To be Argued by:
NILES C. WELIKSON
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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 –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

Action No. 1
Index No. 101235/15

– 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)

SUPPLEMENTAL BRIEF FOR PETITIONER-RESPONDENT

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Respondent,

– and –

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Action No. 2
Index No. 101236/15

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PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of Petitioner-Respondent Regina Metropolitan Co., LLC ("Regina") in response to that of the Intervenor-Respondents Levy and Carr ("Tenants" or "Intervenors").

Having failed before the DHCR, Supreme Court, and Appellate Division in their argument that Regina was somehow guilty of wrongdoing thus entitling them to recover treble damages, the Tenants nevertheless continue to urge Regina should be punished by recourse to the *Thornton* default formula in order that they might reap what would clearly be a substantial and unjustified windfall.

Pursuant to this court's order of June 27, 2019 Regina's motion to strike the Tenants' brief was granted to the extent that Points II and III thereof were stricken and they were directed to file and serve a revised brief within 20 days. The court's letter to the parties of that date advised that the Tenants "do not have the status of appellants in this court." They thus lack standing to present arguments contrary to that of appellant DHCR. Accordingly, their argument in favor of the utilization of a formula other than that which was previously utilized by DHCR, which methodology was found by the Appellate Division to be erroneous, should not be considered.

If the Tenants' arguments for recourse so the default formula were to be considered it is clear they have no merit. They fail to offer any support for their

claim Regina somehow should have predicted the *Roberts* ruling. They also fail to refute any of the arguments in *Regina*'s main brief in response to that of appellants DHCR. The cases the Tenants cite were relied upon by DHCR for its position that it need not rely on the rent in effect on the "base date" four years prior to the filing of the complaint, even if it is not permitted to go beyond that date. Regina addressed those citations in its responsive brief and will further briefly address them in this brief solely in response to the specific arguments made by the Tenants. However, what is arguably most significant is the Tenants' failure to address Regina's position that the court should not legislate yet another exception to pre-base date review to calculate their rent.

As the dissenting opinion stated in *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 295, (2009), "the court has upended an understanding of the law upon which numerous and substantial business transactions and dealings have been predicated for over a decade." Equally clear is that in treating the subject apartment as deregulated during the receipt of J-51 benefits, Regina, like landlords throughout the City of New York, relied upon DHCR's own guidance. DHCR's PAR Order in this matter noted that Regina's position was based upon DHCR's understanding and promulgation, and upon industry-wide and public understanding before issuance of the *Roberts* determination. (R. 47).

The Tenants go so far as to claim any ruling contrary to that which was initially made by DHCR in this proceeding "would render virtually meaningless" this Court's ruling in *Roberts*. That statement obviously ignores the fact that as a consequence of the manner in which *Roberts* interpreted the applicable law the Tenants enjoy the numerous benefits and privileges of rent stabilization despite the fact that, with respect to *Roberts* matters, the legislative history indicates a preference not to have people who can easily afford market value rental property inhabit rent regulated housing. *Ram I LLC v. New York State Div. of Housing and Community Renewal*, 123 A.D.3d 102, 106 (1st Dept. 2014).

As they did before DHCR and the courts below, the Tenants continue to irrationally rely upon cases that involved fraudulent schemes and thus are not relevant to this appeal. There is no language in any of the cases they rely upon that suggests it is permissible to allow yet another exception to reviewing the rent history beyond the base date for the purpose of constructing a base date rent.

COUNTER STATEMENT OF RELEVANT FACTS

Regina has set forth the facts in its initial brief to this Court and thus will not repeat them except to address several distortions relied upon by the Tenants.

Regina does not dispute the fact that it was in receipt of J-51 benefits when it entered into a deregulated lease on June 9, 2003 with the prior tenants for the term July 15, 2003 – July 31, 2005 at a monthly rent of $4,500. Nor does Regina dispute

the fact that the prior lease states the apartment is not subject to rent regulation. (R. 152). While the Tenants attempt to paint a picture of wrongdoing in this regard they ignore the well-established fact that the *Roberts* determination was unanticipated and, even more significantly, Rent Stabilization Code ("RSC") § 2520.11(r)(5); (s)(2) promulgated in the year 2000 clearly and unequivocally permitted Regina to treat the apartment as deregulated when it entered into the 2003 lease. The RSC amendment was consistent with a DHCR opinion letter that had issued January 16, 1996. (R. 123). That situation continued through the Tenants' tenancy and it was obviously not until 2009, when *Roberts* was decided by this court, that any such action was found to be erroneous.

Rather than attempting to refute Regina's position that there are no legal grounds to engraft yet another exception to pre-base date review of an apartment's rent history or to calculate their rent other than by utilizing the rent in effect on the base date, the Tenants argue that Regina, for some unknown and unexplained reason, somehow should have known that DHCR's guidance and position on the issue would, years later, be held to be invalid. Language in the *Roberts* determination itself, especially in the dissenting opinion, expressly refutes the Tenants' position. In addition, in *Borden v. 400 East 55th Street Associates, L.P.*, 24 N.Y.3d 382, 397, (2014) this Court further confirmed Regina's position in this regard by stating the following:

> "... a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*. For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units, so there is little possibility of a finding of willfulness ... Only after the *Roberts* decision did the DHCR's guidance become invalid." [internal citation omitted].

The Tenants' reliance on the rent registration history for the subject apartment is another non-issue. That history shows the apartment was rent controlled from 1984, when registrations first came into being (R. 118), until 1995. The registered rent in 1995 was $1,722.57. Thereafter, the registration history shows the apartment was registered each year through and including 2003. (R. 119-120). The 2003 registered rent (R. 120) indicates a legal regulated rent of $2,096.47 for the then tenants, Beale and Lana, which was in excess of the then deregulation threshold of $2,000 per month. Thereafter, in reliance upon the pre-*Roberts* understanding of the law, the apartment was rented to the next tenants, who were the Intervenors' predecessors, for the term July, 2003 – July, 2005 on a deregulated basis. (R. 152). Notwithstanding the foregoing, the Tenants claim that the July 26, 2007 registration for the year 2004 indicated the apartment was rent stabilized and was somehow an affirmative misrepresentation to them even though the registration was obviously done in error. (R. 120). The Tenants' misplaced reliance on this statement is shown by the fact that their tenancy commenced pursuant to a lease dated June 30, 2005 for the term August 1, 2005 – August 1, 2007. The Tenants fail to show how a registration that was done June 26, 2007 could somehow be an attempt to defraud

them over two years earlier, that being June 30, 2005, when their lease actually commenced. Moreover, the 2003 registration that was timely filed in that year shows a rent of $2,096.47, which was in excess of the then $2,000 deregulation threshold. (R. 120). In addition, this registration was done at a time when Regina obviously believed the apartment was deregulated based upon the pre-*Roberts* understanding of the law. Further illustrating the fact that Regina at all times acted in good faith in complying with the laws is the fact that even though *Roberts* was not held to be retroactive until the ruling in *Gersten v. 56 7th Avenue, LLC*, 8 A.D.3d 189 (1st Dept. 2011), Regina registered the apartment rent from 2005 through and including 2009 on October 14, 2010 (R. 120), as well as for 2010 on July 30, 2010. (R. 121). In addition, the 2011 rent was registered July 11, 2011 (prior to *Gersten*) and thereafter timely registrations were filed for 2012 and 2013. *Id.* Thus, Regina fully complied with the registration requirements for the period encompassed by the record in this matter.

Even the decision by Supreme Court, albeit it denied Regina's Article 78 proceeding, agreed that there was no wrongdoing on its part. The court stated the following in pertinent part:

> "Here, it is pointed out that pre-*Roberts*, what the owner did was common practice under the then existing state of the law. Further, 'while the owner did not properly register the subject apartment, the Commissioner finds that the owner otherwise acted reasonably in the context of the circumstances surrounding apartments that were

> deregulated while receiving J-51 benefits pre-*Roberts*'. (pg. 17). I find this explanation by DHCR to be understandable and rational."

The Tenants' arguments pertaining to registrations were made and similarly rejected at the DHCR level. (R. 50).

DHCR's commissioner's PAR order also addressed the Tenants' fraud claims predicated upon prior judicial rulings which the Tenants similarly rely upon on this appeal. The PAR order states the following in addressing this issue:

> "The commissioner finds that *Grimm*, *Thornton* and *Jazilek* do not apply in the instant case, and that the tenants' contentions based upon these cases are therefore not persuasive. The overcharge was a result of the owner's assumption that the apartment was deregulated while receiving J-51 benefits before issuance of the *Roberts* decision ... Accordingly, there is no authority to support the tenants' contention that the default formula should be applied in this case." (R. 47).

The foregoing also negates the Tenants' reliance upon *Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590 (1st Dept. 2012) and *Rosenzweig v. 305 Riverside Corp.*, 35 Misc.3d 1241(A) (S. Ct. N.Y. Co. 2012). Though neither case is relevant to the issues on this appeal the Tenants cite them for the proposition the properties have the same corporate officers and managing agent and that they "changed the DHCR registrations from rent stabilized to exempt because of high rent vacancy at the earliest vacancy opportunity." (Tenants' Brief, p. 14). The Tenants conveniently omit the fact that occurred years before the *Roberts* ruling. Both cases were decided in 2012, during the early evolution of the calculation of rents in the wake of *Roberts*. *Gordon* involved a different legal issue, that being the fact that the apartment had

been vacant on the base date. The Court held that since the legal regulated rent after a vacancy is that which is agreed to by the owner and the first rent stabilized tenant, the fact that the apartment was treated as deregulated at that time precluded reliance upon the base date rent that the parties had agreed upon[1]. *Gordon* did not involve an issue of registration and nor was there any finding of fraud or any similar wrongdoing. In *Rosenzweig*, the court found no wrongdoing. In fact, the findings were exactly to the contrary. The court stated the following in pertinent part:

> "... This is not simply a case where a landlord is claiming ignorance of the law. Instead, 305 Riverside claims that it was relying upon the interpretation of law made by the Agency charged with its enforcement. This reliance was widely accepted within the real estate community at the time ...
>
> There is no evidence that, in the aftermath of *Roberts*, 305 Riverside is seeking to evade the law. As this decision makes abundantly clear, the rent that now can be charged for the apartment is hardly clear cut, and 305 Riverside's present inability to forecast how the issue will ultimately turn out is not a matter of willful defiance of the law."

Based upon the fact that the Tenants, like DHCR, have failed to show any authority exists for going beyond four years from the filing of their complaint, their rent must be calculated based upon the rent in effect on the base date.

[1] Rent Stabilization Code § 2526.1(a)(3)(iii), which is the basis for the court's finding that "the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy" was amended in 2014 to, *inter alia*, delete "the first rent stabilized tenant taking occupancy after such vacancy."

ARGUMENT

POINT I

THE TENANTS HAVE FAILED TO SET FORTH ANY LEGAL PRINCIPLE THAT SUPPORTS UTILIZING OTHER THAN THE RENT IN EFFECT ON THE BASE DATE AS THE PREDICATE FOR CALCULATING THEIR RENT

DHCR's PAR order expressly rejected any reliance upon *Thornton v. Baron*, 5 N.Y.3d 175 (2005) and *Matter of Grimm v. State of New York Division of Housing and Community Renewal*, 15 N.Y.3d 358 (2010). (R. 47). Regardless of that fact, the Tenants now erroneously claim that DHCR's brief relies upon those determinations in support of application of the punitive default formula. DHCR clearly makes no such claim.

The Tenants similarly err by claiming DHCR's order was not arbitrary and capricious. That criteria is only one of those set forth at CPLR § 7803(3) with respect to the questions that may be raised in a proceeding under that article. In this matter, the criteria of whether the determination "was affected by an error of law" is also implicated. However, the determination was also arbitrary and capricious in that DHCR deviated from a prior ruling in which it held, in another *Roberts* matter, that pre-base date review was impermissible. See Regina's initial brief at p. 16.

DHCR's brief, at page 12 thereof, addressed *Grimm* and other matters as examples of situations where courts have allowed pre-base date review. Not one of those citations involves calculating rent in a *Roberts* situation. The fact that they are

irrelevant to the issues in this matter is addressed at pages 16-17 of Regina's initial brief to this court. Neither DHCR nor the Tenants have shown why the court should legislate yet another exception to calculating rent based upon other than that which was in effect on the base date.

The issues that arose as a consequence of *Roberts* were obviously well known to the New York State Legislature, and that body chose to refrain from addressing it. To accept the arguments addressed by the Tenants or DHCR would effectively carve out exceptions to the statutory proscriptions against pre-base date review for any situation where there was an error in calculating rent or a judicial ruling in an unrelated case, years after the fact, that finds the Agency misinterpreted applicable law. There is nothing in the statutes pertaining to the processing of a rent overcharge complaint that remotely suggests any such exceptions are appropriate or lawful[2]. Significantly, as noted in DHCR's appellate brief to this court, DHCR amended its regulations to codify various exceptions to the evidentiary component of the four year rule in addition to those expressly recognized by this Court and the Appellate Division. However of utmost significance is the fact that DHCR itself stated "the 2014 Amendments are not at issue in this case." (DHCR's Brief, p. 13).

[2] In order to avoid repetition on issues pertaining to the proscription against judicial legislation the court is respectively referred to Point II at p. 20 of Regina's initial brief in response to that of DHCR which addresses this issue. Although the Tenants' counsel was served with the brief they do not address that argument.

The Tenants claim that utilizing the base date rent would make the *Roberts* determination "toothless" and largely meaningless. In other words, according to the Tenants, even though they agreed to a certain rent, unless that rent is lowered by thousands of dollars and they receive a windfall in the neighborhood of $300,000 based on DHCR's decision, *Roberts* would have no impact[3]. That argument ignores the numerous benefits afforded a tenant under rent stabilization including, but not limited to, the right to what equates to a lifetime tenancy, being able to pass an apartment down to their relatives, and the right to renew their lease on the same terms and conditions with minimal rent increases for one or two year periods at their sole option, all of which has no bearing on any type of means test.

Equally misplaced is the Tenants' reliance upon *Matter of Partnership 92 LP and Vamps & Building, Mgt. Co., Inc. v. N.Y. Division of Hous. & Community Renewal*, 46 A.D.3d 425, 428 (1st Dept. 2007) aff'd 11 N.Y.3d 859 (2008). In that matter, this court held "there was ample basis on this record for the Division to conclude that, in arguing for a higher base rent, the owner had relied on an illusory tenancy. It was therefore appropriate for the Agency to apply the default formula to set the base date rent since no reliable records were available [citation omitted]."

[3] By requesting the default formula or a sampling method the Tenants are seeking a much larger award, all in addition to their treble damages and attorneys' fees claims that were previously denied by DHCR and the courts below.

POINT II

DHCR'S "SAMPLING" METHOD IS INAPPLICABLE TO SETTING A NEW BASE DATE RENT IN THE ABSENCE OF PROOF OF FRAUD

Equally erroneous is the Tenants' argument that the Appellate Division's determination in this matter provided DHCR with the option to use the sampling method referenced in *Matter of 160 E. 84th Street Assoc. LLC v. New York State Division of Housing and Community Renewal*, 160 A.D.3d 474 (1st Dept. 2018). While the Appellate Division in this matter cited that case as an example of situations where DHCR could use the "sampling" method, this matter is completely distinguishable from the fact pattern in that case. This was expressly confirmed by footnote 4 of the dissenting opinion in this case, which referenced the fact that such method "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) and it pertains only to the following situations: (i) the rent charged on the base date cannot be determined; (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. None of the foregoing is applicable to this matter[4].

[4] In *Raden v. W7879, LLC*, 164 A.D.3d 440 (1st Dept. 2018), which was issued the same day as *Regina*, it was held, in a *Roberts* situation, that the rent was correctly calculated predicated on the rent charged on the base date. This issue is addressed at p. 23 of Regina's initial brief to this court.

Tenants again argue "alternatively" this court should choose the default formula used in *Thornton v. Baron*, *supra*, since, in that matter, it "rejected the landlord's attempt to use an unlawfully deregulated lease and unlawful rent ..." (Tenants' Brief, p. 18). The Tenants conveniently failed to mention that in *Thornton*, as well as in the next case they cite, *Wasserman v. Gordon*, 24 A.D.3d 201, 806 (1st Dept. 2005), which involved the same apartment complex and situation as *Thornton*, fraudulent illusory tenancies were the basis for this court's approving use of the default formula. In the Supreme Court's decision pertaining to *Wasserman*, 2003 WL 25668453 (Sup. Ct. N.Y. Co. 2003), the following is stated:

> "The court notes however, that the landlord has engaged in identical or nearly identical conduct with respect to other apartments in the same building. See, e.g. *390 West End Associated v. Zouker*, *supra*; *390 West End Assocs. v. Hare*, 298 A.D.2d 11 (1st Dept. 2002); *390 West End Assocs. v. Shlomo Baron*, 274 A.D.2d 330 (1st Dept. 2000); *390 West End Ave. Assocs v. Youngstein*, 221 A.D.2d 292 (1st Dept. 1995)."

POINT III

A PUNITIVE RENT FREEZE IS INAPPLICABLE TO A *ROBERTS* SITUATION

Tenants next contend that failing to file a "proper and timely" annual rent registration prior to the *Roberts* determination when the apartment was erroneously treated as deregulated should result in a rent freeze. Once again, the Tenants misplace reliance upon cases involving fraud. (Tenants' Brief, p. 19-20). In *Altschuler v. Jobman 478/480 LLC*, 135 A.D.3d 439 (1st Dept. 2016) the court noted that because "plaintiffs established a colorable claim of fraud, Supreme Court properly disregarded the rent charged four years prior to the filing of the rent overcharge claim." In *215 West 88th Street Holdings LLC v. New York State Division of Housing and Community Renewal*, 143 A.D.3d 652 (2016), the court held that the inclusion of a fraudulent non-primary residence rider in the tenant's initial lease rendered a legal nullity and required that the base date rent for the purpose of calculating the rent overcharge be arrived at using the "default method" prescribed in *Thornton*. In *Matter of Hargrove v. Division of Hou. & Community Renewal*, 244 A.D.2d 241 (1st Dept. 1997) the court found that the overcharge was willful since there was no rational basis to support the landlord's claim that it thought J-51 benefits had expired in 1989, after the tenant therein had commenced occupancy, and only changed its position to state that it thought the benefits expired in 1988, before the tenant commenced occupancy, when it learned that even if the 1989 date

were correct the apartment would still have been rent stabilized for the entire term of the occupancy. The Appellate Division found the landlord's statement that the first time it learned the J-51 exemptions expired in 1989 and 1994, respectively, was the Rent Administrator's letter to that effect. Obviously no such factors are involved in this proceeding. More significantly, there is language in *Matter of Hargrove* that supports Regina's position that in no circumstances can there be a "rent freeze" based upon the failure to register prior to *Roberts*. The court stated the following:

> "Administrative Code § 26-517(e) provides that a landlord who serves and files a late registration shall not be found to have collected an overcharge at any time prior to filing of the late registration, and thus is not subject to a rent freeze penalty, 'provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration.'" 244 A.D.2d 242.

Jazilek v. Abart Holdings, LLC, 72 A.D.3d 529 (1st Dept. 2010) involved a fraudulent scheme. Accordingly, the rent freeze for failure to register was predicated upon the court's finding that the registration filed by the landlord was false, as it continued to list the prior tenant as the tenant of record, and listed the prior rent of $812.34, instead of an actual paid so-called preferential rent of $1,800. In addition, the court found the rent registration filed in 2004 was defective as it listed a legal rent of $2,200 which was "vastly in excess of $974.81, the highest possible legal rent at that time." The court thus found that both registrations were nullities and also noted no further registration statements were filed.

Neither *Jazilek*, *Altschuler*, or *Matter of Hargrove* involved *Roberts* J-51 disputes.

In *Park v. New York State Div. of Housing and Community Renewal*, 150 A.D.3d 105, 113 (1st Dept. 2017) the court stated the following in rejecting a tenant's claim pertaining to rent freezes for failure to register during a building's receipt of J-51 benefits when an apartment is erroneously treated as deregulated.

> "Preventing the owner from charging what is otherwise a legal rent, solely based on the lack of registration filings during the period before *Roberts* and *Gersten* were decided, would unfairly penalize the owner for action that was taken in good faith, relying upon DHCR's own interpretation of the law, without furthering any legitimate purpose of the Rent Stabilization Laws [citation omitted]."

In *Taylor v. 72A Realty Assoc., L.P*, 151 A.D.3d 95, 101 (1st Dept. 2017) the Court noted it decided in 2011 that *Roberts* was to be applied retroactively "making it clear from that point forward that owners had an obligation to retroactively restore affected apartments to rent stabilization and register them," citing *Park*, *supra*. Again, Regina registered in 2010, over a year prior to the holding that *Roberts* was to be retroactively applied.

CONCLUSION

The order of the Appellate Division should be affirmed, with the proceeding being remanded to DHCR to recalculate the Tenants' rent and overcharges, if any, utilizing the rent in effect on the base date four years prior to the filing of their complaint.

Dated: Williston Park, New York
July 29, 2019

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