*To be Argued by:*
SIMCHA D. SCHONFELD
*(Time Requested: 25 Minutes)*

APL-2018-00183
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# Court of Appeals

*of the*

# State of New York

THERESA MADDICKS, JOHN AMBROSIO, PAUL WILDER, SAMUEL WILDER, ALYSSA O'CONNELL, JOHANNA S. KARLIN, BRIAN WAGNER, TYLER STRICKLAND, DANIEL ROBLES, ELENA RICARDO, LIAM CUDMORE, JENIFER MAK, JOSHUA BERG, ANISH JAIN, JOHN CURTIN, JONATHAN FIEWEGER, MARIA FUNCHEON, JORDANI SANCHEZ, MELLISA MICKENS, M.D. IVEY, DEVIN ELTING, SEMI PAK, KAITLIN CAMPBELL, SARAH NORRIS, MIKIALA JAMISON, SHERESA JENKINS-RISTEKI, YANIRA GOMEZ and KRISTEN PIRO, on behalf of themselves and all others similarly situated,

*Plaintiffs-Respondents,*

– against –

BIG CITY PROPERTIES, LLC and XYZ CORPORATIONS 1-99,

*Defendants,*

*(For Continuation of Caption See Inside Cover)*

## BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: November 28, 2018

– and –

BIG CITY REALTY MANAGEMENT, LLC, BIG CITY ACQUISITIONS, LLC, 145 PINEAPPLE LLC, 2363 ACP PINEAPPLE, LLC, 408-412 PINEAPPLE, LLC, 510-512 YELLOW APPLE, LLC, 513 YELLOW APPLE, LLC, 535-539 WEST 155 BCR, LLC, 545 EDGECOMBE BCR, LLC, 603-607 WEST 139 BCR, LLC, 106-108 CONVENT BCR, LLC, 110 CONVENT BCR, LLC, 3660 BROADWAY BCR, LLC, 3750 BROADWAY BCR, LLC, 559 WEST 156 BCR LLC, 605-607 WEST 141 BCR, LLC, 605 WEST 151 BCR, LLC and 580 ST. NICHOLAS BCR, LLC,

*Defendants-Appellants.*

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## PRELIMINARY STATEMENT

This appeal arises out of the Decision and Order of the Appellate Division, First Department of the Supreme Court (the "Appellate Division"), entered on July 26, 2018, with two Justices of the Appellate Division dissenting (the "Order"), whereby the Appellate Division modified the Order of the Supreme Court, New York County, Edwards, J., dated November 8, 2017 (the "Supreme Court Order"), and reinstated Plaintiffs-Respondents' class allegation claims against the Defendants-Appellants,[1] except with respect to the claims grounded in General Business Law ("GBL") § 349.

By Order dated September 27, 2018, the Appellate Division granted Defendants-Appellants' motion for leave to appeal to this Court and certified the following question for this Court's review: "Was the order of this Court, which modified the order of the Supreme Court to the extent of reinstating certain claims properly made?"

In its order granting leave to appeal, the Appellate Division further certified that "its determination was made as a matter of law and not in the exercise of discretion."

[1] Big City Realty Management, LLC, Big City Acquisitions, LLC, 408–412 Pineapple LLC, 510–512 Yellow Apple, LLC, 535–539 West 155 BCR, LLC, 545 Edgecombe BCR, LLC, 106–108 Convent BCR, LLC, 110 Convent BCR, LLC, 3750 Broadway BCR, LLC, 3660 Broadway BCR, LLC, and 605 West 151 BCR, LLC. The claims against the remaining original defendants have been dismissed and are not before this Court.

Defendants-Appellants respectfully submit that the answer to the certified question is in the negative and that the Order should be reversed, consistent with the opinion of the dissenting Justices.

In this putative class-action, Plaintiffs-Respondents, twenty-six current and former tenants from a series of eleven separate properties, each owned by a different company, advanced claims of improper rent overcharges alleged to have been committed by the Defendants-Appellants and their non-party predecessors. Plaintiffs-Respondents' First Amended Class Action Complaint sought certification of a class and other forms of relief (R. 27). [2]

Defendants-Appellants moved to dismiss the Complaint pursuant to CPLR 3211. The trial court held that with respect to the eight defendants against which "no allegations of wrongdoing" had been made, dismissal was appropriate pursuant to CPLR 3211(a)(7) (R. 12). The trial court also ruled that the class allegations required fact-specific and intensive analyses separate and distinct for each purported class member and that any attempt to certify a class was improper as a matter of law (R. 13-14). Finally, the trial court dismissed the class allegations grounded in alleged violation of GBL § 349 (R. 13).

On appeal, a divided Appellate Division modified the Supreme Court Order to "reinstate the claims only against the defendants named in the decretal

[2] References to "R." are to the Record on Appeal.

paragraph, except for those involving General Business Law § 349" (R. 302) (the majority opinion hereinafter referred to as the "Majority"). The Majority held that with respect "to the remaining class allegations, the dismissal, at this early stage, before an answer was filed and before any discovery occurred, was premature" (R. 303). The Majority explained further that since the time to make a motion for class certification "had not occurred, it was premature, in this case, for the court to engage in a detailed analysis of whether the requirements for class certification were met" (R. 303) and noted further that if "discovery were to show that, for example, Big City charged all the tenants the same fraudulent and inflated amounts for claimed improvements,[3] this would support a class action and make one tenant's proof relevant to that of other tenants" (R. 305).

In his lengthy dissent (the "Dissent"), Justice Friedman, joined by Justice Andrias, wrote that "the complaint does not identify any question of law or fact common to the entire proposed class (or to the proposed subclass of current tenants). Stated otherwise, in the end, regardless of any plan by defendants or any overcharges of other tenants, each class member either was or was not overcharged—a question that can be determined only by looking at the evidence concerning that tenant's individual unit" (R. 308).

[3] Although not stated in the Order, it is presumed that this would apply only if the improvements were also the "same" for each tenant.

The Dissent underscored its position by writing: "[t]o be clear, the point I am making is not that the common questions will not predominate; it is that questions common to the class, predominant or otherwise, simply do not exist. Indeed, the Majority itself does not identify any such common question" (R. 311).

With respect to the Majority's holding that dismissal at this stage of the action was "premature", the Dissent noted that "it is apparent from plaintiffs' own pleadings that there can be no basis for class relief based on the class and subclass they propose. Thus, there is no reason to defer the resolution of this issue to a motion for class certification under CPLR 902" (R. 318).

It is respectfully submitted that for the reasons set forth in the Dissent, as well as those stated in the Supreme Court Order and, in addition, for the reasons set forth below, the Order should be reversed insofar as it reinstated the class allegation claims against the Defendants-Appellants, and the Complaint should be dismissed.

The question certified by the Appellate Division, First Department to this Court, should be answered in the negative.

## QUESTION PRESENTED FOR REVIEW

QUESTION: WAS THE ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, WHICH MODIFIED THE ORDER OF THE SUPREME COURT TO THE EXTENT OF REINSTATING CERTAIN CLASS ALLEGATION CLAIMS WHERE EACH CLAIM REQUIRES SEPARATE AND INDEPENDENT LEGAL AND FACTUAL ANALYSES PROPERLY MADE?

ANSWER: NO

## STATEMENT OF FACTS

This action presents putative class action allegations of twenty-six proposed claimants residing in eleven apartment buildings in Manhattan, alleging rent overcharges on numerous grounds. Defendants-Appellants moved to dismiss the Complaint pursuant to CPLR 3211. The Supreme Court granted the motion. Thereafter, in a 3-2 decision, the Appellate Division modified the Supreme Court Order to reinstate the class action allegations against the Defendants-Appellants, with the exception of those advanced pursuant to GBL § 349. The Appellate Division then granted Defendants-Appellants' motion for leave to appeal its Order to this Honorable Court.

This appeal follows.

A. The Complaint.

The initial Complaint in this action was filed on December 6, 2016. An Amended Complaint was filed on February 17, 2017 (R. 27) (the "Complaint") and is the subject of this appeal.

The Complaint alleges that Defendants-Appellants as well as prior non-party owners of the relevant properties engaged in wrongful conduct with respect to rent increases. Specifically, Plaintiffs-Respondents alleged violation of Rent

Stabilization Law ("RSL") § 26-512[4] on the following grounds: (1) altering and misrepresenting the legal regulated rent records provided to tenants; (2) inflating or misrepresenting the amount of individual apartment improvements ("IAI"s) that were completed; and (3) using such false information to increase rents and / or deregulate apartments that should have remained rent stabilized (R. 54 at ¶ 216-218, 55 at ¶ 223). Plaintiffs-Respondents also alleged that Defendants-Appellants failed to provide rent-stabilized leases to tenants residing in four properties subject to J-51 tax benefits (R. 37 at ¶ 83, 38 at ¶¶ 90 & 95, 39 at ¶ 107), though did not explicitly include this allegation in the causes of action stated in the Complaint.

Plaintiffs-Respondents alleged that all of the properties at issue in the litigation are part of what they describe as the "Big City Portfolio" (R. 29 at ¶ 1). Plaintiffs-Respondents propose the following class: "current and former tenants of Big City Portfolio buildings who, between December 6, 2012 and the present date, reside in rent stabilized or unlawfully deregulated apartments, and who paid rent in excess of the legal limit based on misrepresentations by Defendants, or any predecessor in interest, concerning legal regulated rents and improvements" (R. 51).

[4] The Complaint also alleged violation of BGL § 349 (R. 57). However, that cause of action was dismissed by the Supreme Court, unanimously affirmed by the Appellate Division and not before this Court.

Plaintiffs-Respondents also propose the following subclass: "all current tenants of Big City Portfolio building (sic) who currently reside in a rent-stabilized apartment or unlawfully deregulated apartment" (R. 51 at ¶ 202).

The buildings that are the subject of this action, were purchased by the various Defendants-Appellants between 2012 and 2016 (R. 61-204). The vast majority of the allegations set forth in the Complaint relate to time periods prior to the Defendants-Appellants taking ownership of the properties.

Plaintiffs-Respondents allege that they were charged rent in excess of the legal amounts and that they see "no evidence" that IAIs in the amount necessary to justify a number of the increases were actually performed. Plaintiffs-Respondents alleged that the increases in rent are therefore in violation of RSL § 26-512 (R. 54-55).

Each apartment at issue in this litigation was the subject of significant IAIs both by the prior owners and by the Defendants-Appellants. The Complaint makes no attempt to quantify, describe or otherwise address the improvements that were made. Plaintiffs-Respondents do not affirmatively deny that IAIs were made to each unit. Rather, they repeatedly posit equivocally and without a modicum of certainty whatsoever that "[t]here is no evidence that IAIs in that amount were implemented ... and in fact, an inspection of that apartment *suggests* to the contrary." See e.g. R. 30 at ¶ 12 (emphasis added).

This pleading deficiency alone is an adequate basis by which the Supreme Court Order should have been affirmed. Plaintiffs-Respondents made no claim that the necessary IAIs were not done; they merely stated that they saw "no evidence" of the necessary IAIs and that the condition of the apartment "suggests" – not "confirms" – to the contrary. The Complaint fails to state a claim on a most elementary level.

Even accepting the allegations as true, an assertion that a fact pattern merely "suggests" wrongdoing is insufficient to constitute a stated claim as a matter of law. Perhaps most importantly, however, the only conceivable way to discern the extent of the merit, if any, to the allegations of the Plaintiffs-Respondents, whether they are suggestions or something more, is to embark on a fact-specific analysis of each and every apartment at issue in all of the eleven properties that are the subject of this action.

Plaintiffs-Respondents' inability to plead violations with certainty is not the result of oversight or poor drafting. It is the unavoidable outgrowth of the simple reality that a fact-specific and intensive analysis will have to be performed with respect to each individual claim asserted.

Plaintiffs-Respondents' allegations with respect to alleged improper filing and first rents are equally intensely fact-specific. That is, whether a particular unit was properly registered with DHCR requires an analysis specific to that unit, the

nature and history of each filing, the performance or non-performance of IAIs, the history of prior and currents rents, the nature of the representations made to or withheld from each tenant and many other factors that foreclose the possibility of common issues of fact or law.

B. The Supreme Court Order.

Following motion practice, the Supreme Court granted Defendants-Appellants' motion and dismissed the class allegation claims advanced by the Plaintiffs-Respondents, holding that "questions of law or fact common to the class do not predominate over questions affecting only individual members" (R. 12).[5]

In the Supreme Court Order, the trial court provided a thorough analysis demonstrating that class action relief was not appropriate here. The court noted, *inter alia*, that:

> for several reasons, each claim requires fact-specific analysis which precludes class certification. There are different buildings involved, different owners, different dates when the owners acquired the property, different prior owners, different registration periods and since there are different theories of recovery, each theory requires different defenses and evidence (R. 12-13).

[5] The Supreme Court also dismissed the claims against 145 Pineapple LLC, 2363 ACP Pineapple LLC, 513 Yellow Apple LLC, 603–607 West 139th BCR LLC, 559 West 156 BCR LLC, 605–607 West 141 BCR LLC, and 580 St. Nicholas BCR LLC for failure to state a claim, which dismissal was unanimously affirmed by the Majority (R. 302) and the Dissent (R. 314 at n.5).

The Supreme Court also noted that:

> Plaintiffs' claims based on IAIs require a determination of whether any qualified improvements were done on each individual apartment, the cost of such improvements based on the invoices submitted and the appropriate rental increase, which may require individual inspections of each apartment. On the contrary, the determination of whether Defendants or their predecessors failed to properly register each apartment requires a separate and distinct analysis of the paperwork filed for each apartment (R. 13).

C. The Appellate Division Order.

Plaintiffs-Respondents appealed the Supreme Court Order to the Appellate Division, First Department. By Decision and Order dated July 26, 2018, a sharply divided Appellate Division modified the Supreme Court Order "to deny the motion as to the claims, except those involving General Business Law § 349, against defendants Big City Realty Management, LLC, Big City Acquisitions, LLC, 408–412 Pineapple LLC, 510–512 Yellow Apple, LLC, 535–539 West 155 BCR, LLC, 545 Edgecombe BCR, LLC, 106–108 Convent BCR, LLC, 110 Convent BCR, LLC, 3750 Broadway BCR, LLC, 3660 Broadway BCR, LLC, and 605 West 151 BCR, LLC, and to deny the motion as to the class action allegations against these defendants, except those supporting the General Business Law § 349 claim" (R. 301-392).

The Majority offered two separate rationales for its conclusion. First, the Majority wrote that since a motion for class certification had not yet been filed, "it was premature, in this case, for the court to engage in a detailed analysis of

whether the requirements for class certification were met" (R. 303). Second, the Majority concluded that dismissal was improper because "we do not know what documents [Defendants-Appellants] have, if any, to justify the increases or what explanations they have for the purported failures to register the apartments" (R. 305).

Although the Majority did not articulate a question of fact or law that would be common to the class or subclass, it did posit that "[i]f discovery were to show that, for example, Big City charged all the tenants the same fraudulent and inflated amounts for claimed improvements, this would support a class action and make one tenant's proof relevant to that of other tenants" (R. 305). However, the Majority did not explain what it intended by use of the term "the same fraudulent and inflated amounts" in light of the fact that the nature and extent of the impermissibility of any alleged overcharge, would itself be specific to each unit and could not possibly be calculated or even considered on a portfolio-wide basis.

In a lengthy dissent, Justice Friedman, joined by Justice Andrias, argued that the Supreme Court Order should have been affirmed because "the complaint does not identify any question of law or fact common to the entire proposed class (or to the proposed subclass of current tenants)" (R. 308). The Dissent explained that "in the end, regardless of any plan by defendants or any overcharges of other tenants, each class member either was or was not overcharged—a question that can be

determined only by looking at the evidence concerning that tenant's individual unit" (R. 308).

The Dissent openly challenged the Majority to identify a single question common to the class: "To be clear, the point I am making is not that the common questions will not predominate; it is that questions common to the class, predominant or otherwise, simply do not exist. Indeed, the majority itself does not identify any such common question" (R. 310-311).

The Dissent repeatedly stated – as the Supreme Court originally held – that the class action allegations by their very definition require separate and independent analyses, which simply cannot establish liability, if any, beyond the specific unit at issue.

D. Appellate Division Order Granting Leave to Appeal.

By Order dated September 27, 2018, the Appellate Division granted Defendants-Appellants' motion for leave to appeal the Order to this Honorable Court. In granting the motion, the Appellate Division certified the following question for this Court's review: "Was the order of this Court, which modified the order of the Supreme Court to the extent of reinstating certain claims properly made?"

In its order granting leave to appeal, the Appellate Division further certified that "its determination was made as a matter of law and not in the exercise of discretion."

Defendants-Appellants respectfully submit that the answer to the certified question is in the negative, and that the Order should be reversed, and the Complaint should be dismissed consistent with the opinion of the dissenting Justices and of the Supreme Court.

## ARGUMENT

### PLAINTIFFS-RESPONDENTS' CLASS ACTION ALLEGATIONS FAIL AS A MATTER OF LAW.

It is respectfully submitted that the Appellate Division Order should be reversed for two reasons. First, by their very nature, the class action allegations require fact-specific analyses and do not present common questions of fact or law. Second, the Complaint failed to state a claim upon which relief could be granted with respect to performance or non-performance of IAIs. Therefore, and for the reasons stated by the Dissent, the Order should be reversed, and the Complaint should be dismissed.

A. Plaintiffs-Respondents' Class Action Allegations Fail as a Matter of Law.

The requirements for class certification include "questions of law or fact common to the class which predominate over any questions affecting only

individual members; [and] the claims or defenses of the representative parties are typical of the claims or defenses of the class." CPLR 901(a). "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." *City of New York v. Maul*, 14 N.Y.3d 499, 508 (2010).

These requirements cannot be satisfied here.

*i. Factual issues involving liability are not common to the class or subclass.*

This Court has held that even in cases where damages among class members may differ, a class action may still proceed only "if the important legal or factual issues involving liability are common to the class." *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014). The factual issues with respect to the liability of the eleven remaining defendants and the eleven apartment buildings that they are alleged to own and / or operate, are not common to the class. Rather, each alleged basis for liability will require a separate and distinct factual analysis.

Plaintiffs-Respondents allege IAIs in different amounts, occurring (or not occurring) at different times, in different properties, occupied by different tenants and owned by different landlords. Every claim based upon inadequate IAIs will necessarily require its own analysis. That is, there is nothing that is true of one putative class member that would necessarily be true for another.

By way of illustration, if it is proven that the claims of John Ambrosio with respect to IAIs performed in [redacted] as set forth in the Complaint (R. 33-24 at ¶¶ 33-37) are true, that would have no bearing whatsoever as to whether the claims of Brian Wagner with respect to IAIs performed in apartment [redacted] as set forth in the Complaint (R. 35 at ¶¶ 49-52) are true as well. It goes without saying, then, that the validity of any such IAI claim could not establish whether putative class members or subclass members would also be entitled to recovery based upon the claim of inadequate IAIs.

The impossibility of determining liability with respect to IAIs is equally true with respect to the allegations that Defendants-Appellants failed to properly register some apartments and misrepresented the legal rents with respect to others. Whether an apartment was properly registered requires an analysis of the history of that specific apartment. Nothing about whether one of the Defendants-Appellants failed to register apartment X would tell us anything as to whether Apartment Y was properly registered by that same one, or another one of the Defendants-Appellants. Similarly, if one or more of the Defendants-Appellants made a false representation to a specific party, that would tell us nothing about whether similar – or dissimilar – misrepresentations were made to other parties by that same, or another one of the Defendants-Appellants.

A class action would necessarily require hundreds if not thousands of individual inspections of renovated units, registration histories and the specific representations made to, and knowledge of, each potential claimant. Similarly, allegations concerning whether or not consent was or was not given by any particular tenant would also require an analysis limited to the particular tenant at issue (see R. 45 at ¶ 171).[6]

It is respectfully submitted that the Dissent correctly framed the error of Majority as follows:

> [W]hether any particular tenant has actually been overcharged can be determined only by examining the evidence pertaining to that tenant's individual apartment. Proof that defendants engaged in these practices with respect to other apartments in the portfolio—even proof that such overcharges were part of a conscious scheme—will not establish any element of an overcharge claim with respect to any particular unit as to which evidence is not presented (R. 311).

As the Dissent further noted, the decisive factor here "is not that the common questions will not predominate; it is that questions common to the class, predominant or otherwise, simply do not exist" (R. 311).

In response to the Dissent, the Majority stated that the "dissent fails to consider plaintiffs' allegation that the setting of the improper rents in these apartments was part of a systematic effort by Big City Acquisitions to avoid

[6] "If a tenant occupies an apartment for which an IAI rental increase is sought, the landlord must get the tenant's written consent for the IAI rental increase. RSC § 2552.4(a)(1)."

compliance with the rent stabilization laws. Plaintiffs identify several different ways this alleged scheme was accomplished, and offer examples of each. We disagree with the dissent's statement that it is 'irrelevant' whether Big City was engaged in a systematic effort to destabilize these units" (R. 304-305). The opinion of the Majority is contrary to the precedent of this Court.

This Court has "repeatedly held that separate wrongs to separate persons, even if committed by similar means and pursuant to a single plan, do not alone create a common interest to sustain a class action." *Ray v. Midland Grace Trust Co.*, 35 N.Y.2d 147, 151 (1974)[7] *citing Gaynor v. Rockefelle*r, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627 (1965); *Society Milion Athena v. National Bank of Greece*, 281 N.Y. 282, 292—293, 22 N.E.2d 374, 376—377 (1939); and *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 11 N.E.2d 890 (1937).

The sole justification offered by the Majority in reversing the Supreme Court Order is precisely the suggestion that the Complaint alleges a "systematic effort" – the very same "single plan" that this Court held to be insufficient to justify a class action. The Dissent was exactly correct in deeming the possibility of a broader scheme to be irrelevant, because even if that were true, the existence of a "single

[7] Although this analysis was conducted under CPLR 1005, the predecessor to CPLR 901, the principle remains equally applicable under the present statutory scheme. *See e.g. Rife v. Barnes Firm, P.C.*, 48 A.D.3d 1228, 1230, 852 N.Y.S.2d 551, 553 (4th Dept. 2008) quoting and citing *Gaynor* in analyzing CPLR 901.

plan" would do nothing to demonstrate the existence of a question of fact common to the individual members of the class. That is, regardless of motivation, every allegation of every potential class member would have to be analyzed and investigated on its own.

The statement of the Majority that if "discovery were to show that, for example, Big City charged all the tenants the same fraudulent and inflated amounts for claimed improvements, this would support a class action and make one tenant's proof relevant to that of other tenants" is particularly puzzling (R. 305). In fact, Plaintiffs-Respondents allege exactly the opposite of what the Majority suggested could form the basis for class certification. That is, the Complaint alleges overcharges for inflated IAI increases in the amounts of $935, or 136% (R. 34 at ¶¶ 42-43); $1,060, or 97%; $947, or 82% (R. 35 at ¶¶ 51, 55); $968, or 104% (R. 35-36 at ¶¶ 58-59); $1,054, or 113% (R. 36 ¶¶ 62-63); 33% (R. 38 at ¶ 86); and $1,579, or 254% (R. 39 at ¶¶ 99-100). Therefore, by its very terms, the Complaint itself establishes that Plaintiffs-Respondents do not allege that "Big City charged all the tenants the same fraudulent and inflated amounts for claimed improvements" as the Majority suggests to justify the Order. Moreover, even if the alleged overcharges could be construed as "separate wrongs to separate persons, even if committed by similar means and pursuant to a single plan" that would still not form a basis for a class action, pursuant to this Court's precedent.

Plaintiffs-Respondents also alleged that Defendants-Appellants failed to provide stabilized leases to tenants residing in four properties subject to J-51 tax benefits (R. 37 at ¶ 83, 38 at ¶¶ 90 & 95, 39 at ¶ 107). However, Plaintiffs-Respondents did not explicitly include this allegation in the causes of action stated in the Complaint (R. 54-59). More importantly, the proposed class does not distinguish between claimants alleging liability for violation of the J-51 program and the other bases for liability. The addition of the claims grounded in violation of the J-51 to collection of alleged improper conduct to be included in the proposed class, further underscores the impropriety of this class action.

It is anticipated that Plaintiffs-Respondents will cite to this Court's holding in *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382 (2014) to support their contention that claims grounded in violation of the J-51 program may be the subject of a class action. However, the proposed class in *Borden*, unlike here, involved allegations concerning a single, common, specific program, namely the J-51 program. Moreover, in *Borden*, unlike here, each of the three actions considered by this Court and consolidated into that decision, involved a single property or complex.[8]

[8] *See Borden v. 400 E. 55th St. Assoc., L.P.*, 105 A.D.3d 630 (1st Dept. 2013) (involving a single property owned by the lone defendant); *Gudz v. Jemrock Realty Co.*, LLC, 105 A.D.3d 625, 964 N.Y.S.2d 118 (1st Dept.2013) (same); and *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86 (1st Dept. 2013) (involving "a single residential complex" (R. 318)).

As this Court noted in *Borden*, "the predominant legal question involves one that applies *to the entire class* – whether the apartments were unlawfully deregulated pursuant to the *Roberts*[9] decision." *Id.* at 399 (emphasis added). Here, the allegations relating to violation of the J-51 program relate only to four of eleven buildings and quite obviously not "to the entire class".

In the case at bar, Plaintiffs-Respondents are attempting to take highly individualized claims and issues and shoehorn them into a class; as opposed to *Borden,* where a class was certified based on a single, common legal issue, relating to a single property or complex that applied equally to the entire class. The innumerable legal deficiencies that exist here and formed the basis of the Supreme Court Order as well as the Dissent, are exacerbated, and not undermined, by the inclusion of claims based upon alleged violations of the J-51 program and by the holding in *Borden*.

Courts should particularly "focus on the liability issue and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 148 (S.D.N.Y. 2002)[10] *citing Dura–Bilt Corp. v. Chase Manhattan Corp*., 89

[9] *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 (2009).

[10] Although the analysis in *Bolanos* was pursuant to FRCP 23, this Court has noted that the "prerequisites to the filing of a New York class action are virtually identical to those contained in rule 23." *Colt Industries Shareholder Litigation v. Colt Industries Inc.*, 77 N.Y.2d 1160, 194, 566

F.R.D. 87, 93 (S.D.N.Y.1981). "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Bolanos, quoting In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 139 (2d Cir. 2001). Here, liability cannot possibly "be determined on a class-wide basis" for the following reasons:

1. Inadequate IAIs performed by one (or more) of the Defendants-Appellants, in one apartment, in one building, and for one tenant would tell us nothing about whether inadequate IAIs were performed by one (or more) of the Defendants-Appellants in another (or the same) building, in another apartment and for another tenant;
2. The failure to register one apartment in one building by one (or more) of the Defendants-Appellants, would tell us nothing about whether one (or more) of the Defendants-Appellants failed to register another apartment in another (or the same) building;
3. A misrepresentation made by one (or more) of the Defendants-Appellants, to one tenant in one apartment, in one building, would tell us nothing about whether a similar – or dissimilar – misrepresentation was

N.E.2d 1160, 1165, 565 N.Y.S.2d 755, 760 (1991). *See also City of New York v. Maul*, 14 N.Y.3d 499, 510 (2010) ("New York courts have also found that federal jurisprudence is helpful in analyzing CPLR 901 issues because CPLR article 9 has much in common with Federal rule 23") (citations omitted).

made by one (or more) of the Defendants-Appellants, to a different tenant in a different apartment, in a different (or the same) building; and

4. Failure to provide a rent-stabilized lease to one tenant in one apartment of one building owned by one (or more) of the Defendants-Appellants that was previously (R. 39 at ¶ 107) or is currently (R. 37-38 at ¶¶ 83 & 90) receiving J-51 tax credits, is utterly irrelevant to tenants in buildings that did not or do not receive such credits or are – or were – owned by a different one of the Defendants-Appellants or a third-party altogether.

The Majority stated that dismissal in the pre-answer stage was "premature" because "we do not know what documents they have, if any, to justify the increases or what explanations they have for the purported failures to register the apartments" (R. 305). While that statement is certainly true, it is equally true that any such documents would necessarily be apartment-specific. Just as establishing liability with respect to one apartment will not establish liability with respect to another, similarly, documents demonstrating a defense to the allegations concerning one apartment will not establish a defense with respect to a claim concerning another.

In light of the foregoing, it is respectfully submitted that the Order should be reversed, and the Complaint dismissed, because factual issues involving liability

are not common to the class or the subclass, and certainly do not predominate over questions affecting only individual members.

*ii. Legal issues involving liability are not common to the class or subclass.*

As noted above, this Court has held that even in cases where damages among class members may differ, a class action may still proceed only "if the important legal or factual issues involving liability are common to the class." *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014). The legal issues with respect to the liability of the eleven remaining defendants and the eleven apartment buildings that they are alleged to own and / or operate, are not common to the class. Rather, each alleged basis for liability will require a separate and distinct legal analysis.

The arguments set forth above in § (i) with respect to the lack of commonality concerning issues of fact, are applicable to the issues of law. That is, an analysis of whether adequate IAIs were performed, apartments were properly registered or deregulated and the applicability of the restrictions that accompany J-51 benefits are as disparate and distinct as the factual analyses. In some cases, they are inextricably intertwined.

In addition to the arguments set forth above, there exist numerous legal differences between the various bases of liability alleged, and the naming of

multiple landlords as defendants further exacerbates the lack of commonality with respect to the laws at play.

For example, "in evaluating the legitimacy of an IAI increase, the court is required to determine (1) whether the owner made the improvements to the apartment during the relevant time period, (2) whether those improvements constitute legitimate individual apartment improvements within the meaning of the regulations, (3) the total cost of the improvements, (4) one fortieth of that cost, and (5) the sum of one fortieth of the costs plus the monthly rent level after any other increases to which the owner may be entitled." *Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 42 (2d Dept. 2006) (citations omitted). Each one of those factors requires an analysis specific only to the apartment in question. This analysis cannot possibly be conducted on a class-wide basis.

In *Elisofon v. New York State Div. of Housing and Community Renewal*, 262 A.D.2d 40 (1st Dept. 1999), the First Department affirmed denial of an overage complaint, noting that "[w]hile the petitioner claims that his express written consent was required before such improvements were made, and the increase imposed, his contention lacks merit since all improvements were completed before the effective date of his lease when the apartment was still vacant." Thus, in addition to the factors outlined by the Second Department in *Rockaway One*, each claim based upon inadequate IAIs must also consider whether consent was given

by the tenant and if not, whether it was required, based on the date of the completion of improvements, compared with the date of the commencement of the tenancy at issue. This analysis, like the one set forth in *Rockaway One*, cannot possibly be conducted on a class-wide basis.

One of the bases proffered by Defendants-Appellants as grounds for dismissal was that a number of the claims set forth in the Complaint were barred by the applicable four-year statute of limitations (R. 223). RSL § 26-516(a)(2) states that "a complaint under this subdivision shall be filed with the state division of housing and community renewal within four years of the first overcharge alleged[11]" and this Court has explained that that "rent overcharge claims are generally subject to a four-year statute of limitations." *Grimm v. State Div. of Hous. & Cmty. Renewal Office of Rent Admin*., 15 N.Y.3d 358, 364 (2010).

In *Grimm*, this Court also held that the DHCR may examine histories beyond the four-year limitation only where there is "substantial indicia of fraud." *Id.* At 366. However, the Court cautioned that "an increase in the rent alone will not be sufficient to establish a colorable claim of fraud, and a mere allegation of

[11] The putative class includes "current and former tenants of Big City Portfolio buildings who, between December 6, 2012 and the present date, reside in rent stabilized or unlawfully deregulated apartments ..." (R. 51). However, this does not mitigate the availability of a defense based upon the statute of limitations, which is governed by the date of the "first overcharge" regardless of when the tenant resided at the property at issue.

fraud alone, without more, will not be sufficient to require DHCR to inquire further." *Id.* at 367.

The initial complaint in this action was filed on December 6, 2016, which renders any alleged overcharge prior to December 6, 2012 time-barred. Many of the claims advanced in the Complaint relate to time periods within the applicable statute of limitations. Yet the Complaint is also replete with claims that would be subject to dismissal based on the statute of limitations.[12]

The determination of whether or not to allow examination of the rental history for a specific apartment beyond the four-year statute of limitations is decidedly and intensely fact-specific. *See e.g. Conason v. Megan Holding, LLC,* 25 N.Y.3d 1, 17 (2015) (finding that the DHCR was not limited by the statute of limitations because "tenants do not just make a generalized claim of fraud. They instead advance a colorable claim of fraud within the meaning of *Grimm*—i.e., tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by [defendant] to remove tenants' apartment

[12] For example, Plaintiff Lian Cudmore alleges that her rent was improperly increased "between 2009 and 2010" (R. 30 at ¶ 11). Plaintiff Theresa Maddicks alleges that her rent was decontrolled and improperly raised starting in 2011 (R. 33 at ¶ 30). Plaintiff John Ambrosio alleges that his apartment was decontrolled in 2007, and improperly raised when it was deregulated in 2010 (R. 33 at ¶¶ 34-36). Other Plaintiffs alleging improper rent increases from before December of 2012 include Paul and Samuel Wilder (2011) (R. 34 at ¶ 39), Alyssa O'Connell (between 2009 and 2010) (R. 34 ¶ 42), Brian Wagner (between 2012[12] and 2013) (R. 35 at ¶ 50), Liam Cudmore (between 2009 and 2010) (R. 36 at ¶ 62), Joshua Berg (who alleges non-registration from 2002 to 2011) (R. 36 at ¶ 68), M.D. Ivey (between 2011 and 2012) (R. 38 at ¶ 86), Sarah Norris (between 2011 and 2012) (R. 39 at ¶ 99) and Yanira Gomez (2009) (R. 40 at ¶ 112).

from the protections of rent stabilization"). *See also Taylor v. 72A Realty Associates, L.P.*, 151 A.D.3d 95, 103 (1st Dept. 2017) (holding that the statute of limitations was applicable because the allegations of fraud were "pure speculation").

In *Boyd v. N.Y. State Div. of Hous. & Cmty. Renewal*, 23 N.Y.3d 999, 1000-1001 (2014), this Court held the fraud exception to be inapplicable where the allegation of fraud was based only on the tenant's subjective analysis of the improvements, holding that "tenant failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period."

Insofar as one of the allegations advanced by the Plaintiffs-Respondents lies in fraud and misrepresentation (*see* R. 54 at ¶ 216-218, 55 at ¶ 223), the legal analysis with respect to each claim subject to dismissal based upon the statute of limitations, will necessarily require an individualized and separate inquiry.

As this Court stated in *Gaynor*, "a class action may not be maintained where the wrongs asserted are individual to the different persons involved and each of the persons aggrieved ... may be subject to a defense not available against others." 15 N.Y.2d at 129. Here, a defense based on the statute of limitations may apply to some tenants and not others. The determination of whether the defense applies to any given claimant will depend upon the date of the first overcharge and whether

there exist "substantial indicia of fraud" with respect to each tenant subject to the four-year limitation.

In light of the foregoing, it is respectfully submitted that this action raises questions of law that are not common to the class. The claims by the Plaintiffs-Respondents will require separate and distinct analyses for each tenant in each apartment and the defenses available to the Defendants-Appellants will be similarly fact-specific.

B. The Complaint Failed to State a Claim With Respect to IAIs.

Plaintiffs-Respondents allege that numerous named plaintiffs, and by extension proposed class and subclass members, were overcharged because "an inspection of that apartment *suggests*" that the IAIs necessary to justify the rent charged to them was not completed See e.g. R. 30 at ¶ 12 (emphasis added). This equivocal pleading itself, renders the Complaint fatally flawed as a matter of law.

On a motion to dismiss pursuant to CPLR 3211, the court is tasked with deciding "whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994) *citing Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980) *and Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976).

Here, Plaintiffs-Respondents do not affirmatively allege wrongdoing with respect to IAIs. Rather, they allege that unspecified inspections of the apartments merely *suggest* that IAIs may not – or for that matter may – have been completed. Therefore, even if the Court were to "accept the allegations as true and provide plaintiffs with the benefit of every favorable inference", *Roni LLC v. Arfa,* 18 N.Y.3d 846 (2011), Plaintiffs-Respondents would be held to have shown only a suggestion that IAIs were inadequate, not that they actually were inadequate.

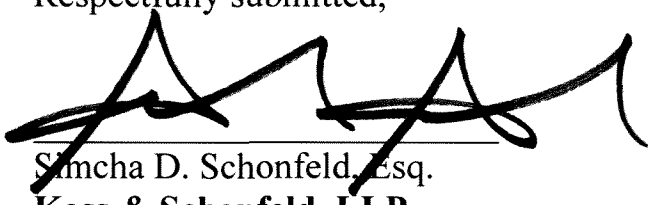
It is respectfully submitted that for the reasons stated above, Plaintiffs-Respondents failed to state a claim upon which relief could be granted. Therefore, the Order should be reversed, and the Complaint dismissed.

## CONCLUSION

Defendants-Appellants respectfully submit that the facts of this case demonstrate that the claims of Plaintiffs-Respondents cannot proceed as a class action. The claims of the parties and potential class members and the potential defenses available to the Defendants-Appellants, raise separate and distinct issues of fact and law. As the Dissent correctly noted: "questions common to the class, predominant or otherwise, simply do not exist" (R. 311). Therefore, and for the reasons set forth in the Dissent and above, it is respectfully submitted that the Order appealed from should be reversed, and the Complaint dismissed.

Dated: November 27, 2018
New York, NY

Respectfully submitted,



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# ATTORNEY CERTIFICATION

I, Simcha D. Schonfeld, Esq., a member of the firm of Koss & Schonfeld, LLP and counsel to Defendants-Appellants, do hereby certify pursuant to 22 NYCRR § 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: November 27, 2018
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