To Be Argued By:
Joseph Goldsmith
Time Requested: 30 Minutes

APL-2021-00004

New York County Clerk's Index No. 570235/17

Court of Appeals

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 PETITIONER-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1 (f) of the Rules of Practice of the Court of Appeals of the State of New York, Petitioner-Appellant, Aurora Associates, LLC, hereby states that it has no parent corporation or subsidiaries. Petitioner-Appellant further states it has the following affiliate: United American Land LLC.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13 (a) of the Rules of Practice of the Court of Appeals of the State of New York, Petitioner-Appellant states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

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QUESTIONS PRESENTED

Q1. Did the Appellate Division, First Department, err in holding that the subject premises, an Interim Multiple Dwelling, is subject to the Emergency Tenant Protection Act ("ETPA") after the sale of rights and improvements pursuant to Multiple Dwelling Law §§286 (6) and 286(12)?

A1. Yes.

Q2. Did the Appellate Division, First Department, err in affirming the Order of the Appellate Term, First Department, entered on or about December 6, 2017, which reversed the Decision and Order of the Civil Court of the City of New York, dated and entered in the office of the Clerk of said Court on November 28, 2016, and held that the subject tenant is entitled to recover his reasonable attorneys' fees as the putative "prevailing party" pursuant to the lease between the parties and the reciprocal provisions of Real Property §234?

A2. Yes.

STATEMENT OF JURISDICTION

On December 29, 2020, the Appellate Division, First Department ("First Department") granted the application by Petitioner-Appellant, Aurora Associates, LLC ("Appellant") for leave to appeal the Subject Order.[1]

Moreover, the record reflects that this Appeal is timely submitted. A final judgment was rendered by the Civil Court of the City of New York ("Civil Court"), by Decision/Order, dated and entered in the office of the Clerk of said Court on November 28, 2016 ("Civil Court Decision/Order"). (R. 6-10). Pursuant to CPLR 5513, Appellant appealed the Civil Court Decision/Order (and Respondent cross-appealed). After oral argument on November 13, 2017, the Appellate Term, First Department ("Appellate Term"), issued an Order, entered on or about December 6, 2017 ("Appellate Term Order"), modifying the Civil Court Decision/Order and otherwise denying Appellant's appeal and partially granting Respondent's cross-appeal. (R. 4-5). Appellant and Respondent both sought leave from the Appellate Division, First Department ("First Department"), to appeal the Appellate Term Order, which was granted by Order, dated June 18, 2019 ("Leave Order"). (R. 2-3). The First Department heard oral argument on January 21, 2020 and issued the Subject Order on June 11, 2020 affirming the Order of the Appellate Term. (R. 139-141).

[1] Citations to the record on appeal are to "R. __"

Pursuant to CPLR 5513 (b), Appellant and Respondent timely sought leave to reargue the Subject Order. Appellant further sought alternatively for leave to appeal the Subject Order to the Court of Appeals. On December 29, 2020 the First Department denied both motions to reargue, but granted Appellant leave to appeal the Subject Order to the Court of Appeals. (R. 137-138).

PRELIMINARY STATEMENT

Appellant submits the instant appeal of the Subject Order, which affirmed the Appellate Term Order, which modified and thereafter upheld the portion of the Civil Court Decision/Order dismissing Appellant's holdover proceeding brought due to Respondent's failure to vacate the subject unregulated premises after the expiration of his term. The Subject Order also upheld the portion of the Appellate Term Order which affirmed the denial of claim for overcharge of rent by Rafaello Locatelli ("Respondent"), but reversed the portion of the Civil Court Decision/Order which dismissed Respondent's counterclaim for attorneys' fees. It is respectfully submitted that the First Department erred in rendering the Subject Order and it should be reversed.

This appeal arises from Appellant's petition to recover possession of Loft 3B ("Premises") located in the building known as and by the street address of 78 Reade Street, New York, New York ("Building") on the grounds that Respondent failed to vacate the Premises after the expiration of the term of his tenancy.

Since 1983, the Premises has been a registered Interim Multiple Dwelling ("IMD") unit, subject to regulation under the Article 7-C of the Multiple Dwelling Law ("Loft Law"). As such, the Premises was exempt from the Emergency Tenant Protection Act ("ETPA"), the Rent Stabilization Law ("RSL"), and Rent Stabilization Code ("RSC") during the period of time it was subject to regulation

under this alternate State Law. In 1998, the former protected IMD tenants of the Premises sold all of their rights and improvements to Appellant's predecessor-in-interest pursuant to the Loft Law, which consequently provides that the sale exempts the Premises from rent regulation.

The issue thus brought up for review by this Court is whether, after the exemption from rent regulation pursuant to the Loft Law, the Premises becomes subject to regulation pursuant to the ETPA. In summary, Appellant submits that it does not, either because the first rent charged exceeded the high rent threshold at the time it was paid or because the purchase of the rights and fixtures from the former Loft Law tenant resulted in the rent deregulation of the unit which did not then become subject to ETPA. The Second Department decisions that have been issued on this subject indicate that the Premises would not become subject to regulation pursuant to the ETPA. It is therefore submitted that the First Department's erroneous finding that the Premises did become subject to regulation pursuant to the ETPA creates an unresolvable conflict between the First and Second Departments, as well as between the Loft Law and the ETPA.

The incorrect interpretation of *Acevedo v Piano Bldg, LLC*, 70 AD3d 124 (1st Dept 2009), *appeal withdrawn*, 14 NY3d 884 (2010) ("*Acevedo*") by the First Department is in direct and indisputable conflict with the rulings of the Second Department of the Appellate Division, and its lower courts, which regularly hold

that lofts are not subject to Rent Stabilization after the purchase of rights and fixtures pursuant to MDL §§286 (6) and 286(12). The First Department's application of *Acevedo* to this matter conflicts with the foregoing. It 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 (2004) ("*Wolinsky*"), which expressly ruled that the ETPA did not serve to regulate units subject to the Loft Law. As the courts of the Second Department have repeatedly held: the Loft Law would have been unnecessary if protection for the residents of such premises was already available under ETPA.

Even if this Court were to disagree with the exclusion of IMDs from ETPA and Rent Stabilization found by the Second Department, the First Department's interpretation of the ruling in *Acevedo* and the application of this interpretation to the instant controversy is still erroneous and has created an unresolvable conflict between the Loft Law and the ETPA.

Even if this Court finds that the Premises could theoretically be subject to Rent Stabilization after the purchase of rights and fixtures pursuant to MDL §§286 (6) and 286(12), the Loft Law provides that an owner who purchases the improvements may rent the unit at market value. Here, the owner of the Building purchased the improvements from the former Loft Law tenant and would therefore be entitled to charge market rent pursuant to the Loft Law, which it did – it charged

and collected a rent far in excess of $2,000. In addition, in 1998, the ETPA and RSC similarly provided that an owner was entitled to collect a new "first rent" from an incoming tenant if the relevant premises had been vacant or temporarily exempt from the ETPA for four (4) or more years. Accordingly, both statutory schemes entitled Appellant to charge a rent in excess of the deregulation threshold of $2,000.00.

Here, for the fifteen (15) years between 1983 and 1998, the rents charged to the tenants of the Premises were regulated by the Loft Law and therefore exempt from Rent Stabilization. The first rent charged and collected for the Premises after the sale of rights and improvements pursuant to the Loft Law substantially exceeded the applicable statutory threshold for regulation pursuant to the ETPA and RSC. Therefore, the Premises was permanently exempted from coverage pursuant to ETPA and RSC because it became vacant after June 19, 1997 - but before the Rent Act of 2019 - with an initial legal rent in excess of the applicable statutory threshold.

The Subject Order nonetheless incorrectly held the Premises remains subject to the ETPA after the sale of rights and improvements pursuant to the applicable provisions of the Loft Law despite the fact that the first rent charged for the Premises after the sale exceeded the ETPA/RSC's statutory threshold for regulation. The lower courts' support for this position is predicated wholly upon their misinterpretation of the First Department's decision in *Acevedo*.

However, with this interpretation and application of *Acevedo*, the Subject Order inappropriately created what is effectively a new class of apartments - one that is neither completely subject to the Loft Law, nor completely subject to the ETPA and the RSC, and is incapable of being deregulated notwithstanding the applicable provisions in both statutory schemes which expressly provide for deregulation.

It is improper for the courts to cherry-pick which provisions of the ETPA and RSC to apply to the Premises. If *Acevedo* stands for the proposition that all Loft Law units should be re-regulated as of right by virtue of the ETPA after the purchase of Loft Law rights and improvements from a protected IMD tenant, then these units must also be allowed to be exempted from coverage pursuant to the terms of the ETPA and RSC. However, the First Department does not provide an explanation or authority as to why the Premises should not be subject to these exemption provisions of the ETPA and RSC.

As will be detailed herein, the misinterpretation of the ruling in *Acevedo* so as to create an absolute rule mandating regulation of a former IMD unit under the ETPA nullifies and preempts the Loft Law's provisions regarding deregulation, the prior rulings of the New York City Loft Board ("Loft Board") holding that a premises is deregulated after a sale of rights and improvements, the Loft Law's provision providing that an owner who purchases the improvements may rent the unit at market value, 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 far-reaching result countermanding the Legislature and overturning scores of the Loft Board's rulings was intended.

To the contrary, the plain language of the *Acevedo* decision indicates that the court therein held only that there is no blanket exclusion from eligibility for rent regulation pursuant to the ETPA subsequent to a sale of rights and improvements under the Loft Law. The *Acevedo* court did not make the more expansive and untenable determination that an absolute rule exists which renders such units permanently and perpetually subject to the ETPA without any possibility of deregulation.

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 the First Department's holding in the Subject Order is upheld, as shall be discussed herein, there would be numerous conflicting provisions of the Loft Law, ETPA, and RSC that would apply to the Premises and to similarly situated units.

Accordingly, for the reasons set forth herein, it is respectfully submitted that the First Department erred in rendering the Subject Order and upholding the Appellate Term Order affirming the portion of the Civil Court's Decision/Order

which dismissed Appellant's holdover proceeding and reversing the portion of the Civil Court's Decision/Order which dismissed the Respondent's counterclaim for attorneys' fees.

STATEMENT OF THE CASE:

A. Parties.

Appellant is the owner of the Building pursuant to a deed dated June 30, 1998. (R. 57-61).

Respondent is the tenant of record of the Premises in the Building, who entered into possession of the Premises pursuant to the terms of a written lease with Appellant, as landlord/owner, dated July 2009. (R. 68-76). After its initial expiration, Respondent's last written lease was continually renewed and extended. Most recently, Respondent's last written lease was extended by written agreement, dated September 29, 2014, for a term of one (1) year commencing on December 1, 2014 and ending on November 30, 2015 (collectively, "Lease"). (R. 67).

Upon expiration of the most recent renewal lease, Respondent remained in possession of the Premises as a month-to-month tenant. (R. 30, 77-80). Respondents Cleantech Strategies LLC, "John Doe" and "Jane Doe" (collectively with Respondent, "Respondents") were named as parties because, upon information and belief, they are undertenants of Respondent. (R. 31).

The term for which the Premises was rented to Respondent expired on April 30, 2016 by virtue of the fact that, on March 28, 2016, which was more than thirty (30) days prior to the expiration of the term, a Thirty (30) Day Notice of Termination of Month-to-Month Tenancy Pursuant to Section 232-A of the Real Property Law

("Termination Notice") was served upon all Respondents terminating the tenancy as of April 30, 2016 and advising Respondents to remove from the Premises on or before this date. (R. 81-84).

B. Procedural History.

Appellant 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 by causing a holdover Notice of Petition and Petition, dated May 5, 2016 ("Petition"), to be duly served upon Respondents. (R. 34-52).

On or about June 21, 2016, Respondent interposed an unverified Answer generally denying the allegations set forth in the Petition and alleging, *inter alia*, that Appellant failed to register the Premises and Building with the New York State of Division of Housing and Community Renewal ("DHCR"). Respondent interposed two (2) counterclaims for illegal rent overcharge and for attorneys' fees incurred in connection with the defense of the Civil Court proceeding, respectively. (R. 53-56). No actual claim that the Premises were subject to rent regulation under the Loft Law or the Rent Stabilization Law or Code was submitted by Respondent in his Answer.

Appellant brought a motion for summary judgment in its favor on the Petition and/or dismissal of Respondent's affirmative defenses. (R. 26-109). In its motion, Appellant established that it is the landlord and owner of the Building, pursuant to a deed. (R. 57-61). Appellant further established that the Building and Premises are

an IMD, subject to the Loft Law, and are duly registered with the Loft Board and that, pursuant to MDL §284 (2), there is currently an effective registration statement on file with the Loft Board in which the owner has designated a managing agent, a natural person over 21 years of age, to be in control of and responsible for the maintenance and operation of the dwelling. (R. 64-66).

Appellant also established that from 1983 until 1998 the Premises was subject to and regulated by the Loft Law. Appellant further established that in 1998, fifteen (15) years after the initial IMD registration was filed with the Loft Board, the rent for the Premises was 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 improvements to Appellant's predecessor-in-interest pursuant to MDL §§286 (6) and 286 (12). In support of its motion, Appellant submitted a true copy of the record of the earlier sale of rights and improvements pursuant to MDL §§286 (6) and 286 (12) in the Premises which was duly filed with the Loft Board. (R. 87-89).

Appellant's motion also established that, after the prior IMD tenants' vacatur, Appellant renovated the Premises and thereafter leased it to John Chen, as evidenced by a true copy of the written lease, dated December 16, 1998, with a monthly "first rent" of $4,250.00[2], which was well in excess of the statutory deregulation threshold

[2] It must be noted that in the Decision & Order, the Civil Court mistakenly and incorrectly stated that the "first rent" for the Premises was $2,001.00 despite the fact that the lease to Mr, Chen

pursuant to the ETPA of $2,000.00 per month. (R. 90-98). To further evidence the foregoing, Appellant submitted true copies of a rent ledger, several rent checks tendered by Mr. Chen, and an Affidavit from Appellant. (R. 99-109, 28-33).

The documentary evidence established that over a decade thereafter, Respondent entered into possession of the Premises pursuant to the terms the Lease. (R. 68-76).

In response to Appellant's motion for summary judgment at the Civil Court, Respondent made a cross-motion seeking the entry of an order summarily dismissing the Petition and awarding Respondent a judgment on his two (2) counterclaims. (R. 110-122).

The Civil Court Decision/Order denied Appellant's motion for summary judgment and dismissed the summary holdover proceeding. However, the Civil Court properly dismissed Respondent's second affirmative defense, along with his first counterclaim for rent overcharge, and second counterclaim for attorneys' fees. (R. 6-10). The Civil Court found that although the Premises was subject to rent regulation pursuant to the RSL and RSC, the rent charged to Respondent was the Legal Regulated Rent and there was no rent overcharge. (R. 6-10).

reflects $4,250.00 as the rent and that $2,001.00 was only an initial partial month at the commencement of the lease term. (R. 99-109).

An appeal and cross-appeal were filed. Predicated upon a misinterpretation of *Acevedo*, the Appellate Term partially affirmed and partially reversed the Civil Court's Decision/Order. (R. 4-5.1). The Appellate Term incorrectly held that the Premises is subject to Rent Stabilization by virtue of the ETPA because the Building contains six (6) or more residential units, irrespective of 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 exceeded the statutory deregulation threshold pursuant to the ETPA. (R. -5-5.1). The Appellate Term further erred in reversing the Civil Court's dismissal of Respondent's counterclaim for attorneys' fees (R. 5.1). The Appellate Term correctly affirmed that portion of the Civil Court Decision/Order that found the rent charged to Respondent was the Legal Regulated Rent and there was no rent overcharge. (R. 5-5.1).

An appeal and cross-appeal of the Appellate Term Order were filed by the parties. However, the First Department erroneously affirmed the Appellate Term Order in all respects, similarly relying upon an incorrect and overly expansive interpretation of the import of *Acevedo.* (R. 139-141).

Respondent moved before the First Department for leave to reargue the Subject Order. Appellant cross-moved for leave to reargue the Subject Order and/or for leave to appeal the Subject Order to the Court of Appeals.

The First Department denied both applications for leave to reargue and granted the portion of Appellant's motion which sought leave to appeal to this Court as a matter of law on the ground that the correctness of its determination ought to be reviewed by the Court of Appeals. (R. 137-138).

ARGUMENT

RSC §2520.11(e) and (n) exclude from Rent Stabilization commercial or other nonresidential units and housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974. As discussed *infra*, both the DHCR and the 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 (Civ Ct, New York County 1981) (internal citation omitted); *See also Baxter v Captain Crow Mgt.*, 128 Misc 2d 254 (Sup Ct, New York County, 1985).

Prior to *Acevedo,* the courts - including this Court's holding in *Wolinsky* - held that the prior-enacted ETPA did not apply to IMD units or commercial units illegally converted to residential. As a result, the Loft Law was enacted in 1982 specifically to deal with the issue of illegally converted loft units. In order to qualify for coverage as an IMD building in the first instance, the Loft Law required the subject 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. MDL §281.

In discussing the legislative history and enacted laws, in *Wolinsky,* this Court held that if the prior-enacted ETPA already protected IMD units or illegally converted units, significant portions of the Loft Law's wholly separate and

differentiated rent regulatory scheme would have been unnecessary. *Wolinsky*, 2 NY3d at 493, citing e.g. MDL §286 (3). 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. "[I]t is evident that the Legislature did not view the ETPA as safeguarding the interests of the 'loft pioneers' *Wolinsky*, 2 NY3d at 493. ("If the prior-enacted ETPA already protected illegal residential conversions of manufacturing space, significant portions of the Loft Law would have been unnecessary (*see e.g.* Multiple Dwelling Law §286 [3]"). *See also Gloveman Realty Corp. v Jefferys*, 18 AD3d 812, 813 (2d Dept 2005).

In MDL §286, the Loft Law details the protocol for obtaining a residential certificate of occupancy for an IMD and, thereafter, how certain units become subject to Rent Stabilization. *See* MDL §286 (3) - MDL §286 (5). The Loft Law, in relevant part, also provides for deregulation of an IMD premises upon a sale of rights and improvements/fixtures. Pursuant to MDL §286 (6), an IMD tenant has the right to sell the *improvements* they have made to their premises, or which they have purchased, to a new, prospective tenant. However, before consummating a sale to an "incoming tenant," the outgoing IMD tenant must offer the owner the right to purchase the improvements at fair-market value. MDL §286 (6) provides, if the owner only purchases the improvements, they are permitted to rent the unit at market

value subject to the possibility of subsequent rent regulation if such building had six or more residential units at such time.

However, the Loft Law further provides, pursuant to MDL §286 (12), an IMD tenant can further sell their *rights* in the premises directly to the building's owner. Under MDL §286 (12), an owner has two options after such a sale. First, the owner may return the unit to its lawful commercial use, in which event the owner must file a certificate with the Loft Board and submit to a Loft Board inspection to confirm that all residential fixtures have been removed. *See* 29 RCNY §2-10 (d) (1). The second option - and the one Appellant availed itself of here - is to continue residential use. Under this second option, the owner must still legalize the unit under the Loft Law, but an unregulated rent may be charged. *See* 29 RCNY §2–10 (d) (2).

As articulated in the Loft Board's Rules, in either event, the purchase by an owner of rights and improvements is a deregulating event removing premises from rent regulation pursuant to the Loft Law if the premises are to remain residential. 29 RCNY §2-10 (2) (c) (2). *See also 73 Tribeca LLC v Greenbaum*, 36 Misc 3d 1217 (A), 2012 WL 3044265, 6 (Civ Ct, New York County) ("[th]e sale of improvements or rights is considered a deregulating event."); *Matter of the Application of Don Kiamie of Kiame-Princess Marion Realty Corp.*, Loft Bd. Order No. 3581, Docket No. LE-0526/RA-0006 (June 17, 2010) (after a sale of rights pursuant to MDL §286[12], a premises is not subject to rent regulation); *Matter of the Application of*

315 Berry Street Corp., Loft Bd. Order No. 3571, Docket No. LE-0557 (April 15, 2010) (post-legalization rent adjustment not necessary for premises where there has been a sale of rights pursuant to MDL §286[12]).

It is thus well settled that a sale of rights and improvements removes premises from rent regulation. *Id. See also Bennett v Hawthorne Village, LLC*, 56 A.D.3d 706, 709, 870 N.Y.S.2d 33 (2d Dept 2008) (The former owner's purchase of the rights and improvements exempted the loft premises from the provisions of the Loft Law providing for rent regulation); *Swing v NYC Loft Board*, 180 AD2d 529, 530 (1st Dept 1992) (finding sale of fixtures pursuant to MDL §286 (6) "entitl[ed] the landlord to decontrol"); *Walsh v Salva Realty Corp.*, 2009 WL 2207516, 2009 NY Slip Op 31573 (U) (Sup Ct, New York County 2009) (the effect of the sale of both the improvements and rights pursuant to MDL §§286 (6) and 286(12) of the premises freed the loft from rent regulation and allowed the owner to charge a monthly rent that was at or above the threshold level of vacancy rental decontrol); *19 W. 36th Holding Corp. v Parker*, 193 Misc 2d 519, 522, 749 NYS2d 824 (Civ Ct, New York County 2002) ("Concerning the effect of a sale of rights pursuant to Multiple Dwelling Law §286 (12) of a premises that was at one time an IMD, both the Loft Board and the DHCR have found that such an event is a deregulating event and the premises after such sale is no longer subject to rent regulation"); *Matter of Grundon,* OATH Index Nos. 2445/11 & 2446/11 (November 16, 2011); *Matter of*

Taylor, OATH Index No. 2051/11 (September 9, 2011); *Matter of Brown*, OATH Index No. 1598/05 (Oct. 24, 2005), aff'd, Loft Bd. Order No. 3015 (Feb. 16, 2006); *Matter of Canal Venture, Inc.*, Loft Bd. Docket No. LE-0379, Report & Rec. at 1-2 (Mar. 14, 2005), adopted, Loft Bd. Order No. 2913 (Mar. 17, 2005); *Matter of Justin Tower, LLP*, Loft Bd. Docket No. LE-0386, Report & Rec. at 2 (Mar. 11, 2005), adopted, Loft Bd. Order No. 2914 (Mar. 17, 2005).

In interpreting the foregoing Loft Board's Rules, courts routinely hold a unit may be rented and used residentially in violation of the certificate of occupancy after the owner's purchase of rights and improvements, and the unit is still subject to the Loft Law, but no longer rent regulated pursuant to the Loft Law. *73 Tribeca LLC v Greenbaum*, 36 Misc 3d 1217 (A), 2012 WL 3044265, 6 (Civ Ct, New York County) (*"*[th]e sale of improvements or rights is considered a deregulating event."); *Matter of the Application of Don Kiamie of Kiame-Princess Marion Realty Corp.*, Loft Bd. Order No. 3581, Docket No. LE-0526/RA-0006 (June 17, 2010) (after a sale of rights pursuant to MDL §286[12], a premises is not subject to rent regulation); *Matter of the Application of 315 Berry Street Corp*., Loft Bd. Order No. 3571, Docket No. LE-0557 (April 15, 2010) (post-legalization rent adjustment not necessary for premises where there has been a sale of rights pursuant to MDL §286[12]).

Here, in 1998, the Loft Law protected tenants of the Premises, Mr. William Lombardi and Mrs. Helena Lombardi, sold their rights, pursuant to MDL §286 (12), and their improvements in the Premises, pursuant to MDL §286 (6), to Appellant's predecessor in interest. (R. 85-89). Accordingly, it is irrefutable that the Premises is still subject to the provisions of the Loft Law but is exempt from rent regulation pursuant to the statutory scheme.

The issue thus brought up for review by this Court is whether, after the exemption from rent regulation pursuant to the Loft Law and the charge and collection of unregulated rent as permitted by the Loft Law, the Premises nonetheless becomes subject to regulation pursuant to the ETPA and whether ETPA nullifies the permissible rent increases provided for in the Loft Law. The Appellant submits that it does not. The Second Department decisions indicate that the Premises would not become subject to regulation pursuant to the ETPA, and any attempt to find that the Premises did become subject to regulation pursuant to the ETPA creates an unresolvable conflict between the First and Second Departments, as well as between the Loft Law and the ETPA.

Point I: The First Department's interpretation of the ruling in *Acevedo* and the application of this interpretation to the instant controversy has created an unresolvable conflict between the Loft Law and the ETPA and the Subject Order must therefore be reversed.

The First Department incorrectly held the Premises became subject to rent regulation pursuant to the ETPA despite an uncontroverted sale of rights and

improvements pursuant to MDL §§286 (6) and 286 (12) and a subsequent first rent that exceeded Rent Stabilization's threshold for regulation solely because the Premises is located in a building built before pre-1974 which subsequently contained six (6) or more residential units. The First Department's ruling was predicated solely upon its erroneous interpretation and expansion of its prior ruling in *Acevedo.* However, in reaching its conclusion, the First Department wholly disregarded the fact that the Premises is exempt from Rent Stabilization pursuant to the express provisions of the RSC and Loft Law which expressly provide the right to charge a market rent after the sale of rights and improvements in 1998 and deregulation as a result of the high-rent.

A. The plain language of the applicable statutes demonstrate the Premises is not subject to regulation pursuant to the ETPA.

i. The Loft Law entitled Appellant to charge a market rent for the Premises after the IMD's tenant's rights and improvements were purchased in 1998.

The Loft Law expressly provides, in MDL §286 (6), that after an owner purchases an IMD tenant's rights and improvements, the unit may thereafter be rented at market value. Accordingly, under the Loft Law, Appellant was permitted to charge a market rent for the Premises after the purchase of rights and improvements in 1998 from the former IMD tenant of the Premises. (R. 87-89). Here, that first lease and rent charged and collected after the sale of rights and fixtures was $4,250 per month. (R. 90-98).

ii. The RSC entitled Appellant to charge a "first rent" for the Premises after a temporary exemption of four (4) or more years.

After the sale of rights and improvements in 1998, pursuant to RSC §2526.1(a)(3)(iii) (1997), the owner of the Building was entitled to charge a "first rent" since the Premises was temporarily exempt from the ETPA for substantially more than four (4) years. 9 NYCRR §2526.1(a)(3)(iii) (1997). *See e.g., Matter of Hatanaka v Lynch*, 304 AD2d 325 (1st Dept 2003); *Matter of Vivienne U. Kahng*, DHCR Admin. Rev Dkt. No. XF410031RT (Dec. 30, 2009); *Matter of Forest Royale Assoc.*, DHCR Admin. Rev Dkt. No. WC110015RO (Aug. 21, 2008); *Matter of Zachary M. Berman*, DHCR Admin. Rev Dkt. No. VF610026RT (Oct. 30, 2007); *Matter of East-Ville Realty Co.*, DHCR Admin. Rev Dkt. No. MA410114RO (Mar. 27, 2001). *See also* NYS DHCR Advisory Opinion, dated February 16, 1999 (stating that an owner has the right to charge a first rent after a temporary exemption of four [4] or more years).

The express provisions of the RSC provide that regulation of the Premises pursuant to the Loft Law constituted an applicable temporary exemption. RSC §2520.11(c) specifically provides, in relevant part, that any building completed prior to January 1, 1974 whose rents were regulated by any State Law other than the RSL or the City Rent Law, shall only become subject to the ETPA, the RSL, and the Code

after the termination of such other regulation. 9 NYCRR §2520.11(c)[3] (emphasis added).

The Loft Law is indisputably a law of the State of New York. S*ee* MDL §281 *et. seq.*). It is also undisputed that the Premises was subjected to rent regulation under the Loft Law from 1983 until the sale of rights and improvements in 1998. Accordingly, the Premises was temporary exempt from rent regulation under the ETPA and RSL for this fifteen (15) period pursuant to RSC §2520.11(c). This temporary exemption gave rise to the entitlement to charge a "first rent" for the Premises pursuant to RSC §2526.1(a)(3)(iii) (1997).

The undisputed documentary evidence proffered by Appellant demonstrated that following the vacatur of the IMD tenant and the sale of rights and improvements pursuant to the Loft Law in 1998, the owner of the Building charged and collected a new "first rent" of $4,250.00 per month for the Premises from the incoming tenant, John Chen. (R. 99-109).

[3] 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).

iii. The RSC provides, since this first rent charged and collected exceeded the ETPA's statutory threshold for regulation, the Premises is not subject to Rent Stabilization.

The Premises became vacant after June 19, 1997 with an initial legal monthly rent of more than $2,000.00. This permissible "first rent" was well in excess of the $2,000.00 threshold for regulation. *See* 9 NYCRR §2500.9 (m), 9 NYCRR §2520.11(r)(4). 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.

Since the legally charged and collected "first rent" after the purchase of rights and improvements and an exemption of more than four (4) years exceeded the statutory threshold, the Premises is not subject to Rent Stabilization since the Rent Stabilization Law and Code do not apply to units where the rent is in excess of the statutory threshold. *See* 9 NYCRR §2500.9(m), 9 NYCRR §2520.11(r)(4).

iv. In *Acevedo*, the First Department recognized that coverage by the Loft Law is a temporary exemption from Rent Stabilization.

In misinterpreting *Acevedo,* the courts below erroneously held that the Premises is subject to Rent Stabilization by virtue of the ETPA simply because the Building contains six or more residential units. However, to the contrary, in *Acevedo* it was held only that a former IMD premises *may*, in certain circumstances, be subject to subsequent rent regulation under the ETPA, despite a sale of rights and

improvements pursuant to MDL §286(6) or MDL §286(12). However, the decision in *Acevedo,* did not create a blanket mandate that all loft units must necessarily revert to Rent Stabilization after the sale of rights and improvements pursuant to the Loft Law. Rather, in order for there to be such a reversion after a sale, the premises must still qualify for regulation under ETPA's separate statutory scheme. The opinion in *Acevedo* uses only permissive language to indicate the possibility of re-regulation under the ETPA; it does not create a bright-line standard mandating re-regulation under the ETPA after all qualifying sales under the Loft Law if the subject unit remains residential.

The holding in *Acevedo* specifically acknowledged that an IMD premises is temporarily exempt from the ETPA while it is subject to regulation under the Loft Law. *Acevedo* expressly held that after a sale of rights and improvements pursuant to MDL §286 (6) or MDL §286 (12), a premises "may" then "revert" back into Rent Stabilization after it is deregulated under the Loft Law, but only if it is otherwise covered. By specifically using the word revert, the *Acevedo* court expressly articulated the temporary exemption from Rent Stabilization as a result of a premises' regulation under the Loft Law. Indeed, the very first line of the Appellate Division's decision in *Acevedo* states, in pertinent part, "we revisit the issue of whether an apartment covered by the Loft Law *may revert* to Rent Stabilization after the landlord purchased the prior occupant's rights under Multiple Dwelling Law

§286(12) in a pre-1974 building containing six or more residential premises." (emphasis added). The plain meaning of the word "revert" is to go back or return, such as to an earlier state.[4] Thus, taking the language employed in *Acevedo* to its natural conclusion, the subject IMD premises was once covered by Rent Stabilization and then returned to Rent Stabilization after a period of being temporarily exempt during the period of Loft Law regulation.

The *Acevedo* court held that once a premises is no longer temporarily exempt from Rent Stabilization by virtue of the Loft Law, the ETPA provides for the possibility of subsequent re-regulation, *if the premises is otherwise covered*. Glaringly absent from the *Acevedo* ruling is any language whatsoever to support the proposition that the ETPA automatically confers Rent Stabilization status on an IMD unit after a sale of rights and fixtures. Rather, *Acevedo* merely purports to prohibit blanket exclusion of those former lofts from ETPA Rent Stabilization if they would otherwise be covered. If, as here, the unit is independently deregulated in accordance with the RSC (by high rent deregulation), such unit does not necessarily revert to Rent Stabilization.

[4] The definition pursuant to www.merriam-webster.com for "revert" is: 1: to come or go back (as to a former condition, period, or subject); 2: to return to the proprietor or his or her heirs at the end of a reversion; 3: to return to an ancestral type.

B. The First Department erred in finding the Premises is subject to Rent Stabilization pursuant to *Acevedo.*

Notwithstanding the above, the First Department incorrectly held, without elaboration, that the Premises is subject to regulation pursuant to the ETPA based on its misinterpretation of *Acevedo.* However, the law and facts before the court in *Acevedo* are materially and crucially distinguishable from those now before the Court. The issue of a first rent was not before the Court in *Acevedo,* nor decided by it. Moreover, even if either of the above were not the case, then the simple fact would be that the ruling in *Acevedo* is wrong.

Acevedo is devoid of any discussion regarding the entitlement to charge a "first rent" after a four (4) year temporary exemption, which is a critical distinction from the facts of the instant controversy. As a primary matter, in *Acevedo,* the sale of rights and improvements occurred in 1995, two (2) years prior to the 1997 Rent Stabilization Code amendment which established the four (4) year temporary exemption rule. *See* 9 NYCRR §2526.1(a)(3)(iii) (1997). In 1995, the Rent Stabilization Code did not provide that the landlord in *Acevedo* was entitled to set a "first rent" after the temporary exemption at an amount that exceeded the statutory threshold for deregulation.

Therefore, the *Acevedo* court could not have even considered the applicability of the four (4) year exemption rule as a basis for obtaining a rent over the statutory threshold because the sale of rights in question occurred over two (2) years prior to

the enactment of the RSC provision which added this exemption. Consequently, *Acevedo* is devoid of any express reference to a temporary exemption from Rent Stabilization and the impact of such an exemption.

In contrast, the temporary exemption detailed in RSC §2526.1(a)(3)(iii) as it existed at the time of the sale of rights and improvements pursuant to MDL §§286(6) and 286(12) is squarely at issue in the instant matter. *See* 9 NYCRR §2526.1(a)(3)(iii) (1997). Here, the sale of rights and improvements pursuant to the Loft Law occurred in 1998, and the "first rent" charged and collected by Appellant after the temporary exemption exceeded the $2,000.00 deregulation threshold. Accordingly, the First Department's ruling here that *Acevedo* provides for automatic re-regulation of the Premises pursuant to the ETPA and RSC irrespective of the deregulation threshold is incorrect.

Acevedo is also materially distinguishable from the instant matter insofar as it there is no indication in *Acevedo* that the sale in that matter was of the fixtures, pursuant to MDL §286(6), in addition to a sale of rights pursuant to MDL §286(12). The *Acevedo* decision is wholly bereft of any reference to MDL §286(6) and the express entitlement to charge a market rent which it affords to the owner of an IMD unit. Notably, the Subject Order improperly omits this distinction and, merely cites MDL §286 (6) as a contrary comparison to the First Department's erroneous ruling relying on *Acevedo.*

C. The First Department's interpretation of *Acevedo* and its application has improperly created a new class of apartments which are neither fully subject to the Loft Law nor the ETPA.

Here, the Subject Order has 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 *Acevedo*. This interpretation improperly involves an indiscriminate application of the provisions of the Loft Law and the ETPA/RSC.

The First Department's attempt at the creation of a blanket rule guaranteeing regulation of a premises under the ETPA would nullify the Loft Law provisions regarding setting of market rents and 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 an expansive result was contemplated or 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. It did not establish bright-line rule these units become permanently and perpetually subject to the ETPA.

The Premises is not and could not be subject to the ETPA after the rights and improvements 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).

Accordingly, by its ruling in the Subject Order, the First Department has impermissibly cherry-picked which provisions of the ETPA and RSC to apply to the Premises and disregarding those that it finds inconvenient. If *Acevedo* stands for the proposition that all Loft Law units should be subject to the ETPA and RSC after sale of Loft Law rights and improvements by a protected IMD tenant, then the provisions of the ETPA and RSC that provide units may be deregulated or exempted from coverage pursuant to those very same terms of the ETPA and RSC must be permitted. That the First Department has not done so and has conversely opted to indiscriminately select provisions from both regulatory schemes – while ignoring the Legislature's intent in enacting the Loft Law – is improper.

D. The First Department's interpretation of *Acevedo* as applied in the Subject Order has resulted in conflicts between the Loft Law and the RSC which cannot be reconciled.

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 set forth in the Subject Order. This is not a circumstance where the Loft

Law and the ETPA are being applied in a manner to ensure their consonance. Rather, express provisions of each regulatory scheme are being improperly disregarded resulting in a conflict.

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 above, 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 meaningful purpose for the Loft Law's wholly different form of rent regulation. The Loft Law could simply have been one which required legalization for residential use without mention of the rents which would have been subject to the prior-enacted ETPA. But under the Subject Order and *Acevedo,* there is a conflict.

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. However, if as the First Department held in the Subject Order, such a unit is subject to the ETPA, this increase to market rate rent expressly authorized by the Loft Law would nonetheless be wholly impermissible under Rent Stabilization. RSC §2522.8(a) only allows an increase of twenty (20%) percent of the previous legal regulated rent for a vacancy lease for two (2) year term. Further, RSC §2522.4 only authorizes an increase if there are increased space and services, new equipment, new furniture or furnishings or major capital improvement. The First Department's ruling in the Subject Order pits the two statutory schemes in direct opposition to each other, leaving affected parties, such as Appellant, to guess at which statutory scheme controls, albeit at their peril.

Another illustrative example of the statutory conflict created by the First Department's interpretation of *Acevedo* arises in the area of "substantial rehabilitations" under Rent Stabilization. RSC §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 the 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 (Civ Ct, New York County 1981) (internal citation omitted); *See also Baxter v Captain Crow Mgt.*, 128 Misc 2d 254 (Sup Ct, New York County 1985).

Yet, in order to qualify for coverage as an IMD building in the first instance, the Loft Law 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. MDL §281. Taken to its logical conclusion, all IMD buildings would be exempt from the RSC by reason of a substantial rehabilitation.

As another example of conflict between the Loft Law and RSC, if *Acevedo* stands for the claimed proposition of the Subject Order, is with respect to RSC §2520.11(q). This provision of the RSC provides for exemption from Rent Stabilization for housing accommodations which would otherwise be subject to rent regulation solely by reason of the provisions of the Loft Law requiring rent regulation, but which are exempted from such provisions pursuant to MDL §§286 (6) and 286 (12). Here, it is undisputed that the Appellant purchased the rights and improvements from the former, protected IMD tenant pursuant to MDL §§286 (6) and 286(12) and proof of this purchase was filed with the Loft Board. The

interpretation of *Acevedo* propounded in the Subject Order nullifies RSC §2520.11(q).

Point II: The Subject Order and the interpretation by the First Department of the ruling in *Acevedo* has resulted in an untenable conflict between the First and Second Departments of the Appellate Division.

The First Department's reliance on *Acevedo* has created a direct and indisputable conflict between the rulings of the courts of the Appellate Division. In contrast to the courts in the First Department, the courts of the Second Department have rejected *Acevedo* and have consistently held that the ETPA does not protect IMD units or illegally converted units and that a premises which has been the subject of a sale of rights and improvements pursuant to the Loft Law are not regulated or re-regulated under the ETPA. It is respectfully submitted that this Court should resolve the stark divergence between the rulings of the courts of the Appellate Divisions and adopt the logical reasoning of the Second Department's courts. The First Department's exercise of a piecemeal, mix-and-match approach to the two statutory schemes in order to eviscerate the deregulation provisions of both should not be countenanced.

The issue of whether, after a sale of rights and improvements pursuant to MDL §§286(6) and 286(12), a unit is subject to any regulation under the Loft Law or Rent Stabilization has been decided by the courts of the Second Department numerous times. As recently as January 2020, and detailed in *Meserole A-B 81-93 Equities*

Corp. v Russo, 66 Misc 3d 136 (A) (App Term, 2d Dept, 11th & 13th Jud Dists 2020), it was recognized by the Second Department that the rulings 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, specifically notwithstanding the First Department's ruling in *Acevedo.* The *Meserole* court noted that *Caldwell* held that lofts are not subject to Rent Stabilization after the purchase of rights and fixtures, in part because the "Loft Law would have been unnecessary if protection for the residents of such premises was already available under ETPA." 66 Misc 3d 136 (A), citing *Caldwell v American Package Co., Inc.*, 57 AD3d at 23. With its subsequent ruling in *Bennett*, the Second Department continued to assert that the purchase of the rights and improvements exempts a unit from the provisions of the Loft Law and Rent Stabilization. 66 Misc 3d 136 (A), citing *Bennett v Hawthorne Vil., LLC*, 56 AD3d at 706.

The lower courts in the Second Department have followed the precedential authority of their Division. In *New York City Const., Inc. v Morgenstern Bros. Realty Inc.*, 51 Misc 3d 1222 (A) (Sup Ct, Kings County 2016), the court recognized:

> 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]).

The lower courts in the Second Department likewise follow the precedential authority of *Wolinsky* and its progeny, *Caldwell v American Package Co., Inc.*, 57 AD3d 15 and *Gloveman Realty Corp. v Jefferys*, 18 AD3d 812, 813 (2d Dept 2005). These courts acknowledge that in *Wolinsky* the Court of Appeals noted the inclusion of one broad statutory scheme implies the exclusion of the other, insofar as it relates to the Loft Law. *Bravo v Marte*, 64 Misc 3d 1223 (A) (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*. *Wolinsky* also noted that another necessary consideration is "to construe statutes so that they do not conflict with one another." *Id*. Unlike the First Department, the Second Department has declined to flout this core principle of statutory interpretation.

In *Caldwell*, the units in question were not eligible for Loft Law coverage. In its reasoning, the court recognized that the ETPA would ordinarily apply to any housing accommodation in the City that is not expressly excluded from coverage. However, the *Caldwell* court held that in *Wolinsky* this Court considered the interplay of the Loft Law and ETPA, and recognized that: "illegal conversions do not fall under the ambit of the ETPA".

The *Caldwell* court further discussed the Second Department's consideration of the interplay between the Loft Law and the ETPA in *Matter of 315 Berry St. Corp.*

v Hanson Fine Arts, 39 AD3d 656. There, ETPA protection was available to that particular converted commercial unit, despite the illegality of the conversion, but only because "it was undisputed that the [owner] nevertheless knew of and acquiesced in the unlawful conversion, [undertaken] 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 [owner] sought legal authorization to convert the premises to such use during the pendency of [the] proceeding". *Caldwell* noted that previously, in *Gloveman Realty Corp. v Jefferys*, 18 AD3d 812, 813 (2d Dept 2005), the Second Department relied on *Wolinsky* and held that the defendants' tenancies in the illegally converted lofts at issue were not subject to ETPA.

The *Caldwell* court further found that *Wolinsky* bolstered this conclusion by citing the "subsequent inaction of both the City and the State to extend such protections does not undermine its major premise that ETPA does not protect illegal loft occupants." Rather the unique circumstance at issue in *315 Berry St.* presents the only situation in which, consistent with *Wolinsky*, ETPA protection can be recognized for illegally converted commercial premises. There, "both parties, while aware that a claim of ETPA protection had been asserted, pursued a course leading to that end" and the Second Department "simply endorsed the status that each of the parties had sought." The request to bestow "ETPA protection whenever a building owner has acquiesced in an illegal conversion that is merely 'capable of being

legalized,' would be inconsistent with *Wolinsky's* declaration that ETPA protection is only available in limited circumstances which do not appear here.

The Second Department's rulings in *Caldwell* and *Gloveman* are consonant with the Department's repeated finding that, other than coverage under the Loft Law, regulatory protection is only applicable to illegally converted loft units in very limited circumstances. In *South Eleventh Street Tenants Assn. v Dov Land, LLC*, 59 AD3d 426 (2d Dept 2009), they again held that it is only in a "rare case" that an illegally converted loft space is properly afforded ETPA protection. *See also Malden v R.P.S. Properties, LLC*, 2017 WL 5903328, at *4, 2017 NY Slip Op 32518 (U) (Sup Ct, Kings County 2017); *Bravo v Marte*, 64 Misc 3d 1223. Similarly, in *Sheila Properties, Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424, 426 (2d Dept 2009), citing *Caldwell and 315 Berry St. Corp.*, the Second Department noted that ETPA protection was not properly afforded in the absence of a demonstration that the owner acquiesced in the unlawful conversion of an eligible unit undertaken at the expense of the occupants where the owner actually sought to legalize the residential use during the pendency of the proceeding in which the tenants sought RSL protection.

Here, and by contrast unlike the "rare case" discussed above, the Premises is subject to the Loft Law thereby nullifying any regulatory protection pursuant to the ETPA. In addition, the unlawful conversion <u>was not</u> undertaken at the expense of

Respondent and no such claim in the Answer alleges that it was at his expense. To the contrary, and as discussed in the underlying motion for summary judgment, it was Appellant's predecessor in interest and the former IMD tenant who originally converted the Premises to residential purposes and that former IMD tenant sold those improvements at fair-market value to Appellant's predecessor in interest pursuant to MDL §286 (6). Additionally, here, the legally charged and collected rent in excess of the relevant high rent amount also serves to remove the Premises from ETPA.

As a result of the foregoing, after a sale of rights and improvements pursuant to MDL §§286 (6) and 286(12), the Premises is not subject to any regulation under the Loft Law or Rent Stabilization.

Point III: 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.

It is respectfully submitted that the Subject Order should also be reversed because the First Department's interpretation of the ruling in *Acevedo* appears to run counter to the Loft Board's understanding of that case's import. Although the agency has not taken a direct position against the First Department'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 (1st Dept 2017), the Loft Board took a

position indicating that the Loft Law's deregulation provisions must be observed. In its opposition brief to this Court in in *Matter of Fievet*, 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*, the First Department 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 [MDL] §281(5) … suggests a legislative intent to re-regulate units that were properly removed from rent regulation pursuant to [MDL] §286(6). *See Fievet v New York City Loft Bd.*, 150 AD3d at 402.

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 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*, Loft Bd. Order No. 4989 (June 18, 2020); *Matter of Triad Capital LLC*, Loft Bd. Order No. 4937 (Jan. 24, 2020); *Matter of W28 Street Holding LLC,* Loft Bd. Order No. 4915 (Dec 3, 2019); *Matter of Malach Premises Trust*, Loft Bd. Order No. 4899 (Sept. 27, 2019);

Matter of Benjamin Duell c/o Duell LLC, Loft Bd. Order No. 4196 (Nov. 21, 2013); *Matter of Hawthorne Village, LLC*, Loft Bd. Order No. 4087 (May 7, 2013).

It is respectfully submitted that while the Loft Board's interpretation is not dispositive, it is certainly consonant with long-standing understanding that a sale of rights and improvements pursuant to the Loft Law renders an IMD unit eligible for rent de-regulation. Unlike the Subject Order and the First Department's interpretation of *Acevedo,* the Loft Board's interpretation does not disregard the express provisions of the Loft Law which entitle a market rent to be charged after a qualifying sale. This interpretation by the agency of the laws that it was specifically created to administer and for which it has the technical expertise to implement should not be given short shrift.

Point IV: The First Department erred in affirming the Appellate Term's improper reversal of the Civil Court Decision/Order which had held that Respondent was not entitled to attorneys' fees.

It is respectfully submitted that the Civil Court correctly held that Respondent was not entitled to attorneys' fees and the Appellate Term's erroneous reversal of the lower court's ruling should not have been affirmed by the First Department in the Subject Order.

Before an award of attorneys' fees may be made under the reciprocal provisions of Real Property Law ("RPL") §234, the court must determine which party in the litigation was the "prevailing party." "Ordinarily, only a prevailing party

is entitled to attorney's fees [*citation omitted*].” *Nestor v McDowell*, 81 NY2d 410 (1993). Respondent has not demonstrated an entitlement to judgment as a matter of law and therefore failed to show entitlement to attorneys' fees pursuant to RPL §234 as the putative prevailing party.

It is well-settled that: “New York has traditionally followed the common law rule disfavoring any award of attorneys' fees to the prevailing party in a litigation ... Therefore, the appropriate canon of statutory construction to be applied ... favors a narrow interpretation”. *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 464 (1993), *reargmnt denied*, 83 NY2d 801 (1994); *See also Beach Haven Apartments #1 Inc. v Cheseborough*, 2 Misc 3d 33 (App Term, 2d Dept 2003); *205 Third Ave. Ownership v Ziegler*, 21 HCR 170A, NYLJ, Apr. 21, 1993 at 22, col 5 (Civ Ct, New York County); *Sohn v Calderon*, NYLJ, Sept. 20, 1995 at 26, col 1, 23 HCR 568B (Sup Ct, New York County).

Narrowly construing RPL §234, which is in derogation of the common law rule "disfavoring any award of attorney's fees to the prevailing party in a litigation", attorneys’ fees should be awarded only where the party has “truly prevailed” and in circumstances that do not impair the underlying policy rationale of RPL §234. *Beach Haven Apartments #1 Inc. v Cheseborough*, 2 Misc 3d 33*; Solow v Wellner,* 205 AD2d 339 (1st Dept 1994). *See also Murphy v Vivian Realty Co.*, 199 AD2d 192,

193 (1st Dept 1993), citing *Sperling v 145 East 15th Street Tenant's Corp.*, 174 AD2d 498 (1st Dept 1991).

As discussed in *Matter of Duell v Condon*, 84 NY2d 773 (1995),

> The overriding purpose of Real Property Law §234 was to level the playing field between landlords and residential tenants, creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense. The statute thus grants to the tenant the same benefit the lease imposes in favor of the landlord. An additional purpose ... is to discourage landlords from engaging in frivolous litigation in an effort to harass tenants....

RPL §234 seeks to protect blameless tenants which were nonetheless brought to court in bad faith by their landlord. The statute provides these innocent tenants with a method of recovering the costs of their defense against an unwarranted proceeding commenced in bad faith. RPL §234 is not a mandatory provision that must be applied automatically in every proceeding. Its application is discretionary, allowing the courts to consider the facts of each case. *Townhouse Company, LLC v Peters*, 2007 Slip Op 52111 (U) (App Term, 1st Dept 2007); *360 Clinton Ave. Tenants Corp. v Fatsis*, 25 HCR 397B, NYLJ, July 21, 1997 at 30, col 1 (App Term, 2d & 11th Dept) ; *Ariel Assocs. LLC v Brown*, 25 HCR 495A, NYLJ, Sept. 18, 1997 at 29, col 5 (Civ Ct, New York County); *KSLM Columbus Apartments, Inc. v Ayala*, 18 HCR 324A, NYLJ, June 22, 1990 at 22, col 3 (Civ Ct, New York County). An award of counsel fees is not required in every case; rather the determination of the

propriety of such an award is subject to the discretion of the trial court, "taking into account the underlying facts and circumstances involved." *Duane Thomas Loft Tenants Assn. v Sylvan Lawrence Co., Inc.*, 117 Misc 2d 360, 369 (Sup Ct, New York County 1982).

Therefore, the Civil Court, in its discretion, properly determined that Respondent had not prevailed on its first counterclaim for alleged rent overcharge and, therefore, was not a prevailing party. Accordingly, the Civil Court correctly dismissed Respondent's second counterclaim for attorney's fees. The First Department erred by affirming with the Subject Order the Appellate Term's reversal of the Civil Court's dismissal of Respondent's first counterclaim.

CONCLUSION

As discussed above, the Subject Order constitutes reversible error for several reasons. The First Department's expansion of the narrow ruling in *Acevedo* has created an unresolvable conflict between the Loft Law and the ETPA and created a new class of units which are not wholly subject to either regulatory scheme. If *Acevedo* stands for the proposition that all Loft Law units should be re-regulated as of right by virtue of the ETPA after the purchase of Loft Law rights and improvements from a protected IMD tenant, then these units must also be allowed to be exempted from coverage pursuant to the terms of the ETPA and RSC.

The Subject Order further widens the chasm between the decisions of the First Department and the Second Department regarding the proper interplay of the Loft Law and ETPA in order to ensure that each's provisions are given their appropriate import. The Subject Order should also be reversed because it contravenes this Court's ruling in *Wolinsky* which found that units regulated by the Loft Law were not already subject to regulation by the ETPA. The First Department's overly expansive interpretation of *Acevedo* as applied in the Subject Order also appears to run counter to the Loft Board's understanding as to the rent regulatory status of former IMD units after a sale of rights and fixtures. Finally, the First Department erred in upholding the reversal of the Civil Court's dismissal of the Respondent's counterclaim for attorneys' fees.

Based on the foregoing, Appellant respectfully requests that the Court grant this appeal by: (i) reversing the Subject Order dismissing Appellant's Petition; (ii) granting Appellant a final judgment of possession and warrant of eviction against Respondents; (iii) dismissing Respondent's second counterclaim for attorneys' fees; and (iv) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 5, 2021

Joseph Goldsmith, Esq.

CERTIFICATE OF COMPLIANCE

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

A proportionally spaced typeface was used, as follows:

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Dated: New York, New York
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Joseph Goldsmith, Esq.

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 3/5/2021 deponent caused to be served 3 copy(s) of the within

Appellant's Brief

upon the attorneys at the address below, and by the following method:

By Overnight Delivery

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Sworn to me this
Friday, March 5, 2021

Antoine Victoria Robertson Coston
Notary Public, State of New York
No.01RO6286515
Qualified in Nassau County
Commission Expires on 7/29/2021

Case Name: Aurora Associates, LLC v. Raffaello Locatelli (2)

Docket/Case No: APL-2021-00004

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