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New York County Clerk's Index Nos. 101235/15 and 101236/15

Court of Appeals

of the

State of New York

Action No. 1

In the Matter of the Application of
REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

– against –

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 & Rules.

(For Continuation of Caption See Inside Cover)

RESPONSE TO BRIEF OF *AMICI CURIAE* STEPHENIE FUTCH, JASON GALLAGHER, JACQUELINE SUBRAMANIAM AND LAWRENCE CHAIFETZ

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

Date Completed: December 27, 2019

Action No. 2

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 & Rules.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Petitioner-Respondent, REGINA METROPOLITAN CO., LLC states that there do not exist any related parents, subsidiaries, and/or affiliates.

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PRELIMINARY STATEMENT

This brief is respectfully submitted in response to that of the Amici tenants.

Amici's brief merely proffers a methodology that will produce the highest monetary award in their favor as a consequence of the fortuitous events of the *Roberts* determination and the June 14, 2019 enactment of the Housing Stability and Tenant Protection Act ("HSTPA"). They cite extensively to the HSTPA and claim the Court should rely strictly on that statute.

The unconstitutionality and impracticality of applying the HSTPA to not only *Roberts* situations, but especially to the instant matter, has been addressed by Regina's prior submissions, including its October 16, 2019 letter brief, and therefore will not be repeated except as necessary. Amici's brief barely addresses this issue, other than to examine the HSTPA's provisions. Amici claims "respectfully, DHCR, tenant and landlord all have it wrong, especially after the enactment of HSTPA." (Amici's brief, p. 7). They then state the DHCR formula is "arbitrary, capricious and unconstitutional. Moreover, it requires tenants to pay for DHCR's mistakes, and those of their landlord." *Id.*

The foregoing overlooks the fact that neither DHCR nor any Court has ever found Regina was guilty of any wrongdoing and, in fact, it has been expressly set forth that Regina acted in reliance upon DHCR's own advice, inclusive of the Rent Stabilization Code amendments enacted in the year 2000. Accordingly, Regina did

not make a "mistake". [1] To claim that the tenants are paying for DHCR's mistakes is ludicrous, considering it is well established that the tenants, like the landlord, all believed the subject apartment was deregulated and, even more significantly, these are not tenants who the Rent Stabilization Law is designed to protect.

Since Amici present themselves as victims, it is worth reiterating that the Appellate Division, First Department, in *Ram 1 LLC v. New York State Div. of Housing and Community Renewal*, 123 A.D.3d 102, 106 (2014) stated that, in considering a *Roberts* issue, "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."

In their preliminary statement, Amici states that they submit their brief to resolve "one such question" which is "how to set the legal regulated rent for apartments that were deregulated, pre-*Roberts* and re-registered at some point after that decision." They then go on to question whether, in setting the legal regulated rent, a landlord should have been entitled to vacancy increases, individual apartment increases, and major capital improvement increases, when the pre-*Roberts* tenants

[1] In the letter brief Dated October 17, 2019 submitted on behalf of DHCR the Agency claims, at page 8, that thousands of New Yorkers were subject to unlawful market rents "because owners like Regina Metropolitan had unlawfully deregulated those units prior to *Roberts*." Regina did nothing "unlawful"; it followed DHCR's advice. The record on this appeal is replete with statements absolving Regina of any wrongdoing and noting it followed DHCR's guidance and the Rent Stabilization Code section the Agency promulgated. Rather than seeking a fair solution, which would be maintaining the status quo by using the law in effect at the time of the complaint, DHCR fails to recognize the totality of the situation, inclusive of its own role.

in occupancy when such increases were sought were not informed of their rent stabilized rights. (Amici's brief, p. 1-2).

The *Regina* determination does not involve IAI increases. DHCR's ruling expressly disallowed any reliance upon IAIs, but only because proof thereof was not before the Rent Administrator. Amici's brief addresses their own alleged individual facts rather than those which pertain to this appeal. For example, they claim that for each of their apartments, the landlord deregulated the units pre-*Roberts*. (Brief, p. 4). They then go on to state:

> "Like tenants, their landlord eventually re-registered their units (some five [5] years after directed to do so by the first apartment, in *Gersten*)" *Id.*

While utilizing the word "like tenants" in the preceding sentence does not appear to make sense, reliance on "their [Amici's] landlord" having eventually re-registered their units has nothing to do with this matter since here, Regina registered from 2005 through and including 2010 in the year 2010 and continued to register thereafter. (R. 120-121).

Amici claims it was error to allow a vacancy increase for the tenants in this proceeding. However, vacancy allowances are, and always have been since their inception, statutory.

Rent Stabilization Law § 26-511(c)(5)-a provides that, notwithstanding any provision of this Chapter, the legal regulated rent for any vacancy lease shall, in pertinent part, be the following:

> "The previous legal regulated rent for such housing accommodation shall be increased by the following:
>
> (i) "If the vacancy lease is for a term of two years, 20% of the previous legal regulated rent; or
>
> (ii) If the vacancy lease is for a term of one year the increase shall be 20% of the previous legal regulated rent less than amount equal to the difference between (a) the two year renewal lease guideline promulgated by the Guidelines Board of the City of New York applied to the previous legal regulated rent and (b) the one year renewal lease guideline promulgated by the Guidelines Board of the City of New York applied to the previous legal regulated rent."

It was not until the Rent Stabilization Code amendments of 2014 that Rent Stabilization Code § 2528.4(a) was amended to include the vacancy allowance in the so-called "rent freeze" penalty for failure to register.

Amici claims that "political motivation" pertaining to the HSTPA is "irrelevant" and there is nothing in the HSTPA that would give rise to the conclusion the legislature intended to carve out J-51 rent overcharge claims[2]. (Amici's brief, p. 14). The foregoing overlooks the fact that the Courts have, since *Roberts*, *prior to*

[2] As set forth at page 6 of Regina's October 16, 2019 letter brief, political considerations are clearly relevant, especially where retroactive legislation is involved. *Landmark v. US 1 Film Products*, 114 S. Ct. 1483, 1497, 511 U.S. 244, 267 (1994).

the Appellate Division's decision in this matter, erroneously carved out such exceptions for J-51 rent overcharge claims. What is significant is that this is precisely the argument that has been made by Regina, that being had the Legislature intended to carve out an exception not only would it have done so, but its previous attempt in 2010 did not succeed. Accordingly, the law should and must be applied as it existed at the time of the filing of the complaint through and including date of filing this appeal, that being rent calculations in Regina were required to start from the "base date" four years prior to the filing of the complaint, which is consistent with the Appellate Division's ruling in this matter. Regina's October 16, 2019 letter brief has set forth its position at length as to the unconstitutionality, impracticality, and simple unfairness of applying the HSTPA to this proceeding. There is nothing in movants' brief that confutes Regina's position in that regard.

Amici also fail to refute Regina's showing that precedent established by this Court requires that a rent overcharge complete must be determined in accordance with the law in effect at the time the complaint is filed.

POINT I

AMICI CURIAE FAILS TO REFUTE REGINA'S SHOWING THAT APPLYING THE HSTPA FORMULA TO THIS PROCEEDING IS IRRATIONAL, UNCONSTITUTIONAL, AND BARRED BY PRECEDENT ESTABLISHED BY THIS COURT THAT REQUIRES APPLYING THE LAW IN EFFECT AT THE TIME OF FILING AN OVERCHARGE COMPLAINT

A) It would be irrational and unconstitutional to apply the HSTPA to this matter.

Neither DHCR, Supreme Court nor the Appellate Division found wrongdoing by Regina. Equally clear is that DHCR erroneously relied upon a Rent Stabilization Code section having no relevance to this matter, that being RSC § 2526.1(a)(2)(ix) involving apartments vacant or temporarily exempt on the base date, to justify its commencement of rent calculations from the last stabilized tenancy. The Appellate Division's decision rejected DHCR's reliance on that section and the Agency has not pursued its position in that regard. Therefore, since the exception to going beyond the base date four years prior to the filing of the complaint required proof of fraud, there was no other support for DHCR's position. Instead, DHCR, the Intervenor-Tenants, and now the Amici argue entitlement to rely on the HSTPA that was enacted almost 10 years after the filing of the complaint in this matter.

Conspicuously absent from the Amici's brief are any citations to rulings by this Court or the United States Supreme Court that address Regina's showing that applying the HSTPA to this matter would be unconstitutional. Instead, the Amici

relies on a single Appellate Division ruling, *Dugan v. London Terrace Gardens, L.P.*, 177 A.D.3d 1 (1st Dep't 2019), which permitted the application of the HSTPA to a *Roberts* class action[3].

Amici claims that each of the three sides in this appeal (DHCR, landlord and tenant) proffer a different methodology for setting a legal rent and then boldly proclaim "each of them is wrong." (Amici's brief, p. 2). They then state that HSTPA and the RSC establish how to set the rent for an apartment deregulated pre-*Roberts* and that "it could not be easier." Not only is this a gross over-simplification, but it is completely erroneous.

First, the Rent Stabilization Code has yet to be amended and therefore it is clearly not in conformity with the HSTPA (which is not surprising since, arguably, even DHCR could not have anticipated the extent of the changes brought about by the HSTPA). Secondly, there is no way applying the HSTPA to this matter makes sense even if it could somehow be found to be constitutional (which Regina submits is not the case). Amici's argument at page 2 of its brief as to the impact of the HSTPA on previously filed complaints illustrates not only the impracticality but arguably the absurdity of any such application.

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[3] The decision was authored by then presiding Justice Richter, who dissented in *Raden v. W7879, LLC*, 164 A.D.3d 440 [1st Dep't 2018], which matter is now before this Court. In addition, Justice Gische concurred with Justice Richter. Justice Gische dissented in *Regina* and authored the decision in *Taylor v. 72A Realty Assocs., L.P.*, 151 A.D.3d 95 [1st Dep't 2017].

First, Amici states in setting the rent, look to see if there is a reliable rent registration served upon the tenant at least six years prior to the filing of the complaint. If there is not one, keep going back in time until one can be identified.

Amici's position overlooks the fact that by virtue of DHCR's edicts, as set forth not only in its 1996 opinion letter and the year 2000 Rent Stabilization Code amendment, and again confirmed in its 2016 J-51 initiative, prior to the *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 ruling in 2009, and confirmed by DHCR's PAR determination in this matter (R. 34), there was no issue with respect to a landlord being able to deregulate an apartment during the receipt of J-51 benefits and, accordingly, since deregulated apartments are exempt from regulation they not only were not registered but it was improper to do so. Another obvious problem with the formula argued by the Amici is that until June 14, 2019 there was a strict four-year limitation on a landlord's obligation to retain rent records. Overnight, that turned into a six-year requirement. If as of June 13, 2019, the day before the enactment of the HSTPA, an owner, in compliance with the pre-amendment Rent Stabilization Law and Code, had retained four years of records while lawfully disposing of those which preceded that time period, there is no way to justify the sudden, unforeseen requirement that an additional two years of records must be produced. Similarly, the HSTPA provides the rent should be based upon the reliable registration both served upon the tenant and filed at least six years prior to the

complaint. Pre-amendment, the "service" language was not present. Accordingly, even if it could be argued that the landlord was required to maintain proof of service upon the tenant of the rent registration there is no logic to requiring that go back an additional two years for the same reason previously set forth herein, i.e., the sudden, unforeseen requirement of exposure to producing an additional two years of records when, previously, those two years of records were not required to have been retained.

As the Appellate Division in this matter stated:

> "The Court of Appeals has found that the purpose of the four-year limitations period is 'to alleviate the burden on honest landlords to retain rent records indefinitely' (*Thornton*, 5 N.Y.3d at 181, 800 N.Y.S.2d 118, 833 N.E.2d 261). The Court of Appeals has made what we have called a 'limited exception' to the four-year limitations period in cases where landlords act fraudulently [citation omitted]. To expand this limitation 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."

Further illustrating the absurdity of Amici's position is number 4 of their proffered formula where they state if there is a reliable registration served upon the tenant the landlord may take a vacancy increase "provided the landlord informed the vacating tenant for whom it seeks such increases, of his or her rent stabilized status." (Amici's brief, p. 3). First, the landlord would not be seeking an increase from the vacating tenant. Second, under the circumstances of *Roberts*, a landlord could not have informed the tenant of his or her rent stabilized tenancy since, prior to this

Court's ruling on that issue, the landlord would have no reason to know of any such status.

The Amici, like the Intervenor-Tenants in this matter, present a common theme of blatant unfairness. The latter unsuccessfully sought treble damages before DHCR, Supreme Court and the Appellate Division, as well as recourse to the *Thornton* default formula. Amici, like the tenants, argue for unwarranted punishment by way of unjustified rent freezes based upon a statute that did not exist when this complaint was filed.

The real issue present is when a landlord follows a law in existence at the time which, in this instance, was Rent Stabilization Code § 2520.11 that was promulgated in conformity with the State Administrative Procedure Act (SAPA), and that statute is subsequently found to be erroneous, should the landlord be punished? The obvious answer to that is "no." Even if the HSTPA could somehow be applied there is no way to make sense of doing so here with respect to the issue of registrations. The next question would be whether there was a reliable rent for purposes of calculating an overcharge. As the dissent in this matter stated at footnote 4, the sampling method to calculate the lawful rent is typically used where, because of fraud or other circumstances, the registered rental history of the subject apartment is unavailable or "*unreliable*" and "*which is not the situation here*." (Emphasis added). Similarly, in *Raden v. W7879, LLC*, 164 A.D.3d 440, 84 N.Y.S.3d 30 (1st Dep't

2018), decided the same day as this matter, the Court, in affirming the ruling of the Court below, stated:

> "The referee found that setting the free market base date rent in May, 2006 was a *reliable method* of establishing the stabilized rent and that further look-back was inappropriate, because every lease renewal stated that the apartment was not rent-stabilized and defendants could not have anticipated *Roberts*, which was contrary to industry practice at the time." (Emphasis added).

The impracticality and arguable absurdity of applying the HSTPA to *Roberts* matters is illustrated by Amici's claim that the rent for an apartment involved in a *Roberts* issue should actually be less than if the apartment had been continuously treated as stabilized. They claim that strict application of the HSTPA should produce that result. That argument does nothing more than to further illustrate how unwise and impractical any such application would be.

Amici, in seeking more than the already excessive award under DHCR's formula, claims that DHCR's action "seeks to shift the consequences for the mistake in law from DHCR and the landlords, and on to New York City's rent-regulated tenants, the only innocent stakeholders." (Amici's brief, p. 12). They then go on to claim this is arbitrary and capricious and not to mention unconstitutional and that DHCR is engaged in a game of "make believe," when a landlord seeking such increases "was never in compliance with the very regulations DHCR purports to oversee." *Id.* The blatant error in that claim is that the landlord was absolutely in compliance with the law as it existed, i.e. RSC §2520.11, until this Court ruled that

law was erroneous. Moreover, tenants involved in *Roberts* issues are a distinct subset of the regulated tenancy population who are unintended beneficiaries of the J-51 program. See, *Ram 1 LLC*, *supra.*

B) Precedent established by this Court requires that this matter be determined in accordance with the law in effect at the time the complaint was filed.

Amici attempts to somehow distinguish this Court's holding in *Mengoni v. New York State Div. of Housing and Community Renewal*, 97 N.Y.2d 630, 633, which held that a statutory amendment was inapplicable to an overcharge proceeding filed prior to the effective date of the amendment even though the statute provided it was to be applied to pending cases. That case is addressed at page 10 of Regina's letter brief to this Court of October 16, 2019. Amici's brief states the following:

> "Because the two overcharge claims had not been brought under the 1983 Omnibus Housing Act, the Court held Section 33 is therefore inapplicable." (internal quotation marks omitted). (Amici's brief, p. 16).

The tenants' complaint in this matter was filed in 2009 and therefore it cannot rationally be found to have been filed "under" RSL § 26-516(a)(2) as amended and which became effective approximately 10 years later.

The Omnibus Housing Act of 1983 created what became Rent Stabilization Law § 26-516(g), which became effective April 1, 1984. That Act established for the first time a four-year limitation on the calculation of rent overcharges and, concomitantly, on the number of years for which rent records were required. See

Lavanant v. State Division of Housing and Community Renewal, 148 A.D.2d 185 (1st Dep't 1989). Even though that Act clearly established a "four-year rule" with respect to the calculation of overcharges and the review of a rental history the Legislature, in enacting the Rent Regulation Reform Act of 1997, at section 33 thereof, amended section 26-516(a) of the Administrative Code of the City of New York (Rent Stabilization Law) inclusive of reiterating that, *inter alia*, the legal regulated rent for the purposes of determining an overcharge shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement and that examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to that subdivision was precluded. Section 46 of the Rent Regulation Reform Act of 1997 provides the following in pertinent part:

> "This Act shall take effect immediately; provided, however, that: (1) the provisions of sections 29 through 34 … *shall apply to any action or proceeding pending in any Court or any application, complaint or proceeding before an administrative agency on the effective date of this Act,* as well as any action or proceeding commenced thereafter" (emphasis added).
>
> In Mengoni, this Court stated the following in pertinent part:
>
> "The Omnibus Housing Act of 1983 (L. 1983, ch. 403) revised the RSL to include a four-year statute of limitations for rent overcharges. At that time, it was unclear whether the four-year limitations period applied to rent overcharge complaints filed prior to April 1, 1984. In *Matter of Century Tower Assocs. v. State of New York Div. of Hous. And Community Renewal*, 83 N.Y.2d 819, 823, 611 N.Y.S.2d 491, 633 N.E.2d 1095, this Court held that the law in effect at the time the

> complaint was filed applied to all overcharge complaints filed prior to April 1, 1984. The practical effect of that decision is that the four-year limitations period does not apply in calculating the rent overcharge alleged in complaints filed prior to April 1, 1984 and thus the entire rent history of a tenant may be considered.
>
> In 1997 the Legislature passed the Rent Regulation Reform Act of 1997 ... Section 33 of the RRRA-97 amended RSL §26-516 to preclude DHCR from calculating rent overcharges based upon a rent history prior to the four-year period preceding the filing of a complaint 'pursuant to this subdivision.' Section 46 of RRRA-97 provides that section 33 'shall apply to any action or proceeding pending in any court or any application, complaint, or proceeding before an administrative agency on [its] effective date.' We reject the contention that this language applies to cases brought before April 1, 1984. Because RSL §26-516 became effective April 1, 1984, complaints filed prior to that date 'are not complaints pursuant to §26-516(a), and [§] 33 [of the RRRA-97] is by its terms inapplicable to them." (internal citation and ellipses omitted). 97 N.Y.2d 633.

RSL §26-516(a)(2), as amended by the HSTPA, provides that "A complaint *under this subdivision* may be filed with the State Division of Housing and Community Renewal or in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint. A penalty of three times the overcharge shall be assessed upon all overcharges willfully collected by the owner starting six years before the complaint is filed."

Since the Tenants' complaint was filed in 2009, it cannot rationally be found to have been filed "under" the amended RSL section.

POINT II

REGISTRATION ISSUES DO NOT IMPACT *ROBERTS* MATTERS

Amici claims that unless the apartment was registered, the landlord could not take RGB increases. This further illustrates the confusion they attempt to inject into this situation. In support of their claim, they cite *215 W 88th St. Holdings LLC v. New York State Div. of Hous. & Community Renewal*, 143 A.D.3d 652 (1st Dep't 2016). There, it was held that DHCR properly utilized the default formula to calculate a rent overcharge due to the fact that the landlord included a fraudulent non-primary residence rider in the tenant's initial lease, thus rendering it a legal nullity. The Court found that the practice of imposing a "rent freeze" when the default method applies included calculating the overcharge, without adjustments, through the relevant period. On this appeal, even DHCR does not argue the clearly punitive default method. Amici's brief conspicuously omits any reference to the fact that fraud was involved in the *215 W. 88th St. Holdings, LLC* matter as distinguished from this appeal, where it has been held by DHCR and the Appellate Division that Regina was in no way at fault with respect to its reliance upon the pre-*Roberts* state of the law.

The default formula was addressed in the Appellate Division's determination in this matter. The Court therein stated the following:

> "Tenants argued before DHCR that there was evidence that landlord had engaged in a fraudulent scheme to evade rent regulation of the unit

> and that the correct rent should be set via the default formula specified in *Thornton v. Baron*, ... or the similar default formulas under Rent Stabilization Code (RSC) (9 NYCRR) §2522.6(b)(2) and (3). Additionally, even if the default formula would not be appropriate, tenants asserted that the rent should be frozen as ... landlord failed to file proper and timely rent registration statements." (internal citations omitted).

As the Appellate Division in this matter noted, "DHCR was not arbitrary and capricious in finding that landlord did not engage in a fraudulent scheme to evade the Rent Stabilization Law." That Court further noted that, as a consequence, "DHCR was prohibited from looking at the unit's rental history before November 2, 2005." The Court thus also rejected the tenants' arguments based upon the lack of rent registrations pre-*Roberts*.

As stated in now Appellate Division Justice Gische's decision in *Dodd v. 98 Riverside Drive, LLC*, 2011 WL 5117699, in ruling on a *Roberts* matter:

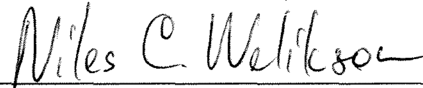
> "The *Thornton* [default] formula is unavailable, where, as here, the overcharge resulted from the owner setting a rent consistent with the DHCR's interpretation of the governing law. The Court finds, instead, that the allowable rent for each apartment, shall be the rent agreed to in the lease in effect four years immediately preceding the filing of the action, along with the periodic rent stabilization guideline increases available over the term of the tenancies."

CONCLUSION

The Appellate Division's determination should be affirmed by a ruling that calculating the legal regulated rent in this matter must be based on the rent in effect on the "base date" four years prior to the filing of the complaint.

Dated: Williston Park, New York
December 26, 2019

HORING WELIKSON ROSEN
& DIGRUGILLIERS, PC



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

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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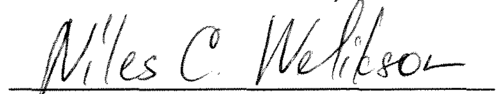
Dated: Williston Park, New York
December 27, 2019

HORING WELIKSON ROSEN
& DIGRUGILLIERS, PC



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