To Be Argued By:
Joseph S. Goldsmith
Time Requested: 15 Minutes

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.

REPLY BRIEF FOR PETITIONER-APPELLANT-RESPONDENT

KOSSOFF, PLLC
Attorneys for Petitioner-Appellant-Respondent
217 Broadway, Suite 401
New York, New York 10007
212-267-6364
jgoldsmith@kaulaw.com

Of Counsel:
Joseph S. Goldsmith

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PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of Petitioner-Appellant, Aurora Associates LLC ("Appellant"): (a) in opposition to Respondent-Respondent - Appellant, Raffaello Locatelli's ("Cross-Appellant") cross-appeal of the Decision and Order of the Appellate Term, First Department, entered December 6, 2017, which affirmed the branch of the Decision and Order of the Civil Court, dated November 28, 2016 denying Cross-Appellant's counterclaim for rent overcharge; (b) in reply to Cross-Appellant's Brief; and (c) in further support of Appellant's Brief, dated September 3, 2019. It is respectfully submitted that Cross-Appellant's arguments in opposition to the instant appeal are unavailing and the Appellate Term erred in rendering its Decision and Order which dismissed Appellant's holdover proceeding and which reversed the Decision and Order of the Civil Court in granting Cross-Appellant's counterclaim for attorneys' fees. It is further submitted that the Appellate Term correctly affirmed the Civil Court and dismissed Cross-Appellant's second affirmative defense, first counterclaim for rent overcharge.

Consequently, it is respectfully requested that this Court reverse the Decision and Order of the Appellate Term and grant Appellant final judgments of possession and warrants of eviction.

LEGAL ARGUMENT

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

A. *Acevedo v. Piano, LLC* is distinguishable from the instant proceeding.

Cross-Appellant incorrectly argues that the instant summary proceeding is identical to the facts in *Acevedo v. Piano*, *LLC*, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dept. 2009), *appeal withdrawn*, 14.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), 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, *Acevedo* was decided in 2009. In *Acevedo*, by the time of sale pursuant to MDL §286(6) and MDL §286(12) took place in 1995, the prior owner had already obtained a certificate of occupancy for residential use of the premises at issue. In addition, in 1993, the prior 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. *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.

Moreover, and most importantly, 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 9 NYCRR §2526.1(a)(3)(iii)(1998) since the Premises was temporarily exempt from the ETPA for substantially more than four (4) years. 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. 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)(1998) was enacted permitting an owner to collect a new "first rent" from an incoming tenant pursuant to 9 NYCRR §2526.1(a)(3)(iii)(1998).

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

Similarly, in *Costanzo v. Joseph Rosen Found., Inc*, 61 Misc. 3d 730, 83 N.Y.S..3d 830 (Sup. Ct. N.Y. 2018), which Cross-Appellant 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.

The *Acevedo* Court never considered this basis for deregulation, nor explicitly referenced a temporary exemption, which is squarely the issue here. Here, the sale of rights and fixtures occurred in 1998, and the "first rent" after the temporary exemption exceeded the $2,000.00 threshold for regulation. Accordingly, Cross-Appellant's claim therefore that the decision of the Court in *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 Cross-Appellant'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 Cross-Appellant 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*, www.nycrgb.org/html/about/about.html.

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, the Premises was temporary exempt from rent regulation from 1983 until through 1998 under the ETPA and Rent Stabilization Law pursuant to 9 NYCRR §2520.11(c), regardless of what the NYC Rent Guidelines Board lists on its website.

And, since the Premises was independently deregulated in accordance with the Rent Stabilization Code, it does not necessarily revert back to Rent Stabilization after the temporary exemption terminated. Since the Premises was exempt from the ETPA for substantially more than four (4) years, the owner was entitled to charge a first rent which then became the legal regulated rent for the Premises. In 1998, the owner collected a new "first rent" from an incoming tenant pursuant to 9 NYCRR

§2526.1(a)(3)(iii)(1998), and the first legal rent following the vacancy was $4,250.00, which was far in excess of the $2,000.00 regulation threshold. *See*, 9 NYCRR §2500.9(m), 9 NYCRR §2520.11(r)(4). Accordingly, the Premises is not subject to Rent Stabilization.

Although Cross-Appellant attempts to distinguish *Rubin v. Decker Associates LLC*, 52 Misc.3d 1208(A), 2016 WL 3747469 (S. Ct. N.Y. County 2016) from the instant matter, the fact is that *Rubin v. Decker Associates LLC* is directly on point. In *Rubin v. Decker Associates LLC*, 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), Cross-Appellant 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 true. *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, 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.

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 Cross-Appellant contends. For instance, in *Matter of Healy*, Docket No. ER410062RT (Jan. 24, 2017), 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 RSC 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 Term erroneously 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 deregulation threshold pursuant to the ETPA. (R. 4-5). Consequently, the Appellate Term erred in denying Appellant's motion for summary judgment

and/or dismissal and dismissing the summary holdover proceeding.

B. Whether or not a building possesses a certificate of occupancy is irrelevant to the inquiry of whether the Premises is rent regulated.

Cross-Appellant erroneously argues that it is impossible to deregulate an apartment when the building lacks a certificate of occupancy; however Cross-Appellant fails to cite any legal authority whatsoever to support such argument. Contrary to Cross-Appellant'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. 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*.

Cross-Appellant fails to cite any legal authority whatsoever to contradict the foregoing binding precedents.

Next, Cross-Appellant 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. Moreover, 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.

Lastly, Cross-Appellant erroneously claims that the Petition was defective because it "makes no representation" as to the regulated status of the Premises. Contrary to Cross-Appellant'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 Cross-Appellant 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

Term erred in denying Appellant's 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.

Since Cross-Appellant is unable to credibly dispute the fact that a sale of Loft Law rights and fixtures occurred with respect to the Premises, Cross-Appellant, instead, conveniently 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 Cross-Appellant 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. Appellant 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.

Cross-Appellant 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 Appellant's predecessor-in-interest's 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. But moreover, 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 did not have 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. 120).

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); *Suffolk County Department of Social Services v. Michael V.*, 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994).

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); *Eldon Group Am. v. Equiptex Indus. Prods. Corp.*, 236 A.D.2d 329, 654 N.Y.S.2d 23 (1st Dept. 1997).

Here, the Civil Court determined that each of these records proffered by Appellant satisfied the "admissible form" requirement. Cross-Appellant'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 App.Div. 544, 547, 255 N.Y.S. 316, 319 [1st Dept. 1932]).

Lastly, Cross-Appellant 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. 85-89). 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); *182 Fifth Ave. LLC v. Design Development Concepts*, NYLJ, Dec. 12, 2001, p. 18, col. 2 (S. Ct. NY County).

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

Cross-Appellant's contention and first affirmative defense 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 not otherwise exempt.

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

NYS DHCR, FAQ, High Rent Vacancy Decontrol/High-Rent High-Income Decontrol.

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. NYS 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).

Again, DHCR's interpretation is entitled to judicial deference. *Matter of Salvati v. Eimicke*, *supra*; *Tockwotten Associates, LLC v. NYS DHCR*, *supra*.

In addition, 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); 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) the Premises was temporarily exempt from Rent Stabilization for at least four years and 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.

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

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

The Appellate Term and Civil Court correctly held that Cross-Appellant is not entitled to an award for rent overcharge and treble damages, on both procedural and substantive grounds. First, Cross-Appellant's notice of cross-motion was procedurally defective in that it failed to cite the CPLR provisions under which it purported to seek relief. (R. 110). *See,* CPLR §2214(a). To the extent that Cross-Appellant sought summary judgment pursuant to CPLR §3212, the cross-motion was correctly denied because it failed to annex the relevant pleadings. Accordingly, the Appellate Term and Civil Court properly denied Cross-Appellant’s cross motion on this procedural basis alone.

Notwithstanding procedural defects, the Civil Court and Appellate Term

properly denied Cross-Appellant's cross-motion on a substantive basis because Cross-Appellant ultimately failed to show entitlement to judgment as a matter of law. As stated *supra*, since the Premises is not subject to the ETPA, there is no rent overcharge or treble damages due to Cross-Appellant.

Cross-Appellant has the burden of proving his affirmative defenses and counterclaims. *See e.g., Clarkton Estates, Inc. v. Chiaro*, 122 Misc.2d 721, 471 N.Y.S.2d 942 (Civ. Ct. New York 1983); *Plattner v. Weiler,* 26 Misc. 813, 57 N.Y.S. 98 (A.T. 1st Dept. 1899); *Bethlehem Steel Corp. v. Solow*, 51 N.Y.2d 870, 433 N.Y.S.2d 1015, 414 N.E.2d 395 (1980); *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).

Here, not only has Cross-Appellant failed to meet its burden to establish its entitlement to summary judgment – by failing to prove each element of its counterclaim for rent overcharge and treble damages – but, Cross-Appellant unequivocally failed to meet its burden in order to defeat Appellant's underlying motion for summary judgment.

First, Cross-Appellant failed to submit any evidence to establish coverage pursuant to the ETPA, rent overcharge, nor evidence of a willful overcharge. Nevertheless, even assuming *arguendo* that there was a rent overcharge – which

there was not – the review of the rent for purposes of an overcharge was, until the recently, restricted to a four-year look back period. *See,* 9 NYCRR §2526.1(a)(2). *See also, Matter of Boyd v. NYS Div. of Hous. & Community Renewal*, 23 N.Y.3d 999, 992 N.Y.S.2d 764 (2014). Even with the recent enactment of the Housing Stability and Tenant Protection Act of 2019, which Cross-Appellant argues should apply, Cross-Appellant admits that his rent on June 21, 2010, which was six years prior to Cross-Appellant interposing his answer, was $4,000.00. In addition, Cross-Appellant fails to take into account milestone rent increases pursuant to the Loft Law, Individual Apartment Improvements, failed to attach any documentary evidence to the cross-motion, and failed to submit any detailed or specific allegations refuting the rent charged.

Once more, Cross-Appellant failed to present any proof for all subsequent vacancy and renewal leases since the 1998 sales and rights and fixtures nor provided for all the Individual Apartment Improvements made to the Premises. Instead, as further summarized in Appellant's Brief, Cross-Appellant again submits an erroneous calculation, which has multiple mathematical errors. By way of example, Cross-Appellant cited RGBO Order No. 30 as the first increase permissible and then calculated a 20% vacancy increase and 4% increase. However, even if Appellant were not entitled to set a "first rent" – which it was -, the landlord would have been entitled to a statutory vacancy increase of 20% plus a longevity increase. Cross-

Appellant's cross-motion, similarly, failed to detail the multitude of renewal leases that occurred between 1998 and 2009.

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 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.

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

Even if it did not correctly dismiss Cross-Appellant's first counterclaim for an award of rent overcharge and treble damages, certainly, for the reasons discussed above, substantial issues of fact were shown so as to deny Cross-Appellant an entitlement to summary judgment. It should be remembered, summary judgment should not be granted if there is a material and triable issue of fact presented. If there is any doubt as to the existence of such an issue, or if the issue is "arguable", a motion for summary judgment should be denied." *DuLuc v Resnick,* 224 AD2d 210, 210–11, 637 N.Y.S.2d 146 (1st Dept. 1996) (*citing Sillman v. Twentieth Century–Fox*

Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]).

Point V- The Appellate Term erroneously reversed the Civil Court Decision which held that Cross-Appellant was not entitled to attorneys' fees.

Cross-Appellant incorrectly argues that it is a prevailing party, which he claims automatically entitles him to an award of attorneys' fees. However, and contrary to Cross-Appellant'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 Cross-Appellant based upon the termination of Cross-Appellant's month-to-month tenancy. Moreover, as further delineated in Appellant's Brief, the Civil Court, in its discretion, properly determined that Cross-Appellant was not entitled to an award of attorneys' fees since Cross-Appellant had not prevailed on its counterclaims and, therefore, was not a prevailing party. *See, Appellant's Brief, Point V.*

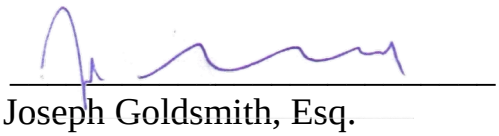
Accordingly, the Civil Court, in its discretion, correctly dismissed Cross-Appellant's counterclaim for attorney's fees and the Appellate Term erred in its reversal.

CONCLUSION

For all the reasons set forth in Appellant's Motion for Summary Judgment, Appellant's Brief and this Reply Brief, it is respectfully requested that this Court should reverse the Decision and Order of the Appellate Term, dated December 6,

2017, with costs, and issue Appellant a final judgment of possession and warrant of eviction.

Dated: New York, New York
October 11, 2019



Joseph Goldsmith, Esq.

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j)

The foregoing brief was prepared on a computer. A proportional typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 6,647.