*To Be Submitted By:*
Peter A. Schwartz

APL-2018-00222

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

# Court of Appeals

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.

*(Additional Caption on the Reverse)*

## AMENDED BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER-RESPONDENT REGINA METROPOLITAN CO., LLC


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*Date Completed: November 26, 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

The only subsidiary of Community Housing Improvement Program, Inc. ("CHIP") is Associated Builders and Owners of Greater New York, Inc.

The only subsidiaries of Rent Stabilization Association of N.Y.C., Inc. ("RSA") are Realty Services of America, Inc., RSA Insurance Agency, Inc., and RSA Mortgage Brokerage, Inc.

Other than the above-named entities, CHIP and RSA have no parents, subsidiaries or affiliates.

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## QUESTIONS PRESENTED

1. Whether the amendments to the rent overcharge statutes of limitation in the recently-enacted Housing Stability and Tenant Protection Act of 2019 ("HSTPA") apply retroactively.

The Appellate Division did not have occasion to address this question because HSTPA was enacted during the pendency of the present appeal. *Amici Curiae* urge the Court to hold that the new rent overcharge statutes of limitation do not apply retroactively.

2. Whether, in the absence of any evidence of fraud, the correct base date for calculating any rent charge is the rent in effect four years before the filing of the overcharge complaint.

The Appellate Division answered this question in the affirmative.

## PRELIMINARY STATEMENT

This *amicus curiae* brief is respectfully submitted by the Community Housing Improvement Program, Inc. ("CHIP"), a not-for-profit organization representing about 3,500 small and mid-sized owners and managers of over 350,000 rent stabilized apartments, and the Rent Stabilization Association of N.Y.C., Inc. ("RSA"), a trade association representing 25,000 property owners and agents with approximately one million housing units.

This appeal stems from this Court's decision in *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009) ("*Roberts*") and affects tens of thousands of similarly situated apartments in New York City. Based on longstanding DHCR policy and language in the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC"), those apartments, were believed to have been lawfully deregulated while the buildings in which they are located were in receipt of tax benefits pursuant to RPTL § 489 ("J-51 benefits"). After this Court held in *Roberts* that such apartments remained or became rent stabilized, there have been no clear rules to determine the legal rents of the apartments other than the statutes of limitations governing rent overcharge claims.

During the pendency of this appeal, those statutes of limitations were amended by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"). HSTPA: (a) extended the limitations period for overcharge liability from four years

to six years; and (b) eliminated entirely the provision that "preclude[s] examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action," substituting provisions authorizing courts and DHCR to examine "all available" records without limit to determine the base rent and the amount of any overcharge.

CHIP and RSA respectfully urge this Court to: (a) hold that the statutes of limitations for rent overcharge actions and proceedings set forth in HSTPA may not be applied retroactively; and (b) affirm the order of the Appellate Division, First Department, entered on August 16, 2018.[1]

HSTPA's amendments to the rent overcharge statutes of limitations unfairly and improperly prejudice owners. The prior four-year statute of limitations was adopted in 1984. For the past 22 years, many owners have disposed of rental history records more than four years old in good-faith reliance upon the previous statute of limitations and a provision adopted in 1997 which expressly provided that an owner is not required to maintain or produce more than four years of records. *See* RSL § 26-516(g). The four-year limitation on examination of a rental history was adopted to alleviate the burden on owners to retain rental history records indefinitely.

[1] By notice to the bar dated September 17, 2019, the Court invited *amicus curiae* submissions on appeals potentially impacted by the HSTPA.

As a result of the new law, law-abiding owners who did not retain records beyond four years are deprived of the means to defend themselves against rent overcharge claims. They no longer have old leases and rental records to justify rent increases, which they must produce to meet their burden of proving that the rent increases were lawful.

That prejudice is exacerbated by the statutory penalty of treble damages. Under the law, any rent overcharge is presumed to be willful unless the owner proves otherwise by a preponderance of evidence, and a finding of willful overcharge subjects owners to liability for treble damages (which HSTPA makes mandatory) and legal fees (which HSTPA also makes mandatory).

The principle of law consistently applied by this Court is that a change to a statute of limitations will not be applied retroactively and a time-barred cause of action will not be revived unless: (a) it is necessary to remedy a clear injustice; and (b) retroactive application or revival is both reasonable and not arbitrary. *See, e.g., In re World Trade Ctr. Lower Manhattan Disaster Site Litig*., 30 N.Y.3d 377, 399, 67 N.Y.S.3d 547, 562 (2017); *Gallewski v. H. Hentz & Co*., 301 N.Y. 164, 174 (1950); *Robinson v. Robins Dry Dock & Repair Co*., 238 N.Y. 271, 279 (1924).

Here, property owners would suffer injustice if the HSTPA amendments to the rent overcharge statutes of limitations were to be applied retroactively.

Retroactive application of the amendment to the rent overcharge statutes of limitation would: (a) violate the due process rights of owners; and (b) be contrary to this Court's established jurisprudence with respect to the retroactive application of amended statutes of limitations. The four-year statutes of limitations should apply to this case and all actions and proceedings commenced prior to HSTPA.

In applying the four-year statutes of limitations, absent a tenant's showing that the owner committed fraud, the base date for calculating any rent overcharge is the rent charged four years prior to the filing date of an overcharge complaint.[2]

The four-year statutes of limitations applicable to rent overcharge claims have operated in brilliant simplicity. The base date upon which the legal rent is determined is a rolling date four years prior to the filing date of an overcharge complaint. The legal regulated rent is the rent charged on the base date, plus any increases subsequently permitted by law. If at any time during the limitations period a tenant paid more in rent than what is calculated to be the legal regulated rent, there is an overcharge. Except in very limited circumstances (*e.g.*, where there are indicia in the record of fraud or intentional wrongdoing by the owner), DHCR may not look beyond the base date to determine the legal rent for a rent stabilized apartment. In

[2] Two other appeals addressing the same issues are scheduled to be argued on the same date: (i) *Raden v. W 7879, LLC*, APL-2018-002141 and *Taylor v. 72A Realty Assocs., L.P.*, APL-2018-00226. Although this *amicus curiae* brief is submitted only in connection with the present case, CHIP and RSA urge the Court to affirm *Raden* and reverse *Taylor* for the same reasons asserted herein.

other words, the four-year statutes of limitations prevent DHCR from discarding what was charged on the base date and calculating a different base date rent, except in those very limited circumstances, none of which apply here.

The "*Roberts* scenario," *i.e.*, cases involving apartments affected by the Court's decision in *Roberts*, is not one of the limited circumstances. Nevertheless, the DHCR order at issue here ignored the statutes of limitations and determined a legal regulated rent for the subject apartment different from that charged on the base date. DHCR's decision to recalculate the base date rent was not authorized by statute, regulation, or case law.

The complaining tenants took occupancy of the subject apartment in August 2005. At that time, the owner believed that, even though the building was receiving J-51 tax benefits, the apartment was deregulated based upon high rent vacancy. The RSC and the long-standing interpretation of DHCR provided that the prohibition from luxury deregulation applied only to apartments that became subject to stabilization *solely* due to receipt of J-51 tax benefits. DHCR repeatedly held that apartments subject to rent stabilization prior to the receipt of J-51 tax benefits could become deregulated during the building's receipt of those benefits pursuant to the RSL.

In 2009, this Court in *Roberts* rejected DHCR's long-standing interpretation of the RSL and held that apartments remain regulated for at least the duration of

those benefits, including apartments receiving J-51 tax benefits which were rent stabilized prior to receipt of such benefits.

*Roberts* explicitly left open the question of whether its holding should be applied retroactively. *See* 13 N.Y.3d at 287, 890 N.Y.S.2d at 395. Two years later, in *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dep't 2011), the First Department held that *Roberts* applied retroactively.

*Roberts* also left open the method of calculating the legal rents for apartments previously believed to have been deregulated. This created confusion in the real estate industry regarding the rents which could lawfully be charged and the prior amounts to register with DHCR.[3] Although there were an estimated 30,000 - 40,000 affected apartments, DHCR provided no guidance to owners until 2016.

DHCR's 2016 guidance was an FAQ which directed owners to register their apartments but failed to explain how the *Roberts* apartments were to be registered. DHCR suggested a manner in which owners "may calculate" the rent which was inconsistent with prior accepted methodology while cautioning that the "law in this area is continuing to evolve."[4] The uncertainty of the rent calculation and manner in which the apartments were to be registered spawned a plethora of litigation,

[3] Pursuant to RSL § 26-517, all rent stabilized apartments must be registered on an annual basis and show the legal rent, the rent charged, if different, and the basis for increases above a prior year's registered rent. The law provides for penalties for failure to properly register.

[4] A copy of DHCR's FAQ has been submitted to the Court.

including numerous class-action lawsuits. *See, e.g., Borden v. 400 E. 55th St. Assocs., L.P.*, 105 A.D.3d 630, 964 N.Y.S.2d 115 (1st Dep't 2013), *aff'd*, 24 N.Y.3d 382, 998 N.Y.S.2d 729 (2014); *Gerard v. Clermont York Assocs. LLC*, 143 A.D.3d 478, 38 N.Y.S.3d 194 (1st Dep't 2016).

In the present case, DHCR explicitly found that the building owner acted in good faith in deeming the subject apartment deregulated based upon high-rent vacancy deregulation. Nevertheless, DHCR ignored the statutes of limitations when it re-determined the base date rent for calculating the tenant's rent overcharge claim, including the explicit prohibition which "preclude[s] examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement" of a rent overcharge action or proceeding.

As more fully discussed below:

1. Statutory language, legislative history, case law, and public policy all emphasize that the four-year limitation on examination of a rental history for determining the legal rent in rent overcharge proceedings was intended to be strictly applied.

2. The only recognized exception to the statutory prohibition against examining the rental history beyond the four-year limitations period is where there is substantial indicia that the rent in existence four years prior to commencement of the overcharge action or proceeding was the result of a fraudulent scheme to avoid

rent regulation. Here, however, DHCR concluded—and the IAS Court and Appellate Division both agreed—that there was no such fraud or other wrongdoing.

Accordingly, the Appellate Division correctly held that it was error for DHCR and the IAS court to ignore the strict four-year limitations then set forth in the rent overcharge statutes of limitations.

The situation faced by the building owner in the present case is not unique. Numerous New York City landlords, in reliance on DHCR's longstanding interpretation of the law, acted in good faith in deeming rent-stabilized apartments in their buildings to have become deregulated pursuant to the luxury deregulation provisions of the RSL, notwithstanding that the buildings were receiving J-51 tax benefits.

That good-faith reliance turned out to be mistaken after the *Roberts* decision, which rejected DHCR's interpretation. That mistaken reliance does not constitute wrongdoing of any kind, let alone a fraudulent effort to evade the rent stabilization laws. As this Court has acknowledged, "a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*." See *Borden v. 400 E. 55th St. Assocs., L.P.*, 24 N.Y.3d 382, 398, 998 N.Y.S.2d 729, 737 (2014).

An owner's honest and good-faith mistake does not provide a basis for DHCR to ignore the statutory prohibition against examination of the rental history of the

housing accommodation prior to the limitations period immediately preceding the commencement of a rent overcharge proceeding.

## STATEMENT OF FACTS

The relevant facts underlying this appeal are not in dispute. This brief adopts the recitation of facts in the brief of Respondent Appellant Regina Metropolitan Co., LLC ("Owner").

## ARGUMENT

## POINT I

## HSTPA'S AMENDMENTS TO THE RENT OVERCHARGE STATUTES OF LIMITATIONS SHOULD NOT BE APPLIED RETROACTIVELY

From 1984 through 1997, the statutes governing the limitations period for a rent overcharge claim merely stated that the period was four years. For example, CPLR 213-a then read simply, in pertinent part:

> An action on a residential rent overcharge shall be commenced within four years of the first such overcharge.

In 1997, the Legislature enacted the Rent Regulation Reform Act of 1997 ("RRRA-97"), L. 1997, ch. 116, which, *inter alia*, made the limitations period for residential rent overcharge claims more rigorous by, *inter alia*, adding the proviso that: "[t]his 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."

Further enforcing the four-year limitation on examination of rent records, RSL § 26-516(g) provided that a property owner who registered an apartment shall not be required to maintain or produce more than four years of rent records, stating:

> Any owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation.

*See* RSL § 26-516(g).

The RSC implemented the RSL and specifically provides that an apartment's rent history may not be examined prior to the base date, which is the date occurring four years prior to the filing of an overcharge complaint.[5] *See* RSC § 2526.1(a)(2)(ii).

The legislative history of RRRA-97 makes clear that the four-year limitation on examining rental history was included to protect the legitimate rights of owners. The legislative memorandum filed with the bill states:

> A number of regulatory reforms are included in the legislation to simplify the administration of rent laws while protecting the rights of tenants and owners. . . . Examination of the rental history by the Division of Housing and Community Renewal (DHCR) or a court with concurrent jurisdiction is limited to the four-year period prior to the date of the complaint.

[5] RSC § 2520.6(f) defines "base date" as the most recent of: (a) the date four years prior to the filing of any rent challenge; or (b) the date on which the housing accommodation first became subject to the RSL.

*See* Memorandum filed with Assembly Bill Number 8346 [New York Bill Jacket, 1997 A.B. 8346, Ch. 116 (available on WESTLAW)].

This Court has repeatedly affirmed that "the purpose of the four-year limitations or look-back period is to alleviate the burden on honest landlords to retain rent records indefinitely." *See Cintron v. Calogero*, 15 N.Y.3d 347, 354, 912 N.Y.S.2d 498, 501 (2010); *Thornton v. Baron*, 5 N.Y.3d 175, 181, 800 N.Y.S.2d 118, 122 (2005); *Gilman v. DHCR*, 99 N.Y.2d 144, 149, 753 N.Y.S.2d 1, 3 (2002).

RRRA-97 thus conferred upon owners the right to dispose of records relating to rental history that are more than four years old. Such records include prior leases, rent ledgers, and records relating to individual apartment improvements ("IAI's"). Those records demonstrated an owner's right to collect among others, (a) longevity allowances after long-term tenants vacated, (b) permissible vacancy increases, including those for intervening tenancies between registration years, and (c) rent increases based upon installation of IAI's within apartments. Owners throughout New York have relied in good faith on the right conferred by RRRA-97 to relieve the oppressive physical and financial burdens of maintaining such rental history records indefinitely.

HSTPA's amendment to the rent overcharge statutes of limitations eliminated the four-year limitation on examination of rental records added by RRRA-97 and on which owners have relied for the past 22 years to alleviate the burden of unlimited

record retention by conferring on them the right to dispose of rental history records more than four years old. HSTPA now provides that:

> [DHCR] or a court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history reasonably necessary to make such determinations."

*See* HSTPA, Part F, § 4(a).

Moreover, HSTPA also provides that:

> An owner's election not to maintain records shall not limit the authority of [DHCR] and the courts to examine the rental history and determine legal regulated rents pursuant to this subdivision.

*Id.* § 2(8), § 5(g).

The final section of HSTPA relating to rent overcharge statutes of limitation states: "This act shall take effect immediately and shall apply to any claims pending or filed on or after such date." *Id*. § 7

HSTPA's amendments to the rent overcharge statutes of limitations, if applied retroactively, threaten to punish owners for their good faith reliance on the four-year limitation on examination of rental history—a provision that was expressly put into the rent overcharge statutes of limitations to alleviate their record-keeping burden. If rent overcharges now go back six years, instead of four years, and especially if a court or DHCR is permitted to examine all past rental history—as HSTPA expressly permits—owners will be prejudiced where they no longer have records they need to defend themselves against rent overcharge claims, having disposed of such records

in reliance on the pre-HSTPA statutes of limitations. The inability of law-abiding owners to substantiate rent increases due to a lack of records which the law expressly stated need not be "maintained or produced" will result in permanent rent reductions with overcharge penalties.

Owners of apartments affected by the *Roberts* decision are doubly prejudiced by retroactive application. Not only did they dispose of rental history more than four years old, but when they deemed apartments to be deregulated in good-faith reliance on DHCR's long-standing interpretation of the law with respect to J-51 benefits, they had no reason to maintain any older records, since deregulation rendered moot any issue about vacancy increases, longevity increases, IAI's, and other rent increases.

In a rent overcharge proceeding, the owner has the burden of proof to show that the rent charged has been lawful and proper. A tenant only needs to file a form complaint with DHCR alleging rent overcharge, and the burden shifts to the owner to prove that the rent at all relevant times was lawful and proper. *See Ador Realty, LLC v. DHCR*, 25 A.D.3d 128, 140, 802 N.Y.S.2d 190, 200 (2d Dep't 2005). The owner must submit a complete rent history for the apartment, including copies of leases and/or other rent records, evidence of the cost and nature of improvements installed within an apartment and the filing of proper annual registrations with DHCR. *See generally* Finkelstein & Ferrara, *Landlord & Tenant Practice in New*

*York* § 11:355 (2019 ed.). To justify a lawful rent increase corresponding with new equipment and improvements within an apartment, an owner must provide specific documentation. DHCR's Operational Bulletin 2016-1 provides that the documentation includes cancelled checks, invoice receipts marked paid in full, a signed contract, and an affidavit from the contractor. The absence of sufficient evidence of improvements results in a permanent rent reduction and a rent refund with penalties to the tenant, notwithstanding that the improvements were installed and paid for.[6]

Similarly, the absence of a complete set of leases or rent records from the applicable base date results in DHCR's resort to its default methodology for determining the rent. *See* RSC § 2522.6(b)(2) and § 2526.1(g).

The default methodology, which typically results in a substantial permanent rent reduction and refund to the tenant, was designed as a punitive measure for owners who failed to produce a complete rent history in response to a rent overcharge claim. *In re Bondam Realty Assocs., L.P. v. DHCR*, 71 A.D.3d 477, 478, 898 N.Y.S.2d 9, 10 (1st Dep't. 2010). It has also been applied in cases of fraud. *Thornton v. Baron*, 5 N.Y.3d 175, 800 N.Y.S.2d 118 (2005). The retroactive application of the expanded statutes of limitations potentially subjects all owners

[6] The Operational Bulletin is available online at https://hcr.ny.gov/system/files/documents/2018/09/orao20161.pdf.

who relied in good faith on the statutory four-year recordkeeping requirement to this severe penalty.

The owner's burden of establishing the legality of the rent is exacerbated by the fact that where an overcharge is found, it is presumed to have been willful unless the owner can overcome that presumption by a preponderance of the evidence. *See* RSL § 26-516(a); RSC § 2526.1; *10th St. Assocs., LLC v. DHCR*, 110 A.D.3d 605, 605, 973 N.Y.S.2d 619, 620 (1st Dep't 2013). A finding of willfulness subjects owners to a penalty of treble damages and an award of legal fees to the other party. See RSL § 25-516; RSC § 2526.1. Those awards are now made mandatory by HSTPA. *See* HSTPA, Part F, § 4(a)(2) (treble damages); § 4(a)(4) (attorneys' fees).

Owners, upon whom the law imposes the burden to rebut the presumption that an overcharge is willful, will not have the evidence needed to satisfy their burden where they relied to their detriment on the right previously conferred on them to dispose of records older than four years, including expired leases and records relating to IAI's.

The owner's burden of proof on a rent overcharge claim is made more difficult by the confusion in the law surrounding the rent and regulatory status of apartments in buildings which received J-51 benefits. As noted above, many owners did not know how to compute the legal rents or register the apartments, and DHCR failed to provide effective guidance.

The purpose of the 1997 amendments to the statutes governing the limitations period for rent overcharge claims was thus to limit the burden on owners of proving that (a) the rents charged were lawful and, (b) where an overcharge did occur, same was not willful.

Statutes of limitation are intended to provide certainty. *See ACE Sec. Corp. v. DB Structured Prod., Inc*., 25 N.Y.3d 581, 593, 15 N.Y.S.3d 716, 720 (2015) ("Statutes of limitation . . . express a societal interest or public policy of giving repose to human affairs."). Indeed, as this Court very recently reiterated:

> Our statute of limitations doctrine serves the objectives of finality, certainty and predictability. Moreover, the statute of limitations . . . expresses a societal interest or public policy of giving repose to human affairs.

*See Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 130 n.6, 99 N.Y.S.3d 749, 755 n.6 (2019). *See also Duffy v. Horton Mem'l Hosp*., 66 N.Y.2d 473, 476, 497 N.Y.S.2d 890, 892 (1985) ("[T]he primary purpose of a limitations period is fairness to a defendant.").

"The general rule is that statutes are to be construed as prospective only. It takes a clear expression of the legislative purpose to justify a retroactive application." *See Jacobus v. Colgate*, 217 N.Y. 235, 240 (1916) (Cardozo, J.).

Even language providing that a law will go into effect immediately is insufficient to demonstrate legislative intent to apply the law retroactively. *See Becker v. Huss Co*., 43 N.Y.2d 527, 541, 402 N.Y.S.2d 980, 984 (1978). *Accord,*

*Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422, 423, 893 N.Y.S.2d 19, 20 (1st Dep't 2010).

"Even remedial statutes are applied prospectively where they establish new rights, or where retroactive application would impair a previously available defense." *See State ex rel. Spitzer v. Daicel Chem. Indus., Ltd*., 42 A.D.3d 301, 302, 840 N.Y.S.2d 8, 11 (1st Dep't 2007); *Dorfman v. Leidner*, 150 A.D.2d 935, 935, 541 N.Y.S.2d 278, 279 (2d Dep't 1989), *aff'd*, 76 N.Y.2d 956, 563 N.Y.S.2d 723 (1990).

Here, retroactive application of the expanded statute of limitations impairs rights of owners who limited their record-keeping to a period of four years in reliance upon longstanding law.

As the United States Supreme Court has explained:

> The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application.

*See Landgraf v. USI Film Prod*., 511 U.S. 244, 266 (1994).

Moreover, the prohibition against *ex post facto* laws "is equally applicable to civil cases. An act of the legislature ought never to be so construed as to do injustice." *See Dash v. Van Kleeck*, 7 Johns 477, 475-96, 1811 WL 1243 (N.Y. Sup Ct. 1811) "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after

the fact." *See Landgraf*, 511 U.S. at 244. *See also E. Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) ("Retroactivity is generally disfavored in the law in accordance with fundamental notions of justice that have been recognized throughout history.").

With respect to revival statutes, which are akin in their effect to lengthening a statute of limitations retroactively, this Court has repeatedly made clear that it will be permitted only "where the circumstances are exceptional." *See Gallewski v. H. Hentz & Co.*, 301 N.Y. 164, 174 (1950).

Two requirements must be met to permit a change to the statute of limitations that permits recovery previously barred. First, there must be "an identifiable injustice that moved the legislature to act." Second, the revival or extension of the plaintiff's claims must be reasonable in light of that injustice. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 399-400, 67 N.Y.S.3d 547, 562 (2017). *Accord*, *Gallewski v. H. Hentz & Co.*, 301 N.Y. at 174; *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 279 (1924); *McCann v. Walsh Const. Co.*, 282 A.D. 444, 449, 123 N.Y.S.2d 509, 514 (3d Dep't 1953), *aff'd*, 306 N.Y. 904 (1954).

Here, there is no injustice to tenants if the HSTPA amendments to the statutes of limitations are not applied retroactively. They will still be able to assert such claims and recover overcharges, including, where appropriate, treble damages and attorneys' fees. Moreover, if there is evidence that an owner perpetrated a fraud in

setting the rent, the court will be permitted to look beyond the otherwise applicable four-year limit for examining rental history. *See* Point II *infra*.

On the other hand, retroactive application of HSTPA's amendment to the rent overcharge statutes of limitations will effect an immediate and irreparable injustice on owners, who relied on the four-year limitation on examining rental history to dispose of old records. Once disposed of, those records cannot be restored. Owners will be permanently prejudiced by the inability to prove that rent increases were proper or, if there was an overcharge, that such overcharge was not willful.

Even prospective application of HSTPA's amendment to the rent overcharge statutes of limitations will work a hardship on owners. First, now that owners will be at risk if they dispose of rental history records, they will suffer the same record retention burdens that RRRA-97 was designed to alleviate. Second, and more immediately, owners will be faced with defending overcharge cases with only four years' worth of records on which to base their defense. It will take years for owners to collect enough rental history records going forward to be able to fairly address future overcharge claims.

Additionally, prior to HSTPA, RSL § 26-516(a) limited challenges to rent registrations to a period of four years. HSTPA permits review of all available records, which presumably includes rent registrations on file with DHCR. Missing

registrations or unexplained rent increases for which records have long since disappeared become difficult, if not impossible, for owners to defend.

Accordingly, the Court should strike Part F of the HSTPA and direct the Legislature, if it wishes to extend the statutes of limitations for rent overcharge claims, to fashion the remedy in such a way that it does not impair owners' rights to defend such claims. At the very least, the Court should hold that the HSTPA amendments to the statutes of limitations may not be applied prospectively.

## POINT II

## ONLY FRAUD MAY PREVENT STRICT APPLICATION OF THE FOUR-YEAR LIMITATION ON EXAMINING AN APARTMENT'S RENTAL HISTORY IN A RENT OVERCHARGE PROCEEDING

Statutory limitations periods are so important that courts are expressly forbidden to extend them. *See* CPLR 201 ("No court shall extend the time limited by law for the commencement of an action.").[7]

The only exception to the strict application of a limitations period is where the party otherwise entitled to assert it is guilty of fraud or some other serious wrongdoing. In such cases, that party may be equitably estopped from asserting the statute of limitations.

[7] Since even a court is prohibited from extend a statutory limitations period, *a fortiori*, an administrative agency such as DHCR may not extend it.

This principle of estoppel is applied very sparingly. As this Court has made clear:

> [E]quitable estoppel will preclude a defendant from using the statute of limitations as a defense where it is the defendant's affirmative wrongdoing which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.

*See Putter v. North Shore Univ. Hosp*., 7 N.Y.3d 548, 552–53, 825 N.Y.S.2d 435 437 (2006). *Accord, Bayuk v. Gilbert*, 57 A.D.3d 227, 227, 868 N.Y.S.2d 645, 646 (1st Dep't 2008).

Recognizing fraud as the only exception to the four-year limitation on examination of rental history is consistent with this Court's understanding that the "purpose [of RRRA-97] was to alleviate the burden on honest landlords to retain rent records indefinitely, not to immunize dishonest ones from compliance with the law." *See Thornton v. Baron*, 5 N.Y.3d 175, 181, 800 N.Y.S.2d 118, 122 (2005).

The handful of cases in which this Court has permitted DHCR to look back more than four years to reset the base date rent are all consistent with the requirement of a showing of fraud or other affirmative fraudulent wrongdoing. Specifically:

- In *Grimm v. DHCR*, 15 N.Y.3d 358, 366, 912 N.Y.S.2d 491, 495-96 (2010), the Court held that where evidence makes a *prima facie* showing that the landlord engaged in a fraudulent deregulation scheme to remove the apartment from the protections of rent stabilization, DHCR may consider pre-base date activity and

documentation to determine if such a fraudulent scheme existed. If such a fraudulent scheme existed, the base date rent the landlord charged the tenant will be recalculated. As the Court explained:

> A mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization.

*Id*. at 367, 912 N.Y.S.2d at 496.

- In *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 16-17, 6 N.Y.S.3d 206, 214 (2015), the Court permitted extending the limitations period where "there was unrefuted proof of fraud in the record."

- In *Thornton v. Baron*, 5 N.Y.3d at 181, 800 N.Y.S.2d at 121, the Court looked beyond the rent in effect four years prior to the overcharge complaint because the fraudulent and illusory non-primary tenancies in that case "[r]eflect[ed] an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York."

In contrast to the foregoing decisions, the courts have strictly applied the four-year limitation on examination of rental history where there was no evidence of fraud or other intentional wrongdoing on the part of the landlord. For example:

- In *Boyd v. DHCR*, 23 N.Y.3d 999, 1000-01, 992 N.Y.S.2d 764 (2014)—which was a "*Roberts* scenario" case—this Court applied the four-year

limitation, holding that "tenant failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period."

- In *Gomez v. DHCR*, 79 A.D.3d 878, 879, 912 N.Y.S.2d 444, 445 (2d Dep't 2010), the court held that "DHCR properly refused to examine the rental history of the subject apartment prior to the four-year period preceding the filing of the rent overcharge complaint because the petitioner's contention that there were substantial indicia of fraud on the record is without merit."

- In *Meyers v. Four Thirty Realty*, 127 A.D.3d 501, 8 N.Y.S.2d 50 (1st Dep't 2015), the court held that review of the proper base date rent requires a determination whether "a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date."

The principle of law that the four-year limitation on examination of an apartment rental history is strictly enforced absent fraud or other wrongdoing has been applied in cases involving buildings receiving J-51 benefits that, following *Roberts*, were restored to rent stabilization status. As noted above, *Boyd v. DHCR* was such a case. In addition:

- In *Todres v. W7879, LLC*, 137 A.D.3d 597, 598, 26 N.Y.S.3d 698, 699 (1st Dep't 2016), the IAS court found that there was no fraud on the part of the owner in connection with the deregulation of the subject apartment. Nevertheless, the IAS court examined the rental history going back more than four years to determine the

amount of the overcharge. On appeal, the Appellate Division reduced the overcharge award, holding that it had been error to examine the apartment's rental history prior to the four-year limitations period. As the court explained:

> [T]he [IAS] court properly found that defendants did not engage in a 'fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization.' Having so found, however, the court 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.

- In *Park v. DHCR*, 150 A.D.3d 105, 50 N.Y.S.3d 377 (1st Dep't 2017),

the Appellate Division held:

> We recognize that under certain circumstances, especially where a landlord has engaged in fraud in initially setting the rent or in removing an apartment from rent regulation, the court may examine the rental history for an apartment beyond the four-year statutory period allowed by CPLR 213–a. However, in this case, there is simply no evidence or indicia that the owner engaged in a fraudulent deregulation scheme to remove the apartment from the protections of the rent stabilization law. .

50 N.Y.S.2d at 384.[8]

- In *Stulz v. 305 Riverside Corp*., 150 A.D.3d 558, 558, 56 N.Y.S.3d 46, 47 (1st Dep't 2017), the Court strictly applied the four-year limitations period for determining the base date rent because there was insufficient evidence of fraud, *i.e*., "evidence sufficient to raise a question of fact as to defendant's stated reliance on

[8] *Park* involved a Fair Market Rent Appeal, which is subject to the same limitations period as rent overcharge claims. *See Muller v. DHCR*, 263 A.D.2d 296, 305, 703 N.Y.S.2d 80, 87 (1st Dep't 2000).

DHCR's policy in decontrolling the apartment." The court held that the owner was correct in maintaining that any calculation of overcharges should be made "utilizing the rent on the base date of four years prior to the filing of the complaint.

- In *Cohen v. 820 West End Ave. L.L.C.*, 2012 WL 10007597 (Sup. Ct. N.Y. County June 29, 2012), the court held:

> [T]here is no evidence that defendant committed any fraud or purposeful evasion of the rent control law. Prior to *Roberts*, defendant was acting in a manner consistent with the DHCR's position that participation in the J-51 tax benefit program precluded luxury decontrol only where the receipt of the J-51 tax benefit was the sole reason for the imposition of rent regulation.

*Id.* at *4. Accordingly, the court held that "[t]he legal rent shall be the rent agreed to in the lease four years immediately preceding the filing of this action." *Id.* at *3.

*72A Realty Assocs. v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dep't 2012), on which DHCR and the IAS Court purported to rely, is not to the contrary. In *Lucas*, the Appellate Division reversed the dismissal of the tenant's counterclaim for treble damages because the record was insufficient to ascertain whether the owner acted in reasonable reliance on the DHCR's now-overturned interpretation, or fraudulently to deregulate the unit when it raised the monthly rent by $1,491 and brought the monthly rent above the $2,000 threshold for luxury deregulation.

As the court in *Lucas* explained, "[f]urther inquiry upon remand is required to determine whether the overcharge was not willful, but rather the result of reasonable reliance on a DHCR regulation." *Id.* at 402-03, 955 N.Y.S.2d at 21-22.

Thus, *Lucas* recognized that a landlord's good-faith, but ultimately mistaken, reliance on DHCR's interpretation of the applicability of luxury decontrol to buildings receiving J-51 benefits is not a basis for discarding the statute of limitations in determining the base rent in a rent overcharge proceeding.

In any event, to the extent that *Lucas* may be read to refer to something other than fraud as justification for ignoring the four-year limitation on examining an apartment's rental history, it is respectfully submitted that *Lucas* is no longer good law in light of this Court's decisions in *Boyd* and *Grimm*. Indeed, in the present case, the Appellate Division explicitly noted that:

> *72 Realty Assoc*. was decided before the Court of Appeals' decision in [*Boyd*], and it does not discuss *Grimm* or the need for some fraudulent behavior by the landlord as a predicate to an examination of rental history beyond four years.

A*mici* are aware that in *Taylor v. 72A Realty Assocs., L.P*., 151 A.D.3d 95, 53 N.Y.S.3d 309 (1st Dep't 2017), despite finding that there were no indicia of fraud, the court ignored the statute of limitations for determining the base date rent and held that determination of the base date rent "requires a mathematical calculation of the applicable rent guidelines (and any other) legally permissible increases since the expiration of the [last rent-stabilized] lease". *Id*. at 106, 53 N.Y.S.3d at 917.

*Taylor* improperly introduced a new factor in determining a base date rent that is contrary to law. The reason proffered by the *Taylor* court for its rent recalculation formula—which has no basis in the statute or prior case law—is that "an Owner

cannot use the . . . misapprehension of the law as a sword to establish a rent that clearly bears no relation to the appropriate parameters of rent regulation." 151 A.D.3d at 106, 53 N.Y.S.3d at 318.

It is respectfully submitted that the court's reasoning in *Taylor* is contrary to fact and law. Owners who, prior to *Roberts*, deregulated apartments in buildings receiving J-51 benefits and thereafter charged market rents did not seek to "use misapprehension of the law as a sword." They were following the law as it had long been interpreted by DHCR, the agency charged with applying and enforcing the RSL and RSC. That this Court chose to reject DHCR's long-standing interpretation of the law does not change the fact that owners, tenants, and DHCR all understood, prior to *Roberts*, that such luxury deregulation was permissible and that, subsequent thereto, rents could be set at market rates an owner was willing to charge and a tenant was willing to pay.

In the present case, Owner and Tenants freely and knowingly entered into a lease in 2005 at a market rate. At the time, Owner believed in good faith and in reliance on DHCR's longstanding interpretation of the law, that the Apartment had been deregulated pursuant to high-rent deregulation. Tenants shared that belief as to the law, either based on their own understanding or on advice of an attorney, who would have made them aware of DHCR's position.

Accordingly, it is respectfully submitted that *Taylor's* newly-invented method of looking back to the last rent-stabilized lease to recalculate the base date rent was in error and contrary to the principle that absent fraud, neither a court nor DHCR may ignore the four-year limitation on examining the rental history of an apartment in determining the base date rent and calculating any overcharge.

The only limited circumstances other than fraud where the rental history of an apartment, or aspects thereof, has been considered in connection with a rent overcharge proceeding involves matters different from determining the base date for calculating any overcharge. Thus:

1. "DHCR's consideration of events beyond the four-year period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated." *See E. W. Renovating Co. v. DHCR*, 16 A.D.3d 166, 167, 791 N.Y.S.2d 88, 90 (1st Dep't 2005)

2. A rent reduction order entered more than four years prior to the commencement of the rent overcharge claim may be considered in determining the base date rent if the rent reduction order is still in effect. *See, e.g., Cintron v. Calogero*, 15 N.Y.3d 347, 912 N.Y.S.2d 498 (2010). The Court based its decision on the fact that although the rent reduction order had been entered more than four years earlier, it "remained in effect during the four-year limitations period," and thus

was "part of the rental history that the Rent Stabilization Law permits DHCR to consider." *Id.* at 356, 912 N.Y.S.2d at 503.

3. An owner may introduce evidence regarding the apartment's rental history for more than four years before the filing of the overcharge complaint as a defense:

a. to establish that an overcharge was *not* willful, *see, e.g., H.O. Realty Corp. v. DHCR*, 46 A.D.3d 103, 109, 844 N.Y.S.2d 204, 207-08 (1st Dep't 2007); or

b. to establish its entitlement to a longevity increase, which requires proof that there had been no vacancy increase for the past eight years. *See Ador Realty v. DHCR*, 25 A.D.3d 128, 136, 802 N.Y.S.2d 190, 197 (2d Dep't 2005).[9]

None of the circumstances listed above apply in the present case. Here, as DHCR, the IAS Court, and the Appellate Division all agreed, the landlord did not engage in fraudulent or other intentionally wrongful conduct. As in the *Boyd*, *Park*, *Todres*, and *Cohen* cases cited above, the Owner here treated the subject apartment as deregulated based on high rent deregulation and thereafter entered into leases in good-faith—albeit ultimately mistaken—reliance on DHCR's position that it was entitled to do so. Such good-faith reliance is not a proper basis for ignoring the strict

[9] Longevity increases were abolished by HSTPA.

four-year limitation on examination of an apartment's rental history mandated by the Legislature in RRRA-97.

## CONCLUSION

For the foregoing reasons, the order of the Appellate Division, First Department, should be affirmed.

Dated: New York, New York
November 26, 2019

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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. § 500.13 that the foregoing brief was prepared on a computer.

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Dated: New York, New York
November 26, 2019

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