. 4989, 06/18/20; *Matter of Triad Capital LLC*, LBO No. 4937, 1/24/20; *Matter of W28 Street Holding LLC*, LBO No. 4915, 12/03/19; *Matter of Malach Premises Trust*, LBO No. 4899, 09/27/19; *Matter of Benjamin Duell c/o Duell LLC*, LBO No.4196, 11/21/13; *Matter of Hawthorne Village, LLC*, LBO No. 4087, 5/7/13.

Point II: Respondent is not entitled to re-argument because the Court did not overlook or misapprehend any fact or law.

A. Respondent has not established that this Court misapprehended the law or fats in affirming the portion of the Appellate Term Order which held that Respondent is not entitled to an award of alleged rent overcharged or treble damages as set forth in the Subject Order.

48. This Court properly affirmed the Appellate Term's ruling that Respondent's claim for putative rent overcharge and treble damages was properly dismissed because there was no basis was shown to examine the rental history beyond the statutory four-year look-back period. *See Appellate Term Order,* citing CPLR 213-a; Rent Stabilization Law [Administrative Code of City of NY] § 26-516[a][2]; *Matter of Boyd v New York State Div of Hous. and Community Renewal*, 23 NY3d 999 [2014]; *Matter of Grimm v State of NY Div of Hous. and Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]). Nonetheless, Respondent incorrectly argues this Court misapprehended the law simply because in the Subject Order found Respondent is not entitled to any award for alleged rent overcharge or treble damages, citing the Court of Appeals' recent ruling in *Regina Metro. Co., LLC v New York State Div off Hous. and Community Renewal,* 2020 NY Slip Op. 02127 (2020).

49. Insofar as relevant to the instant case, the Court of Appeals held that Part F of the Housing Stability and Tenant Protection Act of 2019 may not be applied retroactively, based on the principles of "due process." Generally, Part F of the HSTPA (i) expanded the period upon which overcharge damages may be based, from four (4) to six (6) years, (ii) expanded the allowable period of review for records that may be considered in order to establish damages and the correct legal regulated rent, (iii) increased the amount of treble damages that an owner may be penalized by if an overcharge is found to have occurred, and (iv) made rebuttal of the presumption of willfulness nearly impossible.

50. As a result, the Court of Appeals held, for complaints such as the instant one filed prior to June 14, 2019, the following:

> [W]here the apartment had been deregulated more than four years prior to the filing of an overcharge complaint…the regulations provided that '[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments…Under the pre-HSTPA law, the base date rent was therefore the rent actually charged on the base date.

51. Even where an owner is not capable of substantiating proper deregulation of an apartment, the Court of Appeals plainly stated "there is no indication that, under the pre-[Housing Stability and Tenant Protection Act of 2019] law, an overcharge resulting from improper deregulation warranted anything but the application of the standard lookback period." The Court of Appeals makes clear that the "substantial repose" to which an owner was entitled to prior to the enactment of the HSTPA, must also be extended to an owner against whom a complaint was filed prior to June 14, 2019, even if that complaint was pending on June 14, 2019.

52. Here, the rent charged and collected four years prior to the filing of the claim was the same rent charged to Respondent since that time. Thus, Respondent has not established that

this Court misapprehended the law or fats in affirming the portion of the Appellate Term Order which held that Respondent is not entitled to an award of alleged rent overcharged or treble damages.

53. Additionally, *Regina Metro.* clarifies that conduct that is fraudulent in order to look back beyond the four years prior to the filing of the claim must be "intentional and deliberate," and consists of "evidence [of] a representation of material fact, falsity, scienter, reliance and injury," quoting from *Vermeer Owners v. Guterman*, 78 N.Y.2d 1114, 1116 (1991), "[b]ecause conduct cannot be fraudulent without being willful." ("In this context, willfulness means 'consciously and knowingly charg[ing] . . . improper rent' *Matter of Lavanant v. New York State Div. of Hous. & Community Renewal*, 148 AD2d 185, 190 (1st Dept. 1989).") .

54. Under no reasonable interpretation can it be said that evidence presented in this case demonstrates any "fraudulent" conduct.

B. The Premises was not required to be registered with DHCR since it was temporarily exempt from Rent Stabilization on April 1, 1984, the date that registrations were first required, and thereafter permanently exempted from coverage pursuant to ETPA in 1998 and the lack of a DHCR rent registration does not negate or affect that exemption.

55. Respondent's contention that Petitioner was required to register the Premises and Building with the DHCR is without merit. The requirement that a Rent Stabilized Premises be registered with DHCR only became effective on April 1, 1984 for those subject to Rent Stabilization on that date. Specifically, 9 NYCRR §2528.1 provides that each housing accommodation subject to the RSL on April 1, 1984, or thereafter, and not exempted from registration by the DHCR, shall be registered by the owner thereof with the DHCR within 90 days after such date. Thereafter, annual registration, pursuant to 9 NYCRR §2528.3, are only required

for each housing accommodation not otherwise exempt.

56. Here, since on April 1, 1984 the Premises was subject to regulation under the Loft Law, it was exempt from the ETPA and the RSL pursuant to 9 NYCRR §2520.11(c), and therefore no registration was required. Since the first legal rent following the vacancy was in excess of $2,000.00, the Premises was permanently exempted from coverage pursuant to ETPA as a matter of law. *Matter of Vivienne U. Kahng*, DHCR Admin. Rev Dkt. No. XF410031RT (12/30/09); *Matter of Forest Royale Assocs.*, DHCR Adm. Rev Docket No. WC110015RO (8/21/08). See also, NYS DHCR, FAQ, High Rent Vacancy Decontrol/High-Rent High-Income Decontrol.

57. There is no requirement, pursuant to either 9 NYCRR §2528.1 or 9 NYCRR §2528.3, that a Premises which is permanently exempt from Rent Stabilization be registered with DHCR as a condition of its permanent exemption. In fact, in a similar circumstance, in *Matter of Lejas*, DHCR Adm. Rev Docket No. VJ410063RT (2/14/08), a tenant filed a Complaint with DHCR for Rent Stabilization coverage and a rent overcharge. The tenant argued that landlord had never registered the apartment at any time since 1984 and that, as such, the apartment wasn't subject to high-rent vacancy deregulation. The landlord, in response, showed that when a prior rent-controlled tenant moved out the "first rent" thereafter was over $2,000.00 per month so the apartment was never subject to Rent Stabilization. The DHCR ruled for the landlord finding that the apartment wasn't subject to Rent Stabilization and thus no registrations were required.

58. It is well settled that the DHCR's interpretation of the statute it is charged with implementing is entitled to judicial deference since the interpretation relies upon the special competence the agency is presumed to have developed in its administration thereof and its knowledge and understanding of underlying operational practices. *Matter of Salvati v Eimicke*, 72 NY2d 784, 533 NE2d 1045 (1988); *Tockwotten Associates, LLC v New York State Div off Hous.*

and Community Renewal, 7 AD3d 453777 NY.2d 465 (1st Dept 2004); *Matter of Herzog v Joy*, 74 AD2d 372, 375, 428 NYS2d 1 (1st Dept 1980), aff'd 53 NY2d 821, 439 NYS2d 922, 422 NE2d 582 (1981) ("an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight").

59. Nevertheless, even assuming *arguendo*, that the Premises was subject to the registration requirement, it is merely a ministerial act which serves as a notice of the time limit to challenge a deregulation on the basis of high rent. It does not prohibit or nullify the exemption from rent regulation on the basis of high rent. See, 9 NYCRR §2522.3(a) (if initial tenant was not served with notice of the initial registered rent, subsequent tenant can challenge the initial rent).

60. The fact that the no registration was filed is irrelevant for the purposes of setting the first rent or determining ETPA coverage of the Premises. The Rent Stabilization Code places a premium upon the legality of rent actually paid during the operative four-year period, rather than the largely ministerial task of registering the rent. The relative importance of registration was de-emphasized in favor of a factual examination of the actual rent history during the most recent four years.

61. In *Matter of Vivienne U. Kahng, supra*, the DHCR held that since the first rent was over $2,000 per month, the apartment was exempt from rent regulation and failure to comply with the notice requirements of RSL §26-504.2, including the filing of an exit registration, does not negate the exemption.

62. In *Matter of Pace & Hersh*, DHCR Adm. Rev Docket No. WF410015RT (8/21/08), the tenants paid an initial free market rent after the base date vacancy of $2,625 per month. The tenants filed an overcharge and coverage application with the DHCR contending that since no registration had been filed with DHCR indicating that the rent had reached $2,000.00 or more per

month when the apartment become vacant, the owner could not establish that the subject housing accommodation was exempt from Rent Stabilization when they took occupancy. DHCR denied the petition finding that on the base date of four years prior to the application the apartment was vacant. As a result of the foregoing, the first rent charged after that became the base rent. The tenants themselves were the ones who paid an initial rent after the base date vacancy of $2,625. Since this rent was more than $2,000.00, the DHCR found that the apartment was exempt from Rent Stabilization.

63. Similarly, in *Matter of Davis*, DHCR Adm. Rev Docket No. XF410058RT (8/31/09), the DHCR held that registration is not required to effectuate an exemption that occurs by operation of law, nor is there any Code provision which invalidates high-rent deregulation based upon an owner's failure to file exit registration. See also, *Thorgeirdottir v NYC Loft Bd.*, 161 AD2d 337, 555 NYS2d 706 (1st Dept 1990), aff'd 77 NYS2d 951, 570 NYS2d 486 (1991).

64. Again, DHCR's interpretation is entitled to judicial deference. *Matter of Salvati v Eimicke*, *supra*; *Tockwotten Associates, LLC v New York State Div. off Hous. and Community Renewal*, *supra*.

65. In addition, this Court's ruling in *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199-200 (1st Dept. 2011), appeal withdrawn, 18 NY3d 954, 967 NE2d 707 (2012) is particularly illustrative. In *Gersten*, the court held only that a tenant who had not received notice of a Premises' deregulation is able to challenge the deregulated status without being subject to a statute of limitations.

66. The lack of filing has no effect upon the status of the apartment as being unregulated or exempt. See, *Torres v McHedlishvili*, 28 Misc3d 1210(A), 911 NYS2d 696 (Civ Ct, New York County 2010) (failure to file the up-to-date rent with the DHCR in a timely matter does not make

the agreed-upon rent unlawful); *Central Park South Associates v Haynes*, 171 Misc2d 463, 654 NYS2d 967, (Civ Ct, New York County 1996) citing, NYC Code 26–517(e); NY Apartment Law Insider, "How to Deregulate Vacancy–Decontrolled Apartment," November 1996, p. 8.

67. Accordingly, the lack of a DHCR rent registration merely preserves the right to challenge an exemption, it does not negate or affect that exemption. Petitioner is not precluded from establishing the basis for the exemption, regardless of whether or not there has been a registration. Any purported failure by Petitioner to register the Premises with DHCR simply allows for a continuing challenge to validity of the Premises' exemption.

C. This Court properly affirmed the Appellate Term's ruling that Respondent is not entitled to an award for rent overcharge and treble damages.

68. This Court properly affirmed the Appellate Term's ruling that Respondent is not entitled to an award for rent overcharge and treble damages. As stated *supra*, since the Premises is not subject to the ETPA, there is no rent overcharge or treble damages due to Respondent.

69. Respondent has the burden of proving his affirmative defenses and counterclaims. See e.g., *Clarkton Estates, Inc. v Chiaro*, 122 Misc2d 721, 471 NYS2d 942 (Civ Ct. New York 1983); *Plattner v Weiler*, 26 Misc 813, 57 NYS 98 (A.T. 1st Dept 1899); *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 433 NYS2d 1015, 414 NE2d 395 (1980); *Suissa v Baron*, 24 Misc3d 1236(A), 901 NYS2d 903 (Table) (Disc. Ct. Suff 2009); Landlord and Tenant Practice in New York §15:581 (citing, RPAPL §743; Barker and Alexander, Evidence in New York State and Federal Courts).

70. Here, Respondent has failed to meet its burden to establish any entitlement to an award for alleged rent overcharge and treble damages.

71. First, Respondent failed to submit any evidence to establish coverage pursuant to the ETPA, rent overcharge, nor evidence of a willful overcharge. Nevertheless, even assuming *arguendo* that there was a rent overcharge – which there was not – the review of the rent for purposes of an overcharge was, until the enactment of the HSTPA, restricted to a four-year look back period. See, 9 NYCRR §2526.1(a)(2). See also, *Matter of Boyd v NYS Div of Hous. and Community Renewal*, 23 NY3d 999, 992 NYS2d 764 (2014). The Court of Appeals' ruling in *Regina Metro, supra,* has now definitively established that HSTPA cannot be retroactively applied to extend the four-year look back period. Respondent's incorrect claim that this Court improperly misapprehended the law by citing to *Regina Metro, supra*, in affirming the dismissal of Respondent's overcharge and treble damages claim willfully ignores Respondent's argument that HSTPA should apply. Respondent admits that his rent on June 21, 2010, which was six (6) years prior to Respondent interposing his answer, was $4,000.00. In addition, Respondent fails to take into account milestone rent increases pursuant to the Loft Law, Individual Apartment Improvements, failed to attach any documentary evidence to the Civil Court, and failed to submit any detailed or specific allegations refuting the rent charged.

72. Once more, Respondent failed to present any proof for all subsequent vacancy and renewal leases since the 1998 sales and rights and fixtures nor provided for all the Individual Apartment Improvements made to the Premises. Instead, Respondent again submits an erroneous calculation, which has multiple mathematical errors. By way of example, Respondent cited RGBO Order No. 30 as the first increase permissible and then calculated a 20% vacancy increase and 4% increase. However, even if Petitioner were not entitled to set a "first rent" – which it was -, it would have been entitled to a statutory vacancy increase of 20% plus a longevity increase. Respondent has also failed to detail or take into account the multitude of renewal leases that occurred between

1998 and 2009.

73. Even if Petitioner were not entitled to set a "first rent", the Premises may still be deregulated as the law permits an owner to calculate and increase the rent by identifying and adding to the rent, all subsequent vacancy and renewal leases and applying the appropriate statutory vacancy/longevity adjustments and guideline increases. If that rent exceeds the deregulation threshold, the unit will still be deregulated. See e.g., *Matter of Stevens*, DHCR Adm. Rev Docket No. EQ410002RK (10/5/16); *Matter of Miller*, DHCR Adm. Rev Docket No. DR210009RT (9/8/15); NYS DHCR Advisory Opinion, dated March 12, 2013.

74. Accordingly, this Court properly applied both the law and the facts in affirming the portion of the Appellate Term Order which correctly upheld the Civil Court's dismissal of Respondent's first counterclaim for an award of rent overcharge and treble damages.

75. Even if the Civil Court did not correctly dismiss Respondent's first counterclaim for an award of rent overcharge and treble damages, certainly, for the reasons discussed above, substantial issues of fact were shown so as to deny Respondent application for summary judgment. It is black letter law that summary judgment should not be granted if there is a material and triable issue of fact presented. If there is any doubt as to the existence of such an issue, or if the issue is "arguable", a motion for summary judgment should be denied." *DuLuc v Resnick*, 224 AD2d 210, 210–11, 637 NYS2d 146 (1st Dept 1996), citing *Sillman v Twentieth Century–Fox Film Corp*., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 (1957).

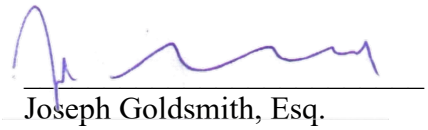
CONCLUSION

76. Based on the foregoing, it is respectfully submitted that that this Court grant reargument or, if not, the instant matter is of a type and nature which the Court of Appeals can and

should resolve and the cross-motion should be granted in its entirety and that this Court grant Petitioner such other and further relief as this Court deems just and proper. Moreover, Respondent has wholly failed to establish that this Court misapprehended the law or facts in reaching its determination that Respondent was not entitled to an award for alleged rent overcharge and treble damages and Respondent's motion for reargument must be denied in its entirety.

WHEREFORE, Petitioner respectfully requests that the instant cross-motion for leave to reargue and/or for leave to appeal to the Court of Appeals be granted in its entirety, that Respondent's motion for reargument be denied in its entirety, and that this Court grant Petitioner such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 13, 2020



Joseph Goldsmith, Esq.

EXHIBIT “A”

Matter of Aurora Assoc. LLC v Locatelli
2020 NY Slip Op 03267
Decided on June 11, 2020
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on June 11, 2020
Friedman J.P., Renwick, Kern, Oing, JJ.

10985 570235/17

[*1] In re Aurora Associates LLC, Petitioner-Appellant-Respondent,

v

Raffaello Locatelli, Respondent-Respondent-Appellant, Cleantech Strategies LLC, et al., Respondents.

Kossoff, PLLC, New York (Joseph S. Goldsmith of counsel), for appellant-respondent.

DeLotto & Fajardo, LLP, New York (Eduardo A. Fajardo of counsel), for respondent-appellant.

Order, Appellate Term, First Department, entered on or about December 6, 2017, which, to the extent appealed from, in modifying an order of the Civil Court, New York County (Jack Stoller, J.), entered on or about November 28, 2016, granted respondent's motion for summary judgment dismissing the holdover petition, granted petitioner's motion to dismiss the overcharge counterclaim, denied respondent's motion for summary judgment on the overcharge counterclaim, and granted respondent's motion for summary judgment on the counterclaim for attorneys' fees, unanimously affirmed, without costs.

Notwithstanding the predecessor owner's purchase of a prior tenant's rights under Multiple Dwelling Law § 286(12), the loft unit at issue remained subject to rent regulation as the apartment is located in a pre- 1974 building containing six or more residential units (*Acevedo v Piano Bldg. LLC* (70 AD3d 124 [1st Dept 2009], *appeal withdrawn* 14 NY3d 884 [2010]; *Costanzo v Joseph Rosen Found.*,

Inc., 178 AD3d 501, 502 [1st Dept 2019], *citing Acevedo*, 70 AD3d at 129). Therefore, petitioner was not entitled to charge a market value rent for the unit (*cf.* Multiple Dwelling Law § 26[6]), and the summary eviction proceeding was properly dismissed.

Because respondent prevailed in his defense of the summary proceeding, the Appellate Term properly concluded that he was the prevailing party on the "core" issue between the parties, and therefore attorneys' fees were properly awarded (*Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279, 280 [1st Dept 2004]).

However, Appellate Term properly dismissed the rent overcharge claim on the ground that, under applicable law, there was no basis to examine the rental history beyond the four-year look-back period (*see* Rent Stabilization Law [Administrative Code of City of NY] § 26—516[a][2]). The Court of Appeals has determined that the Housing Stability and Tenant Protection Act (HSTPA), which requires that the entire rent history be examined, cannot be retroactively applied to overcharges alleged to have occurred before the HSTPA's enactment in 2019 (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal* (__ NY3d __, 2020 NY Slip Op 02127, *9 [2020] ["We conclude that the overcharge calculation amendments (of the HSTPA) cannot be applied retroactively to overcharges that occurred prior to their enactment"]).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 11, 2020

CLERK

Return to Decision List

EXHIBIT “B”

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

---------- X

AURORA ASSOCIATES LLC,

Petitioner,

Index No. 63292/2016

- against -

DECISION/ORDER

RAFFAELOLO LOCATELLI,

Respondents/Tenants.

---------- X

Present:

Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice of Motion and Supplemental Affidavit Annexed.....	1, 2
Notice of Cross-Motion and Supplemental Affidavit and Affirrmation Annexed	3, 4, 5
Reply Affirmation	6

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Aurora Associates LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Raffaello Locatelli, the respondent in this proceeding ("Respondent"), seeking possession of 78 Reade Street, Loft 3B on the 3rd Floor, New York, New York ("the subject premises") on the ground of termination of Respondent's tenancy pursuant to RPL §232-a. Respondent interposed an answer ("the Answer"), which includes, *inter alia*, a claim that the subject premises is subject to rent regulation and includes, *inter alia*, a counterclaim for rent overcharge. Petitioner now moves for summary judgment in its favor and to dismiss Respondent's defenses. Respondent moves for summary judgment in his favor. The

Court consolidates both motions for resolution herein.

The core of the parties' dispute is the rent regulatory status of the subject premises. If the subject premises is unregulated, termination of a tenancy pursuant to RPL §232-a is a remedy available to Petitioner. If the subject premises is rent-stabilized, RPL §232-a is not a remedy available to Petitioner. N.Y.C. Admin. Code §26-511(c)(4). Neither party disputes that, at least at one point in time, the subject premises was an Interim Multiple Dwelling pursuant to Article 7-C of the Multiple Dwelling Law ("the Loft Law"). Petitioner annexes to its motion papers an agreement entered into between Petitioner's predecessor-in-interest and former Loft Law tenants of the subject premises ("the agreement"). The agreement, dated March 26, 1998, purports to effectuate a sale of both improvements and rights of the prior tenants to Petitioner's predecessor-in-interest pursuant to MDL §286(6) and MDL §286(12). A vacancy lease for the subject premises ensued, commencing on December 18, 1998 with a monthly rent of $2,001.00.

Respondent disputes the admissibility of the agreement and that disputes that the agreement effectuated a fixture purchase due to infirmities with the sale.[1] Be that as it may, Respondent argues, even assuming *arguendo* that the agreement is admissible and was legitimate, that the agreement does not deregulate the subject premises.

Exhibit D of Petitioner's motion shows that there are six residential units in the building

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[1] Specifically, the sale purportedly occurred on March 26, 1998 but documentation thereof was not filed with the Loft Board until 2004. An owner must file such a record with the Loft Board within thirty days of a sale of improvements. 29 R.C.N.Y. §2-07(j)(1). Part of the reason for this requirement is to afford an incoming tenant the opportunity to challenge the sale. 29 R.C.N.Y. §2-07(g)(1)(iv). Obviously, the incoming tenant of the subject premises who signed a lease commencing in 1998 had no meaningful opportunity to challenge the sale if it was not filed with the Loft Board until six years after the fact.

in which the subject premises is located, including the subject premises. Where, as here, the building contains six or more residential units, it is subject to rent stabilization by virtue of Emergency Tenant Protection Act ("ETPA") notwithstanding the sale of Loft Law rights by a prior tenant, in part because MDL §286(12) only applies to the actual occupant who sold her or his rights, not subsequent tenants. Acevedo v. Piano Bldg. LLC, 70 A.D.3d 124, 127 (1st Dept. 2009), *appeal withdrawn*, 14 N.Y.3d 884 (2010), VVV Partnership v. Moran, 10 Misc.3d 130(A) (App. Term 1st Dept. 2005), 29 R.C.N.Y. §2-10(d)(2).

Petitioner attempts to distinguish Acevedo, supra, from this case. Petitioner argues that even if the subject premises would otherwise be subject to the Rent Stabilization Law, the first rent in 1998 being above $2,000.00 effectuated a deregulation of the subject premises by the provisions of the very Rent Stabilization Law Respondent claims coverage under. However, the apartment at issue in Acevedo, supra, had a vacancy lease of $2,781.00 in June of 1999, after the vacancy lease for the subject premises. Acevedo, supra, 70 A.D.3d at 126. If the rule that Petitioner urges the Court to apply here were applied in Acevedo, supra, the result would be the same, because rent-stabilized apartments which become vacant on or after June 19, 1997 but before June 24, 2011 with a legal regulated rent of $2,000.00 or more per month are subject to deregulation. 9 N.Y.C.R.R. §2520.11(r)(4). The ruling in Acevedo, supra, that is contrary to Petitioner's argument compels the conclusion that the provisions of the Loft Law and the ETPA preclude such an application of the law as Petitioner urges. See 91 Fifth Ave. Corp. v. New York City Loft Bd., 249 A.D.2d 248, 249 (1st Dept. 1998) (special Loft Law provisions respecting leases take precedence over contrary provisions of the ETPA).

Petitioner cites other authority that stands for a different proposition than Acevedo, supra, and also argues that Acevedo, supra, is not good law. However, the authority that Petitioner cites is not binding on this Court in the same manner that the First Department of the Appellate Division is on this Court. It is axiomatic that a lower Court, like this one, is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department. D'Alessandro v. Carro, 123 A.D.3d 1, 6 (1st Dept. 2014). Accordingly, on the basis of the authority of Acevedo, supra, the Court grants Respondent's motion to dismiss Petitioner's cause of action, denies Petitioner's motion for summary judgment, and denies Petitioner's motion to dismiss Respondent's first affirmative defense to the petition as moot. What remains for the Court to decide is Petitioner's motion to dismiss Respondent's counterclaims sounding in rent overcharge and in attorneys' fees.

"The purpose of the Loft Law was to integrate unregulated loft dwelling units into the coverage of the rent stabilization system, and to harmonize with — rather than displace — existing forms of regulation." Acevedo, supra, 70 A.D.3d at 128-129. Accordingly, the Court evaluates Respondent's rent overcharge counterclaim according to the standards set by the Rent Stabilization Code. The legal regulated rent for the purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases or adjustments. 9 N.Y.C.R.R. §2526.1(a)(3)(I). The base date is four years prior to the filing of a rent overcharge claim. 9 N.Y.C.R.R. §2520.6(f)(1). Respondent does not prove that an objectionable rent increase occurred during this time frame. As Petitioner moved to dismiss Respondent's defense and counterclaim by summary judgment, Respondent was required to "lay

bare" his proof of an objectionable rent increase as such. Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 142 (1st Dept. 2010), Johnson v. Phillips, 261 A.D.2d 269, 270 (1st Dept. 1999); Fileccia v. Massapequa General Hospital, 99 A.D.2d 796 (2nd Dept.), *aff'd*, 63 N.Y.2d 639 (1984); Hasbrouck v. Gloversville, 102 A.D.2d 905 (3rd Dept.), *aff'd*, 63 N.Y.2d 916 (1984). As Respondent has not done so, the Court grants Petitioner's motion to dismiss Respondent's first counterclaim sounding in rent overcharge.

Petitioner also moves to dismiss Respondent's counterclaim sounding in attorneys' fees. Given that Petitioner has not prevailed on its cause of action for possession herein and that Respondent has not prevailed on its counterclaim for rent overcharge, the Court finds that the outcome of this proceeding is mixed to the point that neither party is the prevailing party for purposes of determining which party may be entitled to attorneys' fees. 12-14 E. 64th Owners Corp. v. Hixon, 38 Misc.3d 135(A)(App. Term 1st Dept. 2013), 339-347 E. 12th St. LLC v. Ling, 31 Misc.3d 48, 49 (App. Term 1st Dept. 2011). Accordingly, the Court grants Petitioner's motion to dismiss Respondent's second counterclaim sounding in attorneys' fees.

This constitutes the decision and order of this Court.

Dated: New York, New York
November 28, 2016

HON. JACK STOLLER
J.H.C.

EXHIBIT “C”

[*1]

Aurora Assoc., LLC v Locatelli
2017 NY Slip Op 51649(U) [57 Misc 3d 157(A)]
Decided on December 6, 2017
Appellate Term, First Department
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Decided on December 6, 2017
SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
PRESENT: Lowe, III, P.J., Schoenfeld, Shulman, JJ.
570235/17

Aurora Associates, LLC, Petitioner-Landlord-Appellant

against

Raffaelolo Locatelli, Respondent-Tenant-Cross- Appellant.

Landlord, as limited by its briefs, appeals from that portion of an order of the Civil Court of the City of New York, New York County (Jack Stoller, J.), dated November 28, 2016, which denied its motion for summary judgment of possession and granted tenant's cross motion for summary judgment dismissing the petition in a holdover summary proceeding. Tenant, as limited by his briefs, cross-appeals from so much of

the same order as denied his motion for summary judgment on his counterclaims for rent overcharges and attorneys' fees.

Per Curiam.

Order (Jack Stoller, J.), dated November 28, 2016, modified to grant tenant's cross motion for attorneys' fees and to remand the matter to Civil Court for a hearing to determine the reasonable attorneys' fees due tenant; as modified, order affirmed, without costs.

Civil Court properly granted tenant's cross motion for summary judgment dismissing the holdover petition. Notwithstanding the predecessor owner's 1997 purchase of a prior tenant's [Lombardi's] improvements and/or rights under Multiple Dwelling Law §§ 286(6) and (12), the loft unit at issue remained subject to rent regulation, since this pre-1974 building contained six or more residential units and the unit remained residential (*see Acevedo v Piano Bldg. LLC*, 70 AD3d 124 [2009], *appeal withdrawn* 14 NY3d 884 [2010]; *182 Fifth Ave., v Design Dev. Concepts*, 300 AD2d 198 [2002]; *VVV Partnership v Moran*, 10 Misc 3d 130[A], 2005 NY Slip Op 51958[U] [App Term, 1st Dept 2005]; 29 RCNY 2-10[d][2], 2-10[d][4][iii]).

Contrary to the parties' respective contentions, the market value rent ($4,250) charged to the tenant immediately following Lombardi constituted neither a basis for high rent deregulation (*see* Rent Stabilization Code [9 NYCRR] § 2520.11[r][7][ii])nor an illegal rent (*see* Multiple Dwelling Law § 286[6]; 29 RCNY 2-07[d][4][iii]). In any event, for purposes of the rent overcharge counterclaim, no basis was shown to

examine the rental history beyond the statutory four-year look-back period (*see* CPLR 213-a; *see also* Rent Stabilization Law [Administrative Code of City of NY] § 26-516[a][2]; *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]; *Matter of Grimm v State of NY Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]). Thus, the overcharge [*2]counterclaim was properly dismissed.

However, contrary to the motion court's finding that "mixed" results were achieved in this proceeding, tenant is entitled to recover his reasonable attorneys' fees as the "prevailing party" in this litigation pursuant to the lease and the reciprocal provisions of Real Property Law § 234, and the matter is remanded for an assessment on that issue. Although tenant was unsuccessful in the prosecution of his rent overcharge counterclaim, tenant received "substantial relief" on the central relief sought by landlord (*see Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279, 280 [2004]). The "core" of the parties's dispute, as acknowledged by the motion court itself, was the rent regulatory status of the subject unit, which resulted in the dismissal of the underlying holdover proceeding on the merits.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: December 06, 2017