To be Argued by:
EDUARDO A. FAJARDO
(Time Requested: 15 Minutes)

APL- 2021-00004
Appellate Division–First Department
New York County Clerk's Index No. 570235/17

Court of Appeals

of the

State of New York

AURORA ASSOCIATES LLC,

Petitioner-Appellant,

– against –

RAFFAELLO LOCATELLI,

Respondent-Respondent,

– and –

CLEANTECH STRATEGIES LLC, JOHN DOE and JANE DOE,

Respondents.

BRIEF FOR RESPONDENT-RESPONDENT

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QUESTIONS PRESENTED

1. Whether Tenant's Apartment is subject to Rent Stabilization?

The court below properly answered in the affirmative.

2. Whether the Tenant's Apartment is subject to Rent Stabilization independent of the Loft Law?

The court below properly answered in the affirmative.

3. Whether an apartment covered by the Loft Law is considered "temporarily exempt" from Rent Stabilization?

The court below properly answered in the negative.

5. Whether Tenant is entitled to an award of attorneys' fees as the prevailing party?

The court below improperly answered in the affirmative.

PRELIMINARY STATEMENT

This opposition brief is respectfully submitted on behalf of Respondent-Respondent Raffaello Locatelli ("Tenant") in opposition to the appeal of Petitioner-Appellant Aurora Associates LLC ("Landlord") from the Decision and Order of the Appellate Division First Department (the "First Department") entered June 11, 2020 (the "Subject Order), which affirmed the Decision and Order of Appellate Term First Department, entered December 6, 2017 (the "AT Order"), which: (i) affirmed that portion of the Decision and Order of the Civil Court, New York County (Hon. Jack Stoller, J.H.C.), dated November 28, 2016, dismissing the underlying holdover petition inasmuch as Tenant is not a month-to-month tenant but instead is protected by Rent Stabilization, and (ii) reversed that portion of the Housing Court's Decision which had improperly denied attorneys' fees to Tenant.

Landlord commenced the underlying holdover summary proceeding based upon the unfounded claim that Tenant was a free market tenant whose month-to-month tenancy of the subject loft apartment (the "Apartment") had allegedly been properly terminated.

The First Department's Subject Order properly affirmed the AT Order, which in turn had affirmed the Housing Court's dismissal of the underlying holdover petition inasmuch as the Tenant's Apartment is subject to the protections of Rent Stabilization. The First Department further affirmed the AT Order's

reversal of the Housing Court's failure to grant Tenant an award of attorneys' fees inasmuch as Tenant is the prevailing party. Finally, the First Department also affirmed that portion of the AT Order, which declined to award Tenant a rent overcharge.

It is undisputed that, to date, Landlord has failed to ever register the Apartment with DHCR and Landlord has also failed to obtain a Certificate of Occupancy for the Apartment. There is no existing precedent that would support Landlord's position that after a sale of fixtures, a loft apartment without a Certificate of Occupancy, can be rented out as a deregulated fair market residential housing unit.

On this appeal, Landlord is trying to create new law. Landlord would have this Court rule that every apartment that exits Loft Law protection via a sale of fixtures must result in blanket deregulation of each and every kind including the far-reaching embrace of Rent Stabilization. Absent success in securing such a radical holding from this Court, Landlord secondarily argues that the Apartment should nevertheless be somehow deemed deregulated on the specific facts of this matter.

Landlord's position is that the Apartment is deregulated either because a 1998 sale of fixtures by a previous tenant automatically resulted in blanket deregulation or that Landlord was able to evade the applicability of Rent

Stabilization by collecting a so called first rent that was above the deregulation threshold. As will be detailed below, Landlord had no ability to collect a first rent. Landlord's arguments waffle between arguing that Rent Stabilization never applied to the Apartment because of the separate applicability of the Loft Law or that the Apartment was "temporarily exempt" from Rent Stabilization because of the applicability of the Loft Law. The contradiction in Landlord's argument is glaring. If the Apartment could never be separately subject to Rent Stabilization because of the applicability of the Loft Law, then it could not be considered "temporarily exempt" from Rent Stabilization. To be "temporarily exempt" from Rent Stabilization, a housing unit would have first been registered at DHCR as a regulated unit and then registered as "temporarily exempt" for a reason such as owner occupancy, subject to re-application of Rent Stabilization upon the end of the usage subject to a "temporary exemption." Loft Law apartments were never first registered at DHCR and then registered as "temporarily exempt" because of the applicability of the Loft Law. Instead, it is only when landlords elect to continue residential use after a purchase of fixtures that such apartments become subject to Rent Stabilization and must be registered, for the first time, at DHCR.

At one point in time, a "temporary exemption" from Rent Stabilization would have opened the door to achieving deregulation via the charging of a first rent after four years of a "temporary exemption." That loophole has been closed.

And, importantly, no precedent exists that would support Landlord's argument that Loft Law status was ever considered a "temporary exemption" from Rent Stabilization. Accordingly, there was no basis for Landlord charging a first rent.

Plainly stated, Loft Law status was never an exemption from Rent Stabilization but rather a different avenue to protect certain residential tenancies that might not have otherwise been covered by Rent Stabilization. As will be demonstrated below, under any scheme, the Apartment must remain protected by Rent Stabilization.

Landlord's theory that there is an unresolvable conflict between the First and Second Departments is a red herring that has no bearing on the facts of this particular matter. Landlord claims that this Court's decision in Wolinksky v. Kee Yip Realty Corp., 2 NY3d 487, 779 N.Y.S.2d 812 (2004) ruled that Rent Stabilization could never apply to apartments subject to the Loft Law. Contrary to Landlord's position, the Wolinsky ruling stands for the proposition that illegal loft units are not entitled to Rent Stabilization protection when the unit is incapable of being legalized. Moreover, Landlord concedes that 315 Berry St. Corp. v. Hanson Fine Arts, 39 A.D.3d 656, 835 N.Y.S.2d 261 (2d Dep't 2007) is valid precedent where the Second Department found the applicability of Rent Stabilization to a housing unit that was previously covered by the Loft Law.

In this case, it is undisputed that the Apartment can be legalized and that Landlord has, to date, failed to obtain a valid Certificate of Occupancy for the Apartment. Thus, Rent Stabilization properly covers the Apartment.

COUNTER-STATEMENT OF FACTS

Landlord argues that Tenant is a fair market tenant whose month-to-month tenancy was terminated. R. 81-84. Landlord further claims that: a) Tenant's Apartment was subject to an alleged sale of fixtures in 1998 that resulted in permanent exemption from all forms of rent regulation (R. 87-89); and b) the previous owner's charging of $4,250 in monthly rent to a previous tenant in 1999 somehow serves as proof that the Apartment was permanently exempt from Rent Stabilization. R. 90-98.

In support of its claim that a sale of fixtures occurred, Landlord has proffered a photocopy of a handwritten document purporting to be a Sales Record Form, dated March 26, 1998. R. 87-89.

While the alleged sale of fixtures took place in 1998, each page of the document shows a Loft Board "Received" stamp of October 12, 2004. R. 87-89. By attorney's affidavit sworn to on October 11, 2004, also filed with the Loft Board on October 12, 2004, Landlord's then counsel in 2004 acknowledged that the Loft Board had no record of the original Sales Record Form ever having been filed. R. 122. Landlord's attorney in 2004 merely claimed in his affidavit "upon information and belief" that the original Sales Record Form was filed with the Loft Board. R. 121. Landlord does not offer any other proof that a sale of fixtures ever took place. Landlord has not submitted any proof that the Loft Board has

recognized that a sale of fixtures occurred. To the contrary, Landlord itself has admitted that the Loft Board has no record of the original purported 1998 sale of fixtures on file. R. 121.

The basis for Landlord's claim to possession is the mistaken belief that a sale of fixtures somehow forever precludes the applicability of rent regulation.

The Housing Court summarily dismissed the petition, holding that:

> 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 in Acevedo, supra, had a vacancy lease of $2,781.00 in June 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 to Acevedo, supra, the result would be the same, because the 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. . . .
>
> 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.

R. 8-9.

The Appellate Term First Department affirmed the petition's dismissal and revered that portion of the Housing Court's Decision which had denied Tenant's claim for attorneys' fees as the prevailing party. R. 4-5.1. The First Department thereafter affirmed the AT Order. R. 139-141.

ARGUMENT

POINT I

THE SUBJECT BUILDING IS SUBJECT TO RENT STABILIZATION INDEPENDENT OF THE LOFT LAW

The Court of Appeals have repeatedly held, the ETPA is "inclusive, rather than exclusive" and, as such, sweeps within rent stabilization "*all* housing accommodations which it does *not expressly* exempt." Salvati v. Eimicke, 72 NY2d 784, 787, 537 NYS2d 16, 18 (1988)(emphasis added); accord, Gracecor Realty Co., Inc. v. Hargrove, 90 NY2d 350, 355, 660 NYS2d 704 (1997) (finding lodging house cubicles covered because "[t]he ETPA does not contain any exemptions applicable to (the tenant's) living space"); 520 East 81st Street Associates v. Lenox Hill Hospital, 38 NY2d 525, 527, 381 NYS2d 465, 466 (1976) (hospital-owned apartments covered because "none of the kinds of housing accommodations exempted from … coverage encompasses the apartments in question"); See also, Axelrod v. Starr, 41 NY2d 942, 394 NYS2d 639 (1977), aff'g on op. at App. Div. & Special Term, 52 AD2d 232, 383 NYS2d 31 (1st Dep't 1976) (refusing to create unwritten exemption for apartments not explicitly exempted); Ruskin v. Miller, 172 AD2d 164, 164, 567 NYS2d 702, 703 (1st Dep't 1991) ("The ETPA was intended to provide substantive protection more expansive than that in the pre-existing Rent Stabilization Law, and any housing

accommodation not expressly excluded by the ETPA is included in the regulation …," citing *Salvati*). Because neither the ETPA nor the Loft Law contains an exemption for lofts formerly covered by the Loft Law, this loft is covered.

The statutory structure amply supports this conclusion. The statute states that all housing accommodations within New York City are covered, *except* those listed. The statute contains fourteen specific exceptions, *none* of which apply to the Apartment. ETPA §5; Mck. Unconsol. Laws, §§8623 & 8625. Where, as here, a remedial statute contains exceptions, the latter must be strictly construed and "all doubts resolved in favor of the general provision rather than the exception." Farnham v. Kittinger, 83 NY2d 520, 529, 634 NYS2 162, 167 (1994); accord, Walker v. Town of Hempstead, 84 NY2d 360, 643 NYS2 360 (1994); see Mck. Statutes, §213.

Thus, Landlord has failed to refute that independent of the Loft Law, the creation of six or more residential housing units in a building that was built prior to 1974 subjects the created housing units to Rent Stabilization. Indeed, it does not even matter if the housing units were created illegally. It is the mere creation of 6 or more units, which can be legalized, that establishes the applicability of Rent Stabilization. Shubert v. DHCR, 162 A.D.2d 261 (1st Dep't 1990); Wilson v. One Ten Duane Street Realty Co., 123 A.D.2d 198 (1st Dep't 1987); Rosenberg v. Gettes, 187 Misc. 2d 790 (A.T. 1st Dep't); Duane Thomas

Loft Tenants Association v. Sylvan Lawrence Co., Inc., 117 Misc. 2d 360 (Sup. Ct. N.Y. Co. 1982); Rashid v. Cancel, N.Y.L.J., p. 28, col. 3, 33 H.C.R. 893 (A.T. 2d Dep't 2005); Commercial Hotel, Inc. v. White, 194 Misc. 2d 26, 752 N.Y.S.2d 779 (A.T. 2d Dep't 2002); and Lucimar Properties, Inc. v. Owens, Decision/Order dated July 7, 2006, Halprin, J.H.C, LT Index No. 98221/03, N.Y. Co. Hous. Ct. (2003).

Thus, controlling law dictates that an illegal housing unit that can be legalized, such as the Apartment in this case, remains subject to the protections of Rent Stabilization. However, there is no precedent for finding that an apartment without a valid Certificate of Occupancy can be legally deregulated and rented as a fair market housing unit. It is axiomatic that in order to legally and permanently deregulate an apartment, the apartment would first have to be legalized with a valid Certificate of Occupancy. While a unit without a Certificate of Occupancy can be subject to Rent Stabilization, there is no way that a landlord can escape Rent Stabilization without a valid Certificate of Occupancy in place together with a host of other factors. It is simply impossible to deregulate an apartment without a Certificate of Occupancy. In a setting outside of the Loft Law, without a valid Certificate of Occupancy in place, a landlord cannot legally collect any rent let alone a deregulated free market rent. To hold otherwise, would allow a landlord to

charge free market rent for an allegedly deregulated albeit illegal housing unit without a valid Certificate of Occupancy in place.

Landlord has done nothing to legally deregulate the Apartment. Again, Landlord has cited no authority for a housing unit without a valid Certificate of Occupancy being considered exempt from Rent Stabilization. Indeed, if a landlord claims that a housing unit is no longer covered by the Loft Law, then that unit must be legalized and a Certificate of Occupancy obtained if the landlord wants to continue renting the unit for residential purposes. The pertinent and controlling laws mandate that when a landlord does buy fixtures then such landlord's options are to either discontinue residential use and return to commercial use or legalize the apartment for residential use by obtaining a valid Certificate of Occupancy. No landlord has the option of remaining in limbo by claiming that the Loft law no longer applies yet renting the unit as a free market residential apartment without a valid Certificate of Occupancy. Indeed, without a valid Certificate of Occupancy, the landlord has no basis to collect any rent let alone a free market rent.

Aside from other arguments, Landlord could not maintain the summary holdover proceeding because the underlying petition is fatally defective inasmuch as it fails to assert the rent regulated status of the Apartment let alone trying to proffer an explanation as to how the Apartment is exempt from rent

regulation. Indeed, the Housing Courts have refused to recognize deregulation when a housing unit has never even been registered at DHCR, holding that:

> In 111 on 11 Realty Corp. v. Norton, the court refused to find that an apartment had become *deregulated*, even though the tenant had been paying more than $2000 a month. *(189 Misc 2d 389, 398 [Civ Ct, Kings County 2001]*.) The apartment was not automatically *deregulated* because, as in this proceeding, the landlord had never registered the apartment with the DHCR and because that agency never set a legally regulated rent. (Id.) The court expressly found that only regulated apartments can have legally regulated rent. (Id.) Petitioner has not filed any registration with the DHCR and has not notified respondents of the status of their accommodations. Without complying with the proper regulation procedures, petitioner cannot prove that the apartments have been properly *deregulated* by respondents paying a legally regulated rent over $2000. (See id.) No case or statute says otherwise, and the 111 on 11 Realty court's reasoning is persuasive. This court therefore rejects petitioner's claim of *deregulation*.

Tribeca M. Corp. v. Haller, 2003 NYLJ LEXIS 1560, N.Y.L.J., 9/17/03, p. 20, col. 1 (N.Y. Hous. Ct., 2003, Lebovits, J.H.C.), aff'd, 11 Misc. 3d 133 (A), 816 N.Y.S.2d 702 (A.T. 1st Dep't 2006).

POINT II

LANDLORD'S ATTACK ON ACEVEDO IS BASELESS AND WOLINSKY DOES NOT BAR RENT STABILIZATION PROTECTION TO ALL LOFT UNITS

Landlord's counsel insists that Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dep't 2009) is either somehow not applicable to this matter or that the ruling in that case is wrong. The crux of Landlord's appeal is that this Court should rule in a manner that ignores and/or disavows the First Department's holding in Acevedo. Landlord, however, cannot escape the directly on point applicability of the First Department's ruling in Acevedo. See also, VVV Partnership v. Moran, 10 Misc. 3d 130(A), 809 N.Y.S.2d 484 (A.T. 1st Dep't 2005).

Both the Appellate Term and the First Department properly affirmed the Housing Court's dismissal of the underlying holdover petition citing Acevedo. The pertinent facts in Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dep't 2009) are practically identical to the facts in this dispute. Thus, in Acevedo:

> (i) the building was constructed prior to 1974 and contained more than six residential units;
>
> (ii) the Loft Board ruled that the subject building was an IMD in 1985;

(iii) the landlord purchased the subject loft apartment's prior occupant's rights under MDL §286(12) in 1995;

(iv) after the landlord's purchase of prior occupant's rights under MDL §286(12), the subject apartment continued being used for residential purposes;

(v) in 1999 (which was two years after the enactment of the 1997 Rent Stabilization Code amendment, which codified what is commonly referred to as the four year temporary exemption rule under NYCRR §2526.1(a)(3)(iii)[1997]), the landlord rented the apartment to a tenant at an "unregulated market rent" with a monthly rent of $2,781, which rent was above the luxury rent threshold at that time;

(vi) in 2005, six years after commencement of the subject tenancy, the tenant sought a declaration that his apartment was subject to Rent Stabilization;

(vii) the landlord asserted that the prior owner's purchase of fixtures resulted in the permanent inapplicability of rent regulation;

(viii) the tenant argued that the continued residential use of the apartment in a pre 1974 building with six or more units triggered Rent Stabilization protection;

(ix) the court rejected the landlord's "assertion that the sale of the Loft Law rights here ended the unit's eligibility for rent stabilization;" and

(x) the Appellate Division First Department affirmed the lower court's granting of summary judgment in the tenant's favor declaring that Rent Stabilization applied to the subject apartment.

The facts of the instant litigation mirror Acevedo as follows:

(i) The subject building was constructed prior to 1974 and contains six or more residential units;

(ii) The building was declared an IMD in 1983;

(iii) Landlord claims that the prior owner purchased the fixtures in 1998;

(iv) After the purported purchase of fixtures, the subject apartment has continuously been rented for residential purposes;

(v) In 1999 Landlord started renting the unit for a monthly rent over the luxury rent threshold;

(vi) Tenant entered into possession in 2009; and

(vii) Landlord has done nothing to legally deregulate the Apartment.

Try as it has, Landlord cannot distinguish or somehow escape the squarely on point applicability of Acevedo.

Another pending case that has properly applied Acevedo is Costanzo v. Joseph Rosen Found., Inc., 61 Misc. 3d 730, 83 N.Y.S.3d 830 (N.Y. Sup . Ct. 2018), affirmed,178 A.D.3d 501, 114 N.Y.S.3d 336 (1st Dep't 2019), 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."

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.

*** *** ***

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]).

*** *** ***

> 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*."

(emphasis added). 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.

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 failed to do what is necessary to obtain a Certificate of Occupancy. During oral argument of the summary judgment motion and cross-motion before the Housing Court, Landlord's counsel readily relayed that the Landlord was sill in the process of legalizing the Apartment. In this regard, Landlord counsel stated in open court as follows:

> And here, this unit is being legalized. It's in the process of being legalized.

R. 21.

Landlord has pointed out conflict between the First and Second Departments. Respectfully, if this Court finds that there is conflict that needs resolving, a restatement of the Wolinsky holding should suffice to resolve any such conflict. Landlord cites some case where the Second Department has purported to apply Wolinsky in manner that precludes the applicability of Rent Stabilization to any illegally converted premises. Wolinsky, supra 2 NY3d at 493, however, stands for the proposition that an illegally converted premises that is incapable of being legalized into a residential housing unit because of zoning cannot fall under the ambit of Rent Stabilization's protection.

Landlord cites Caldwell v. American Package Co, Inc., 57 A.D.3d 15 (2d Dep't 2009) in support of its argument that the First and Second Department are at odds. The Caldwell case involved premises that had been expressly rented

for commercial purposes and was illegally used residentially by the tenants apparently without the landlord's consent. It was undisputed that the subject premises in Caldwell was never subject to Loft Law protection because the unit was used residentially well after the statutory deadline date necessary for the Loft Law to apply. The Second Department affirmed that lower court's declaratory judgment holding that an illegally converted Apartment could not be protected by Rent Stabilization. The fact that the Caldwell premises was never subject to the Loft Law makes its holding inapplicable to the facts of our case. The Apartment in the instant matter was subject to the Loft Law and there is nothing that would bar the premises from being legally used as a residential housing unit. Landlord is obligated to do whatever is necessary to obtain a Certificate of Occupancy.

Certain Second Department holdings adhere to the ruling in Bennett v. Hawthorne Village, LLC, 56 A.D.3d 706, 870 N.Y.S.2d 33 (2d Dep't 2008), which expounded the satisfaction of a three-tiered analysis before conferring Rent Stabilized status on a unit illegally converted from commercial to residential use, namely: 1) the building owner knew of the illegal conversation; 2) the zoning allows residential use; and 3) the owner sought legalization of the subject premises. Landlord has also cited the more recent case of Mesorole A-B 81-93 Equities Corp. v. Russo, 66 Misc. 3d 136(A) (A.T. 2d Dep't, 11th & 13th Jud. Dist. 2020), which follows the Bennett analysis. Should this Court choose to uphold the

Bennett analysis, the Apartment in this litigation would remain subject to Rent Stabilization inasmuch as Landlord knowingly rented the Apartment as a residential unit and Landlord continues to seek the issuance of a Certificate of Occupancy and there is no zoning restriction prohibiting residential use. Moreover, Tenant in this matter had absolutely nothing to do with any conversion from commercial to residential use.

Landlord's citation to Bravo v. Marte, 64 Misc.3d 1223 (A) (Hous. Ct., Kings Co. 2019) does not lend any support to its claim that the Apartment should be treated as deregulated. Housing Court Judge Slade meticulously reported the various pertinent holdings that have led to varying decisions in the Second Department but ultimately the Housing Court decided that the subject commercial unit was not proven to be used for residential purposes to the extent necessary for the building to reach the magic number of six residential units needed for Rent Stabilization to apply. Landlord's reliance on Swing v. NYC Loft Board, 180 A.D.2d 529 (1st Dep't 1992) and 19 W. 36th Holding Corp. v. Parker, 193 Misc. 2d 519, 749 N.Y.S.2d 824 (Hous. Ct. N.Y. Co. 2002) is misplaced in view of the fact that both those decisions predate Wolinsky. Likewise, Landlord citation to various non-controlling Loft Board decisions at the agency level are superfluous inasmuch as this is not a matter of first impression that might necessitate examining precedent outside of case law.

POINT III

THE FOUR YEAR TEMPORARILY EXEMPT RULE DOES NOT APPLY

Notably, while the Acevedo holding makes no mention whatsoever of loft units being "temporarily exempt" from Rent Stabilization under the ETPA, Landlord has fabricated the "temporarily exempt" theory and misapplied it in a Loft setting in order to advance its claim that the subject apartment is exempt from rent regulation because the rent collected after the purported purchase of fixtures was above the luxury rent threshold. At page 21 of its counsel's appellate brief, Landlord erroneously states that "[t]his temporary exemption from Rent Stabilization due to regulation under the Loft Law is discussed by the Appellate Court in *Acevedo."* Contrary to Landlord's misleading argument, however, the "temporarily exempt" theory was not raised in Acevedo because it has no application whatsoever to the issues that were at the heart of that (and the instant) dispute. Notwithstanding that the Acevedo holding makes no mention of loft units being "temporarily exempt" from Rent Stabilization under the ETPA, Landlord insists in trying to force a round peg into a square hole.

The reason that the "temporarily exempt" theory was not raised in Acevedo is because it has no viability. The tenant who fought for and won a declaration of applicability of Rent Stabilization in Acevedo also paid a rent higher

than the luxury rent threshold (namely $2,781) from the inception of his tenancy in 1999.

The New York City Rent Guidelines Board defines "temporarily exempt" housing accommodations as:

> A temporarily exempt accommodation is one which is not presently occupied by a rent stabilized tenant, but may be covered by rent stabilization if the tenancy changes. For example, the accommodation:
>
> 1. Is occupied by the owner or members of the owner's immediate family.
> 2. Is occupied by an employee who is not paying rent.
> 3. Is rented solely for business or professional use.
> 4. Is in a hotel or SRO and houses a transient occupant.
> 5. Is occupied by a tenant not using the unit as his or her primary residence, as determined by a court of competent jurisdiction.
> 6. Is owned by a non-profit institution and is occupied by a tenant who is affiliated with that institution, in a building which also contains non-affiliated tenants.
>
> *The owner is required to register these apartments on an annual basis***.**

See http://www.nycrgb.org/html/glossary_defs.html#tu (emphasis added).

Had a Loft unit ever been intended to be "temporarily exempt" then surely it would have been specifically included in the definition of "temporarily exempt." Notably, there is no precedent that defines a unit under the Loft Law protections to be a "temporarily exempt" unit under Rent Stabilization. It bears noting that all of the above definitions of "temporarily exempt" involve situations

where a housing unit was initially properly registered at DHCR with a legal rent and then subsequently registered as "temporarily" exempt with no rent being collected during the time period of the "temporary exemption."

Landlord goes on to proffer an argument that certain apartments no longer covered by the Loft Law may "revert" to coverage under Rent Stabilization. Landlord's use of the word "revert" meaning go back to ties into Landlord's flawed theory that units covered by the Loft Law are "temporarily exempt" from Rent Stabilization notwithstanding this Court's ruling in Wolinsky, which stated in part that "illegal conversions are not expressly exempted from ETPA coverage" albeit "the Legislature did not view the ETPA as safeguarding the interests of the 'loft pioneers.' " Wolinsky, supra 2 NY3d at 493. Landlord's argument lacks integrity because Landlord repeatedly states that Rent Stabilization did not apply to loft units converted to residential usage, which necessitated the creation of the Loft Law. If Rent Stabilization could never apply to loft units then a "temporary exemption" would be nonsensical. It is impossible to be deemed "temporarily exempt" from a rent regulation scheme that never applied in the first place. In any event, there is no basis for Landlord's claim that units covered by the Loft Law are "temporarily exempt" from Rent Stabilization.

Moreover, Landlord improperly argues that, but for the ruling in Acevedo, the purchase of fixtures results in automatic and permanent deregulation.

That conclusion is a fallacy. The Acevedo case itself was not new law but rather the application of previous rulings rendered by this Court. Thus, in Acevedo this Court held:

> We reject the owner's assertion that the sale of the Loft Law rights here ended the unit's eligibility for rent stabilization. In 182 Fifth Ave., this Court confronted a circumstance identical to this one: the owner of a loft covered by the Loft Law purchased the protected occupant's rights under Multiple Dwelling Law § 286 (12) and then leased the unit for residential purposes. We held that HN3 where, as here, the building contains six or more residential units, it is subject to rent stabilization by virtue of ETPA "notwithstanding the sale of Loft Law rights by a prior tenant" (300 AD2d at 199; see also Matter of 315 Berry St. Corp. v Hanson Fine Arts, 39 AD3d 656, 835 NYS2d 261 [2007], lv dismissed 10 NY3d 742, 882 NE2d 898, 853 NYS2d 285 [2008]).
>
> The result in 182 Fifth Ave. and its progeny is amply supported by the plain language of Multiple Dwelling Law § 286 (12), which reads as follows:
>
> > "No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article 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" (emphasis added).
>
> By its own terms, Multiple Dwelling Law § 286 (12) applies only to the purchase of an occupant's Loft Law rights. The statute says nothing about rent stabilization or

> ETPA; it says nothing about any subsequent tenant's rights; indeed, it says nothing about deregulating units in any way whatsoever. The purchase of rights permitted in this section is thus necessarily limited to an occupant's rights under the Loft Law.

Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 127, 891 N.Y.S.2d 41, 42-43 (1st Dep't 2009), citing 182 Fifth Ave v. Design Dev. Concepts, Inc., 300 A.D.2d 198, 751 N.Y.S.2d 739 (1st Dep't 2002).

POINT IV

LANDLORD COULD NOT CHARGE A "FIRST RENT"

Contrary to Landlord's flawed theory, RSC §2526.1(a)(3)(iii) does not serve to divest Tenant of the protections afforded by Rent Stabilization. Indeed, this is not the first time that a landlord has tried to rely upon RSC §2526.1(a)(3)(iii) to effectuate deregulation albeit to no avail. In this regard, in the case Arnold v. 4-6 Bleecker LLC, 2017 N.Y. Misc. LEXIS 2139 (N.Y. Sup. Ct., Index No.: 158541/13), the New York Supreme Court held as follows:

> [Landlords-Defendants] simply rehash their prior argument that the legal rent for apartments 2E and 3E should be determined in accordance with *RSC §2526.1(a)(3)(iii)*. Relying on that provision, defendants assert that those apartments were temporarily exempt from regulation, and upon the expiration of those temporary exemptions, the legal rent is the rent agreed upon by the landlord and the ***first tenant***. The Court rejected that identical argument as without merit in both the original decision and upon reargument. . . .

*** *** ***

> The Court rejected [Landlord's] reliance on the language in *RSC §2526.1(a)(3)(iii)* which states that "the legal regulated rent shall be the rent agreed to by the owner and the *first* rent stabilized *tenant* taking occupancy after such vacancy or temporary exemption expires." Significantly, the 2014 amendments to the Rent Stabilization Code substantially changed *section 2526.1(a)(3)(iii)* and eliminated that language. *Section 2526.1(a)(3)(iii)* now provides as follows:
>
> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to *section 2520.11* of this Title on the base date, the legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under *section 2522.8* of this Title, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this code.

2017 Misc. LEXIS 2139; aff'd, 165 A.D.3d 493, 86 N.Y.S.3d 22 (1st Dep't 2018).

Thus, by amending RSC §2526.1(a)(3)(iii), the legislature made it unmistakably clear that the "temporary exemption" rule was never meant to result in deregulation of any housing unit (let alone a premises that was previously subject to Loft Law protections until a sale of rights and fixtures occurred) via the use of a so called first rent. The courts should therefor apply RSC

§2526.1(a)(3)(iii) as amended. See Arnold v. 4-6 Bleecker LLC, supra, holding that:

> Rent Stabilization Code §2527.7 which expressly provides in relevant part that "[e]xcept as otherwise provided herein, unless undue hardship or prejudice results therefrom . . . where a provision of this Code is amended or an applicable statute is enacted or amended during the pendency of a proceeding, the determination shall be made in accordance with the changed provision."

Accordingly, the Appellate Term First Department, citing the exemption language codified in RSC §2520.11(r)(7)(ii), properly held that the above threshold rent that was charged to the tenant immediately following the purported purchase of fixtures in 1998 could not constitute a basis for high rent deregulation. R. 5.

Moreover, the longstanding tradition has always been to zealously protect rent regulation and the Court of Appeals has expressly stated that the central purpose of Rent Stabilization is to combat the widespread lack of affordable housing. Manocherian v. Lennox, 84 N.Y.2d 385 (1994).

Not only should the older and now amended version of RSC §2526.1(a)(3)(iii) not be relied upon to deregulate the Apartment, but even the previous incarnation of §2526.1(a)(3)(iii) did not define units covered by the Loft Law as “temporarily exempt” from Rent Stabilization.

Notably, the cases cited by Landlord in so called support of charging a non regulated "first" rent without even securing a valid Certificate of Occupancy are inapposite. In this regard, Landlord cites 73 Tribeca LLC v. Greenbaum, 36 Misc. 3d 1217(A), 959 N.Y.S.2d 92 (N.Y. Hous. Ct. 2012), claiming that "[t]he sale of improvements or rights is considered a deregulating event." The facts in 73 Tribeca LLC are distinguishable from our case in that the building in 73 Tribeca LLC contained "fewer than six (6) residential units." Accordingly, outside of the Loft Law, the building in 73 Tribeca LLC could not have any other independent basis for the applicability of Rent Stabilization. Moreover, the lower court's ruling in 73 Tribeca LLC was reversed by 73 Tribeca LLC v. Greenbaum, 44 Misc. 3d 16, 988 N.Y.S.2d 837 (A.T. 1st Dep't 2012), wherein the Appellate Term First Department ruled that the landlord failed to establish that a sale of fixtures had even occurred.

Landlord also cites Hatanaka v. Lynch, 304 A.D.2d 325, 756 N.Y.S.2d 578 (1st Dep't 2003), where a first rent was permitted inasmuch as the subject apartment had been rented by an educational institution to students for more than four years. Thus, the apartment in Hatanaka v. Lynch clearly was "temporarily exempt" from rent stabilization.

Likewise, Landlord's reliance upon Walsh v. Salva Realty Corp., 2009 WL 2207516, 2009 Slip. Op. 31573(U) (N.Y. Sup. Ct. 2009) is also

misguided. In Walsh, the landlord obtained a Certificate of Occupancy in 2004 and presumably renovated the subject unit in such a manner as to create a free market unit. In our case, Landlord cavalierly continued renting for residential purposes without renovating or obtaining a Certificate of Occupancy.

Another lower court ruling that provides an example of how a landlord could exit the Loft Law and evolve into the free market is Rubin v. Decker, 52 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2016). The facts in Rubin involved the creation of a residential apartment from the combination of a total of 5 separate units (only one of which may have previously been subject to Loft Law protection). Thus, in Rubin the New York Supreme Court properly ruled that a newly created luxury apartment, which initially rented for $6,995 a month after issuance of a final Certificate of Occupancy should not be subject to rent regulation. In our dispute, Tenant's Apartment was not substantially rehabilitated into a new unit five times the size of a previous housing accommodation covered by the Loft Law. Indeed, Tenant's Apartment remains the humble unrenovated residential loft unit that it has always been and Landlord has yet to obtain a Certificate of Occupancy.

POINT V

TENANT IS ENTITLED TO AN AWARD OF HIS ATTORNEYS' FEES

Tenant is entitled to collect attorney's fees pursuant to RPL § 234, which states, in pertinent part:

> Where a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease. . . there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant in . . . the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law . . . by way of a counterclaim in any action or summary proceeding commenced by the landlord against the tenant.

Paragraph 19 of Tenant's initial Lease, is a unilateral attorneys' fees provision in favor of Landlord. R. 70.

Since Landlord's eviction proceeding was dismissed and the dismissal was upheld because Tenant is a Rent Stabilized tenant, the reciprocity provision of RPL § 234 applies in this case, and Tenant is entitled to an award of attorneys' fees.

Once again, on appeal, Landlord merely repeats its argument that the Apartment is free market. It should be noted that the crux of this litigation

involves legal possession of the Apartment, and thus the First Department properly affirmed the Appellate Term's reversal of that portion of the Housing Court's Decision that had denied Tenant attorneys' fees inasmuch as Tenant was and remains entitled to attorneys' fees as the prevailing party.[1]

CONCLUSION

For all of the foregoing reasons, the dismissal of the underlying petition and the award of attorneys' fees to Tenant should be affirmed.

Dated: Rhinebeck, NY
June 1, 2021

Respectfully submitted,

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[1] Tenant awaits the outcome of this appeal before any attempt to ultimately restore this matter to the Housing Court for a determination on the amount of the judgment for attorneys' fees that Tenant is entitled to against Landlord as the prevailing party in this litigation.

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

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Dated: June 1, 2021