*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.*

## REPLY BRIEF FOR PETITIONER-APPELLANT

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*Date Completed: June 15, 2021*

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## PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of Petitioner-Appellant, Aurora Associates LLC ("Appellant"): (a) in reply to the Respondent's Brief of Respondent-Respondent, Rafaello Locatelli ("Respondent"); and (c) in further support of Appellant's Brief. It is respectfully submitted that Respondent's arguments in opposition to the instant appeal are unavailing.

## LEGAL ARGUMENT

**Point I - The Appellate Division erred in holding that the Premises was subject to Rent Stabilization based upon the holding of *Acevedo v. Piano, LLC*.**

**A. Coverage under Rent Stabilization of the Premises would lead to irrevocable conflicts between the Loft Law, ETPA, and the Rent Stabilization Law and Code.**

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, the ETPA's provisions regarding the exclusion of high rent accommodations from regulation, and the ETPA's provisions regarding exemptions from regulation for units that were commercial in January 1, 1974 or underwent a conversion to residential after January 1, 1974.

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, 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. 85-89). Here, that first lease and rent charged and collected after the sale of rights and fixtures was $4,250 per month. (R. 90-98).

This permissible first rent was well in excess of the $2,000.00 threshold for regulation pursuant to the ETPA and RSL. *See* 9 NYCRR §2500.9(m), 9 NYCRR §2520.11(r)(4). Since the legally charged and collected first rent after the purchase of rights and improvements 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 also,* 9 NYCRR §2500.9(m), 9 NYCRR §2520.11(r)(4). *See also*, *Rubin v. Decker Associates LLC,* 52 Misc.3d 1208(A), 2016 WL 3747469 (S. Ct. N.Y. County 2016); *Matter of Vivienne U. Kahng*, DHCR Admin. Rev. Dkt. No. XF410031RT (12/30/09); *Matter of Forest Royale Assocs.*, DHCR Adm. Rev. Docket No. WC110015RO (8/21/08).

The Appellate Division never discusses MDL §286(6) and the right to set a market rent other than to state "cf MDL §286(6)" and cite to *Acevedo v. Piano, LLC,* 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dept. 2009), *appeal withdrawn*, 14. N.Y.3d 884 (2010) which, as discussed *infra*, MDL §286(6) is never discussed.

Even in arguendo, if the permissible setting of a first rent above the statutory threshold does not serve to exempt the Premises from Rent Stabilization, the setting of the rent above the threshold was several tenancies before Respondent. As discussed in *Matter of Healy*, Administrative Review Docket No: ER410062RT (January 24, 2017), since the first rent is above the regulation threshold the next tenant cannot be subject to rent regulation since the rent is above the statutory threshold.

Nowhere in Respondent's Brief has Respondent explained how this conflict can be resolved so that the two statutory schemes can be *in pari materia*. Respondent merely repeats that he believes there should be a blanket rule guaranteeing regulation of a premises under the ETPA without discussing how one were to actually regulate such a unit whose tenancy and rents would be subject to multiple and conflicting regulation.

Nowhere in Respondent's Brief has Respondent explained why, had the prior-enacted ETPA already protected IMD units, there is a meaningful purpose for the Loft Law's wholly different form of rent regulation. *See Wolinsky v Kee Yip Realty Corp.*, 2 NY3d 487 at 493 (2004) citing e.g. MDL §286(3).

Nowhere in Respondent's Brief has Respondent explained why this Court should ignore 9 NYCRR §2520.11(n) which exclude from Rent Stabilization commercial or other nonresidential units, which the Building undoubtedly was given

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. *See,* MDL §281.

Nowhere in Respondent's Brief has Respondent explained why units subject to the Loft Law would not be exempt from Rent Stabilization under 9 NYCRR §2520.11(e) by reason of a substantial rehabilitation since the creation of a residential unit out of a unit previously required to be used solely for commercial purposes after the January 1, 1974 constitutes a substantial rehabilitation of the space in question. *See e.g. Lipkis v Krugman*, 111 Misc 2d 445 (Civ Ct, New York County 1981); *Baxter v Captain Crow Mgt.*, 128 Misc 2d 254 (Sup. Ct., New York Co. 1985).

Nowhere in Respondent's Brief has Respondent explained why the exemption from Rent Stabilization in 9 NYCRR §2520.11(q), 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), would be inapplicable here.

It is improper to cherry-pick which provisions of the Loft Law, ETPA and 9 NYCRR to apply to the Premises. If *Acevedo* stands for the proposition that all Loft

Law units should be regulated or 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 set rents in accordance with, and be exempted from coverage pursuant to, the very same terms of the ETPA and 9 NYCRR.

Respondent's citation to *Matter of 315 Berry St. Corp. v Hanson Fine Arts*, 39 AD3d 656 (2nd Dept. 2007) is misplaced. Again, 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". It was, as the Court stated in *South Eleventh Street Tenants Assn. v Dov Land, LLC*, 59 AD3d 426 (2d Dept 2009), a "rare case" that the Courts have not continued to follow as a matter of a blanket rule.

In addition, even applying this "rare case" to the circumstance here and by contrast, there was no evidence in the record that the owner knew of and acquiesced in the unlawful conversion. Nor was there any evidence in the record that it was undertaken at the expense of the occupants. Lastly, there is nothing illegal about the

renting of the Premises to Respondent after the sale of rights and fixtures pursuant to MDL §286(6) and MDL §286(12). The Loft Law rules specifically provide that an owner is permitted to continue to rent the unit residentially even though there is no residential Certificate of Occupancy and that, in such a case, the unit is no longer subject to rent regulation. *See*, 29 RCNY §2–10(d)(2).

### B. *Acevedo v. Piano, LLC* is distinguishable from the instant proceeding and, moreover, that the argument was not made or addressed does not negate the bases for deregulation presented.

Respondent incorrectly argues that the instant summary proceeding is identical to the facts in *Acevedo v. Piano, LLC,* and, therefore, the Premises is subject to Rent Stabilization solely by virtue of the holding in *Acevedo v. Piano*, *LLC.* However, the instant proceeding and *Acevedo v. Piano*, *LLC,* are not factually similar and, in fact, there are several key differences.

First, in *Acevedo,* in 1993, the owner submitted an application to the Loft Board seeking a final rent order in order to remove the building from the Loft Board's jurisdiction and that application had been granted, removing the *Acevedo* building from regulation under the Loft Law entirely. Thus, by the time the tenant in *Acevedo* began residing in the unit that building and unit were not subject to and regulated by the Loft Law. *See*, *In the Matter of the Application of SVT Realty Co.*, Loft Board Order No. 1951 (April 25, 1996).

Here, the Building did not have a residential Certificate of Occupancy at the time of the sale pursuant to MDL §286(6) and MDL §286(12) in 1998 and currently does not have a residential Certificate of Occupancy. In addition, the Building and Premises are currently registered with the Loft Board as an IMD and remain subject to the Loft Law. Thus the unit is, and remains, subject to and regulated by the Loft Law.

Moreover, and most importantly, here, after the sale of rights and fixtures in 1998, the owner was entitled to collect a new first rent from an incoming tenant pursuant to both MDL §286(6) and 9 NYCRR §2526.1(a)(3)(iii)(1997) since the Premises was exempt from the ETPA for significantly more than four (4) years. Respondent incorrectly states on page 16 of his Respondent's Brief that the sale of rights and fixtures in *Acevedo* took place in 1999 but that is not true, it took place in 1995. 70 A.D.3d at 126.

Following the vacancy, the first legal rent for the Premises was $4,250.00, which was far in excess of the $2,000.00 regulation threshold pursuant to the former RSL 26-504.2. In *Acevedo* the sale pursuant to MDL §286(6) and MDL §286(12) took place in 1995, before 9 NYCRR §2526.1(a)(3)(iii)(1997) was enacted permitting an owner to collect a new first rent from an incoming tenant pursuant to the 1997 Rent Stabilization Code amendment which set forth the rule.

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

Similarly, in *Costanzo v. Joseph Rosen Found., Inc*, 61 Misc. 3d 730, 83 N.Y.S.3d 830 (Sup. Ct. N.Y. 2018) affirmed,178 A.D.3d 501, 114 N.Y.S.3d 336 (1st Dep't 2019), which Respondent cites, the sale of rights and improvements entered by Stipulation dated January 27, 1997 occurred prior to the 1997 Rent Stabilization Code amendment which codified 9 NYCRR §2526.1(a)(3)(iii) permitting a first-rent following a four-year temporary exemption rule. In addition, in *Costanzo* another critical fact was that the unit never turned over and was never re-leased to a new party after the sale of rights and improvements entered by Stipulation dated January 27, 1997, they continued to rent it to the same tenant under the terms of the Stipulation.

The *Acevedo* Court never considered this basis for deregulation, nor explicitly referenced the right to set a first rent pursuant to MDL §286(6) or 9 NYCRR

§2526.1(a)(3)(iii), which is squarely the issue here. Here, the sale of rights and fixtures occurred in 1998, and the first rent exceeded the $2,000.00 threshold for regulation. Accordingly, Respondent's claim that *Acevedo v. Piano Bldg. LLC* provides for automatic regulation of the Premises pursuant to the Rent Stabilization Code is without merit.

By completely ignoring the express statutory language set forth in 9 NYCRR §2520.11(c), the crux of Respondent's argument that the temporary exemption is inapplicable hinges on the definition section set forth on the NYC Rent Guidelines Board website. On its website, the NYC Rent Guidelines Board provides only a few examples of temporary exempt housing accommodations, which Respondent points out does not include the Loft Law as an example. At no time, however, does the NYC Rent Guidelines Board website state that the list is exhaustive. Nor is the NYC Rent Guidelines Board website binding precedent on either the DHCR or the Courts. To the contrary, the NYC Rent Guidelines Board is merely charged with providing yearly and bi-yearly rent adjustments recommendations. *See,* https://rentguidelinesboard.cityofnewyork.us/about/.

Further, as stated in Appellant's Brief, 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, there can be no other justifiable reading of the law than the Premises was exempt from rent regulation from 1983 until through 1998 under the ETPA and Rent Stabilization Law pursuant to 9 NYCRR §2520.11(c), regardless of the examples the NYC Rent Guidelines Board lists on its website.

And, since the Premises was independently deregulated in accordance with the Rent Stabilization Code upon the first rent being established as greater than $2,000.00 per month, it does not necessarily revert back to Rent Stabilization. Since the Premises was exempt from the ETPA for substantially more than four (4) years, the owner was entitled to charge a first rent which then became the legal regulated rent for the Premises. In 1998, when the owner collected a new first rent from an incoming tenant pursuant to MDL §286(6) and 9 NYCRR §2526.1(a)(3)(iii)(1998), and the first legal rent following the vacancy was $4,250.00, which was far in excess of the $2,000.00 regulation threshold. *See,* 9 NYCRR §2500.9(m), 9 NYCRR §2520.11(r)(4). Accordingly, the Premises is became exempt pursuant to the very same sections of the ETPA and RSL.

Although Respondent attempts to distinguish *Rubin v. Decker Associates LLC* from the instant matter, the fact is that *Rubin* is directly on point. In *Rubin*, the Court

specifically held that "[b]ecause the first rent defendant charged exceeded $2000, [the premises] is expressly decontrolled from Rent Stabilization", notwithstanding the fact that the building was subject to the Loft Law.

Next, in attempting to distinguish *73 Tribeca LLC v. Greenbaum*, 36 Misc.3d 1217(A), 2012 WL 3044265, 6 (Civ. Ct., N.Y. Co. 2012), Respondent again claims that *Acevedo* stands for the blanket proposition that the ETPA automatically confers Rent Stabilization status on an IMD unit after a sale of rights and fixtures. This is not the case. *Acevedo* held that once a premises is no longer exempt from Rent Stabilization by virtue of the Loft Law, the ETPA provides for subsequent re-regulation, only <u>if the Premises is otherwise covered</u>. Here, the Premises is not "otherwise covered" because the first rent charged exceeded $2,000.00, thereby deregulating the Premises by operation of law.

Lastly, the fact that the Rent Stabilization Code was amended many years later in 2014 does not have a retroactive effect to undo or delegitimize an act that was permitted at the time in 1998 as Respondent contends. For instance, in *Matter of Healy*, *supra*, which involved a dispute after the 2014 amendment to the Rent Stabilization Code but over a deregulation that occurred during a time that the Rent Stabilization Code permitted such a "first rent," the DHCR found:

> In this case there was an owner occupancy for several years and the apartment was exempt from rent regulation during that time. The first tenant after this exemption (Mr. Kottman) was charged $2,250.00 per month pursuant to a

> lease beginning March 1, 2007, which was appropriate pursuant to 9 NYCRR Section 2526.1, which at that time provided that the first rent after an exemption such as the one at issue herein is the rent as agreed to by the owner and the first tenant taking occupancy of an apartment after such exemption. This rent was greater than the threshold for deregulation in 2007 when Mr. Kottman first took occupancy of the subject apartment. The next tenant, the complaining tenant herein, was therefore not protected by rent stabilization.

Similarly, in *Matter of Keim*, Docket No. AQ410041RT (March 31, 2014), the DHCR found:

> it must be mentioned that while Section §2526.1(a)(3)(iii) of the Rent Stabilization Code now sets forth a new rule for determining the initial legal rent when an apartment was vacant on the base date, this agency is not applying same to Administrative orders, like the instant one, that were issued while the old rule was in effect, because retroactivity as to the new rule would be unfair to owners.

It is well settled that courts will not apply a new law (or new regulation) retroactively when a new principle of law is established overruling clear past regulation or precedent on which litigants may have relied. *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189 (1st Dept. 2011). It is also clear that that the 2014 amendment to 9 NYCRR §2526.1(a)(3)(iii) sets forth a new regulation overruling a past regulation and clear past precedent on which the prior owner relied, and therefore, it cannot be applied retroactively.

Inasmuch as the foregoing sets forth the irrefutable basis that the Premises was exempt from the ETPA in 1984 through 1998 and properly deregulated in 1998, Appellant is entitled to judgment as a matter of law.

Nevertheless, by Decision and Order, dated December 6, 2017, misinterpreting *Acevedo*, the Appellate Division erroneously affirmed the decision of the Appellate Term that held that the Premises is subject to Rent Stabilization by virtue of the ETPA because the building contains six or more residential units, notwithstanding the sale of Loft Law rights and improvements by a prior occupant pursuant to MDL §286(6) and MDL §286(12) and despite the fact that the monthly first rent charged was $4,250.00, which exceeded the regulation threshold pursuant to the ETPA. (R. 4-5 & 139-141). Consequently, the Appellate Division erred in denying Appellant's appeal of the denial of the motion for summary judgment and/or dismissal and dismissing the summary holdover proceeding.

### C. Whether or not a building possesses a Certificate of Occupancy is irrelevant to the inquiry of whether the Premises is rent regulated.

Respondent erroneously argues that it is impossible to deregulate an apartment when the building lacks a Certificate of Occupancy; however Respondent fails to cite any legal authority whatsoever to support such argument. Contrary to Respondent's arguments, after a sale of rights and fixtures pursuant to MDL §286(6)

or MDL §286(12), the Loft Law rules specifically provide that an owner is permitted to continue to rent the unit residentially even though there is no residential Certificate of Occupancy, but that the unit is no longer subject to rent regulation. *See*, 29 RCNY §2–10(d)(2).

As discussed in the Appellant's Brief, Courts routinely hold the units may be rented and used residentially in violation of the Certificate of Occupancy after the purchase of rights and improvements by an owner, but that the unit is no longer rent regulated pursuant to the Loft Law. *73 Tribeca LLC v. Greenbaum, supra*; *Matter of the Application of Don Kiamie of Kiame-Princess Marion Realty Corp.*, Loft Board Order No. 3581, Docket No. LE-0526/RA-0006 (June 17, 2010); *Matter of the Application of 315 Berry Street Corp*., Loft Board Order No. 3571, Docket No. LE-0557 (April 15, 2010); *Bennett v. Hawthorne Village, LLC*, 56 A.D.3d 706, 709, 870 N.Y.S.2d 33 (2nd Dept. 2008); *Swing v. NYC Loft Board*, 180 A.D.2d 529, 530 (1st Dept. 1992); *Walsh v. Salva Realty Corp.*, 2009 WL 2207516, 2009 N.Y. Slip Op. 31573(U) (S. Ct. NY County 2009); *19 W. 36th Holding Corp. v. Parker*, 193 Misc. 2d 519, 522, 749 N.Y.S.2d 824 (Civ. Ct., NY County 2002); *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*, Loft Bd. Order No. 3015 at I (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).

Similarly, the Rent Stabilization Code does not in any way condition regulation or deregulation on whether the unit has a Certificate of Occupancy providing for residential use. Neither 9 NYCRR §2520.11(r)(4) nor 9 NYCRR §2526.1(a)(3)(iii) - which provide an exemption from Rent Stabilization - make any reference or requirement for the unit to have a Certificate of Occupancy providing for residential use as a condition for regulation or deregulation. *See also, Dixon v 105 W. 75th St. LLC*, 148 A.D.3d 623, 53 N.Y.S.3d 1 (1st Dept. 2017). Moreover, in *73 Tribeca LLC v. Greenbaum, supra*, the Court determined that the premises at issue was not subject to Rent Stabilization because there was a prior sale of Loft Law rights and fixtures even though the building lacked a residential Certificate of Occupancy. *See also, Bennett v. Hawthorne Village, LLC, supra*; *19 W. 36th Holding Corp. v. Parker, supra*.

Respondent fails to cite any legal authority whatsoever to contradict the foregoing binding precedents.

Next, Respondent incorrectly argues that without a valid Certificate of Occupancy, the landlord has no basis to collect any rent. However, MDL §285(1) specifically permits an owner of an Interim Multiple Dwelling which lacks a Certificate of Occupancy to collect rent from residential occupants qualified for the

protection pursuant to the Loft Law and, as stated *supra*, the Loft Law allows an IMD unit to continue to be rented residentially in violation of the Certificate of Occupancy after the purchase of rights and fixtures. *See*, 29 RCNY §2–10(d)(2).

Lastly, Respondent erroneously claims that the Petition was defective because it "makes no representation" as to the regulated status of the Premises. Contrary to Respondent's arguments, the Petition specifically states "The Premises is an Interim Multiple Dwelling, subject to Article 7-C of the New York Multiple Dwelling Law ("Loft Law"), and is duly registered with the New York City Loft Board" and that Respondent was a month-to-month tenant whose term had expired. (R. 38-39, 64-66).

Based upon the foregoing, it is clear that whether or not the Building possesses a Certificate of Occupancy is irrelevant to the inquiry of whether the Premises is rent regulated. And, since there was a sale of rights and fixtures, the Premises is not rent regulated pursuant to the Loft Law or Rent Stabilization. Accordingly, the Appellate Division erred in denying Appellant's appeal of the denial of the motion for summary judgment and/or dismissal and dismissing the summary holdover proceeding.

**Point II - The sales record and sales agreement filed with the Loft Board are admissible and valid. The date the sales record and sales agreement were re-filed with the Loft Board is immaterial.**

Respondent attempts to attack the authenticity of the sales record and sales agreement. However, the sales agreement and sales record are authentic inasmuch as they were duly executed by the landlord and then tenant, bear the "received" stamp of the Loft Board, *were accepted by the Loft Board as a deregulating event*, and the Loft Board has designated the Premises on its records as BUYR -- the designation for units that are no longer rent regulated because of a purchase of rights or improvements by the owner. (R. 64-66, 85-89, 122). And, it is particularly noteworthy that neither Respondent nor anyone else has challenged the validity of the sales record and sales agreement by commencing a proceeding with the Loft Board. *See*, 29 RCNY §2-10 and 29 RCNY §2-07.

In addition, the owner and landlord of the building at the time the sale of rights and fixtures occurred in 1998, as well as when the sales record was re-filed with the Loft Board in 2004, was Appellant's predecessor in interest, Reade Street Equities Associates LP. Reade Street Equities Associates LP was owned and operated by the same related corporation as Appellant. (R. 57-61). The signatory on the sales agreement and sales record on behalf of Reade Street Equities Associates LP was Albert Laboz, the same person who submitted the affidavit in support of the underlying motion for summary judgment. Mr. Laboz specifically stated he had

knowledge of the sale of rights and fixtures in 1998, as well as when the sales record was re-filed with the Loft Board in 2004, and authenticated the same. Both documents were signed by Appellant and/or its predecessor in interest and the signatures was acknowledged and authenticated. Thus, it is admissible. *See also*, CPLR §4538.

Respondent alleges that Appellant acknowledges that no original sales record was ever filed with the Loft Board. However, such allegation is simply untrue. First, as stated previously, the Loft Board already accepted the sales record and sales agreement and has designated the Premises on its records as having received the same and the Premises no longer rent regulated because of a purchase of rights or improvements by the owner. Moreover, as stated in the attorney's affidavit submitted to the Loft Board upon submission of a copy of the sales record and sales agreement (R. 122), the Loft Board did not have the sales record in its files, which was most likely due to the fact that it was misplaced. Pursuant to 29 RCNY §2-10(b), where a sales record needs to be filed with the Loft Board, but the prior occupant refuses or fails to sign the sales record, the owner or its representative may satisfy this requirement by filing proof of the sale of rights, in addition to an affidavit stating that the prior occupant failed and/or refused to sign the sales record. This is exactly what Appellant's predecessor-in-interest did here. When the Loft Board informed Appellant's predecessor-in-interest that they could not locate an original of the sales

agreement and sales record, Appellant's predecessor-in-interest's attorney reached out to the prior tenant to obtain a re-executed sales record. When no response was received from the prior occupant, Appellant's predecessor-in-interest's attorney re-filed proof of the sale of rights along with an affidavit stating his reasonable efforts to obtain a re-executed sales record from the prior tenant, but that the prior tenant failed to and/or refused to re-execute the sales record. (R. 122).

It must be said, the determination of issues of relevancy and authentication are matter resting largely in the discretion of the trial court. S*ee e.g., Radosh v. Shipstad,* 20 N.Y.2d 504, 508, 285 N.Y.S.2d 60 (1967). In this regard, a motion for summary judgment pursuant to CPLR §3212(b) shall be denied only if a party shows "facts sufficient to require a trial of any issue of fact." CPLR §3212(b). *See also, Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Courts have routinely ruled that the formal requirements of CPLR §3212 are satisfied when, as here, the motion relies on an attorney's affirmation or affidavit and adequate documentary evidence. *See e.g., Zuckerman, supra* at 563 ("[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form", e.g., documents, transcripts"). *See also Prudential Sec. v. Rovello*, 262 A.D.2d 172, 692 N.Y.S.2d 67 (1st Dept. 1999).

Here, the Civil Court determined that each of these records proffered by Appellant satisfied the "admissible form" requirement. Respondent's opposition in this regard thus fails to raise a genuine, bona fide, and substantial issue of fact as to the authenticity of the sales agreement and sales record. *Leumi Fin. Corp. v. Richter*, 24 A.D.2d 855, 855, 264 N.Y.S.2d 707, 709 (1965), aff'd sub nom. *Leumi-Fin. Corp. v. Richter*, 17 N.Y.2d 166, 216 N.E.2d 579 (1966) ("To require a trial such fact issue must be genuine, bona fide and substantial.") (citing *Richard v. Credit Suisse*, 242 N.Y. 346, 350, 152 N.E. 110, 111, 45 A.L.R. 1041 [1926]; *Strasburger v. Rosenheim*, 234 A.D. 544, 547, 255 N.Y.S. 316, 319 [1st Dept. 1932]).

Lastly, Respondent alleges that the sales record was only signed by one tenant. However, as demonstrated by the sales agreement and sales record both tenants of record sold their rights and fixtures to the Premises. (R. 85-86). But moreover, again, the failure to file a record of sale within 30 days of the date of the sale only subjects the owner to a monetary penalty and will not result in nullification of the sale. The date of filing of the record of sale, a ministerial act, has no bearing on the deregulation, since the purchase of rights and improvements "is the definitive event for deregulation" and not the date it is filed with the Loft Board. 29 RCNY §2-10(b); 29 RCNY §2-07(j); *Thorgeirsdottir v New York City Loft Bd.*, 161 A.D.2d 337, 555 N.Y.S.2d 706 (1st Dept. 1990).

In the case at bar, simply put, the sales record and sales agreement from 1998 are valid, authentic, and admissible. Moreover, the fact that a copy of the sales record and sales agreement from 1998 were filed and then re-filed with the Loft Board in 2004 has no bearing on the deregulation of the Premises since the purchase of rights and improvements is the definitive event for deregulation.

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

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

Here, since on April 1, 1984 the Premises was subject to regulation under the Loft Law, it was exempt from the ETPA and the RSL pursuant to 9 NYCRR

§2520.11(c), and therefore no registration was required. Since the first legal rent following the vacancy was in excess of $2,000.00, the Premises was *permanently exempt* from coverage pursuant to ETPA as a matter of law. *Matter of Vivienne U. Kahng*, *supra*; *Matter of Forest Royale Assocs.*, *supra.*

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

It is well settled that the DHCR's interpretation of the statute it is charged with implementing is entitled to judicial deference since the interpretation relies upon the special competence the agency is presumed to have developed in its administration thereof and its knowledge and understanding of underlying operational practices.

*Matter of Salvati v. Eimicke*, 72 N.Y.2d 784533 N.E.2d 1045 (1988); *Tockwotten Associates, LLC v. DHCR*, 7 A.D.3d 453777 N.Y.S.2d 465 (1st Dept. 2004); *Matter of Herzog v. Joy*, 74 A.D.2d 372, 375, 428 N.Y.S.2d 1 (1st Dept. 1980), affd. 53 N.Y.2d 821, 439 N.Y.S.2d 922, 422 N.E.2d 582 (1981)("an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight").

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

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

In *Matter of Vivienne U. Kahng*, *supra*, the DHCR held that since the first rent was over $2,000 per month, the apartment was exempt from rent regulation and

failure to comply with the notice requirements of RSL §26-504.2, including the filing of an exit registration, does not negate the exemption.

In *Matter of Pace & Hersh*: DHCR Adm. Rev. Docket No. WF410015RT (8/21/08), the tenants paid an initial free market rent after the base date vacancy of $2,625 per month. The tenants filed an overcharge and coverage application with the DHCR contending that since no registration had been filed with DHCR indicating that the rent had reached $2,000.00 or more per month when the apartment become vacant, the owner could not establish that the subject housing accommodation was exempt from Rent Stabilization when they took occupancy. DHCR denied the petition finding that on the base date of four years prior to the application the apartment was vacant. As a result of the foregoing, the first rent charged after that became the base rent. The tenants themselves were the ones who paid an initial rent after the base date vacancy of $2,625. Since this rent was more than $2,000.00, the DHCR found that the apartment was exempt from Rent Stabilization.

Similarly, in *Matter of Davis,* DHCR Adm. Rev. Docket No. XF410058RT (8/31/09), the DHCR held that registration is not required to effectuate an exemption that occurs by operation of law, nor is there any Code provision which invalidates high-rent deregulation based upon an owner's failure to file exit registration. *See also, Thorgeirdottir v. NYC Loft Bd.*, 161 A.D.2d 337, 555 NYS2d 706 (1st Dept. 1990), *aff*. 77 N.Y.S.2d 951, 570 N.Y.S.2d 486 (1991).

The Appellate Division's ruling in *Gersten, supra* is particularly illustrative. In *Gersten,* the court held only that a tenant who had not received notice of a Premises' deregulation is able to challenge the deregulated status without being subject to a statute of limitations.

The lack of filing has no effect upon the status of the apartment as being unregulated or exempt. *See, Torres v. McHedlishvili*, 28 Misc.3d 1210(A), 911 N.Y.S.2d 696 (Civ. Ct. New York 2010)(failure to file the up-to-date rent with the DHCR in a timely matter does not make the agreed-upon rent unlawful); *Central Park South Associates v. Haynes,* 171 Misc.2d 463, 654 N.Y.S.2d 967, (Civ. Ct. New York 1996) (*citing,* NYC Code 26–517(e) and NY Apartment Law Insider, "How to Deregulate Vacancy–Decontrolled Apartment," November 1996, p. 8).

Accordingly, the lack of a DHCR rent registration merely preserves the right to challenge an exemption, it does not negate or affect that exemption. Appellant is not precluded from establishing the basis for the exemption, regardless of whether or not there has been a registration. Any purported failure of Petitioner to register the Premises with DHCR simply allows for a continuing challenge to validity of the Premises' exemption. Nonetheless, Appellant has amply demonstrated that: (1) the Premises was properly deregulated under the Loft Law; (2) Appellant was entitled to charge a first rent; and (3) the first rent charged and paid was in excess of $2,000.00 per month.

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

**Point IV- The Appellate Division erroneously affirmed the Appellate Term's reversal of the Civil Court Decision which held that Respondent was not entitled to attorneys' fees.**

Respondent incorrectly argues that it is a prevailing party, which he claims automatically entitles him to an award of attorneys' fees. However, and contrary to Respondent's arguments, RPL §234 is not a mandatory provision that must be applied automatically in every proceeding. It is applied within the discretion of the Court based upon the facts of each case. *Townhouse Company, LLC v. Peters*, 2007 Slip Op. 52111(U), 851 N.Y.S.2d 74 (A.T. 1 2007); *360 Clinton Ave. Tenants Corp. v. Fatsis*, 25 H.C.R. 397B, N.Y.L.J. July 21, 1997, p.30, col.1, (A.T.2 & 11); *Ariel Assocs. LLC v. Brown*, 25 H.C.R. 495A, N.Y.L.J. September 18, 1997, p. 29, col.5, (Civ. Ct. NY 1997).

An award of counsel fees is not required in every case. Rather, the determination is left to the discretion of the trial court, taking into account the underlying facts and circumstances involved. *Duane Thomas Loft Tenants Ass'n v.*

*Sylvan Lawrence Co., Inc.*, 117 Misc.2d 360, 369, 458 N.Y.S.2d 792, 798 (N.Y. Sup., 1982).

Even a victorious tenant does not automatically receive attorneys' fees. The decision to award attorneys' fees "must be determined from the scope of the actual issues". *205 Third Ave. Ownership v. Ziegler*, 21 H.C.R 170A, N.Y.L.J. April 21, 1993 p. 22, col. 5 (Civ. Ct. N.Y. Cty.); *Sohn v Calderon,* 23 H.C.R 568B, N.Y.L.J. September 20, 1995 p. 26, col. 1 (Sup. Ct. New York).

In fact, an award of attorneys' fees can be denied "where bad faith is established on the part of the successful party or where unfairness is manifest." *Jacreg Realty Corp. v. Matthew Barnes,* 284 A.D.2d 280, 727 N.Y.S.2d 103 (1st Dept., 2001); *Beach Haven Apartments #1 Inc. v. Cheseborough,* 2 Misc.3d 33, 773 N.Y.S.2d 775 (A.T. 2nd Dept., 2003)(attorneys' fees should only be awarded where the party has "truly prevailed" and in circumstances that do not impair the underlying policy rationale of Real Property Law §234).

Similarly, where there is a mixed outcome of the litigation, "neither party can claim to have prevailed in the litigation" so as to give rise to an entitlement to attorneys' fees. *See e.g., 12-14 E. 64th Owners Corp. v Hixon,* 38 Misc.3d 135(A), 967 N.Y.S.2d 870 (Table) (A.T. 1st Dept. 2013); *339-347 E. 12th St. LLC v Ling*, 31 Misc.3d 48, 921 N.Y.S.2d 781 (A.T. 1st Dept. 2011).

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, supra; Solow v. Wellner*, 205 A.D.2d 339, 613 N.Y.S.2d 163 (1st Dept., 1994). *See also, Murphy v. Vivian Realty Co.*, 199 A.D.2d 192, 193, 605 N.Y.S.2d 285, 286 (1st Dept., 1993) (*citing, Sperling v. 145 East 15th Street Tenant's Corp.*, 174 A.D.2d 498, 571 N.Y.S.2d 275 [1st Dept., 1991]). A court should invoke its discretion to deny fees where unfairness is manifest. *Nesbitt v. New York City Conciliation and Appeals Bd.*, 121 Misc.2d 336, 340, 467 N.Y.S.2d 528, 532 (S. Ct. N.Y. Co., 1983). Moreover, RPL §234 provides innocent tenants with a method of recovering the costs of their defense against an unwarranted proceeding brought in bad faith.

Here, Appellant had a good faith basis for commencing a summary eviction proceeding against Respondent based upon the termination of Respondent's month-to-month tenancy. Moreover, as further delineated in Appellant's Brief, the Civil Court, in its discretion, properly determined that Respondent was not entitled to an award of attorneys' fees since Respondent had not prevailed on its counterclaims and, therefore, was not a prevailing party, as discussed in the underlying Appellant's Brief.

Accordingly, the Civil Court, in its discretion, correctly dismissed Respondent's counterclaim for attorney's fees. The Appellate Division erroneously affirmed the Appellate Term's reversal of the foregoing.

## CONCLUSION

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
June 15, 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.

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Dated: New York, New York
June 15, 2021

Joseph Goldsmith, Esq.

**Prepared by PrintingHouse Press, Ltd. 10 East 39th Street, New York, NY 10016**
**Tel No: (212) 719-0990 Fax No: (212) 398-9253**

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

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**Reply Brief**

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

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

**Docket/Case No:** APL-2021-00004

**Index:** 570235/17