To be Argued by:
NILES C. WELIKSON
(Time Requested: 15 Minutes)

APL-2018-00222
New York County Clerk's Index Nos. 101235/15 and 101236/15
Appellate Division, First Department Case No. 5026

Court of Appeals
of the
State of New York

In the Matter of the Application of

REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

– against –

Action No. 1
Index No. 101235/15

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

– and –

LESLIE E. CARR and HARRY A. LEVY,

Intervenors-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

(For Continuation of Caption See Reverse Side of Cover)

BRIEF FOR PETITIONER-RESPONDENT

HORING WELIKSON & ROSEN, P.C.
Attorneys for Petitioner-Respondent
11 Hillside Avenue
Williston Park, New York 11596
Tel.: (516) 535-1700
Fax: (516) 535-1701

Date Completed: April 25, 2019

In the Matter of the Application of

LESLIE E. CARR and HARRY A. LEVY,

Petitioners,

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

– and –

REGINA METROPOLITAN CO., LLC,

Intervenor-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Action No. 2
Index No. 101236/15

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.l(f), Petitioner-Respondent, REGINA METROPOLITAN CO., LLC states that there do not exist any related parents, subsidiaries, and/or affiliates.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other

PRELIMINARY STATEMENT

The Appellate Division in this matter correctly held that DHCR may not use a non-statutorily sanctioned method to determine rent overcharge complaints that arise out of this Court's ruling in *Roberts v. Tishman Speyer Props., L.P.,* 13 NY3d 270 (2009). Their determination is consistent with numerous judicial rulings on this issue, all of which unequivocally held that, in the absence of fraud, review beyond four years from the filing of a rent overcharge complaint is barred.

DHCR's position, which was correctly rejected by the Appellate Division as erroneous as a matter of law, is that in disputes arising as a consequence of *Roberts* it should be allowed to engraft an exception to the "Four Year Rule". In the absence of other factors that are concededly not present in this matter, the rule requires that calculations start from the "base date rent", which is the rent in effect four years prior to the filing of a rent overcharge complaint. *Roberts* merely held that apartments remain rent regulated during a building's receipt of J-51 tax benefits. It neither addressed, nor suggested, a methodology for calculating rent.

The Appellate Division also correctly ruled that DHCR erred in relying upon amended Rent Stabilization Code (RSC) §2526.1(a)(2)(ix) which became effective in 2014 and permits pre-base date review and calculations based thereon where an apartment was vacant or temporarily exempt on the base date, neither of which factors were present in this matter. Significantly, that was the only RSC provision

DHCR's determination claimed was relevant to its order. DHCR has not pursued that position on this appeal, thus implicitly acknowledging its error.

Pre-*Roberts* DHCR's guidance permitted deregulation during the receipt of J-51 benefits. Respondent Regina Metropolitan relied on such guidance but subsequently as a result of this post-*Roberts* proceeding was penalized by DHCR's rent overcharge award in favor of the complaining tenants in the exorbitant sum of $285,380.39, inclusive of $76,096.19 in statutory interest. (R. 58). In addition, the order reduced the complaining tenants' initial monthly rent from $5,195.00 to $3,325.24. Regina's quarrel here is with the exemption that DHCR would like to engraft onto the statute in *Roberts* related proceedings. Regina's position is that the base date rent is inviolate and may not be challenged in the absence of fraud.

DHCR, in apparently attempting to support its argument that it should be allowed to by-pass statutory restrictions for policy reasons, claims the central purpose of rent stabilization has always been to preserve affordable housing for low income, working poor and middle-class residents in New York City and its surrounding counties. It thus overlooks the fact that the tenants in *Roberts* situations were not amongst those the rent laws were intended to protect. In *Matter of Santiago-Monteverde*, 24 NY3d 283, 290 (2014), this Court stated the Rent Stabilization Program "has all of the characteristics of a local public assistance benefit." It "provides assistance to a specific segment of the population that could

not afford to live in New York City without a rent regulatory scheme." *Id.* The fact that such benefits were not intended to be conferred on tenants with financial means was recognized in *Ram I LLC v. New York State Div. of Housing and Community Renewal*, 123 AD3d 102, 106 (1st Dept. 2014) where, in considering a *Roberts* luxury deregulation issue, the Court stated "we are not unmindful that the legislative history indicates a preference not to have people who can easily afford market value rental property inhabit rent-regulated housing." Similarly, in *Noto v. Bedford Apts. Co.*, 21 AD3d 762, 765 (1st Dept. 2005) the Court recognized that the original Rent Regulation Reform Act of 1993 was an "attempt to restore some rationality" to a system which "provides the bulk of its benefits to high income tenants" and that the Act recognizes "[t]here is no reason why public and private resources should be expended to subsidize rents for these households."

It cannot be disputed that *Roberts* has in some cases created a windfall in favor of tenants to the detriment of landlords and that it clearly upset a status quo predicated upon a position that had been expressly set forth by Appellant DHCR, now overruled by *Roberts*. DHCR now argues that its present position is justified by the J-51 benefits the owner received. It should be noted that in numerous instances owners would gladly forego those "benefits" to avoid the consequences they have faced in the wake of *Roberts*. See, e.g. *London Terrace Gardens, L.P. v. City of New York*, 101 AD3d 27 (1st Dept. 2012), which held the landlord was not

permitted to rescind its participation in the program. However, there is no language in *Roberts* nor in any legislative or regulatory action that followed that in any way justifies DHCR's right to create, and thus impermissibly legislate, its own formula to calculate a complaining tenant's rent other than pursuant to existing statutory mandates. We have no quarrel with setting the base year at four years and calculating rent overcharges from that date forward as mandated by *Roberts*.

QUESTION PRESENTED

1. Did the Appellate Division err in modifying Supreme Court's decision by granting landlord's petition to the extent of remanding the matter to DHCR to recalculate the base date rent by looking back to four years before the filing of a rent overcharge complaint to determine the legal regulated rent?

Regina argues that the Appellate Division properly applied the governing statutes in looking back to four years.

STATEMENT OF FACTS

Respondent Regina Metropolitan is the owner and landlord of the residential apartment building located at and known as 27 West 96th Street, New York, New York. Effective during the 1999/2000 tax year, Regina began receiving J-51 tax benefits. The building was subject to rent stabilization prior to, and independent of, the receipt of such benefits.

The Administrative Proceedings

On or about November, 2009, shortly after the *Roberts* determination, the tenants of Apartment 10D in the subject building, intervenors Leslie E. Carr and Harry A. Levy, filed a rent overcharge complaint with Appellant DHCR. Their tenancy had commenced pursuant to a written fair market lease for the period August 1, 2005 through July 31, 2007, at an agreed upon monthly rent of $5,195 which encompassed the November, 2005 "base date." On February 26, 2014, over four years from the filing of the complaint, DHCR's Rent Administrator ("RA") issued an order granting the Tenants' rent overcharge complaint, awarding them a total of $209,294.20 plus $76,096.19 in statutory interest totaling $285,390.39 while reducing their initial rent from $5,195 to $3,325.24 and calculating increases thereafter pursuant to the Rent Stabilization Law. (R. 53-58).

The RA's determination noted that the "base date" for the proceeding was November 2, 2005, "which is the date four years prior to the filing date of the complaint." (R. 53). However, the RA went beyond the base date to re-calculate the rent and fix the overcharge award because the subject apartment had been treated as deregulated from the inception of the complaining Tenants' tenancy at a time when the building was in receipt of J-51 benefits. (R. 56). The RA based the decision to go beyond the base date upon the holding in *72A Realty Associates v. Lucas*, 101 AD3d 401, 955 N.Y.S.2d 119 (1st Dept. 2012) noting that, in that case, the Court

ruled that in light of the improper deregulation of the apartment and given that the record did not clearly establish the validity of the rent increase that brought the rent stabilized amount above $2,000, the free market lease amount should not be adopted. The RA further stated that "Therefore, a further review of any available record of rental history necessary to set the proper base date rent is warranted." *Id.* Here, the RA made this finding despite the fact that the record in the proceeding, as subsequently confirmed by the Deputy Commissioner pursuant to his ruling on the PAR (R.48), found no issue with the validity of the rent increases that brought the rent stabilized amount above the $2,000 threshold for deregulation.

Had the RA calculated the rent from the base date, the overcharge award would have been $10,776.50 plus interest rather than $209,294.20 plus interest (totaling $285,390.39)- - a difference of over $200,000. (R. 24, 267).

Regina timely filed a PAR from the RA's order. (R. 59). The Tenants also filed a PAR, alleging, without any support, "fraud," and claimed DHCR should have relied upon its punitive default formula in order to further decrease the rent and increase the overcharge award. In addition, the Tenants sought to reverse that part of the RA's order that denied their claims for treble damages and attorneys' fees.

The Deputy Commissioner denied both the Landlord's and Tenants' PARs pursuant to an order dated May 13, 2015 ("the PAR Order"). (R. 34-52).

The PAR Order rejected the Tenants' claims that the default formula should be utilized, stating that the overcharge was the result of the Landlord's assumption that the apartment was deregulated while receiving J-51 benefits before the issuance of the *Roberts* determination. (R. 47). The PAR Order further noted the RA did not find any fraudulent scheme to deregulate the apartment or that the Landlord willfully attempted to circumvent the Rent Stabilization Law but, rather, "Deregulation was based upon Agency understanding and promulgation, and upon industry-wide and public understanding before issuance of the *Roberts* case." *Id.* Notwithstanding the foregoing, the Deputy Commissioner relied, albeit erroneously, upon *72A Realty* despite the fact that as distinguished from *72A Realty*, there was no issue as to whether the rent had reached the $2,000 then deregulation threshold prior to the commencement of the complaining Tenants' tenancy. In addition, the order relied upon newly enacted Rent Stabilization Code §2526.1(a)(2)(ix), which permits review of the rental history prior to the four-year period preceding the filing of a complaint where the apartment was vacant or temporarily exempt on the base date. Here, the apartment was neither vacant nor temporarily exempt on that date.

The Article 78 Proceeding

Regina challenged DHCR's determination pursuant to a verified Article 78 petition dated July 2, 2015. (R. 21). The Tenants also filed an Article 78 petition

seeking recourse to DHCR's punitive default formula, treble damages and attorneys' fees.

Supreme Court dismissed both Regina's and the tenants' Article 78 petitions. It approved DHCR's pre-base date rent calculations going back to when the apartment was first treated as deregulated and found that DHCR appropriately granted increases from that pre-base date. Supreme Court further distinguished certain owners that use fraudulent means to escape giving their tenants a proper regulated rent from Regina, finding that the "owner here, Regina Metropolitan Co., LLC did not do any of these things. In other words, the owner here did not act fraudulently." (R. 13). This factual finding was upheld by the Appellate Division.

The Appellate Division's Determination

The Appellate Division, by an order dated August 16, 2018, modified Supreme Court's ruling, holding that DHCR erred by going beyond the base date to calculate the complaining tenants' rent and, accordingly, remanded the matter to the agency "to recalculate the overcharge and proper rent using a base date rent of four years before the filing of the overcharge complaint." (R. 376).

The Appellate Division's decision noted the "primary question presented on this appeal is how to determine the proper rent on the base date." (R. 362). It held "the absence of fraud affects our analysis of how DHCR calculated the base date rent." (R. 367). The decision addressed the fact that DHCR's method of calculation

violated the Rent Stabilization Law and the applicable statute of limitations, specifically RSL § 26-516(a)(2), RSC § 2526.1(a)(2)(ii) and CPLR 213-a. The Court recognized those provisions are "detailed and categorical" in barring an examination beyond the four-year limitations period, but that this Court has carved out an exception where there is evidence of a landlord engaging in a fraudulent scheme to evade rent regulation, citing *Matter of Grimm v. State of N.Y. Div. of Hous. and Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010] (R. 369), and that this Court "has continued to require a showing of fraud or intentional wrongdoing before Courts may allow any look-back at a unit's rental history beyond the four-year limitations period" (R. 370). The decision further stated that in the absence of evidence of fraud, the Appellate Division has declined to look back more than four years before the filing of an overcharge complaint to set the base date rent. (R. 371). As to DHCR's reliance upon RSC § 2526.1(a)(2)(ix) pertaining to situations where an apartment is "vacant or temporarily exempt from regulation" on the base date the Appellate Division noted the apartment was neither vacant nor temporarily exempt and accordingly rejected DHCR's reliance upon that section. (R. 372). Finally, the decision addressed the fact that this Court has made a limited exception to the four-year limitations period in cases where landlords act fraudulently, and that to "expand this exception to landlords who have not engaged in fraud would create a much broader exception that would appear to negate the

temporal limits contained in the Rent Stabilization Law and the CPLR" (R. 373), and that "the relevant body of authority rests upon the presence, or absence, of fraudulent behavior by the landlord." (R. 374). The Court also went into a detailed analysis of why its earlier decision in *Taylor v. 72A Realty Assoc., L.P.*, 151 AD3d 95 (1st Dept.) was incorrect, noting that the determination in that case was based upon policy reasons using the method DHCR utilized in this matter and that it "runs athwart the Court of Appeals decisions in Grimm and Boyd and the bulk of authority in this Department." (R. 373).

DHCR moved for, and was granted leave to appeal to this Court by the Appellate Division and Regina urges this Court to affirm the Order of the Appellate Division.

ARGUMENT

POINT I

DHCR'S ACTIONS IN GOING BEYOND THE BASE DATE TO CALCULATE THE COMPLAINING TENANTS' RENT IS VIOLATIVE OF BOTH STATUTORY MANDATES AND PRIOR RULINGS OF THIS COURT

1. The Statutory Framework Requires Utilizing the Rent in Effect on the Base Date to Calculate the Legal Regulated Rent

The calculation of a legal regulated rent upon a filing of a rent overcharge complaint by a tenant is governed by the provisions of § 2526.1 of the Rent Stabilization Code, which is entitled "Determination of Legal Regulated Rents;

Penalties; Fines; Assessment of Costs; Attorney's Fees; Rent Credits". The formula set forth at subpart (a)(3)(i) is the following:

> "The legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments."

Rent Stabilization Code §2520.6(f) defines the base date in pertinent part and as applicable to this matter as follows:

> "For the purpose of proceedings pursuant to Sections 2522.3 and 2526.1 of this Title, the base date shall mean the date which is the most recent of:
>
> (9) the date four years prior to the date of the filing of such appeal or complaint."

CPLR 213-a, entitled "Actions to Be Commenced Within Four Years; Residential Overcharge" provides the following in pertinent part:

> "... This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

Supplementing the CPLR's restriction, Rent Stabilization Law § 26-516(a)(2) states the following in pertinent part:

> "This paragraph shall preclude examination of the rent history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision."

Consistent with the foregoing, prior to the Rent Stabilization Code amendments that became effective January 8, 2014, RSC § 2526.1(a)(2)(ii) stated the following in pertinent part:

> "The rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section, and § 2522.3 of this Title, shall not be examined; this subparagraph shall preclude examination of a rent registration for any year commencing prior to the base date, as defined in § 2520.6(f) of this Title, whether filed before or after such base date."

Effective January 8, 2014, Rent Stabilization Code § 2526.1(a) was amended to add certain exceptions to the four-year look-back period, none of which address a *Roberts* situation.

Rent Stabilization Code § 2526.1(2)(ii), as amended, provides the following:

> "(ii) subject to subparagraphs (iii), (iv), (v), (vi), (vii), (viii) and (ix) of this paragraph, the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section, and section 2522.3 of this Title, shall not be examined; and examination of a rent registration for any year commencing prior to the base date, as defined in section 2520.6(f) of this Title, whether filed before or after such base date shall be precluded;"

An examination of the subparagraphs referenced in subparagraph "(ii)" is pertinent to this dispute. What is extremely significant about the foregoing is not only the fact that the amendments to the Rent Stabilization Code do not address calculating the rent in the wake of *Roberts* but that subparagraph "(iv)" expressly addresses the issue of under what circumstances "a rental practice proscribed" may have "rendered unreliable the rent on the base date."

RSC § 2526.1(2)(iii) permits pre-base date review to determine whether an apartment is subject to the RSL and RSC. Subparagraph "(iv)" permits pre-base date review "for the limited purpose" of determining whether a fraudulent scheme to

destabilize the apartment or a rental practice proscribed under § 2525.3(b) (requiring that the tenant represent or agree to refrain from using the apartment as a primary residence), (c) (requiring a tenant sign a lease or rental agreement in the name of a corporation or for professional or commercial use as a condition of renting an apartment) or (d) (illusory or collusive rental practices) of the Code "rendered unreliable the rent on the base date." Subparagraph "(v)" permits using an order issued pursuant to RSC § 2523.4(a) (reduction of rent for failure to maintain services) remaining in effect within four years of the filing of the complaint to be utilized in determining an overcharge. Thus, pre-base date review to ascertain the existence of any such order is permissible. Subparagraph "(vi)" permits pre-base date review to determine willfulness; subparagraph "(vii)" pertains to longevity increases; and subparagraph "(viii)" permits pre-base date review to establish the existence or terms and conditions of a preferential rent; and subparagraph "(ix)" allows pre-base date review for the purpose of establishing the legal rent for the apartment that was vacant or temporarily exempt on the base date.

It is DHCR's contention that a *Roberts* situation renders the base date rent "unreliable" regardless of the fact that neither the Code in effect on the base date in this matter nor any judicial authority supported that conclusion. Even more significantly, the specific rental practices listed in subparagraph "(iv)" of the RSC as potentially rendering unreliable the rent on the base date clearly have nothing to

do with a *Roberts* scenario. Moreover, the amended RSC provisions that allow for pre-base date review in limited circumstances are, with the exception of the issue of preferential rents, based upon prior appellate rulings, many from this Court, that interpreted the Rent Stabilization Law as permitting those exceptions.

The New York State Register, which announced the promulgation of the amendments to § 2526.1 of the RSC, identified the changes as follows:

> 9 NYCRR § 2526.1(a)(2)(ii) is amended and 9 NYCRR § 2526.1(a)(2) adds new subparagraphs (iii), (iv), (v), (vi), (vii), (viii) and (ix) and 9 NYCRR § 2526.1(a)(3)(iii) is amended to provide a more comprehensive list of exceptions to the rule that when examining rent overcharges the look-back period to determine an overcharge is four years. The list of exceptions includes: when there is an allegation of a fraudulent scheme to deregulate the unit; prior to base date there is an outstanding rent reduction order based upon a decrease in services; it is determined that there is willful rent overcharge; there is a vacant or exempt unit on the four-year base date, in which case DHCR may also look at the last rent registration, or; there is a need to determine whether a preferential rent exists[1]."

See N.Y.S. Register, p. 34 (Jan. 8, 2014).

In its Response to Comments in the New York State Register, DHCR declined to add any other exceptions. DHCR's response to a comment requesting that a "*Roberts* scenario" exception be included states:

> "Review of the preceding four years in the other circumstances listed has already met with court approval or is based on such case law. DHCR will not presently accede to the request to expand the list of exceptions to all apartments that have been deregulated pursuant to high

[1] The validity of this RSC amendment is questionable as it is in conflict with the RSL. However, that is not an issue in this matter.

> rent vacancy deregulation as it sees this matter as insufficiently settled for inclusion."

See N.Y.S. Register, p. 35 (Jan 8, 2014).

In its Consolidated – Regulatory Impact Statement Summary to the amendments to the RSC codifying certain exceptions to the four-year limitation on examining an apartment's rental history, DHCR further cemented its position by stating:

> There is ongoing litigation over the applicability of the four-year rule to *Roberts* limitation; given that such litigation is still ongoing and not finally determined, it is not contained in this regulation.

Id. at pg. 16 (the Regulatory Impact Statement Summary is available online at www.NYCLA.org/pdf/the Rent Code Amendments of 2014).

2. In the Absence of Fraud DHCR May Not Go Beyond the Base Date to Calculate a Complaining Tenant's Rent

Despite DHCR's own explicit admission that the amended Rent Stabilization Code does not address a *Roberts* scenario the agency argues its methodology in this matter was consistent with this Court's precedent in cases involving "unreliable rents." (DHCR's Brief, p. 41). DHCR then goes on to cite *Thornton v. Baron*, 5 NY3d 175 (2005) and *Matter of Grimm v. State of N.Y. Div. of Hous. and Community Renewal Off. of Rent Admin.*, 15 NY3d 258 (2010), both of which permit pre-base date review in instances involving fraud, which is not at issue here.

In *Grimm*, this Court succinctly stated the following exception to going beyond the base date:

> "What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date."

Contrary to its own prior ruling in the *Matter of Majestic Properties LLC*, Admin. Red. Dckt No. DR110015RO (R. 351), DHCR attempts to expand the "limited purpose" for which pre-base date review is permitted by *Grimm* and *Thornton* by claiming those determinations somehow permit such review where they claim the base date rent is "unreliable." Yet, they fail to provide any case or statutory citations supportive of this position.[2]

DHCR misplaces reliance on a claim that this Court has repeatedly held that Courts adjudicating rent-overcharge claims may look at rental history beyond the preceding four years under appropriate circumstances. In *Conason v. Megan Holding, LLC*, 25 NY3d 1 (2015) the issue was the landlord's fraud. *Scott v.*

[2]In *Majestic*, DHCR stated the following: "Section 2526.1 of the Rent Stabilization Code (RSC) states that, subject to enumerated exceptions, none of which apply in this case, 'the rental history of the housing accommodation prior to the four-year period preceding the filing of [an overcharge] complaint ... shall not be examined ...' Pursuant to the RSC, as explained above, because *Lucas* does not apply to this case, as also explained above, the Rent Administrator properly used the rent paid on the base date as the legal regulated rent on said date, and as the proper rent for calculating subsequent lawful rent increase." (R. 353).

Rockaway Pratt, LLC, 17 NY3d 739 (2011) ruled it was proper to calculate the amount of a rent overcharge that referenced a 1982 rent reduction order which remained in effect during the four-year limitations period, citing *Matter of Cintron v. Calogero*, 15 NY3d 347 (2010), which held DHCR should, in calculating any rent overcharge, honor rent reduction orders that were issued prior to the four-year limitations period preceding the filing of the overcharge complaint that remained in effect during that that four year period. The ruling held that pursuant to Rent Stabilization Law § 26-514, DHCR rent reduction orders place a continuing obligation on an owner to reduce rent until required services are restored and that such orders, if still in effect during the four-year period preceding the complaint, are part of the rental history that DHCR must consider. Amended RSC § 2526.1(a)(2)(v) codified this exception. That obviously does not give DHCR license to invent a methodology for the purpose of calculating rent in a *Roberts* situation since *Roberts* does not involve rent reduction orders. DHCR similarly misplaces reliance upon *Riverside Syndicate, Inc. v. Munroe*, 10 NY3d 18 (2008), which involved an agreement by tenants to pay an illegal rent for a rent-stabilized apartment in exchange for an agreement to allow them to use it as a second home. The case did not involve a rent overcharge complaint but, rather, whether the agreement was lawful. This Court held the agreement was, on its face, one to waive the benefit of rent stabilization, and it was therefore void pursuant to Rent Stabilization Code §

2520.13. None of these situations are present here and thus deference need not be given to an agency's determination that interprets a statutory scheme. See *Roberts*.

In a further attempt to support its position DHCR argues the Appellate Division in this matter was "especially wrong to suggest" this Court's ruling in *Matter of Boyd v. New York State Division of Hous. & Community Renewal,* 23 NY3d 999 (2014) was not about the legality of the rent charged on the base date. (Brief, p. 46). However, DHCR does not dispute the fact that, as noted by the Appellate Division, *Boyd* was "a J-51 case" (R. 370) in which this Court held the tenant failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period. Accordingly, and contrary to DHCR's argument, the ruling clearly pertained to the legality of the rent on the base date and the fact that in the absence of fraud it could not be challenged.

The Appellate Division, First Department, with the exception of its ruling in *Taylor,* has consistently held that in the absence of fraud, calculations in *Roberts* matters are to be based upon the rent in effect on the base date. See *Stulz v. 305 Riverside Corp.*, 150 AD3d 558 (1st Dept. 1017), lv. denied 30 NY3d 909 (2018), which affirmed Supreme Court's dismissal of plaintiff's complaint based upon the landlord having reimbursed the tenants for overcharges utilizing the rent in effect on the base date of four years prior to the filing of the complaint to compute the overcharges; *Todres v. W7879, LLC*, 137 AD3d 597, 26 Misc3d 698 (1st Dept. 2016),

lv. denied 28 NY3d 910 (2016), held that once the trial Court found the defendants did not engage in a fraudulent deregulation scheme it should not have looked at the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action; and *Meyers v. Four Thirty Realty*, 127 AD3d 501 (1st Dept. 2015) which held, in affirming Supreme Court's denial of the landlord's motion for summary judgment dismissing the tenant's complaint, and in reliance upon this Court's holding in *Grimm*, *supra*, that a determination of the proper base date rent would be premature and must await further discovery "for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date."

Rather than addressing the First Department decisions that address *Roberts,* DHCR relies on rulings that permitted pre-base date calculations in unrelated matters. *Gordon v. 305 Riverside Corp.*, 93 AD3d 590 (1st Dept. 2012) has no relevance based upon the fact that the apartment involved in that proceeding was vacant on the base date and thus reliance upon RSC § 2526.1(a)(3)(iii) that was in effect at that time was appropriate. Similarly, *Matter of Ador Realty, LLC v. Division of Hous. and Community Renewal*, 25 AD3d 128, 802 NYS2d 190 (2d Dept. 2005) is distinguishable from this matter since it recognized the only way a landlord could prove entitlement to a longevity increase, which requires at least eight years between vacancy increases to be obtainable, must necessarily involve pre-base date review.

That ruling was codified by amended RSC § 2526.1(a)(2)(vii). *Matter of H.O. Realty*, 46 AD3d 103 (1st Dept. 2007) merely stands for the proposition that pre-base date review is permissible to determine the issue of willfulness and thus, whether treble damages could be imposed. The Court held Rent Stabilization Law § 26-516(a) did not limit an owner in proving its good faith to the four-year period immediately prior to the filing of the overcharge complaint. The Court noted that the four-year limitation specifically refers to the period within which a rent may be challenged, and that "it does not, by its terms, limit the period in which the owner can draw evidence to explain its actions to the four years immediately prior to the filing of the complaint." *Id.* at 108. That ruling was subsequently codified by amended RSC § 2526.1(a)(2)(vi).

POINT II

ANY AFFIRMANCE OF DHCR'S ACTIONS IN THIS PROCEEDING WOULD BE VIOLATIVE OF THE PROSCRIPTION AGAINST JUDICIAL LEGISLATION

Since the Omnibus Housing Act of 1983 that established the four-year limitation period, neither the Rent Stabilization Law nor Code provided for any exceptions until the Code amendments that became effective January 8, 2014. As previously noted, those amendments very clearly describe the limited situations in which pre-base date review and rent calculations based thereon are permissible. Those sections unquestionably do not include a *Roberts* scenario.

Where a statute describes the particular situations in which it is to apply, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Patrolmen's Benev. Assoc'n of City of New York v. City of New York*, 41 NY2d 205 (1976), citing McKinney's Cons. Laws of N.Y. Book 1, Statutes, § 240. Equally clear is that a Court may not adopt a strained interpretation in order to fill a perceived gap in the statute. *Kennedy v. Kennedy*, 251 AD2d 407,674 NYS2d 95 (2d Dept. 1998). It also a well settled principle that Courts are not to legislate under the guise of interpretation. *People v. Finnegan*, 85 NY2d 53, 623 NYS2d 546 (1995).

It is a matter of public record that Bill 8050 that was introduced in the Senate in 2010 provided several proposed formulas to calculate rents in the wake of *Roberts*. The significance of this 2010 proposed bill is that it did not pass; nor has there been an attempt to re-introduce it. The question that thus arises is whether a Court could then become a de facto legislative body and promulgate a rule that has been rejected by the New York State Legislature. Certainly in a proper situation a court can interpret a statute that is ambiguous, but that is not the situation here. DHCR cannot use the Courts to amend a statute that is unequivocal on its face and which clearly does not refer to *Roberts* situations.

Roberts situations clearly require adherence to the statutory formula for the calculation of rent, that being RSC § 2526.1(a)(3)(i). If it was either DHCR's or the

Legislature's intent that an exception to that provision was required, that could readily have been addressed. Yet, in the 2015 amendments to the Rent Stabilization Law the legislature did not provide yet another exception to the "Four-Year Rule." Moreover, while it is DHCR who is charged with the responsibility of promulgating amendments to the Rent Stabilization Code, there is no question that any such amendments must be consistent with the Rent Stabilization Law. In addition, any such amendments must be promulgated in accordance with the provisions of the State Administrative Procedure Act. See McKinney's State Administrative Procedure Act § 202. DHCR obviously cannot circumvent that requirement by merely engrafting an exception to the Rent Stabilization Code in *Roberts* situations when the Code clearly fails to address any such issue.

POINT III

IT WOULD BE APPROPRIATE FOR THIS COURT TO CLARIFY THE FACT THAT THE COMPLAINING TENANTS' RENT MUST BE CALCULATED USING THE RENT THAT WAS ACTUALLY IN EFFECT ON THE BASE DATE

The Appellate Division's decision in this matter, while addressing the concerns of the two dissenting Justices, stated that the majority's determination did not leave the tenants with "a right without a remedy," noting that DHCR has the discretion to implement other methods of base date rent calculation "that do not run afoul of the limitations period," citing *Matter of 160 E. 84th St. Assoc., LLC v. New*

York State Div. of Hous. and Community Renewal, 160 AD3d 474 (1st Dept. 2018). (R. 375).[3]

Significantly, the same day the Appellate Division issued its ruling in this matter it also decided *Raden v. W7879, LLC,* 164 AD3d 440 (2018), holding that rent in that *Roberts* situation was correctly calculated according to RSC §2526.1 "which provides that '[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments' (subd [a][3][i]…" The Court also referenced its decisions in two other *Roberts* matters, those being its 2016 ruling in *Todres v. W7879, supra,* which held that upon the trial court's finding fraud was not present, the rent in effect on the base date was required to be utilized in calculating the rent, and its 2017 determination in *Stulz v. 305 Riverside Corp*., *supra,* which held the landlord's calculations properly utilized the rent in effect on the base date.

There is no factor that distinguishes this matter from *Raden, Todres* or *Stulz.* Therefore, as in those matters, the rent in effect on the base date must be the starting point for calculating the tenants' rent in this case.

[3] The dissent correctly noted, at fn 4, that the sampling method referred to in Matter of *160 E. 84th St. Assoc*. is typically used where, because of fraud or other circumstances, the registered rental history is unavailable or unreliable, "which is not the situation here". (R. 384-385). That sampling method is found at RSC §2522.6(b)(2) where either i) the rent charged on the base date cannot be determined; or ii) the full rental history from the base date is not provided; or iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment.

Based upon the fact that *Matter of 160 E. 84th St. Assoc.* is clearly inapplicable to the facts pertaining to this matter, it is respectfully submitted that in affirming the Appellate Division's ruling this Court should clarify the fact that, on remand, DHCR is bound to calculate the complaining tenants' rent and any overcharges pursuant to Rent Stabilization Code § 2526.1(a)(3)(i), which expressly requires that such calculations commence from "the rent charged on the base date."

CONCLUSION

The order of the Appellate Division modifying the Order of Supreme Court should be affirmed in all respects.

Dated: Williston Park, New York
April 24, 2019

HORING WELIKSON & ROSEN, P.C.

Niles C. Welikson

By: Niles C. Welikson, Esq.
Attorneys for Petitioner-Respondent
11 Hillside Avenue
Williston Park, NY 11596
(516) 535-1700

Certificate of Compliance

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York

The foregoing brief was prepared on a computer. A proportionally spaced 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 and regulations, etc. is 5,924 words.