To Be Argued By:
Joseph S. Goldsmith
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New York County Clerk's Index No. 570235/17

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

AURORA ASSOCIATES LLC,

Petitioner-Appellant-Respondent,

against

RAFFAELLO LOCATELLI,

Respondent-Respondent-Appellant,

and

CLEANTECH STRATEGIES LLC,
JOHN DOE and JANE DOE,

Respondents.

BRIEF FOR PETITIONER-APPELLANT-RESPONDENT

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Petitioner-Appellant, Aurora Associates LLC ("Appellant"), submits the instant appeal of the Decision and Order of the Appellate Term, entered December 6, 2017. The Appellate Term's December 6, 2017 Decision and Order affirmed the Decision and Order of the Civil Court, dated November 28, 2016, which dismissed Appellant's holdover proceeding brought due to Respondent's-Cross-Appellant's ("Cross-Appellant") failure to vacate the subject premises after the expiration of his term and as well reversed the Decision and Order of the Civil Court, dated November 28, 2016, which dismissed the Cross-Appellant's counterclaim for attorneys' fees. It is respectfully submitted that the Appellate Term erred in rendering its December 6, 2017 Decision and Order and overlooked or misapprehended the facts or the law or mistakenly arrived at its conclusion.

Since 1983, Loft 3B ("Premises") located in the building known as and by the street address of 78 Reade Street, New York, New York ("Building") has been a registered Interim Multiple Dwelling ("IMD") unit, subject to Article 7-C of the Multiple Dwelling Law ("Loft Law"). Since the Premises was subject to regulation under the Loft Law, it was exempt from the Emergency Tenant Protection Act ("ETPA") and the RSL ("RSL") pursuant to 9 NYCRR §2520.11(c). In 1998, the former protected IMD tenants of the Premises sold all of their rights and fixtures to Appellant's predecessor-in-interest pursuant to Multiple Dwelling Law ("MDL")

§§286(6) and (12). As a result of the foregoing, the Loft Law provides that while the Premises remained and remains subject to the Loft Law the sale exempts the Premises from rent regulation pursuant to the Loft Law pursuant to 29 RCNY §2–10(d)(2).

In 1998 the ETPA and RSC ("RSC") provided that an owner was entitled to collect a new "first rent" from an incoming tenant if the Premises had been vacant or temporarily exempt from the ETPA for four (4) or more years. Here, for the fifteen years between 1983 and 1998 the rents charged to the tenants of the Premises were regulated by the Loft Law and exempt from Rent Stabilization pursuant to 9 NYCRR §2520.11(c). The first rent charged for the Premises after the sale pursuant to MDL §§286(6) and (12) was $4,250.00 per month, which exceeded the two thousand dollars ($2,000.00) threshold for regulation pursuant to the ETPA and RSC. Therefore, the Premises was permanently exempted from coverage pursuant to ETPA and RSC because, pursuant to the ETPA, it became vacant after June 19, 1997 with an initial legal rent of more than two thousand dollars ($2,000.00) per month. *See,* 9 NYCRR §2500.9(m). *See also*, 9 NYCRR §2520.11(r)(4).

Notwithstanding the foregoing, the Appellate Term's December 6, 2017 Decision and Order essentially creates a new class of apartments, one that is neither completely subject to the Loft Law nor completely subject to the

Emergency Tenant Protection Act ("ETPA") and the RSC ("RSC"), and one that is not capable of deregulation. The Appellate Term's support is found entirely within its reading of *Acevedo v. Piano Bldg, LLC*, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dept. 2009), *appeal withdrawn*, 14. N.Y.3d 884 (2010)[1] ("*Acevedo*").

The Premises is not and could not be subject to the ETPA after the sale of rights and fixtures pursuant to MDL §286(6) and (12) since the Premises was permanently exempted from coverage pursuant to the very same ETPA and RSC because the Premises became vacant after June 19, 1997 with an initial legal rent of more than two thousand dollars ($2,000.00) per month. *See*, 9 NYCRR §2520.11(c) and 9 NYCRR §2520.11(r)(4)[2].

The Courts may not cherry-pick which provisions of the ETPA and RSC to apply to the Premises and if it believes *Acevedo* stands for the proposition that all loft units should be re-regulated as of right by virtue of the ETPA after sale of Loft Law rights and improvements from a protected IMD tenant, then it must allow for them to be exempted from coverage pursuant to those very same terms of the ETPA and RSC.

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[1] It is further noteworthy that this Appellate Division granted *Acevedo v. Piano Bldg. LLC* leave to Appeal to the Court of Appeals, though the proceeding was later withdrawn and discontinued.

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

The Appellate Terms' misinterpretation of the ruling in *Acevedo*, *supra* as creating a blanket rule guaranteeing re-regulation of a premises under the ETPA would nullify the Loft Law provisions regarding deregulation, the Loft Board rulings holding that a premises is deregulated after a sale of rights and improvement, the ETPA provisions regarding the right to charge a first rent after a four-year exemption from Rent Stabilization, and the ETPA provisions regarding the exclusion of high rent accommodations from regulation. Nothing in the *Acevedo*, *supra* decision indicates that the Appellate Division intended such a result. To the contrary, the plain language of the decision indicates that the Court simply held there is no blanket exclusion from rent regulation pursuant to the ETPA subsequent to a sale of rights and improvements under the Loft Law, and not that there is a blanket rule that these units become permanently and perpetually subject to the ETPA at the last rent set by the Loft Law.

If the holding of the Appellate Term were to stand, as shall be discussed *infra*, there would be numerous conflicting provisions of the Loft Law, ETPA, and RSC that would apply to the Premises and to units similarly situated.

Accordingly, for the reasons set forth herein, it is respectfully submitted that the Appellate Term erred in rendering its Decision and Order, dated December 6, 2017, affirming the Decision and Order of the Civil Court, dated November 28, 2016, which dismissed Appellant's holdover proceeding brought due to Cross-

Appellant's failure to vacate the Premises after the expiration of his term and reversing the Decision and Order of the Civil Court, dated November 28, 2016, which dismissed the Cross-Appellant's counterclaim for attorneys' fees.

Consequently, it is respectfully requested that this Court reverse the Decision and Order of the Appellate Term, dated December 6, 2017, and grant Appellant a final judgment of possession and warrant of eviction.

QUESTIONS PRESENTED

Q1. Did the Appellate Term err in affirming the Decision and Order of the Civil Court, dated November 28, 2016, dismissing Appellant's holdover proceeding?

A1. Yes.

Q2. Did the Appellate Term err by finding, notwithstanding the sale of Loft Law rights and improvements by a prior occupant pursuant to MDL §286(6) and (12) and despite the fact that the monthly "first rent" charged thereafter was $4,250.00, which exceeded the deregulation threshold pursuant to the ETPA (R. 4-5), by holding that the Premises is subject to Rent Stabilization by virtue of the ETPA because the Building contains six or more residential units?

A2. Yes.

Q3. Did the Appellate Term err in finding that tenant is entitled to recover his reasonable attorneys' fees as the "prevailing party" in this litigation pursuant to the lease and the reciprocal provisions of Real Property §234?

A3. Yes.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The underlying proceeding sought to recover possession of the Premises on the grounds that Cross-Appellant refused to vacate the Premises after the expiration of the term of the month-to-month tenancy. Cross-Appellant, admittedly, has failed and/or refused to vacate, quit and surrender possession of the Premises on or after the expiration date set forth in the Thirty (30) Day Notice of Termination of Month-to-Month Tenancy Pursuant to Section 232-A of the Real Property Law and is withholding possession thereof from Appellant without Appellant's consent.

In its motion for summary judgment and/or dismissal of affirmative defenses, Appellant established that it is the landlord and owner of the Building, pursuant to a deed, dated June 30, 1998. (R. 57-61). Appellant further established that the Building and Premises are an IMD, subject to the Loft Law, and is duly registered with the New York City Loft Board. Pursuant to MDL §284(2), there is currently an effective registration statement on file with the New York City 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. 62-66).

Appellant also established that fifteen years after the initial IMD registration was filed with the Loft Board, in 1998, the Premises was rent deregulated pursuant

the Loft Law by virtue of the fact that the former protected IMD tenants of the Premises, sold all of their rights and fixtures to Appellant's predecessor-in-interest pursuant to MDL §§286(6) and (12). Appellant submitted as part of its motion a copy of the record of the sale of rights and improvements pursuant to MDL §§286(6) and (12) in the Premises that was filed with the Loft Board. (R. 85-89). As shall be discussed *infra*, since there was a sale of the rights and improvements in the Premises pursuant to MDL §§286(6) and (12) by the IMD tenant, the Premises is not subject to rent regulation pursuant to the Loft Law.

After the prior IMD tenants' vacatur, Appellant renovated the Premises and leased the Premises to John Chen, pursuant to a written lease, dated December 16, 1998, with a monthly "first rent" of $4,250.00[3], which exceeded the $2,000.00 deregulation threshold pursuant to the ETPA. In establishing the foregoing, Appellant submitted a copy of Mr. Chen's lease, dated December 16, 1998, together with a rent ledger, several rent checks tendered by Mr. Chen, and an Affidavit from Appellant. (R. 28-33, 90-109).

Subsequently, and many years later, Cross-Appellant entered into possession of the Premises pursuant to the terms of a written lease with Appellant, as Landlord/Owner, dated July 2009. After it expired, Cross-Appellant's last written

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[3] 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.

lease was continually renewed and extended. Most recently Cross-Appellant's last written lease was extended by written agreement, dated September 29, 2014, for a term of one (1) year between Cross-Appellant, as tenant, and Appellant, as Landlord/Owner, commencing on December 1, 2014 and ending on November 30, 2015 ("Lease"). (R. 67-76).

Upon expiration of the most recent renewal lease, Cross-Appellant remained in possession of the Premises as a month-to-month tenant. (R. 77-80). Respondents – Cleantech Strategies LLC, "John Doe" and "Jane Doe" – are, upon information and belief, the undertenants of Cross-Appellant.

The term for which the Premises was rented to Cross-Appellant 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 their 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 Respondents tenancy as of April 30, 2016 and advising Respondents to remove from the Premises on or before this date. (R. 81-84).

When Respondents failed to surrender possession of the Premises, Appellant caused a holdover Notice of Petition and Petition, dated May 5, 2016, to be duly served upon Respondents. (R. 34-52).

On or about June 21, 2016, Cross-Appellant 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"), rent overcharge, and a claim for attorneys' fees incurred in connection with the proceeding. (R. 53-56).

Thereafter, in or about August 2016, certain motion practice between the parties ensued. Appellant made a motion seeking entry of an order and judgment: (a) pursuant to CPLR §3212, granting Appellant summary judgment on the Petition; and/or alternatively, (b) pursuant to CPLR §3211(b) dismissing Cross-Appellant's First and Second Affirmative Defenses; and/or (c) pursuant to CPLR §3211(a) striking Cross-Appellant's First and Second Counterclaims; and (d) granting Appellant judgment as to liability on Appellant's claim for fair-market use and occupancy and damages in an amount to be determined by the Court through the date of Cross-Appellant's vacatur or eviction; and (e) granting Appellant judgment as to liability for reasonable attorneys' fees and setting the matter down for a hearing to affix the amount of damages; and (f) granting Appellant such other and further relief as this Court deems appropriate. (R. 26-109)

Cross-Appellant made a cross-motion seeking the entry of an order: (a) summarily dismissing the petition; (b) awarding Cross-Appellant a judgment on his

counterclaim for rent overcharge; (c) awarding Cross-Appellant a judgment on his counterclaim for attorneys' fees; and (d) granting Cross-Appellant such other and further relief as the Court deems just and proper. (R. 110)

On or about November 28, 2016, the Civil Court issued a Decision/Order denying Appellant's motion for summary judgment and/or dismissal and dismissed the summary holdover proceeding. The Court correctly however dismissed Cross-Appellant's second affirmative defense, first counterclaim for rent overcharge, and second counterclaim for attorneys' fees. (R. 6-10).

An appeal and cross-appeal were filed. On or about December 6, 2017, mis-interpreting *Acevedo*, *supra*, the Appellate Term partially affirmed and partially reversed the Civil Court's Decision/Order. The Appellate Term incorrectly held that the Premises is subject to Rent Stabilization by virtue of the ETPA because the Building contains six or more residential units, notwithstanding the sale of Loft Law rights and improvements by a prior occupant pursuant to MDL §§286(6) and 286(12) and despite the fact that the monthly "first rent" charged was $4,250.00, which exceeded the deregulation threshold pursuant to the ETPA. (R. 4-5). Furthermore, the Appellate Term erred in reversing the Civil Court's dismissal of Cross-Appellant's counterclaim for attorneys' fees (R. 4-5).

LEGAL ARGUMENT

It is submitted that the Appellate Term erred in affirming the Civil Court's dismissal of the underlying holdover petition, because the Appellant met its burden and pled and proved its direct case by a fair preponderance of the credible evidence. Specifically, Appellant established that: (1) it is the owner of the Building; (2) the Building and Premises were registered as an IMD and there is a currently an effective registration statement on file with the New York City Loft Board; (3) in or about 1998, the prior IMD tenants sold their Loft Law rights and improvements in the Premises pursuant to MDL §§286(6) and §286(12); (4) thereafter, pursuant to a written lease, dated December 16, 1998, with the subsequent tenant, the monthly "first rent" for the Premises was $4,250.00, which exceeded the $2,000.00 deregulation threshold pursuant to the ETPA; (5) Cross-Appellant was the tenant of record of the Premises whose last written lease expired on November 30, 2015; (6) Cross-Appellant continued in possession of the Premises as a month-to-month tenant; (7) Cross-Appellant was properly served with a predicate Termination Notice; and (8) when Cross-Appellant failed and/or refused to vacate, quit and surrender possession of the Premises upon the expiration of the Termination Notice, Cross-Appellant was properly served with a holdover petition. (R. 26-109).

These proven facts provide a basis for a final judgment of possession and

warrant of eviction. *See e.g.,* RPAPL §711(1)(providing a special proceeding for eviction may be maintained upon the ground that the tenant continues in possession of any portion of the premises after the expiration of his term, without the permission of the landlord).

As discussed *infra*, the Appellate Terms' misinterpretation of the ruling in *Acevedo*, *supra* as creating a blanket rule guaranteeing re-regulation of a premises under the ETPA would nullify the Loft Law provisions regarding deregulation, the Loft Board rulings holding that a premises is deregulated after a sale of rights and improvement, the ETPA provisions regarding the right to charge a first rent after a four-year exemption from Rent Stabilization, and the ETPA provisions regarding the exclusion of high rent accommodations from regulation. Nothing in the *Acevedo*, *supra* decision indicates that the Appellate Division intended such a result. To the contrary, the plain language of the decision indicates that the Court simply held there is no blanket exclusion from rent regulation pursuant to the ETPA subsequent to a sale of rights and improvements under the Loft Law, and not that there is a blanket rule that these units become permanently and perpetually subject to the ETPA at the last rent set by the Loft Law.

In addition, as discussed *infra*, the Appellate Term's application of *Acevedo*, *supra* to the facts of the case at bar conflicts with the laws, regulations, and spirit of the Loft Law. Prior to *Acevedo*, the Courts, including the Court of Appeals in

Wolinsky v. Kee Yip Realty Corp., 2 N.Y.3d 487, 812 N.E.2d 302 (2004), held that the prior-enacted ETPA did not apply to IMD units and that if the prior-enacted ETPA already protected IMD units, significant portions of the Loft Law would have been unnecessary. *Id., citing e.g*. MDL §286(3). Indeed, had the prior-enacted ETPA already protected IMD units, there would have been no point to the Loft Law's completely different form of rent regulation and the Loft Law could simply have been one which required legalization for residential use and made no mention of the rents which would have been subject to the prior-enacted ETPA. This inconsistency between the ruling in *Acevedo* and the laws, regulations, and spirit in the enactment of the Loft Law urges this Court to honor the laws, regulations, and spirit of the Loft Law.

Point I - **The Premises are not subject to the ETPA and RSC since the Premises was permanently exempted from coverage pursuant to the provisions of the very ETPA and RSC because it became vacant after June 19, 1997 with an initial legal rent of more than two thousand dollars ($2,000.00) per month.**

A. While still subject to the Loft Law, the Premises is exempt from rent regulation pursuant to the Loft Law.

The Loft Law, in relevant part, provides for rent 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* he/she has made to

their premises, or which he/she has 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 purchases the improvements, they are permitted to rent the unit at market value subject to subsequent rent regulation if such building had six or more residential units at such time.

Pursuant to MDL §286(12), an IMD tenant also has the right to sell his/her *rights* in the premises directly to the owner of the building. An owner has two options after a sale of rights under MDL §286(12). 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 upon a sale pursuant to MDL §286(12), and the one Appellant availed itself of here, is to continue residential use, in which case the owner must legalize the unit under the Loft Law, but the unit is no longer rent regulated pursuant to the Loft Law. *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 rent 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., NY 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 Board 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 Board 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, in fact, 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 (2nd Dept. 2008) (The former owner's purchase of the rights and improvements in the loft premises exempted the premises from the provisions of the Loft Law providing for rent regulation); *Swing v. NYC Loft Board*, 180 A.D.2d 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 N.Y. Slip Op. 31573(U) (S. Ct. NY County 2009) (the effect of the sale of both the fixtures and rights pursuant to Multiple Dwelling Law §286(6) and (12) of the premises freed the loft from rent regulation and allowed the owner to rent the loft at a monthly rent that was at or above the level of

vacancy rental decontrol); *19 W. 36th Holding Corp. v. Parker*, 193 Misc. 2d 519, 522, 749 N.Y.S.2d 824 (Civ. Ct., NY 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*, 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).

In interpreting the foregoing Loft Board's Rules, Courts routinely hold the units may be rented and used residentially in violation of the certificate of occupancy after the purchase by an owner of rights and improvements, and that the unit is still subject to the Loft Law, but that the unit is 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., N.Y. 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 Board 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 Board 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 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 Loft Law but is exempt from rent regulation pursuant to the Loft Law.

B. The Appellate Term erred in holding that the Premises was subject to Rent Stabilization based upon the holding of *Acevedo*.

In misinterpreting *Acevedo*, *supra*, the Appellate Term erroneously held that the Premises are subject to Rent Stabilization by virtue of the ETPA because the Building contains six or more residential units. To the contrary, in *Acevedo*, *supra*, the Appellate Division held that a former IMD premises *may*, in certain circumstances, be subject to subsequent rent regulation under the ETPA, even if there has been a sale of rights and improvements pursuant to MDL §286(6) or (12). Specifically, the decision in *Acevedo*, did not mandate that all loft units must

necessarily revert to Rent Stabilization after the sale of rights and fixtures pursuant to the Loft Law. Rather, in order to revert to Rent Stabilization after a sale of rights and fixtures, the premises would have to qualify for regulation under ETPA's separate statutory scheme.

As articulated by the First Department in *Acevedo*, *supra,* an IMD premises that is otherwise qualified for Rent Stabilization, while it is subject to rent regulation under the Loft Law, is temporarily exempt from rent regulation pursuant to the ETPA. After a sale of rights and improvements pursuant to MDL §286(6) or MDL §286(12), a premises then may *revert back* into Rent Stabilization *only if* it is otherwise covered. 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dept. 2009)(*emphasis added*).

In the case at bar, the Premises was voluntarily registered as an IMD and regulated pursuant to the Loft Law for approximately fifteen (15) years from 1983 to 1998. During those fifteen (15) years the Premises was subject to regulation solely under the Loft Law, *and temporarily exempt from the ETPA and the RSL* pursuant to 9 NYCRR §2520.11(c). As articulated in 9 NYCRR §2520.11(c), any building completed prior to January 1, 1974 whose rents were regulated by any State or Federal 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 regulation. Specifically, 9 NYCRR §2520.11(c) states:

> This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below…
>
> (c) … housing accommodations in buildings completed or substantially rehabilitated prior to January 1, 1974, and whose rentals were previously regulated under the PHFL or any other State or Federal law, other than the RSL or the City Rent Law, shall become subject to the ETPA, the RSL and this Code, upon the termination of such regulation.

Here, the Premises is a registered IMD, subject to the Loft Law. In addition to the foregoing, from 1983 until 1998, when the former Loft tenants sold their rights and fixtures in accordance with the Loft Law, the rent for the Premises was regulated by the Loft Law. IMDs subject to the Loft Law are subject to a completely different form of rent regulation, by which the rent may not exceed the rent charged and collected on December 21, 1982 and owners are compelled to make improvements to legalize the building, and thus collect 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).

The Loft Law is a *State Law*. The rent regulation of the Premises under this State Law from 1983 until 1998 therefore statutorily exempted the Premises from rent regulation under the ETPA and RSL pursuant to 9 NYCRR §2520.11(c). Thus, during those fifteen (15) years that the Premises were subject to rent regulation

under the Loft Law, they were exempt from the ETPA and the RSL pursuant to 9 NYCRR §2520.11(c).

This temporary exemption from Rent Stabilization due to regulation under the Loft Law is discussed by the Appellate Court in *Acevedo*, *supra* and states that the premises in question _*reverts*_ to Rent Stabilization once it is deregulated pursuant to the Loft Law. Accordingly, the *Acevedo*, *supra* 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*, *supra* states, in pertinent part:

> In this landlord-tenant dispute, 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. The landlord invites us to overrule our 2002 pronouncement in 182 Fifth Ave. v Design Dev. Concepts (300 AD2d 198 [2002]) in which we answered the question in the affirmative. The owner relies primarily upon *Wolinsky v. Kee Yip Realty Corp*. (2 NY3d 487 [2004]), which the Second Department has interpreted broadly as barring Emergency Tenant Protection Act of 1974 ([ETPA] L 1974, ch 576, §4, as amended) coverage to all loft Premises not subject to the Loft Law, even where the New York City Zoning Resolution permits residential use as of right. We decline to follow the Second Department, as we find Wolinsky consistent with our view on this issue. (*emphasis supplied*)

The Court in *Acevedo* held that once a premises is no longer temporarily

exempt from Rent Stabilization by virtue of the Loft Law, the ETPA provides for subsequent re-regulation, *if the premises is otherwise covered*. *Id.* (*emphasis added*). Glaringly absent from the ruling by the Appellate Division 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, such unit does not necessarily revert to Rent Stabilization. Indeed, the ETPA does not provide for rent regulation for a premises with a legal regulated rent over $2,000.00 which has been vacated after June 19, 1997[4]. 9 NYCRR §2500.9(m). *See also*, 9 NYCRR §2520.11(r)(4).

To reach that legal rent of $2,000.00 or more, in 1998, the RSC was amended to provide that an owner was entitled to collect a new "first rent" from an incoming tenant if the premises had been vacant or temporarily exempt from the ETPA for four (4) or more years. 9 NYCRR §2526.1(a)(3)(iii)(1998). *See also,*

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[4] 9 NYCRR §2520.11(r)(7)(ii) provides the exemption pursuant to this subdivision shall not apply to housing accommodations which became or become subject to the RSL and this Code solely by virtue of article 7-C of the MDL. However, since in *Acevedo*, *supra* states that the premises in question *reverts* to Rent Stabilization once it is deregulated pursuant to the Loft Law it is not subject to the RSL and this Code solely by virtue of article 7-C of the MDL but qualifies independently.

Matter of Hatanaka v. Lynch, 304 A.D.2d 325756 N.Y.S.2d 578 (1st Dept. 2003); *Reads Development Co. LLC v. New York State Div. of Housing and Comm. Renewal*, 282 A.D.2d 273722 N.Y.S.2d 866 (1st Dept. 2001); *Matter of Vivienne U. Kahng*, DHCR Admin. Rev. Dkt. No. XF410031RT (12/30/09); *Matter of Forest Royale Assoc.,* DHCR Admin. Rev. Dkt. No. WC110015RO (08/21/08); *Matter of Zachary M. Berman,* DHCR Admin. Rev. Dkt. No. VF610026RT (10/30/07); *Matter of East-Ville Realty Co.,* DHCR Admin. Rev. Dkt. No. MA410114RO (03/27/01). *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).

In fact, recently, the New York Supreme Court in *Rubin v. Decker Associates LLC*, specifically found a former IMD unit was not subject to rent regulation under the ETPA after the rent deregulation of the unit pursuant to the Loft Law when the "first rent" was $2,000.00 per month or more. 52 Misc.3d 1208(A), 2016 WL 3747469 (S. Ct. N.Y. County 2016). The Supreme Court found that a former IMD unit was not subject to the ETPA where a landlord charged a "first" or "free market" rent over $2,000.00 per month where the perimeter walls of the unit were substantially moved and changed. The Supreme Court held:

> …the ETPA excludes from rent regulation units with legally regulated rent over $2000. Defendant has proven that the first rent charged after [the premises] was created was $6995. (Defendant Notice of Motion Exhibit P). A

> New York State Housing and Community Renewal opinion letter provides that "if the first rent, negotiated between owner and tenant, is $2000 per month or more... the combined apartment would be high-rent vacancy decontrolled." (N.Y.S. Div. of Hous. & Community Renewal Opinion Letter Jan 25, 2001 [citing 9 NYCRR 2520.11(r)(10)]). Because the first rent defendant charged exceeded $2000, [the premises] is expressly decontrolled from Rent Stabilization.

Here, the Building and the Premises were voluntarily registered as an IMD in 1983, and were temporarily exempt from the ETPA for well over fifteen (15) years before the sale of rights and improvements in 1998. 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.

As such, in 1998, the owner collected a new "first rent" from an incoming tenant pursuant to 9 NYCRR §2526.1(a)(3)(iii)(1998), and the first legal rent following the vacancy was $4,250.00, which was far in excess of the $2,000.00 regulation threshold. Therefore, the Premises was permanently exempted from coverage pursuant to ETPA because, pursuant to the ETPA, it became vacant after June 19, 1997 with an initial legal rent of more than two thousand dollars ($2,000.00) per month. 9 NYCRR §2500.9(m). *See also*, 9 NYCRR §2520.11(r)(4); *Matter of Vivienne U. Kahng*, DHCR Admin. Rev. Dkt. No. XF410031RT (12/30/09); *Matter of Forest Royale Assoc.,* DHCR Admin. Rev.

Dkt. No. WC110015RO (08/21/08).

It must be noted that the RSC does not in any way condition regulation or deregulation on whether the unit has a certificate of occupancy providing for residential use. Both the DHCR and the Courts have specifically found that 9 NYCRR §2520.11(r)(4) and 9 NYCRR §2526.1(a)(3)(iii) provide and allow for the exemption from Rent Stabilization where a first rent after an exemption of four years is above $2,000.00 per month without mention or reference with the certificate of occupancy. Specifically, 9 NYCRR §2520.11(r)(4) provides that Rent Stabilization shall not apply to housing accommodations[5] which:

> became or become vacant on or after June 19, 1997 but before June 24, 2011, with a legal regulated rent of $2,000 or more per month;

As is clear, 9 NYCRR §2520.11(r)(4) makes no reference or requirement for the unit to have a certificate of occupancy providing for residential use as a condition for regulation or deregulation.

In fact, the DHCR previously published a "frequently asked question" on this topic. With respect to a rent stabilized apartment that has been vacant or temporarily exempt for over four years, two of the questions posed asked: (a) can

[5] 9 NYCRR §2520.6 defines housing accommodation as "[t]hat part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment, and all services, privileges, furnishings, furniture and facilities supplied in connection with the occupation thereof."

the owner collect a first rent from the incoming tenant? and (b) if the rent exceeds [the deregulation threshold], is the apartment deregulated? In answering question (a) the DHCR stated Yes, the tenant can be charged a first rent, which is not based upon the prior rental history of the apartment. In answering question (b), the DHCR stated Yes, the apartment is deregulated, provided that the rent at or above [the deregulation threshold] is cited in the lease and paid by the tenant. Here, both conditions cited in DHCR's "frequently asked question" have been met.

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

Moreover, and even regardless, the landlord in *Acevedo* did not make the argument. The *Acevedo* Court never considered this basis for deregulation, nor explicitly referenced a temporary exemption, which is squarely the issue here. Here, the sale of rights and fixtures occurred in 1998, and the "first rent" after the temporary exemption exceeded the $2,000.00 threshold for regulation. Cross-

Appellant's claim therefore that the decision of the Court in *Acevedo*, *supra* provides for automatic regulation of the Premises pursuant to the RSC is without merit.

The right to charge an initial rent at a free market rate is also consonant with the holding in *Acevedo*. The ruling in *Acevedo*, *supra* addressed only a premises' "eligibility for Rent Stabilization" but did not preclude a circumstance where the initial rent for a premises deregulated under the Loft Law would nonetheless be exempt from Rent Stabilization due to the high rent exclusion of the ETPA. In fact, the Court repeatedly stated that a premises "may" be covered by Rent Stabilization, not that rent regulation was guaranteed in all circumstances. Rather, the main thrust of the ruling was simply that there was no "blanket prohibition barring ETPA coverage of all loft units not subject to the Loft Law."

This interpretation is also consonant with the Loft Law and ETPA. Even were it not for the four-year rule of the ETPA, this would be the natural result reading the Loft Law and ETPA *in pari materia* because the Loft Law specifically provides that, after the sale of rights and improvements, a premises may be "rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time." MDL §286(6). The Court in *Acevedo*, *supra* however, never discusses the four year rule of the ETPA because the sale of rights and fixtures in *Acevedo*, *supra* was in 1995; prior to the 1997 the effective date of

the RSC section which added this exemption from Rent Stabilization.

Here, unlike in *Acevedo*, *supra* , the sale of rights and fixtures took place in August 1998, and the first rent after the purchase of rights and improvements commenced on December 1998. As such the four-year rule applies.

The Court's holding in *Acevedo*, *supra* must be harmonized with all the applicable statutes. To interpret the ruling in *Acevedo*, *supra* as creating a blanket rule guaranteeing re-regulation of a premises under the ETPA would nullify the Loft Law provisions regarding deregulation, the Loft Board rulings holding that a premises is deregulated after a sale of rights and improvements, the ETPA provisions regarding the right to charge a first rent after a four year exemption from Rent Stabilization, and the ETPA provisions regarding the exclusion of high rent accommodations from regulation. Nothing in the *Acevedo*, *supra* decision indicates that the Appellate Division intended such a result. To the contrary, the plain language of the decision indicates that the Court simply held there is no blanket exclusion from rent regulation pursuant to the ETPA subsequent to a sale of rights and improvements under the Loft Law which is entirely consonant with the Loft Law's provision for possible re-regulation after a buyout. *See,* MDL §286(6).

Based on the foregoing, it is clear that after the sale of rights and improvement by the last IMD tenants the owner was entitled to charge a market

rent, subject to the possibility of subsequent rent regulation. However, since the first rent after deregulation under the Loft Law was in excess of $2,000.00 the Premises is not subject to rent regulation pursuant to the ETPA.

As such, the Appellate Term erred in holding that the Premises was subject to Rent Stabilization based upon the holding of *Acevedo*.

Point II - The Appellate Term's application of *Acevedo*, *supra* to the facts of the case at bar conflicts with the laws, regulations, and spirit of the Loft Law and RSC.

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 of the Appellate Term.

The reason there are so few written and published decisions on the topic of whether, after the purchase by an owner of rights and improvements, an IMD becomes subject to ETPA, is because there are so few IMD buildings in NYC[6] and further that former IMD units were not found to be covered by the ETPA until 2009 pursuant to *Acevedo*, *supra*. Prior to that date, the Courts, including the Court of Appeals in *Wolinsky v. Kee Yip Realty Corp.*, 2 N.Y.3d 487, 812 N.E.2d 302

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[6] As of November 15, 2015, the NYC Loft Board showed only 331 IMD buildings in the entire City. See http://www.nyc.gov/html/loft/downloads/pdf/imd_buildings.pdf

(2004), held that the prior-enacted ETPA did not apply to IMD units and that if the prior-enacted ETPA already protected IMD units, significant portions of the Loft Law would have been unnecessary. *Id., citing e.g*. MDL §286(3).

Specifically, the Court of Appeals in *Wolinsky* stated:

> Reading the ETPA and Loft Law together, we agree with the courts below that tenants' illegal conversions do not fall under the ambit of the ETPA… 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. MDL §286[3]). Thus, although such illegal conversions are not expressly exempted from ETPA coverage, it is evident that the Legislature did not view the ETPA as safeguarding the interests of the "loft pioneers" (Mem. of Legis. Rep., supra at 2484).

For instance, Rent Stabilization provides protections to tenants including the limitations on the amount of initial rent and the amount of increases to the rent, such as those increases permitted by the guidelines rate of rent adjustments applicable to the new lease and/or upon renewal leases, plus such other rent increases as are authorized pursuant to the RSC. *See e.g.,* 9 NYCRR §2521.1, 9 NYCRR §2522.4, 9 NYCRR §2522.8. By contrast, as stated *supra*, IMDs subject to the Loft Law are subject to a completely different form of rent regulation, where no such increases are allowed and by which the rent may not exceed the rent charged and collected on December 21, 1982 and increases based on the milestones set forth in the legalization plan. *See,* MDL §286(2)(ii); 29 RCNY §2-

06(c); 29 RCNY §2-12(b). Had the prior-enacted ETPA already protected IMD units, there would have been no point to the Loft Law's completely different form of rent regulation and the Loft Law could simply have been one which required legalization for residential use and made no mention of the rents which would have been subject to the prior-enacted ETPA. But under the Appellate Term's Decision and Order and *Acevedo*, *supra* 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 subject to subsequent rent regulation yet, at the same time, if a unit is subject to the ETPA no such rent increase would be allowed since 9 NYCRR §2522.8(a) only allows an increase, if vacancy lease is for a term of two years, of 20 percent of the previous legal regulated rent and 9 NYCRR §2522.4 only allows as increase if there are increased space and services, new equipment, new furniture or furnishings or major capital improvement. In this scenario, which controls?

Similarly, 9 NYCRR §2520.11(e) provides for an exemption from coverage for "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974…" The creation of a residential unit out of a unit previously required to be used solely for commercial purposes automatically constitutes a substantial rehabilitation of the space in question after the January 1, 1974 effective date such as that the unit would not be

subject to the RSL, pursuant to DHCR's Operational Bulletin 95-2. Both the DHCR and Courts have held repeatedly that buildings which were converted to residential use after January 1, 1974 are exempt from Rent Stabilization. *See e.g., Lipkis v. Krugman*, 111 Misc.2d 445, 444 N.Y.S.2d 342 (Civ. Ct., NY County 1981)(*citing, Mayeri Corp. v Teisan*, NYLJ, June 1, 1981, p 7, col 2); *See also, Baxter v. Captain Crow Mgt.*, 128 Misc. 2d 254 (Sup. Ct., NY County, 1985); *81 Russell Street Assoc. v. Scott*, 21 HCR 427A, NYLJ 8/25/93, 24:2 (Civ. Ct. Kings County 1993).

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

As another example of conflicts between the Loft Law and RSC if *Acevedo* stands for the claimed proposition of the Appellate Term is 9 NYCRR §2520.11(r)(4) which exempts from coverage pursuant to ETPA and RSC units that became vacant after June 19, 1997 but before June 24, 2011 with an initial legal rent of more than two thousand dollars ($2,000.00) per month. However, 9 NYCRR §2520.11(r)(7)(ii), however, provides that exemption pursuant to this

subdivision shall not apply to housing accommodations which became or become subject to the RSL and this Code solely by virtue of article 7-C of the MDL. If *Acevedo* stands for the claimed proposition of the Appellate Term then all IMD units in buildings with 6 or more units may be deregulated by way of a high rent vacancy pursuant to 9 NYCRR §2520.11(r) since they would no longer be subject to Rent Stabilization by virtue of article 7-C of the MDL but rather independently qualify. Landlords, in such instances, would no longer be required to purchase the rights and fixtures of tenants pursuant to MDL §286(12) but, rather, could deregulate the units through a combination of turnover and improvements to the units to reach above the deregulation threshold. *See e.g., Altman v 285 W. Fourth LLC*, 2018 NY Slip Op 02829 (2018).

The Legislature passed the Loft Law (L. 1982, ch. 349, §1) in 1982 in response to these issues, in response to the "emergency created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws" and in recognition of the fact "that illegal and unregulated residential conversions undermine the integrity of the local zoning resolution and threaten loss of jobs and industry." MDL §280. *See also, Matter of Lower Manhattan Loft Tenants v. New York City Loft Bd.*, 66 N.Y.2d 298, 302, 496 N.Y.S.2d 979, 487 N.E.2d 889 (1985).

The Legislature specifically stated, in enacting the Loft Law, that it sprung, in part, as a result of the uncertain status of the tenancy in question and that the Courts had been increasingly burdened with disputes between landlords and tenants regarding their respective rights and obligations under the existing circumstances. MDL §280.

Prior to *Acevedo*, *supra*, the Courts routinely held the Legislature did not bestow rent regulatory protections pursuant to the ETPA upon current or former commercial units. *See, Wolinsky, supra, Gloveman Realty v Jefferys*, 795 N.Y.S.2d 462, 2005 N.Y. Slip Op. 04365 (2nd Dept 2005); *Corastor Holding Company, Inc. v. Mastny*, 12 Misc.3d 13 (A. T., 2nd Dept. 2006); *American Package Company v. Kocik*, 2006 WL 1548252 (S. Ct. Kings Co.) ("the illegally converted spaces are not entitled to rent stabilization protection even where the residential use of the spaces may become legalized"); *Sasson v. Gissler*, 2005 WL 3863698 (Civ. Ct., N.Y. Co.); *Forrester v. American Package Company, Inc*., 2006 WL 1559452 (S. Ct., Kings Co.).

Similar to *Wolinsky, supra,* in *Gloveman, supra* the tenants illegally converted the units to residential use despite the subject premises having only a certificate of occupancy for manufacturing within an area that the local zoning law allowed residential use and an ejectment action had been commenced within the Supreme Court. The Supreme Court ruled that the tenants qualified for protection

under the Rent Stabilizations Law and the EPTL in that the building was a "DeFacto" Multiple Dwelling because it contained 12 units that were residentially occupied and that the landlord had entered into commercial leases with the knowledge that the tenants intended to convert the property to residential use. In reviewing the Supreme Court's decision, the Appellate Division specifically rejected the lower court's decision and stated that "the Supreme Court erred in determining that the defendants were entitled to the protections of the EPTL…[in that] the defendants' illegally converted lofts are not eligible for protection under the Loft Law or EPTL".

It is respectfully submitted that *Acevedo*, *supra* is not good law as it stands. The Loft Board, further and upon information and belief, refuses to enforce *Acevedo*. For instance, the Court is referred to the decision of the Loft Board in *Matter of the Application 109 Greene Street Condo*, Loft Board Order No. 4514, Docket No. LE-0662 (April 21, 2016). Because of their disagreement over the holding in *Acevedo supra,* in its decisions such as *109 Greene Street Condo,* the Loft Board cites its own rule, 29 RCNY §2–10(d)(2), and states after a sale pursuant to MDL §286(12) the unit is no longer subject to rent regulation but footnotes it that they do not take a position regarding whether the unit is subject to rent regulation pursuant to any other law.

If *Acevedo*, *supra* is not good law or to be enforced, the Premises is not

subject to the ETPA since there has been a prior sale pursuant to MDL §286(12) and the Premises is not subject to the ETPA.

Point III- Cross-Appellant did not raise in his Answer a claim that the Premises were subject to Rent Stabilization and should not have been granted summary judgment on an unpled claim.

As for all affirmative defenses, the burden of proving same was upon Cross-Appellant. *See e.g., Clarkton Estates, Inc. v. Chiaro*, 122 Misc.2d 721, 471 N.Y.S.2d 942 (Civ. Ct. New York 1983); *Suissa v. Baron*, 24 Misc.3d 1236(A), 901 N.Y.S.2d 903 (Table)(Disc. Ct. Suff 2009); Landlord and Tenant Practice in New York §15:581 (*citing,* RPAPL §743; Barker and Alexander, Evidence in New York State and Federal Courts).

Unless Cross-Appellant met its burden of proof, sufficiently and credibly establishing the necessary elements of its affirmative defenses, Cross-Appellant cannot prevail. In other words, it was incumbent upon Cross-Appellant to plead and prove that the Premises is subject to Rent Stabilization. Cross-Appellant failed to do so. In fact, Cross-Appellant failed to raise any affirmative defense that the Premises is subject to Rent Stabilization. Instead, Cross-Appellant entered a general denial and raised only two affirmative defenses and two counterclaims. As and for its first affirmative defense, Cross-Appellant merely alleged "Appellant

failed to register the Premises and Building with the DHCR." As and for its second affirmative defense and first counterclaim, Cross-Appellant merely alleged "Appellant illegally overcharged Respondent." Lastly, as and for its second counterclaim, Cross-Appellant alleged it was entitled to costs and attorneys' fees. (R. 51-54).

The failure to raise an affirmative defense in the answer results in a waiver of that defense. *Bank of Nova Scotia v. Cartwright & Goodwin, Inc.,* 160 Misc.2d 856, 611 N.Y.S.2d 770 (Civ. Ct. NY County 1994). By failing to interpose an affirmative defense that the Premises is subject to Rent Stabilization, such affirmative defense was waived. As such, the Appellate Term and Civil Court erred in permitting Cross-Appellant to proceed with an affirmative defense that the Premises was subject to Rent Stabilization. *See e.g., 315 West 48th Street Realty Corp. v. Maria's Mont Blanc Restaurant Corp.*, 47 Misc.3d 65, 8 N.Y.S.3d 850 (A.T. 1st Dept. 2015)(citing, CPLR §3018; *McIntosh v. Niederhoffer, Cross & Zeckhauser*, 106 A.D.2d 774, 775, 483 N.Y.S.2d 807 [1984], *lv. denied* 64 N.Y.2d 608, 488 N.Y.S.2d 1023, 477 N.E.2d 1107 [1985]; *Wood v. Proudman*, 122 App.Div. 826, 107 N.Y.S. 757 [1907]).

<u>Point IV</u>- The Appellate Term and Civil Court correctly held that Cross-Appellant is not entitled to an award for rent overcharge and treble damages.

It is respectfully submitted that the Appellate Term and Civil Court correctly held that Cross-Appellant is not entitled to a summary judgment award for rent overcharge and treble damages. As a preliminary matter, as stated *supra*, since the Premises is not subject to the ETPA, there is no rent overcharge or treble damages due to Cross-Appellant.

But, even assuming, arguendo, that Appellant was not entitled to set a "first rent" and the Premises is subject to the ETPA – which it is not – Cross-Appellant failed to submit any evidence to establish coverage pursuant to the ETPA, rent overcharge, nor evidence of a willful overcharge. Cross-Appellant merely submitted to the Court an erroneous calculation for purported overcharge. For instance, even if Appellant were not entitled to set a "first rent", the Premises may still be deregulated as the law permits an owner to calculate and increase the rent on a stabilized apartment that was improperly deregulated by identifying and adding to the rent, all subsequent vacancy and renewal leases and applying the appropriate statutory vacancy/longevity adjustments and guideline increases. If that rent exceeds the deregulation threshold, the unit will still be deregulated. *See e.g., Matter of Stevens*: DHCR Adm. Rev. Docket No. EQ410002RK (10/5/16); *Matter of Miller*: DHCR Adm. Rev. Docket No. DR210009RT (9/8/15); NYS DHCR

Advisory Opinion, dated March 12, 2013 (stating that an owner has the right to apply post deregulation statutory vacancy/longevity adjustments to show an additional basis for deregulation).

Matter of Stevens, supra, was recently decided by the DHCR on October 5, 2016 and shows the DHCR has a long standing policy of allowing an owner to calculate the legal rent on a stabilized apartment that was improperly deregulated or deregulate an apartment previously improperly deregulated where the rent exceeds the deregulation threshold by in either event increasing the rent by vacancy and renewal leases after the purported improper deregulation. *Id, see page 3 thereof.*

And, in fact, in the wake of *Roberts v. Tishman Speyer Props., L.P.,* 13 NY3d 270 (2009), DHCR published a pamphlet regarding, *inter alia*, how an owner should calculate the legal rent to be registered for an apartment improperly deregulated. *See* http://www.nyshcr.org/Rent/J-51-FAQ.pdf. DHCR stated in section 10 thereof that their guidance is that an owner may calculate and register rent on a stabilized apartment that was improperly deregulated while subject to J-51 by:

> a) Identifying the rent stated in the most recent stabilized lease prior to the improper deregulation; then,
>
> b) Identifying and adding to the rent, all subsequent vacancy and renewal leases and applying the appropriate statutory vacancy/longevity adjustments and guideline

> increases set by the New York City Rent Guidelines Board that were in effect at that time, as well as adding any other lawful and documented rent increases for Individual Apartment Improvements (IAIs) and/or Major Capital Improvement (MCI) rent increases. In calculating rent under this re-registration initiative, no additional penalties will be imposed by DHCR for not amending past registrations.

Here, as stated *supra*, Cross-Appellant failed to present any proof for all subsequent vacancy and renewal leases since the 1998 sales of rights and fixtures nor provided for all the Individual Apartment Improvements made to the Premises. As such, the Appellate Term and Civil Court properly found that Cross-Appellant failed to show entitlement to judgment as a matter of law because the rent set forth in Cross-Appellant's calculation fails to detail numerous and multiple increases to the rent.

Furthermore, and again assuming Appellant were not entitled to set a "first rent", Cross-Appellant's calculation had multiple mathematical errors. For instance, Cross-Appellant cited RGBO Order No. 30 as the first increase permissible and then calculated a 4% increase (R. 117). Even if Appellant were not entitled to set a "first rent", the applicable RGBO Order would have been Order 29 and the landlord would have been entitled to a statutory vacancy increase of 20% plus a longevity increase. Neither Order 29 nor 30 prohibit a vacancy increase, despite Cross-Appellant's calculation claiming otherwise. To the contrary, both

Orders specifically provide no vacancy allowance is permitted except as provided by sections 19 and 20 of the Rent Regulation Reform Act of 1997. Yet sections 19 and 20 of the Rent Regulation Reform Act of 1997 (L. 1997, ch. 116) provide for a vacancy increase of 20% for a two year lease plus, where the previous tenant had lived for eight or more years, the landlord shall be entitled to a 0.6 percent increase above the 20 percent vacancy allowance for each year the previous tenant occupied the apartment.

Specifically, sections 19 and 20 of the Rent Regulation Reform Act of 1997, effective June 15, 1997, amended subdivision c of section 26-511 of the administrative code of 28 the city of New York and section 10 of section 4 of chapter 576 of the laws of 1974, to provide:

> …the legal regulated rent for any vacancy lease entered into after the effective date of this subdivision shall be as hereinafter set forth. The previous legal regulated rent for such housing accommodation shall be increased by the following: (i) if the vacancy lease is for a term of two years, twenty percent of the previous legal regulated rent; or (ii) if the vacancy lease is for a term of one year the increase shall be twenty percent of the previous legal regulated rent less an amount equal to the difference between (a) the two year renewal lease guideline promulgated by the guidelines board of the county in which the housing accommodation is located applied to the previous legal regulated rent and (b) the one year renewal lease guideline promulgated by the guidelines board of the county in which the housing accommodation is located applied to the previous legal regulated rent. In addition, if the legal regulated rent was not increased

> with respect to such housing accommodation by a permanent vacancy allowance within eight years prior to a vacancy lease executed on or after the effective date of this subdivision, the legal regulated rent may be further increased by an amount equal to the product resulting from multiplying such previous legal regulated rent by six-tenths of one percent and further multiplying the amount of rent increase resulting therefrom by the greater of (a) the number of years since the imposition of the last permanent vacancy allowance, or (b) if the rent was not increased by a permanent vacancy allowance since the housing accommodation became subject to this act, the number of years that such housing accommodation has been subject to this act…

Here, as stated *supra*, there were multiple vacancies since the 1998 sales and rights and fixtures. Cross-Appellant's cross-motion detailed none of the vacancies and his calculations fail to account for such vacancies. Cross-Appellant's cross-motion, similarly, failed to detail the multitude of renewal leases that occurred between 1998 and 2009. In fact, it is clear from their calculation that they do not discuss at all the tenancies or leases for the entire duration of 2004 to 2009 as if there is some black-hole during that time frame. What is evident is that Cross-Appellant did not presented any proof for all subsequent vacancy and renewal leases since the 1998 sales and rights and fixtures, nor for any Individual Apartment Improvements (IAIs) made to the Premises since that date.

Accordingly, the Appellate Term and Civil Court correctly dismissed Cross-Appellant's first counterclaim for an award of rent overcharge and treble damages.

<u>Point V</u>- The Appellate Term erroneously reversed the Civil Court Decision and held that Cross-Appellant was entitled to attorneys' fees as the "prevailing party" in this litigation pursuant to the lease and the reciprocal provisions of RPL §234.

It is respectfully submitted that the Civil Court correctly held that Cross-Appellant was not entitled to attorneys' fees and the Appellate Term erroneously reversed.

Before an award of attorneys' fees can be made under the provisions of RPL §234, the court must determine which party in the litigation was the "prevailing party." As stated by this Court in *Nestor v. McDowell,* 81 NY2d 410, 599 NYS2d 507 (1993), "Ordinarily, only a prevailing party is entitled to attorney's fees [*citation omitted*]." Cross-Appellant has not shown and did not show an entitlement to judgment as a matter of law and therefore failed to show entitlement to attorneys' fees as the prevailing party.

Moreover, "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, 626 NE2d 29, 33 34 (1993), *reargmnt denied*, 83 NY2d 801, 633 NE2d 491 (1994); *See also, Beach Haven Apartments #1 Inc. v Cheseborough*, 2 Misc 3d 33, 773 NYS2d 775 (A. T., 2d Dept 2003); *205 Third Ave. Ownership v. Ziegler*, 21 HCR 170A, NYLJ, Apr. 21, 1993 at 22, col 5 (Civ. Ct., N.Y. County); *Sohn v. Calderon*,

NYLJ, Sept. 20, 1995 at 26, col 1, 23 HCR 568B (S. Ct., N.Y. 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, supra; Solow v. Wellner,* 205 AD2d 339, 613 NYS2d 163 (1st Dept 1994). *See also, Murphy v Vivian Realty Co.*, 199 AD2d 192, 193, 605 NYS2d 285, 286 (1st Dept 1993) (*citing, Sperling v 145 East 15th Street Tenant's Corp.*, 174 AD2d 498, 571 NYS2d 275 [1st Dept 1991]).

As discussed in *Matter of Duell v. Condon*, 84 N.Y.2d 773647 N.E.2d 96 (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 tenants whom had done nothing wrong, but were brought to court in bad faith by their landlord. RPL §234 provides innocent tenants with a method of recovering the costs of their defense against an unwarranted

proceeding brought in bad faith. 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 NYS2d 74 (AT, 1st Dept. 2007); *360 Clinton Ave. Tenants Corp. v. Fatsis*, 25 HCR 397B, NYLJ, July 21, 1997 at 30, col 1 (AT, 2d & 11th Dept) ; *Ariel Assocs. LLC v Brown*, 25 HCR 495A, NYLJ, Sept. 18, 1997 at 29, col 5 (Civ. Ct., N.Y. County); *KSLM Columbus Apartments, Inc. v. Ayala*, NYLJ, June 22, 1990 at 22, col 3, 18 HCR 324A (Civ. Ct., N.Y. County).

Even when permitted, an award of counsel fees is not required in every case. Rather, the determination even when permitted 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 NYS2d 792, 798 (S. Ct., N.Y. County 1982).

Therefore, the Civil Court, in its discretion, properly determined that Cross-Appellant had not prevailed on its counterclaim for rent overcharge and, therefore, was not a prevailing party. Accordingly, the Civil Court correctly dismissed Cross-Appellant's second counterclaim for attorney's fees and the Appellate Term erred in its reversal.

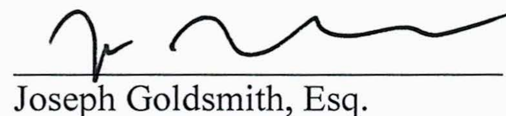
CONCLUSION

Appellant pled and proved its direct case by a fair preponderance of the credible evidence. It established that the Premises is not subject to rent regulation inasmuch as there was a prior sale of Loft Law rights and improvements and, thereafter, the monthly "first rent" charged exceeded the deregulation threshold pursuant to the ETPA.

Accordingly, for the reasons set forth herein, it is respectfully submitted that the Appellate Term erred in rendering its Decision and Order, dated December 6, 2017, affirming the Decision and Order of the Civil Court, dated November 28, 2016, which dismissed Appellant's holdover proceeding brought due to Cross-Appellant's failure to vacate the subject premises after the expiration of his term and as well reversing the Decision and Order of the Civil Court, dated November 28, 2016, which dismissed the Cross-Appellant's counterclaim for attorneys' fees.

Consequently, it is respectfully requested that this Court reverse the Decision/Order of the Appellate Term dated December 6, 2017, and grant Appellant a final judgment of possession and warrant of eviction.

Dated: New York, New York
September 3, 2019



Joseph Goldsmith, Esq.

PRINTING SPECIFICATIONS STATEMENT

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

AURORA ASSOCIATES LLC,

Petitioner-Appellant-Respondent,

against

RAFFAELLO LOCATELLI,

Respondent-Respondent-Appellant,

and

CLEANTECH STRATEGIES LLC,
JOHN DOE and JANE DOE,

Respondents.

1. The index number of the case in the Court below is 570235/17.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, New York County.
4. This action was commenced on or about May 5, 2016, by the filing of a Notice of Petition and Amended Verified Petition. Issue was joined by service of an Answer on or about June 21, 2016.
5. The nature and object of the action: for final judgment possession of the premises, a warrant of eviction, and for fair market use and occupancy of the premises.
6. The appeal is from the Decision of the Appellate Term, First Department, dated December 6, 2017.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.