TO BE ARGUED BY:
DARRYL M. VERNON
TIME REQUESTED: 30 MINUTES

COURT OF APPEALS NO. APL-2019-00116

State of New York
Court of Appeals

ELIZABETH REICH and STANLEE BRIMBERG,
Plaintiffs-Appellants,

-against-

BELNORD PARTNERS, LLC and EXTELL BELNORD, LLC,
Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Supreme Court, New York County, Index No. 159841/2016

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PRELIMINARY STATEMENT

This case is about the improper deregulation of an apartment that should have been rent stabilized because the Landlord[1] received J-51 tax benefits, and the Landlord's charging of an illegal rent both before and after it registered the apartment (the "Apartment") as rent stabilized with the New York State Division of Housing and Community Renewal. The appeal concerns the improper dismissal of the Tenants' claims under CPLR 3211, and denial of the Plaintiffs-Appellants' (the "Tenants") motion for summary judgment, which pursuant to their complaint, sought an award of overcharges, treble damages, and legal fees.

The courts below allowed the Landlord to use a deregulated rent from an illegal five year deregulated lease as the basis for determining the base date rent (the legal rent to be used as a basis for calculating any overcharge claims), all of which runs contrary to this Court's rulings in Roberts v. Tishman Speyer Properties, L.P., 13 N.Y.3d. 270, 890 N.Y.S.2d 388 (2009) and other cases to be cited below. Pursuant to these cases and the Housing Stability and Protection Act of 2019 (the "Current Rent Law"), a landlord must prove a proper and legally established base date rent, and not simply use the rent from an illegally deregulated lease, any registration statement relied upon by a landlord must be a reliable one, and the Court

[1] All references to the "Landlord" in this brief include the current and prior landlord, and refer to the Defendants-Respondents in this action.

may go back more than four years from the filing of a complaint or recent registration record in examining all available evidence necessary to establish a legal rent stabilized rent for a rent regulated apartment. As will be detailed further below, the Current Rent Law applies to the case at bar because this law specifically states it applies to pending cases, and because it is remedial in nature.

With no precedential basis, the Supreme Court improperly dismissed the Tenants' overcharge claim based on a four year statute of limitations of CPLR §213-a, and the Appellate Division would not permit viewing the rental history for more than four years before the filing of the overcharge complaint. This four year rule is no longer valid under the Current Rent Law, nor can the landlord rely on its initial 2010 rent registration which contained an unlawful rent, under the Current Rent Law, since the Current Rent Law requires that the rent registration statement be a reliable one. And even under the old rent law, this Court and others have held that the four year rule should not be applied where a mechanical application of this rule would flaunt statutory mandates or frustrate the purposes of the rent stabilization laws, and that the rent used to calculate the legal rent must be a legal one.

The Landlord claims in this action that that they promptly treated the Tenants as stabilized as soon as they could in 2010, and thus the Tenants should have sued them sooner. This claim is unsupported under either the old or Current Rent Law. Also, the 2010 lease (in the form of a renewal of the unlawfully deregulated 2005

lease) was duplicitous as the landlord explicitly provided that it was keeping all issues "open." This lease\renewal also says that the Landlord made a good faith calculation of the rent (which was never shown to be true) and would adjust the rent if wrong (which was never done). Even after the Appellate Division ruled that this Court's ruling in Roberts was retroactive, the Landlord still kept giving the same equivocal riders in subsequent renewal leases. It wasn't until 2016 that the Landlord gave a whole new rider, this time telling the Tenants that the J-51 tax benefits would be expiring in some three months and the Tenants would no longer be stabilized. This too was false under the law, as the Tenants never previously received the required notice in previous riders to allow such deregulation. The Tenants commenced suit just a few months after receipt of the new 2016 rider. Yet the lower court held they should have sued sooner.

At the end of the day, the Landlord here received the benefit of J-51 tax abatements in exchange for being required to charge legal rent stabilized rents to its tenants. However, the Landlord failed to live up to its end of the bargain. There is little doubt that the Tenants at bar, as well as the many others similarly situated in the building, will not recover all of their overcharges, as the statute of limitations will limit them to a recovery for the statutorily limited period from the filing of their claim (previously four years and now six years under the Current Rent Law). The Landlord will keep the rest of the overcharges. However, the courts do not allow

landlords to also profit from an illegal deregulated rent. Anything to the contrary would, in addition to the windfall that limits the Tenants' overcharge claim to six years under the Current Rent Law, reward the Landlord for abusing the tax system, in essence improperly taking money in the form of tax benefits from New York State and its taxpayers. Neither the case law, nor the facts, nor good policy, allow this for the following detailed reasons.

QUESTIONS PRESENTED

a. When an apartment is unlawfully deregulated, can the base rent be set using the market rent charged under the prior improperly deregulated lease? No. The courts below erred in allowing the base date rent to be set using the unlawfully deregulated market rents that were charged under the illegal 2005-2010 lease. To set the base rent using the deregulated lease would reward the landlord for its improper destabilization, runs contrary to rulings by this Court and other Appellate courts, and violates the Current Rent Law.

b. Should the Tenants be awarded attorneys' fees if the Appellate Division and lower court's ruling on their cross-motion for summary judgment is reversed? The right to legal fees is plainly stated in Rent Stabilization Law §26-516a(4) and Rent Stabilization Code §2526.1(d) and ¶19 of their initial lease agreement (made reciprocal by RPL §234), and is now made mandatory by the Current Rent Law.

c. Are the Tenants entitled to treble damages when the landlord willfully deregulated an apartment while receiving J-51 tax benefits and then, even after the ruling in Roberts v. Tishman Speyer Properties, L.P., 13 N.Y.3d. 270, 890 N.Y.S.2d 388 (2009), continued to charge the Tenants an illegal rent by simply taking the illegal rent from their prior illegal deregulated lease and using it as the charged rent stabilized rent? If this Court reverses the ruling of the Court below and finds an overcharge, then treble damages should be awarded on this basis. The Rent Stabilization Code provides that an owner found "to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess." 9 NYCRR § 2526.1(a)(1). The only exception to this penalty is where "the owner establishes by a preponderance of the evidence that the overcharge was not willful." *Id.* Here, the owner advanced no evidence at all that its overcharge was not willful. It was willful because it was clearly unlawful to deregulate this particular apartment while the Landlord received J-51 tax benefits for the building.

STATEMENT OF FACTS

When the Tenants moved into the subject apartment in 2005, and were given a deregulated lease, Landlord was receiving J-51 tax benefits for the subject building. The first set of benefits for a 14 year period commenced in 1997/1998, with a second series of J-51 tax benefits for a 14 year period commencing in 2002/2003, and a third set of J-51 benefits for a 14 year period commencing in 2004/2005 and expiring in 2018 (R.140-150).

Due to the receipt of J-51 tax benefits starting in 1997/1998 and continuing through 2005 and thereafter, the Landlord was required to give Tenants a rent stabilized lease at a rent stabilized rate. Instead, the Landlord gave them a non-regulated five year lease at an unlawful rent of $18,850.00 for the first year, $19,350.00 for the second year, $19,850.00 for the third year, and $20,000 for the last two years (R.50-70). The Landlord violated the Rent Stabilization laws by (a) failing to give the Tenants an initial rent stabilized lease; (b) not providing the required rent stabilization riders to the initial lease and subsequent renewals; (c) providing misleading lease riders in the 2010 lease\renewal and subsequent renewals, all of which misrepresented the rent regulatory status of the apartment and falsely stated how the rent charged was calculated; and (d) failing to charge the Tenants a proper, legal rent stabilized rent.

An initial rent stabilized lease was required pursuant to Rent Stabilization Code §2522.5(a)(see also DHCR Fact Sheet #5), which then, pursuant to Rent Stabilization Code §2522.5(c) and Rent Stabilization Law §26-511 d(1), should have been subsequently renewed with Rent Stabilization riders that set forth a tenant's rent stabilized rights.[2] Instead, when the initial 2005 deregulated lease ended, the Landlord provided a renewal form with their own equivocal and unlawful rider with each renewal lease. In contrast with the required Rent Stabilization riders, the Landlord's riders (R.170-171,72-73, 78-79, 83-84, 86-87) from 2010 to 2016 state that the rent regulatory status of the Apartment and the rent to be charged are "open" issues (which even contrasts to the Landlord's own motion papers where they acknowledge that the Apartment is rent stabilized) (R.15). The Landlord also put in these renewals that the "Landlord made a good faith calculation of the rent" (which was never shown to be true, and certainly not in the context of the CPLR 3211 motion granted below) and would adjust the rent if wrong (which also was never done). Even after the Appellate Division ruled that Roberts was retroactive under Gersten, infra, the Landlord still kept giving the same equivocal and unlawful

[2] As the Court of Appeals stated in footnote 2 of Grimm State Division of Housing and Community Renewal, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010):

> The Rent Stabilization Code requires that, for each vacancy or renewal lease for premises subject to the Rent Stabilization Code, the landlord "shall furnish to each tenant signing a vacancy or renewal lease, a rider in a form promulgated or approved by the DHCR, in larger type than the lease, describing the rights and duties of owners and as provided for under" the Rent Stabilization Law (Rent Stabilization Code [9 NYCRR] §2522.5[c](1).

riders. Then in 2016 the Landlord gave a whole new rider, this time telling the Tenants that the J-51 would be expiring in some three months and the Tenants would (again) no longer be stabilized. This too was false under the law, as the Tenants never previously received the required riders to allow such deregulation.

For the April 13, 2010 lease\renewal, which they called rent stabilized, the Landlord simply lifted the illegal $20,000 monthly rent from the preceding 2005 five year deregulated lease and charged it to the Tenants in this 2010 lease, stating it might be rent stabilized, calling the rent a preferential one, and even inserting a higher non-preferential rent in the lease (R.169-174). The rent registered with the DHCR did not match either figure. The subsequent renewal leases until 2016 were similar form leases with equivocal rider language, with guideline increases all based on the illegal deregulated $20,000 base date rent figure. As an example of the equivocal rider language, paragraph 4 of the 2013 lease (R.83), in referring to the Court of Appeals ruling in Roberts, wrongly stated that there were open issues which left the rent regulatory status of the Apartment and the rent to be charged for the Apartment up in the air. Paragraph 4 of the 2013 lease states:

> It is the owner's contention that issues specifically left open for ruling by the Decision raise significant questions as to the applicability of the Decision to the Lease, the rent regulatory status of the Apartment and the rent to be charged under said lease.

In fact, by 2013, there were no open issues about the rent regulatory status of the Apartment. This Court had already ruled in 2011in Gersten v. 56 7th Avenue LLC,

88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dep't 2011) that the ruling in Roberts v. Tishman Speyer Properties, L.P., 13 N.Y.3d. 270, 890 N.Y.S.2d 388 (2009) - which held that rent stabilized units in buildings receiving J-51 tax benefits may not be deregulated under high-rent/high-income deregulation - is retroactive.

Moreover, paragraph 5 of the 2010 lease rider (R.170-171) states that the Landlord has made a "good faith calculation" of what the rent stabilized rent should be, when in fact, the Landlord simply took the last rent of the prior illegal deregulated lease, made that the new stabilized rent for the Apartment, and registered that rent with the DHCR in 2010, with no prior registrations provided for the period before 2010 to indicate if there was any other basis for arriving at this rent figure. And the Landlord's 2010 rent registration not only had an illegal rent, but was denominated with a '(D)", which stands for a "Vacancy Decontrol Registration" (R. 96, 98). There was no evidence of what the prior rent regulatory status really was, and nothing about what the rent was. The increase to some $20,000 was, in short, "unexplained" in the language of the Current Rent Law.

Months after the 2016 lease renewal that didn't equivocate about the Tenants' status – other than to tell them for the first time that the J-51 tax benefits would expire in some three months and this would now end their regulated status, placing them back to how the Landlord treated them to begin with - the Tenants commenced this action in 2016 seeking a declaration that their Apartment was rent stabilized,

and requesting an award for overcharges, treble damages, and legal fees based on the Landlord's violation of the Rent Stabilization Law (R.32-46). Prior to the filing of this lawsuit and due to the Tenants' good faith effort to settle all issues, the parties agreed in a "standstill agreement" that the overcharge claim will be deemed filed as of July 26, 2016 (R.47-49).

The Landlord brought a pre- answer motion to dismiss after the complaint was served (and after several extensions to respond), and the Tenants filed a cross-motion for summary judgment.[3] The court below, in a ruling dated September 11, 2017, granted the Landlord's motion to dismiss the Tenants' second cause of action for overcharges, and denied the Tenants cross-motion for summary judgment (R.5-11). The Appellate Division affirmed, on the basis that it would not allow the Tenants to look back more than four years from the filing of their overcharge complaint to view the rent history in order to establish the legal rent for the apartment (R. 13a-15a). The rulings should be reversed for the reasons stated earlier and as will be detailed further in this brief.

[3] The Court's consideration of the Tenants' motion for summary judgment without notice prior to joinder of issue was appropriate since this action and motions involved no issues of fact, but only issues of law. See, Four Seasons Hotels LTD. V. Vinnik, 127 A.D. 2d 310, 515 N.Y.S.2d 1 (1st Dept. 1987).

ARGUMENT

I. THE LANDLORD SHOULD BE HELD LIABLE FOR AN OVERCHARGE AND THE NEW RENT SHOULD BE ESTABLISHED USING VARIOUS ALTERNATE RENT FORMULAS THAT ESTABLISH A LEGAL RENT STABILIZED RENT FOR THE APARTMENT

(A) The Statutory Background of Luxury Decontrol and Rent Stabilization

In 1993, the New York State Legislature enacted certain amendments to the Rent Stabilization Laws ("RSL") and the Rent Control Laws ("RCL"), which are often referred to collectively as "luxury decontrol." One form of such luxury decontrol – called "high rent/vacancy deregulation" – provided that certain units could be deregulated if they became vacant and the legal regulated rent or the legal maximum rent exceeded $2,000 per month. N.Y.C. Admin. Code §§ 26-403(k), 26-504.2(a); L. 1993, Ch. 253, §§ 4, 6, effective July 7, 1993. Another form, referred to as "high rent/high income deregulation," provided that the DHCR could order deregulation of existing rent stabilized and rent controlled units if the legal regulated rent or the legal maximum rent exceeded $2,000 per month and the tenant's household income exceeded a preset annual limit for two years.[4] N.Y.C. Admin.

[4] When the legislation was initially passed, the household income level was set at $250,000 per year for the two-year period. L. 1993, Ch. 253 §§ 4, 6; Compl. ¶ 24. In 1997, the statute was amended to lower the level to $175,000 per year and then later increased to $200,000 as of July 1, 2011, and the legal maximum rent was raised from $2,000 to $2500 as of July 1, 2011. L. 1997, Ch. 116, §§ 12, 14, effective Jan. 1, 1997; N.Y.C. Admin. Code §§ 26-403.1, 26-504.1. Pursuant to the Rent Act of 2015 (L. 2015, ch 20), the legal maximum rent was raised as of June 2015 from

Code §§ 26-403(j), 26-504.1; L. 1993, Ch. 253, §§ 4, 6, effective July 7, 1993.

The amendments to the RSL and RCL provided, however, that these deregulation provisions did not apply to owners who received benefits pursuant to Real Property Tax Law (RPTL) §489. RPTL §489, enacted in 1955, was an enabling statute, authorizing cities to promulgate local laws that would provide multiple dwelling owners with tax incentives to rehabilitate their properties or convert them to residential use. The law further authorized cities to impose rent regulation on building owners as a *quid pro quo* for receiving tax benefits.

In 1960, pursuant to RPTL §489, New York City adopted the J-51 program, now codified as §11-243 of the Administrative Code of the City of New York. The enabling law specifically provided that J-51 benefits were only available to dwellings that were subject to rent control or rent stabilization.

(B) The *Roberts* Holding and Its Retroactive Application to the Apartment

As confirmed by this Court in Roberts v. Tishman Speyer Properties, L.P., 13 N.Y.3d. 270, 890 N.Y.S.2d 388 (2009), the option to take advantage of the luxury decontrol amendments expressly does not apply to owners who receive benefits under RPTL §489 or its enabling local laws, including J-51. In Roberts, the Court

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$2500 to $2700. The Current Rent Law, effective on June 11, 2019, did away with both vacancy decontrol and high rent/vacancy deregulation.

affirmed "that building owners who receive J-51 benefits forfeit their rights under the luxury decontrol provisions even if their buildings were already subject to the RSL." 13 N.Y.3d at 283. The Roberts Court rejected the defendant-landlord's argument that, because its building was subject to rent stabilization before the J-51 benefits began, it should be able to use luxury deregulation provisions. *Id* at 286. Rather, the Court held that the "most natural reading of the statute's language" was that it prohibits luxury decontrol whenever the apartment is receiving J-51 benefits, regardless of whether the apartment was previously rent stabilized. See *Id*. Because the Court's decision in Roberts "was not unforeseen," it applied retroactively. Roberts v. Tishman Speyer Props., L.P., 89 A.D.3d 444, 445-46 (1st Dep't 2011) (internal quotation marks omitted); See also Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 198 (1st Dep't 2011).

(C) The Undisputed Overcharge of the Tenants in the Instant Action

Here, there is no dispute that the Landlord was receiving J-51 benefits for the Apartment in 2005 when it unlawfully gave the Tenants a deregulated lease at a deregulated rent of $18,850.00 per month. Thus the Apartment should have been treated as rent stabilized from the outset of the tenancy pursuant to the ruling in Roberts and its progeny.

(D) Whether under the Prior Rent Stabilization Law or the Current Rent Law, The Entire Rent History of the Apartment Must be Examined in Calculating the Overcharge and New Rent Due to the Illegal Base Date Rent

i. Overcharge Under The Prior Rent Law

Rent overcharge claims were generally subject to a four year statute of limitations. Examination of the rental history for apartments in overcharge cases was generally limited to the four year period preceding the overcharge complaint. Rent Stabilization Law §26-516; CPLR 213-a; 9 NYCRR §2526.1(a)(2)(ii). In rent overcharge cases, the legal regulated rent to be used in calculating any overcharge is the rent charged on the "base date", which was the date four years prior to the date of filing of the overcharge complaint. 9 NYCRR 25206(e), (f)(1); 2526.1(a)(3)(i).

However, the evidentiary component of the old four year rule had never been deemed "inviolate". Matter of H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal, 46 A.D.3d 103, 109 (1st Dept. 2007). To the contrary, "exceptions have been made in its application where circumstances and policy considerations dictate." *Id.* This Court has repeatedly held that courts ruling on overcharge claims may look at rental history beyond the preceding four years under appropriate circumstances. Conason v.Megan Holding, LLC, 25 NY3d 1, 16 (2015); Scott v. Rockaway Pratt, LLC, 17 N.Y.3d 739, 739 (2011); Matter of Grimm v. State of New York Division of Housing and Community Renewal, 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(2005).

These precedents reflect the broader principle that when different parts of a statutory scheme appear to conflict, a court's role is not to elevate one part over another, but rather "to further the intent, spirit and purpose of a statute, [and] to harmonize all parts of a statute to give effect and meaning to every part. Matter of Cintron, 15 N.Y.3d at 355. Thus, in Matter of Cintron, this Court considered such a statutory conflict regarding whether the four year rule precluded a tenant from relying on rent reduction orders issued more than four years prior to the filing of the overcharge complaint. This Court held that the rent reduction orders must be considered in calculating the base date rent, even though the orders were issued more than four years before the filing of the overcharge complaint. This Court stated that this approach "best reconciles and harmonizes the legislative aims of both the four year limitations/look-back period" and the owner's obligation under the law to "reduce rent and make repairs" under RSL §26-514 *Id*.

Similarly, following these same principles, an illegal deregulated rent charged on the "base date" cannot be used as a basis for calculating an overcharge and establishing the correct rent for a rent regulated apartment, and in that event, the entire rental history of the apartment must be examined. Matter of Grimm v. State of New York Division of Housing and Community Renewal, 15 N.Y.3d 358 (2010);

Thornton v.Baron, 5 N.Y.3d 175(2005); Taylor v. 72A Realty Associates, L.P., 151 A.D.3d 95, 53 N.Y.S. 3d 309 (1st Dep't 2017); Altschuler v. Jobman, 135 A.D.3d 439, 22 N.Y.S.3d 427 (1st Dept. 2016); 215 W 88th Street Holdings LLC v. DHCR, 143 A.D. 3d 652, 40 N.Y.S.3d 92 (1st Dept. 2016); Smoke v. Windermere, 130 A.D.3d 522, 12 N.Y.S.3d 885 (1st Dept. 2015); 72A Realty Associates v. Lucas, 101 A.D. 3d 401, 955 N.Y.S.2d 19 (1st Dept. 2012); Grimm v. DHCR, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010); Levinson v. 390 West End Associates, 22 A.D.3d 397, 802 N.Y.S.2d 659 (1st Dept. 2005).[5]

A finding of fraud was not required in order to examine the legality of the base date rent and to look at the rent history beyond the four year period from the filing of the overcharge claim, where the landlord fails to establish the legality of the

[5] The Landlord, in the Court below, cited Park v. New York State Division of Housing and Community Renewal, 150 A.D.3d 105, 50 N.Y.S.3d 377 (1st Dept 2017) in support of its assertion that the Tenants should be bound by the base date rent charged to them four years prior to the filing of their overcharge complaint, regardless as to whether it is a legal and proper rent. That case is not relevant because there, the court properly applied the Article 78 appeal standard and upheld the denial of a fair market rent appeal for good reason. A "first rent" had been created since the apartment went from rent control to rent stabilization, with the first rent stabilized tenant agreeing to a rent that was properly set and established by using the DHCR MBR formula and adding 1/40th of the cost of improvements as allowed under the Rent Stabilization Code. In the case at bar, the apartment was never registered as rent controlled, nor is there any registration prior to 2010. And in Park, unlike the case at bar, the J-51 benefits expired before the complaining tenant moved into the apartment. Nor could a first rent have been created when the Tenants signed their deregulated lease in 2005 or the renewal lease form in 2010, as a first rent is not created where a tenant is not given a rent stabilized lease at a rent stabilized rent upon moving in after a vacancy. Gordon v. 305 Riverside Corp., 93 A.d.3d 590, 941 N.Y.S.2d 93 (1st Dept. 2012); Goldman v. Malagic, 994 N.Y.S.2d 498, 45 Misc.3d 37 (App Term 1st Dept. 2014); 656 Realty LLC v. Cabrera, 910 N.Y.S.2d 408, 27 Misc.3d 138(A) (App Term 1st Dept. 2010) affg 911 N.Y.S.2d 696, 27 Misc.2d 1225(A) (Civ Co NY Co. 2009); Esposito v. Larig, 36 N.Y.S.3d 899, 52 Misc.3d 67 (App Term 2nd Dept. 2016).

rent charged on the base date. Taylor v. 72A Realty Associates, L.P., 151 A.D.3d 95, 53 N.Y.S.3d 309 (1st Dept. 2017).

Indeed, the administrative agency with the expertise in administrating and interpreting these specific provisions of the Rent Stabilization Laws - the New York State Division of Housing and Community Renewal - has stated in the related appeal before this Court entitled Regina Metropolitan Co, LLC v. DHCR and Levy No. APL-2018-00222 that this Court, pursuant to the principles discussed above, should go back more than four years before the filing of an overcharge complaint to examine the rental history for purposes of establishing a legal rent in cases where a landlord has illegally deregulated apartments while in receipt of J-51 tax benefits. As the DHCR stated in page 36 of its brief before this Court in Regina Metropolitan Co, LLC v. DHCR and Levy No. APL-2018-00222:

> The principles set forth in these cases apply with equal force to the post-Roberts overcharge cases at issue here. Roberts squarely held that "the only correct interpretation" of the luxury deregulation provisions contained in the Rent Stabilization Law, as well as the provisions in state and local law authorizing the J-51 program, barred owners from deregulating rental units in buildings receiving J-51 benefits. *See Roberts*, 13 N.Y.3d at 287; RSL §§504(c); 26-504.1, 26-504.2(a); N.Y.C. Admin Code §§ 11-243(i)(1), 11-243(t), 11-243dd2; 28 RCNY 5-03(f); *see also* RPTL § 489(7)(b)(1). And *Roberts* reached this decision in a case involving deregulations that occurred more than four years prior to the underlying complaint filed in 2007. *See* Roberts, 13 N.Y.3d at 282 (referencing deregulations beginning in 2001 and 2002).

Similarly, like the landlord in Matter of Cintron, the Landlord here was under an obligation to charge a rent stabilized rent from 1997-2018, when their building

was receiving J-51 tax benefits (and thereafter, since proper notice was not given regarding expiration of these benefits). See Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 199 (1st Dept. 2011)["the rent regulated status of an apartment is continuous circumstance that remains until different facts or events occur that change the status of the apartment"].

The Landlord here violated the requirement of charging and continuing to charge the Tenants a rent stabilized rent for the apartment. They charged the tenants an illegal deregulated rent of $18,500.00 in 2005, which escalated to $20,000 in 2010 at the end of the five year illegal deregulated lease. The Landlord then used the illegal $20,000 figure as a basis for rents that the Landlord called rent stabilized from 2010 onward. This illegal rent was not based on any rent stabilization calculation – even when the Landlord belatedly registered the apartment as rent stabilized in 2010 at this illegal rent. The Landlord had not registered any prior rent stabilized rents for the prior period of 1984-2009, and thus showed no basis for the $20,350 rent registered in 2010 and the $20,000 charged to the Tenants in 2010 (R.92-95). In sum, the charging of this illegal rent is contrary to the ruling in Roberts and the other cases cited above, and would wrongfully absolve the Landlord from illegally deregulating the apartment while in receipt of J-51 tax benefits.

ii. Overcharge Under The Current Rent Law

The Current Rent Law applies to this case since this matter is still pending and because the law is remedial in nature. Since it allows consideration of an apartment's rental history for more than six years before the commencement of an overcharge claim, it should result in the reversal of the Appellate Division and Supreme Court rulings in this action.

The Current Rent Law applies to this case because it was and is still pending when the law went into effect on June 11, 2019. See NYC Admin Code §26-516(7) [This act shall take effect immediately and shall apply to any claims pending or filed on and after such date]. Moreover, even if the Current Rent Law was silent on this issue (which it isn't), it would still apply to this case, since the Current Rent Law is remedial in nature, and therefore applied retroactively. See Decordova v. Bennett, 32 A.D.2d 959, 303 N.Y.S.2d 8 (2nd Dept. 1969) [Where law is amended while appeal is pending, appeal should be decided on law as it presently exists]; In re Marino S., 100 N.Y.2d 361 (1969)[Ameliorative or remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose]; Chassen v. Chatsworth, LLC. 303 A.D.2d 609, 756 N.Y.S.2d 550 (1st Dept. 2003) [Amendment to Rent Stabilization Code was remedial in nature and therefore should be applied retroactively].

Under the Current Rent Law, the Landlord has charged the Tenants an illegal rent for their home. The Current Rent Law confirms and states more powerfully than the old rent law that an illegal base date rent cannot be used in determining an overcharge claim, and states more explicitly that the DHCR can go back more than even six years from the filing of an overcharge complaint in examining the rental history for the apartment and setting a base date rent. Moreover, the Current Rent Law codifies that an overcharge can be filed at any time instead of within a certain period of the first overcharge, and any rent registration statement relied upon by a landlord must be a reasonable one.

The DHCR and the courts, in investigating overcharge complaints and legal regulated rents, "shall consider all available rental history which is reasonably necessary to make such determinations…", including but not limited to "any rent registration or other records" filed with the DHCR, and "whether the legality of a rental amount charged is reliable in light of all available evidence…" NYC Admin Code §26-516 5(g-i). "Unexplained increases" in rent can be considered (here, the Tenants' rent went from no registered rent at all to some $20,000 per month). Moreover, nothing contained in this provision on how to calculate overcharges:

…"shall limit the examination of rent history relevant as to a determination as to: (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence…" NYC Admin Code §26-516 5 (h-i).

While a landlord is now required to keep rent records for a period of six instead of four years prior to the most recent registration record, the DHCR or the courts are not limited in going back more than six years to examine relevant records:

> However, an owner's election not to maintain records shall not limit the authority of the division of housing and community renewal and the courts to examine the rental history and determine legal regulated rents pursuant to this section. NYC Admin Code §26-516 5 (g).

An overcharge may be filed "at any time" (NYC Admin Code §26-516 4(a)2, and:

> the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the most recent reliable annual registration filed and served upon the tenant six or more years prior to the most recent registration statement.

In sum, there was an overcharge in the case at bar under the Current Rent Law. The 2010 registration relied upon by the Supreme Court, which was the basis of the Supreme Court ruling, is not "reliable" since its rent figure was based on the prior illegal deregulated rent, and the Appellate Division ruling barring examination of the rental history for not more than four from the filing of the complaint is nullified by the language quoted above.[6]

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[6] Also, the Current Rent Law now allows the Tenants here to recover overcharges for a period of six years before the filing of their overcharge complaint (the old law allowed only a four year recovery). See CPLR 213-a.

(E) The Overcharge and the New Rent Should be Calculated Using One of the Three Rent Formulas Established by the DHCR and Cited by the Appellate Courts, And Rent Guideline Increases from the Base Date Rent should not be Allowed

The courts and the Rent Stabilization Code provide for three different formulas in determining an overcharge/establishing a rent when an apartment has been improperly deregulated during the receipt of J-51 tax benefits and there is an illegal base date rent. All three formulas either permit a look back period more than four years from the date of the filing of the overcharge complaint to establish the base date rent, or require use of a comparable rent stabilized rent for a similar apartment in effect four years prior to the filing of the overcharge complaint. What all three formulas have in common is that they do not allow the use of rent taken from an unlawfully deregulated lease. The three different formulas are the following.

(i)The Rent Stabilization Code Default Formula in Rent Stabilization Code §§2522.6(b)(2) and 2522.6(b)(3)

Rent Stabilization Code §§2522.6(b)(2) and 2522.6(b)(3) provide that where the base date rent cannot be determined, or a full rent base date is not provided, or the base date rent resulted from a fraudulent scheme to deregulate the apartment, the rent should be determined by either of the following four methods:

> Where either (i) the rent charged on the base date cannot be determined, or (ii) a 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, or (iv) a rental practice proscribed under section 2525.3 (b), (c) and (d) has been committed, the rent shall be established **at the**

> **lowest** of the following amounts set forth in paragraph (3). [Emphasis Added]. RSC §2522.6(b)(2)

RSC §2522.6(b)(3) specifies the amounts:

> (3) These amounts are:
>
> (i) the lowest rent registered pursuant to section 2528.3 of this Code for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or
>
> (ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Code; or
>
> (iii) the last registered rent paid by the prior tenant (if within the four-year period of review); or
>
> (iv) if the documentation set forth in (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations. RSC 2522.6(b)(3).

This formula should be applied to the case at bar because the base date rent for the Apartment cannot be determined, since the landlord indisputably charged the Tenants a rent of $20,000 in the improper 2010 renewal form lease (with the equivocal rider language trying to leave open a claim that the Apartment might not be rent stabilized), which was based on the illegal deregulated rent of $20,000 charged in the prior year pursuant to the illegal deregulated five year lease. And there are no reliable records which would show what the rent stabilized rent should have been on the date either six or four years prior to the filing of the overcharge complaint or when Plaintiffs moved into the Apartment in 2005, due to the landlord's

failure to register that apartment as rent stabilized through 2010, and then its filing of rent registrations from 2010 onward at the illegal rents of over $20,000 per month.

From the various options provided in RSC §2522.6(b)(3) above, the one that should be used is the one that will establish the base rent "at the lowest" amount. That would be option (i) as set forth in RSC 2522.6(b)(3)(i) above, which would require that this case be remanded for a hearing and document production by the Landlord.

The other options are either not applicable to this case or is not the option that would establish the lowest base rent. Option RSC 2522.6(b)(3)(ii) would produce a higher rent then the chosen option. Option RSC 2522.6(b)(3)(iii) does not apply inasmuch as the last registered rent by the prior tenant is not within the four (now six) year period and also is not available. And option RSC 2522.6(b)(3)(iv) is not relevant since it only applies if one of the other options are not available.

(ii) The Appellate Division *Lucas* Formula

The formula established by the Appellate Division in 72A Realty Associates v. Lucas, 101 A.D. 3d 401, 955 N.Y.S.2d 19 (1st Dept. 2012) provides for a review of any available record of rental history necessary to set the base date rent, where an apartment has been improperly deregulated and the landlord has not set the rent at a legal and proper rate. This review is not limited to four years from the date of filing of an overcharge complaint. A showing of fraud or willfulness by the landlord in

overcharging the tenant is not required. As in the case at bar, Lucas similarly involved an apartment that was improperly deregulated during the building's receipt of J-51 tax benefits. The New York State Division of Housing and Community Renewal applied the Lucas formula in Regina Metropolitan Co, LLC v. DHCR and Levy No. APL-2018-00222. This formula was rejected by the Appellate Division, and as mentioned earlier, is up on appeal before this Court.

In the case at bar, discovery would be required to discover from the Landlord the rent history of the Apartment, as it failed to file any rent registrations prior to 2010.

(iii) The DHCR 'Sampling Method' or the *Thornton* Default Formula

The DHCR sampling method is the option provided by the Appellate Division majority in Regina Metropolitan Co, LLC v. DHCR and Levy No. APL-2018-00222 (see Regina Metropolitan Co, LLC v. DHCR, 164 A.D.3d 420, 84 N.Y.S.3d 420 (1st Dept. 2018). This formula looks to the average stabilized rents for comparable apartments in the same building as of the base date. See Matter of 160 E. 84th St. Assoc. LLC v. New York State Division of Housing and Community Renewal, 160 A.D.3d 474, 75 N.Y.S.3d 141 (1st Dept. 2018). As the Court held in that case, the DHCR use of the sampling method for an apartment improperly deregulated during receipt of J-51 benefits was not arbitrary and capricious:

> The market rent of $2,200 per month, established by lease, in effect on the "base date" (RSC §2520.6(f)(1) was the result of improper deregulation by the petitioner and thus may not be adopted as the proper base date rent (see *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept. 2012); *Gordon v. 305 Riverside Corp.,* 93 AD3d 590, 592 (1st Dept. 2012**)**.
> 160 A.D.3d 474, 475.

This "sampling" formula is set forth in Rent Stabilization Code §§2522.6(b)(2) and 2522.6(b)(3)(iv) and is quoted earlier in this brief.

Alternatively, the Court could choose the default formula it used in Thornton v. Baron, 5 N.Y.3d 175(2005), when it rejected the landlord's attempt to use an unlawfully deregulated lease and unlawful rent to set the rent for the apartment because that would effectively "transform an illegal rent into a lawful assessment that would form the basis for all future rent increases." 5 N.Y.3d 175, 181 (2005). Instead, the Court held that the rent should be set by using "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date." *Id.* at 180, n.1. Also see Wasserman v. Gordon, 24 A.D.3d 201, 806 N.Y.S.2d 49 (1st Dept. 2005).

In the case at bar, pursuant to the standstill agreement between the parties entered into due to settlement negotiations (R.47-49), the parties agreed that the overcharge claim will be deemed filed as of July 26, 2016. Therefore, the date to be used in calculating the overcharge under the Thornton default formula or the DHCR sampling method is July 26, 2010 (six years prior to the filing of the overcharge

claim (while it was four years in Thornton under the old law), using the rent charged on July 26, 201 for an apartment with the same number of rooms as the Tenants' apartment, and the case would need to be remanded for a hearing on this issue.

(F) In Calculating the Overcharge, the Landlord Should not be Permitted Any Guideline Increases

Pursuant to Rent Stabilization Law §26-517(e) and Rent Stabilization Code §2528.4(a), a landlord's failure to file a "proper and timely" annual rent registration statement results in the rent being frozen at the level of the "legal regulated rent in effect on the date of the last preceding registration statement". Jazilek v. Abart Holdings, LLC, 899 N.Y.S.2d 198, 72 A.D.3d 529 (1st Dept. 2010).[7] See also Altschuler v. Jobman 478/480, LLC, 135 A.D.3d 439, 22 N.Y.S.3d 427 (1st Dept. 2016)[Supreme Court properly imposed a rent freeze on the apartment, since defendant, upon improperly deregulating a rent regulated apartment, collected the unlawful rent overcharges before filing late rent registrations]; 215 W 88th Street Holdings LLC v. New York State Division of Housing and Community Renewal, 143 A.D.3d 652, 40 N.Y.S.3d 92 (1st Dept. 2016)[Rent freeze in calculating rent

[7] Moreover, although not directly relevant, even if the landlord here had filed proper amended registrations (which it did not do), the filing of late amended registrations in 2011 would still bar the landlord under RSL §26-517(e) from collecting any rent increases prior to the 2010 filings. See BN Realty Associates v. State Division of Housing and Community Renewal, 254 A.D.2d 7, 677 N.Y.S.2d 791 (1st Dept. 1998). Parenthetically, the Landlord never submitted any proof of filing of any rent registrations with the DHCR, or service of any rent registrations upon the Tenants.

using the Thornton formula is required when owner filed improper rent registrations]; Matter of Hargrove v. Division of Housing. & Community Renewal, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept. 1997).

The DHCR printout for the Apartment (R.92-95) shows that the Landlord failed to register the Apartment as rent stabilized from the year respondents moved into the Apartment in 2005 until 2010, and then filed a registration in 2010 with a "(D) which denotes a "Vacancy Decontrol Registration" (R. 96) based on an illegal rent of $20,000 charged in the prior illegal deregulated lease – a rent which was not calculated using any of the rent formulas presented here, or for that matter, any provisions of the Rent Stabilization Code. On this basis, pursuant to the Appellate authority cited here, the Landlord is not entitled to any rent guideline increases for the period of the overcharge.

II. LEGAL FEES SHOULD BE AWARDED TO THE TENANTS UNDER EITHER THE CURRENT RENT LAW OR THE OLD LAW

i. The Current Rent Law

As noted earlier, the Current Rent Law applies to the case at bar. Under the Current Rent Law, an award of legal fees to a tenant that successfully prevails in an overcharge claim is now mandatory instead of discretionary. The Current Rent Law states:

> An owner found to have overcharged **shall** be assessed the reasonable costs and attorneys fees of the proceeding…"[Emphasis Added]. NYC Admin Code §26-516 4(a)(4).

The old law with the same cite stated that:

> An owner found to have overcharged **may** be assessed the reasonable costs and attorney's fees of the proceeding….[Emphasis Added].

Therefore, under the Current Rent Law, if this Court finds an overcharge, legal fees should be awarded under this new provision.

Legal fees should also be awarded (either under the Current Rent Law or the old law) pursuant to the terms of the Tenants' lease. There is a legal fees clause in paragraph 19 (5) of their initial lease agreement (R.57), which gives the Landlord the right to recover legal fees from Plaintiffs for:

> Any legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits brought against Owner because of your actions.

This right is automatically made reciprocal in Tenants' favor pursuant to Real Property Law §234.

ii. The Old Rent Law

Even under the old rent law, the Tenants should have been awarded legal fees. The Rent Stabilization Law and Code provide that an owner who has overcharged is liable for "reasonable costs and attorneys' fees" as "an additional penalty." RSC § 2526.1(d); RSL §26-516(a)(4). These provisions are designed to discourage violations of the Rent Stabilization Law, and where a violation occurs, to compensate the tenant, particularly where the violation is willful. Conason v. Megan

Holdings, 25 N.Y.3d 1 (2015); Mohassel v. Fenwick, 5 N.Y.3d 44 (2005). The purpose of overcharge proceedings is to fully compensate tenants when owners fail to comply with rent stabilization requirements. Mohassel v. Fenwick, 5 N.Y.3d 44 (2005). A finding of willfulness is not required in order to award tenants their legal fees when an overcharge occurs. Negron v. Goldman, 11 Misc.3d 144(a), 819 N.Y.S.2d 849 (App. Term 1st Dept. 2006) [Legal Fees awarded to Tenants in an overcharge case pursuant to Rent Stabilization Law §26-516(a)(4) where the overcharge was not willful]. A tenant cannot be expected, on their own and without counsel, to navigate the "impenetrable thicket" [of the rent laws], "confusing not only to laymen but to lawyers". Matter of 89 Christopher v. Joy, 35 N.Y.2d 213, 220 (1974).

This is all especially true here, give the legal complexity of the ruling in Roberts v. Tishman Speyer Properties, LP, 62 A.D.3d 71 13 N.Y.3d 270 (2009) and how it applies to the case at bar, the various rent formulas that could be used to establish the Tenants' rent under the Rent Stabilization Law and Rent Stabilization Code and in Thornton v. Baron, 5 N.Y.3d 175 (2005), and the conflicting appellate law in this area which has resulted in this Court hearing this and two other similar cases. In sum, on this basis, the old rent law also merits an award of legal fees to the Tenants.

III. THE TENANTS SHOULD HAVE BEEN AWARDED TREBLE DAMAGES UNDER THE OLD LAW OR CURRENT RENT LAW BECAUSE THE LANLDORD'S OVERCHARGE WAS WILLFUL

The Rent Stabilization Law provides that an owner found "to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess." Rent Stabilization Code §2526.1(a)(1). Pursuant to Rent Stabilization Law §26-516(a), there is a presumption of a trebling of damages, with the owner having the burden of refuting such a finding by establishing by a "preponderance of the evidence that the overcharge was not willful." The burden is on the landlord to plead and prove by a preponderance of the evidence that any overcharge was not willful. Matter of Hargrove v. Division of Housing and Community Renewal, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept. 1997)[Treble damages awarded based on Court's rejection of landlord's claim that it overcharged the tenant due to a mistaken belief that J-51 tax benefits had expired]; Matter of Tockwotten v. New York State Division of Housing and Community Renewal, 7 A.D. 3d 453, 777 N.Y.S.2d 465 (1st Dept. 2004).

The Current Rent Law relaxes the standard for awarding treble damages to a tenant, as it no longer considers a landlord's voluntary adjustment of the rent as evidence that an overcharge was not willful. Here, the overcharge was plainly willful. The Landlord gave the Tenants a deregulated lease at an illegal deregulated

rent when they took occupancy in 2005, when it is undisputed that the apartment was subject to rent stabilization by virtue of the Landlord's receipt of J-51 tax benefits for the building. In doing so, the Landlord attempted to transpose the rent from an undisputedly unlawfully deregulated lease into a stabilized rent. This Court made clear in Roberts v. Tishman Speyer Props., L.P., 13 NY3d 270 (2009) that landlord's deregulation of apartments while in receipt of J-51 tax benefits was in violation of the plain language of the relevant laws relating to rent regulation, as well as the legislative history behind these laws. This Court further found in Roberts that there was nothing "impossible or even strained about" its reading of the statute, referred to other legislative evidence that showed their decision was indeed one that could be predicted, and rejected a landlord's reliance on a self serving DHCR advisory opinion which the landlord itself solicited. Moreover, as noted earlier, the Landlord used the illegal rent from the deregulated 2005 lease to set a rent for the Tenants in 2010, which it claimed was a rent stabilized lease.

The Landlord gave riders advising it would adjust the rent if required – it never did. The Landlord's riders attempted to unlawfully keep the regulatory status of the apartment open – and even did so for some four years after Roberts was ruled retroactive. The Landlord gave the Tenants in 2016 a renewal that again attempted to set up an unlawful deregulation based on the expiration of J-51 tax benefits. That was plain as day unlawful as the required language in prior leases for such

deregulation was not provided. In short, the Landlord had no reasonable argument that a treble damage claim that was unrefuted deserved dismissal under CPLR 3211.

IV. THE LANDLORD BELNORD PARTNERS IS LIABLE FOR THE OVERCHARGE COLLECTED BY THE PRIOR OWNER, WHICH IS THE DEFENDANT EXTELL BELNORD LLC

The Landlord did not dispute before the lower court that if an overcharge is found, they would be liable for any overcharge committed by the prior landlord. The deeds for the building where Tenants' apartment is situated shows that Defendant Extell Belnord LLC purchased the building on October 19, 2006 and sold the building to Defendant Belnord Partners on March 12, 2015 (R.151-168). Pursuant to Rent Stabilization Code §2526.1(a)(2), Tenants are entitled to collect on the overcharge for a period of four years prior to the filing of their overcharge complaint under the old law, and six years under the Current Rent Law, which under the standstill agreement between the parties, is for the four or six year period prior to July 26, 2016, specifically, July 26, 2010 (or 2012) to July 26, 2016. In sum, Defendant Extell Belnord LLC overcharged the Tenants for the period of July 26, 2010 until it sold the building on March 12, 2015, and the Landlord Belnord Partners continued to overcharge the Tenants after it purchased the building on March 12, 2015.

For overcharges filed or collected on or after April 1, 1984, a current owner is liable for all overcharge penalties based on overcharges collected by a prior owner.

Rent Stabilization Code §2526.1(f)(2); Gaines v. New York State Div. of Housing and Community Renewal, 90 N.Y.2d 545, 664 N.Y.S.2d 249 (1997). Rent Stabilization Code §2526.1(f)(2) states in part:

> For overcharge complaints filed or overcharges collected on or after April 1, 1984, a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner.

Therefore, on this basis, the current Landlord, Belnord Partners, is liable for the overcharge committed by the prior owner, Defendant Extell Belnord.

CONCLUSION

For all the foregoing reasons, the rulings of the Appellate Division and Supreme Court below should be reversed, and this Court should award to the Tenants any relief that is just and proper.

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CERTIFICATE OF COMPLIANCE

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