No. APL-2018-00222

To be argued by:
ESTER MURDUKHAYEVA

State of New York
Court of Appeals

Action No. 1

In the Matter of the Application of

REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

LESLIE E. CARR and HARRY A. LEVY,

Intervenors-Respondents,

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

(Caption continues inside front cover.)

BRIEF FOR APPELLANT IN RESPONSE TO AMICI CURIAE

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Dated: January 2, 2020

Supreme Court, New York County, Index No. 101235/15 and 101236/15
First Department No. 5026

(*Caption continues from front cover*)

Action No. 2

In the Matter of the Application of

LESLIE E. CARR and HARRY A. LEVY

Petitioners,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

REGINA METROPOLITAN CO., LLC,

Intervenor-Respondent,

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

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PRELIMINARY STATEMENT

Appellant New York State Division of Housing and Community Renewal submits this brief in response to the amicus curiae brief filed by the Community Housing Improvement Program, Inc. and the Rent Stabilization Association of N.Y.C., Inc. ("Owner Amici") in support of respondent Regina Metropolitan Co., LLC. This response brief also addresses the amicus curiae brief filed by Stephenie Futch and other litigants in pending overcharge cases ("Futch Amici"), to the extent that brief presents arguments adverse to DHCR.

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended the Rent Stabilization Law (RSL) in several relevant respects. First, the HSTPA directed a factfinder in a rent overcharge proceeding to consider all available rental history, regardless of temporal limitation. Second, the HSTPA deleted the statutory language that the Appellate Division had relied on below in finding that DHCR was precluded from reviewing older rental history. Third, the HSTPA made these changes apply to all "pending" proceedings such as this one. Owner Amici are wrong to argue that

the Court should disregard the Legislature's pellucid directive to apply the HSTPA's changes in this case. As explained in DHCR's supplemental brief, the HSTPA's effect on this proceeding was, at most, to change the evidentiary rules that apply in an otherwise timely overcharge case. Such changes do not trigger constitutional scrutiny. And as explained in DHCR's opening and reply briefs, pre-HSTPA law likewise permitted DHCR to review older rental records in cases involving undisputedly illegal base date rents such as this one because to do otherwise would eviscerate the core purposes of the rent-stabilization laws.

Separately, Futch Amici are wrong to argue that DHCR exceeded its authority in calculating the applicable overcharge by giving Regina Metropolitan credit for rent increases that could have been charged if the owner had not deregulated the subject apartment improperly. To the contrary, DHCR's methodology is consistent with both the applicable statutes and with the agency's obligation to consider the facts, circumstances, and equities in determining the legal regulated rent and calculating an overcharge in individual proceedings.

ARGUMENT

POINT I

THE RENT STABILIZATION LAW PERMITS DHCR TO REVIEW RENTAL HISTORY OLDER THAN FOUR YEARS IN CASES SUCH AS THIS ONE

Part F of the HSTPA made multiple amendments to the RSL to expressly permit a factfinder (whether DHCR or a court) to look at all available rental history to determine a legal regulated rent and whether there has been an unlawful overcharge—thus repealing what had been known as the evidentiary Four-Year Rule. *See* Ch. 36, pt. F, §§ 4-6, 2019 N.Y. Laws (LRS), pp. 11-14 (amending RSL §§ 26-516(a), 26-516(g), and C.P.L.R. 213-a, and adding RSL § 26-516(h)); see generally Suppl. Ltr. Br. for Appellant (Suppl. DHCR Br.) at 3-4.[1] As Owner Amici admit (Owner Amici Br. at 13), these amendments apply to all "pending" claims, including overcharge claims like this one that were subject to ongoing litigation

[1] The HSTPA made parallel amendments to the Emergency Tenant Protection Act of 1974 (ETPA), which applies to rent stabilization outside of New York City. *See* Ch. 36, pt. F, §§ 1-2, 2019 N.Y. Laws (LRS), pp. 8-11 (amending ETPA §§ 12(a)(1)(b)(i), 12(a)(8) and adding ETPA § 12(a)(9).)

as of the effective date of the HSTPA.[2] *See* Ch. 36, pt. F, § 7, 2019 N.Y. Laws (LRS), p. 14.

Owner Amici argue that part F's application to pending overcharge disputes is impermissibly retroactive. In addition to the reasons already given in DHCR's Supplemental Brief, Owner Amici's arguments are meritless for the additional reasons below.

First, Owner Amici's due process argument is premised on a fundamental misunderstanding of the *evidentiary* Four-Year Rule as a *statute of limitations*. *See* Owner Amici Br. at 3-6, 10-21. Although the HSTPA separately amended the portion of the RSL

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[2] The overcharge claim here is "pending" for two independent reasons: first, because the Appellate Division remanded to DHCR for the non-ministerial task of recalculating the overcharge using alternative methodologies such as sampling (Record on Appeal (R.) 376), and second, because of the pendency of this appeal. Under either rationale, the only "pending" issue to which the HSTPA could apply is the calculation of the overcharge. The issues of legal fees and treble damages have been litigated to finality and are thus no longer "pending." See Opening Br. for Appellant (DHCR Br.) at 26 n.7; Letter from Ester Murdukhayeva at 2-4 (May 14, 2019); Suppl. DHCR Br. at 6-7; *see also Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 33 N.Y.3d 1062 (2019); Letter from John P. Asiello (June 27, 2019); Letter from John P. Asiello (Aug. 9, 2019).

that had provided for a four-year limitations period on recovery of overcharge damages, *see* Ch. 36, pt. F, § 4, 2019 N.Y. Laws (LRS), p. 12 (amending RSL § 26-516(a)(2)); *id.*, pt. F, § 6, 2019 N.Y. Laws (LRS), p. 14 (amending C.P.L.R. 213-a), those amendments are not relevant to the constitutional challenge here because the underlying claim is unquestionably timely under either the former or current statute of limitations.[3] See DHCR Br. at 9-10.

The RSL provisions at issue in this case (and the corresponding amendments under HSTPA) relate to the *evidentiary* component of the Four-Year Rule. As explained in DHCR's opening brief at 11-13, these evidentiary rules affected, at most, the scope of records that a factfinder could consider in resolving an otherwise timely rent-overcharge dispute. Due process does not restrict the Legislature's power to alter evidentiary rules in pending proceedings. It is well established that "[t]he Legislature has power to change

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[3] To the extent Owner Amici challenge the retroactive extension of the HSTPA's extension of the damages recovery period from four to six years, there is no constitutional barrier to the Legislature's ability to extend limitations periods for claims that have not yet expired. *See Hopkins v. Lincoln Trust Co.*, 233 N.Y. 213, 216 (1922).

[evidentiary] rules and in so doing it is not restricted by constitutional prohibitions as to taking of life, liberty, or property without due process of law." *Matter of L'Hommedieu v. Board of Regents of Univ. of State of N.Y.*, 276 A.D. 494, 507 (3d Dep't), *aff'd sub nom. Thompson v. Wallin*, 301 N.Y. 476 (1950); *see also* Statutes § 55 & n.70, 1 McKinney's Cons. Laws of N.Y. (Westlaw). A litigant has "no vested right in a rule of evidence" and the Legislature may therefore repeal or alter an evidentiary rule "without affecting any constitutional right" of a party that may have preferred the prior rule. *People v. Turner*, 117 N.Y. 227, 233 (1889); *Cook v. Town of Nassau*, 40 A.D.2d 1050 (3d Dep't 1972), *aff'd*, 33 N.Y.2d 757 (1973); *see also* 57 N.Y. Jur. 2d § 4 ("The legislature may change the rules of evidence without derogation to a party's constitutional rights."). Indeed, the 1997 amendments that established the evidentiary Four-Year Rule in the first place likewise retroactively applied to "any action or proceeding pending" on the effective date. Ch. 116, § 46(1), 1997 N.Y. Laws 1814, 1836; *see also Partnership 92 LP v. New York State Div. of Hous. & Community Renewal*, 11 N.Y.3d 859, 860 (2008) (applying 1997

amendments retroactively to complaint that had been pending for approximately ten years).

Second, Owner Amici's constitutional argument is based on a misunderstanding of pre-HSTPA law. Owner Amici are wrong to contend (Owner Amici Br. at 12-17) that owners had an absolute right to destroy records older than four years prior to the HSTPA or that they in fact did so. Among other things, the RSL has always required owners to maintain and produce records older than four years to establish the regulatory status of an apartment. *See East W. Renovating Co. v. New York State Div. of Hous. & Community Renewal*, 16 A.D.3d 166, 167 (1st Dep't 2005). Moreover, more than fifteen years of case law from this Court and the Appellate Division have established various circumstances that required review of rental history records older than four years in overcharge proceedings, including in cases involving fraud, rent-reduction orders, longevity increases, and treble-damages determinations. *See, e.g.*, *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 16 (2015); *Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739, 739 (2011); *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15

N.Y.3d 358, 367 (2010); *Matter of Cintron v. Calogero*, 15 N.Y.3d 347, 355 (2010); *Thornton v. Baron*, 5 N.Y.3d 175, 181 (2005); *Matter of H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal*, 46 A.D.3d 103, 109 (1st Dep't 2007); *Matter of Ador Realty, LLC v. Division of Hous. & Community Renewal*, 25 A.D.3d 128, 136-39 (2d Dep't 2005). Notwithstanding Owner Amici's arguments, the actual party here—Regina Metropolitan—has never claimed that it lacked rental records that were more than four years old or that it routinely destroyed such documents in reliance on the prior law. To the contrary, Regina Metropolitan presented records beyond four years during the agency proceeding. (*See generally* R. 103-221.)

Owner Amici are thus also wrong to argue that, absent fraud, pre-HSTPA law required a factfinder to mechanically accept the rent actually charged on the base date as the legal rent if it was imposed more than four years ago. As DHCR explained in its merits briefs, the evidentiary component of the Four-Year Rule has never been deemed "inviolate." *Matter of H.O. Realty Corp*, 46 A.D.3d at 109; see also DHCR Br. at 11-12, 32-36, Reply Br. for Appellant

(DHCR Reply Br.) at 14-19. Owner Amici attempt to distinguish the many cases allowing consideration of rental records beyond four years as being based on some "equitable estoppel" exception to the evidentiary Four-Year Rule (Owner Amici Br. at 21-31), but there is no support for this interpretation; to the contrary, these cases were based on the courts' statutory interpretation of the evidentiary Four-Year Rule provisions and the RSL as a whole. See DHCR Br. at 32-41; DHCR Reply Br. at 16-18.

Third, Owner Amici offer no legal or statutory basis for their extraordinary suggestion (*see* Owner Amici Br. at 9, 26-28) that an owner's "honest and good faith" misunderstanding of the law requires DHCR to accept and enshrine an illegal market-based rent for purposes of calculating the legal regulated rent and corresponding overcharge. The absence of fraudulent intent does not alter the determination of liability or the calculation of the proper base date rent. *Matter of 160 E. 84th St. Assoc. LLC v. New York State Div. of Hous. & Community Renewal*, 160 A.D.3d 474, 474-75 (1st Dep't 2018); *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 402 (1st Dep't 2012). Owner Amici's self-serving rule would penalize

tenants for their landlords' legal errors, reduce the availability of affordable housing in New York, and perpetuate unlawful rents that are far higher than the Legislature wished to permit.

Fourth, even if Owner Amici were correct in their predicate arguments—that the evidentiary Four-Year Rule is actually a statute of limitations and that pre-HSTPA law precluded DHCR's methodology—the retroactive application of the HSPTA would still be constitutional. Even a true claim-revival statute satisfies due process if it is "enacted as a reasonable response in order to remedy an injustice." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 400 (2017). This Court has never found a claim-revival statute to fail this test. *See id.* at 405 (Rivera, J., concurring). The amendments contained in part F of the HSTPA are a reasonable legislative response to the unfairness and irrationality of a mechanical application of the evidentiary Four-Year Rule in overcharge cases. *See* Suppl. DHCR Br. at 6.

Finally, Owner Amici's request (Owner Amici Br. at 21) that this Court "strike part F of the HSTPA" is beyond the scope of this litigation. The actual parties here have challenged, at most, the

application of part F to this overcharge dispute. The facial validity of the HSTPA in whole or in part is thus not at issue here. That question is being litigated in three separate federal lawsuits, including one brought by Owner Amici. *See Community Hous. Improvement Program v. City of New York*, No. 19-cv-4087 (E.D.N.Y., filed July 15, 2019); *74 Pinehurst LLC v. State of New York*, No. 19-cv-6447 (E.D.N.Y., filed Nov. 14, 2019); *Building & Realty Inst. of Westchester & Putnam Counties v. State of New York*, No. 19-cv-11285 (S.D.N.Y., filed Dec. 10, 2019). Owner Amici's attempt to use this discrete rent-overcharge dispute to obtain a ruling on the facial validity of any part of the HSTPA is inappropriate and should be disregarded.

POINT II

DHCR'S METHODOLOGY IS CONSISTENT WITH THE RENT STABILIZATION LAW

DHCR calculated the overcharge in this case by recreating the legal regulated rent that Regina Metropolitan could have charged on the base date and during the overcharge period if it had not unlawfully deregulated the subject apartment in 2003. Specifically, DHCR began by looking at the last stabilized rent registered in 2003 and added to that amount certain increases for vacancies, guidelines, and major capital improvements (MCIs) that Regina Metropolitan would have been entitled to if the apartment had remained stabilized. (R. 55-58; see also DHCR Br. at 23, 46-51.)

Futch Amici erroneously contend (Futch Amici Br. at 7-13) that the methodology used here was arbitrary, capricious, or otherwise unlawful.[4] Futch Amici argue that the vacancy and guideline

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[4] Although Futch Amici rely on a general description of DHCR's methodology based on an informal "FAQ" document (Futch Amici Br. at 7), the question before this Court is the lawfulness of the methodology used in the underlying agency action. For example, although Futch Amici discuss at length the theoretical propriety of increases for individual apartment improvements (*id.* at 6, 9, 20),

increases allowed were inappropriate because Regina Metropolitan failed to file contemporaneous registration statements, and further contend that the MCI increases allowed were impermissible because Tenants had no opportunity to challenge the MCI orders at the time they were issued. Neither argument has merit under the facts here.

The relevant question in this article 78 proceeding is not whether DHCR could have applied a different methodology to calculate the overcharge, but whether the methodology used was reasonable and lawful under the circumstances. DHCR's method-ology in this case is consistent with both the statutory regime and the agency's obligation to consider the equities in determining the legal regulated rent and calculating an overcharge. *See* 9 N.Y.C.R.R. § 2522.7.

The vacancy and guidelines increases were permissible under RSL §§ 26-516(a) and 26-517(e). As amended by the HSTPA, section 26-516(a) provides that "the legal regulated rent for purposes of determining an overcharge[] shall be the rent indicated in the most recent reliable annual registration statement filed and served" prior

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DHCR did not apply such increases in this case and they are therefore irrelevant here.

to the base date "plus in each case any subsequent lawful increases and adjustments." RSL § 26-516(a). Section 26-517(e) provides that owners who file late registration statements may be credited with "increases in the legal regulated rent," provided that those increases "were lawful except for the failure to file a timely registration."[5] RSL § 26-517(e). Under the circumstances in this case, DHCR reasonably concluded that the vacancy and guideline increases credited to Regina Metropolitan would have been lawful if the apartment had remained subject to rent stabilization and had not been deregulated prior to this Court's decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009). *Cf. Matter of Kramer v. New York State Div. of Hous. & Community Renewal*, 306 A.D.2d 172, 172 (1st Dep't 2003).

The fact that Regina Metropolitan filed late registration statements that listed the "rent charged on the registration date . . . rather than the technically legally collectible rent" does not void the

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[5] Regina Metropolitan re-registered the subject apartment in July 2010, and filed retroactive registrations for the years 2005 through 2009 in October 2010. *See* DHCR Br. at 20-21. The registrations listed the market-based rent charged during this time period.

registration statement for purposes of determining whether increases may be applied to a properly determined legal regulated rent. *Matter of Enriquez v. New York State Div. of Hous. & Community Renewal*, 166 A.D.3d 404, 404 (1st Dep't 2018). Here DHCR did not accept the market-based rent listed on the registration as the legal regulated rent. And unlike in *Matter of 215 W 88th Street Holdings LLC v. New York State Division of Housing & Community Renewal*, which involved the application of the default formula, the applicable law does not prohibit DHCR from crediting an owner with vacancy and guideline increases when using the formula applied here. *See* 143 A.D.3d 652, 653 (1st Dep't 2016).

DHCR likewise acted lawfully in crediting Regina Metropolitan with increases pursuant to three MCI orders that were effective as of 2005, 2006, and 2013. (R. 56, 58.) MCI increases can be imposed only pursuant to DHCR orders and are based on major capital improvements to an entire building. RSL § 26-511(c)(6). Each of the MCI increases credited here was imposed pursuant to a properly issued MCI order. While the 2005 and 2006 orders may not have been contemporaneously served on the Tenants in this proceeding

(because the subject unit was deregulated at the time), the orders would have been served on other rent-regulated tenants in the subject building and those tenants would have had the opportunity to challenge the orders. Moreover, Tenants had ample opportunity to challenge the bases for the MCI increases during the proceedings before DHCR here. (*See, e.g.* R. 214 (owner submission during administrative proceeding citing to MCI orders).) There is no indication in the record that the increases permitted by the underlying MCI orders were unsubstantiated.

To be sure, the methodology used by DHCR in this proceeding may not be appropriate in every rent-overcharge case. But under the circumstances here, DHCR acted well within its authorized discretion in adopting a methodology that sought to restore the parties to the place they would have been absent the misapprehension of the law corrected by *Roberts*. See DHCR Reply Br. at 27-30; *see also* 9 N.Y.C.R.R. § 2522.7. DHCR's intent was not to leave Tenants to "bear the brunt" of any legal errors (Futch Amici Br. at 10-13) but to respond fairly and equitably to the sea change caused by *Roberts*.

CONCLUSION

For these reasons, as well as those stated in DHCR's opening, reply, and supplemental briefs, the Appellate Division's decision and order should be reversed to the extent it granted Regina Metropolitan's petition to remand to DHCR for recalculation of the base date rent and corresponding overcharge.

Dated: New York, New York
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Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Ester Murdukhayeva, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,098 words, which complies with the limitations stated in § 500.13(c)(1).

/s/ Ester Murdukhayeva

Ester Murdukhayeva