To be argued by: Joel M. Zinberg
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Court of Appeals
of the
State of New York

JAMES TAYLOR and TAMARA JENKINS,

Plaintiffs-Respondents,

— against —

72A REALTY ASSOCIATES, LP and JANET ZINBERG,,

Defendants-Appellants.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Defendant-Appellant respectfully submits this Brief in Reply to the Brief for Plaintiffs-Respondents dated May 21, 2019 (hereinafter "Pl Brief"). The facts have been previously stated in Defendant-Appellant's February 6, 2019 Brief (hereinafter "Defendant Brief" at pp 11-19). Plaintiffs' brief does not dispute any of the facts. Plaintiffs' brief does not dispute that when the base date rent is properly set at the rent in effect on the four-year base date, as the statute and the overwhelming majority of appellate decisions say that it should be in the absence of fraud, that not only was there no overcharge, but Plaintiffs were undercharged (Defendant Brief pp. 14-15, 43-44). Plaintiffs' brief also does not challenge the fact that Defendant offered the Plaintiffs a rent stabilized lease shortly after its previous case, *72A Realty Assoc. v. Lucas*, was finally decided in 2013 (2013 NY SlipOp 68006(U) (1st Dept.)) and several months *before* Plaintiffs commenced the instant overcharge action (Defendant Brief p. 14). Nor does Plaintiffs' brief dispute that the lease gave the Plaintiffs notice that their status had changed from free market to stabilized (Defendant. Brief pp. 15, 42). Finally, Plaintiffs do not address Defendant's legal arguments that the legislature intended stabilization to expire when the J-51 expired in buildings like Defendants and that the Courts below erred in granting Plaintiffs Declaratory Judgment to continue their stabilized status more than 11 years after the subject building's J-51 expired (Defendant Brief pp.46-50).

The bulk of Plaintiffs-Respondents' brief is an attempt to have this Court review multiple arguments Plaintiffs made to the Court below that the Court below rejected (*Taylor v. 72A Realty Associates, L.P.*, 151 AD3d 95 (1st Dept. 2017)) and decided adversely to the Plaintiffs-Respondents. Despite ample opportunity to appeal the decision below in both 2017 and in 2018, Plaintiffs never appealed. Therefore this Court lacks jurisdiction over nearly all the arguments made in Respondents' Brief (see *infra* Section II).

On the central issue of this case – what method should be utilized to set the base date rent and thereby calculate overcharges, if any – the sole argument advanced in Plaintiffs' brief is that the method adopted by the Court below in this case is fairer than the method prescribed by the legislature in the statute and adopted by every other appellate court in the state. Plaintiffs do not cite a single case that adopts the method used by the Court below. Their brief does not mention, distinguish or discuss this Court's decision in *Matter of Boyd v. New York State Div. of Hous. & Community Renewal* 23 NY3d 999 (2014) or the multiple cases in the First Department that have adopted the rent in effect on the base date in J-51, post *Roberts* overcharge cases when, as in this case, there is no evidence of fraud.

I. THE COURT BELOW ERRED IN UTILIZING A NOVEL METHOD THAT UTILIZES THE PRE FOUR-YEAR BASE DATE RENTAL HISTORY TO CALCULATE THE BASE DATE RENT AND OVERCHARGES

The method of computing the base date rent and calculating overcharges employed by the Court below is contrary to the relevant statutes, decisions of this Court, and multiple other First Department decisions (Defendant Brief 20-38). Like the Court below, Plaintiffs do not cite a single statute or precedent supporting the novel method of calculating the base date rent and overcharges used in this case.

Plaintiffs erroneously cite *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept. 2012) (Pl Brief pp.7-8). But *Lucas* did not adopt the method used by the Court below. *Lucas* did not prescribe any method for setting the base date rent. *Lucas* simply said that if an apartment was improperly deregulated while a J-51 was in effect **and** the record did not establish the validity of the rent increase that brought the rent above the deregulation threshold the entire rental history could be used to set the base date rent (Defendant Brief pp.25-27). But in this case the Court below found the Defendant had provided detailed records in admissible form that proved the validity of the rent increase (*Taylor* at 104-105).

Plaintiffs' reliance (Pl Brief pp.8-10) on *Meyers v. Four Thirty Realty*, 127 AD3d 501 (1st Dept 2015) is similarly misplaced. Unlike the situation in this case,

the *Meyers* Court found that the owner had not provided proof of alleged improvements or any other documents explaining the significant rent increase that brought the rent above the deregulation threshold (*Meyers supra* at 502). But *Meyers* did not adopt the method of calculating the rent used by the Court below. In fact, the *Meyers* Court suggested that in the absence of fraud the base date rent would be used. It concluded that,

> "Under all these circumstances, a determination of the proper base date rent would be premature and must await further discovery '**for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date**' (*Matter of Grimm v. State of N.Y. Div of Hous. & Community Renewal Off. of Rent Admin.* 15 NY3d 358…)." *Meyers supra* at 502 (emphasis added)

In the instant case, the Defendant documented the improvements that justified the rent increase and "disproved any fraud" (*Taylor* at 102-103, 105).

The gravamen of the Plaintiffs' argument is that they think the novel method of calculating the base date rent and overcharges adopted by the Court below is fairer than the statutory four-year rule (Pl Brief section I).

> "However, the legislature has made a different policy determination. It not only set a four-year limitations period, but it also explicitly barred any 'examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint' (RSL § 26-516[a][2]). …The Court of Appeals has made what we have called a 'limited exception' to the four-year limitations period in cases where landlords act fraudulently [citing *Matter of Grimm*]. To expand this exception to landlords who have

> not engaged in fraud would create a much broader exception that would appear to negate the temporal limits contained in the Rent Stabilization Law and the CPLR." *Matter of Regina Metro. Co. v. New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 427 (1st Dept 2018)

The fact that Plaintiffs and the Court below believe their method of calculating the base date rent and overcharges is fairer than the time limitations set out by the legislature is a matter they should have taken up with the legislature.

> "…we have been reluctant to modify the law governing limitations, even when a party's case seems particularly compelling and we have consistently stated that the responsibility for balancing the equities and altering Statutes of Limitations lies with the Legislature (citations omitted)." *Snyder v. Town Insulation, Inc.*, 81 NY2d 429, 435-436 (1993)

> "The very purpose of a Statute of Limitations is to relieve those who have violated the law or the rights of others from continued civil or even criminal liability when the Legislature has determined that the passage of a fixed period of time has made further pursuit of the claim or penalty either unfair or ineffectual." *King v. Carey*, 57 NY2d 505, 512 (1982).

If the imposition of time limits by the legislature can relieve a putative wrongdoer "from continued civil or even criminal liability" the Court below should not have discarded the legislature's rule simply because the Plaintiffs might have paid a little more rent than they would have if the DHCR had not misled the real estate community on deregulation while a J-51 was in effect. In *Matter of Boyd* this Court was unwilling to deviate from the four-year base date rule even though the owner did not provide any renovation records for his claimed $39,000 of improvements

because the tenant had waited beyond the four year window permitting a rent challenge without showing fraud.[1] This Court should not deviate from the four-year rule in the instant case where the owner provided detailed records for $18,343.07 of improvements (double the amount needed to exceed the deregulation threshold) that the Court below found admissible and probative, and where the Court below explicitly found no evidence of fraud and that the owner had given the Plaintiffs all the information they needed to challenge the rent increase and regulatory status back in 2000 (*Taylor* at 103).

The fact that just last month, more than two years after the decision by the Court below, the legislature amended the rent laws to delete the statutory language prohibiting consulting rental history from more than four years before the overcharge complaint to calculate the overcharge and directed the utilization of the rental history to determine the correct base date rent (now a six year base date rather than a four year base date) proves that Defendant is correct and the Court below was incorrect in its interpretation of the statute in 2017. The legislature clearly intended to amend CPLR § 213-a and other related statutes which had

[1] Please note that there is a typo in Appellant's February 6, 2019 brief to this Court on the top of page 32. The brief reads that Boyd plaintiff moved into the apartment in March 2007 and waited "another 2 years (April 2007) to initiate an overcharge compliant." The correct date for the overcharge complaint was "April 2009."

remained intact for the preceding twenty-two years (1997-2019) precisely because every appellate court in the State, other than the Court below in this case, had correctly interpreted and applied the unambiguous four year rule of the previous statute to set the base date rent and calculate overcharges.

Plaintiffs' belated suggestion that the RR-2A registration form that Defendant served on the Plaintiffs in 2000 was blank and violated the law because it did not list the previous rent or explain how the new rent was calculated (Pl Brief pp 9, 16) is an attempt to mislead this Court. Even a cursory glance at the form (R. 258) shows that it is not blank. The required boxes were filled in. As Plaintiffs' counsel is aware, the form and legal requirements have changed since 2000 to now require showing the previous rent and new rent calculations. There was no place to record that information on the 2000 form. Moreover, Plaintiffs ignore the voluminous other documentation showing that they were informed in 2000 that the apartment was exiting rent stabilization on the basis of ongoing apartment improvements and that the previous rent was a matter of public record. As the Court below noted (*Taylor* at 103), Defendant proved that the Plaintiffs had all the information they needed and "every incentive to contest" their rent increase, the improvements made to support it, and their stabilization status in 2000. They

waited 14 years to do anything, five years after this Courts' decision in *Roberts* and several months *after* Defendant gave them a stabilized lease.

II. THIS COURT LACKS THE JURISDICTION TO HEAR MOST OF THE ARGUMENTS RAISED IN THE PLAINTIFFS-RESPONDENTS' BRIEF BECAUSE PLAINTIFFS-RESPONDENTS DID NOT CROSS-APPEAL OR SEEK PERMISSION TO CROSS-APPEAL

Nearly the entirety of Plaintiffs' brief is an attempt to have this Court review the holdings and findings of the Court below that were adverse to Plaintiffs-Respondents, (listed below next to the claims in Plaintiffs' brief) that the Plaintiffs did not appeal. In a virtual repeat of their arguments to the Court below Plaintiffs claim that:

1. the DHCR default formula should be used to set the base date rent (Pl Brief pp.11-17) - The Court below rejected this argument and instead adopted the method at issue in this case. (*Taylor* at 106);

2. the rent should be frozen at the last rent registered with the DHCR (Pl Brief pp.17-31) - "… in a *Roberts* situation where an owner had discontinued DHCR rent registrations based on a justifiable belief that the apartment was not subject to rent regulation, it should not be penalized by rolling back the rent to the last registered rent (citations omitted)." (*Taylor* at 106);

3. discovery and a trial on the legality of the 2000 rent increase are needed because the rent and renovation records were inadmissible and the unavailability of the managing agent from 1999-2000, who passed away in 2008, to testify (Pl Brief 31-45) - "…plaintiffs failed to raise any issue of fact requiring a trial or further discovery." and "Plaintiffs do not provide any basis for their claim that further discovery will lead to additional relevant evidence on the issue of fraud." (*Taylor* at 103 & 105). Defendant provided detailed, admissible business records that documented the validity of the rent increase in 2000 (*Taylor* at 104-105) ;

4. summary judgment on the issue of treble damages should be dismissed because, with the managing agent's death, no one knows if Defendant was relying on the DHCR opinions and regulations and the DHCR records indicate another reason for deregulation (Pl Brief 45-47) – Defendant relied on the DHCR's policy and regulations when it deregulated the apartment in 2000 while a J-51 was in effect (*Taylor* at 99, 105 & 98 footnote 3); The DHCR entry that the apartment was exempted from regulation because it was a coop or condo was "…a clerical error; the exemption was based on luxury decontrol." (*Taylor* at 99-100);

This Court's jurisdiction in this appeal is based upon Defendant-Appellant's motion for permission to appeal which was granted by the Appellate Division on December 13, 2018 (R.263). Plaintiffs, now Respondents, filed neither a Notice of Appeal, nor a cross-motion for permission to appeal.

This Court has made clear that,

> "Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is 'limited to those parts of the [order] that have been appealed and that aggrieve the appealing party'" (*Hain v Jamison*, 28 NY3d 524, 534 n 3 [2016], quoting *Hecht v City of New York*, 60 NY2d 57, 61 [1983])." *Forman v Henkin*, 30 NY3d 656, 660 n.1 (2018)

While the Appellate Division in granting permission to appeal seemingly included a broad grant of jurisdiction - "Was the order of this Court, which modified the order of the Supreme Court, properly made?" (R.267) - Plaintiff-Respondents are barred from seeking review in this Court of the Appellate Division decision on issues that were decided favorably for the Defendant-Appellant

> "…because plaintiffs failed to cross-move for leave to appeal. We will generally deny affirmative relief to a nonmoving party (*see Hecht v City of New York*,60 NY2d 57, 61-62 [1983]), even where the Appellate Division broadly certifies the propriety of its order for review by this Court (*see Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 118 and n 2 [1995])." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151 n 3 (2002)

Similarly, since a party that moves for leave to appeal is limited to the issues they sought to have reviewed and may not raise additional issues (*see Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 NY3d 645, 650-51 (2019); *Quain v. Buzzetta*, 69 NY2d 376, 380 (1987)), a party that did not appeal is restricted in the issues that it may have reviewed by this Court.

Plaintiffs did not appeal or file a cross motion to appeal either in 2017 when the decision was originally issued and Defendant moved for re-argument or for permission to appeal to the Court of Appeals in light of the contrary decision two days earlier in *Stulz v. 305 Riverside Corp.*, 150 AD3d 558 (1st Dept. 2017) or in 2018 when the Defendant-Appellant, following the contrary decisions in *Regina supra* and *Raden v. W.7879, LLC*, 164 AD3d 440 (1st Dept. 2018), filed a motion to renew or in the alternative permission to appeal to the Court of Appeals. Allowing Plaintiffs to re-litigate issues they argued and lost in the Court below would prejudice Defendant who lost the opportunity to challenge Plaintiffs' right to appeal those issues that they could have, but did not, seek permission to appeal.

III. EVEN IF THE PLAINTIFF-RESPONDENTS FAILURE TO APPEAL DID NOT LIMIT THIS COURT'S JURISDICTION TO REVIEW THE ARGUMENTS IN PLAINTIFF-RESPONDENTS' BRIEF, THEIR ARGUMENTS ARE WITHOUT MERIT.

A. THE DHCR DEFAULT FORMULA TO SET THE BASE DATE RENT SHOULD NOT BE USED IN THIS CASE

Plaintiffs repeat the litany of alleged wrongdoing by the Defendant that they made to the Court below to support utilizing the default formula (Pl Brief 11-17). The Court below rejected these claims and Plaintiffs did not appeal.

Plaintiffs do not cite a single case that has utilized the DHCR default formula as required by *Thornton v. Baron,* 5 NY3d 175 (2005) in the absence of fraud. Their citation (Pl Brief p.15) of *Altschuler v. Jobman 478/480, LLC.,* 135 AD3d 439 (1st Dept 2016) is inapt for two reasons: 1) unlike this case where the apartment was subject to stabilization before the J-51 was obtained and the Court below found that the owner relied on the DHCR opinions and regulations to deregulate, in *Altschuler* "the apartment was rent stabilized solely because of the receipt of J-51 tax benefits" and the owner could not and should not have relied on the DHCR; and 2) unlike this case where the Court below found no evidence of fraud, the plaintiff in *Altschuler* "established a colorable claim of fraud" and the "Defendant failed to refute these allegations of fraud." (*Altschuler supra* at 429)

Plaintiffs' counsels have repeatedly tried and failed to have courts to apply DHCR default formulas where owners did nothing wrong other than follow the DHCR's erroneous guidance. Their brief for the tenant at the Appellate Division in *Boyd* is one example (R.217-242). This Court reviewed that brief "pursuant to section 500.11 of the Rules" (*Boyd*, 23 NY3d at 1000) and rejected the Plaintiffs' counsels' call to utilize the default formula (R.236-238).

In an alternative to what is usually described as the DHCR default formula, Plaintiffs now seem to suggest this Court utilize the unique sampling of stabilized rents on the base date method used in *Matter of 160 E. 84th St. Assoc. LLC v. New York State Div. of Hous. & Community Renewal*, 160 AD3d 474 (1st Dept 2018) to establish the base date rent (Pl Brief pp. 13-15). This is the first time Plaintiffs are proposing this formula. This formula was not before the courts below. If the Plaintiffs wanted to advance this alternative to the method of calculating the base date rent used by the Court below they should have appealed. Their failure to appeal bars them from proposing the *Matter of 160 E.* method as an alternative. Moreover, the Court in *Matter of 160 E. 84th St.* only used the sampling method because of its mistaken belief that the holding in *Lucas* barred them from utilizing the rent in effect on the base date even though there was no fraud. (Def Brief p.27)

B. THERE IS NO REQUIREMENT THAT THE RENT BE FROZEN IN THIS POST *ROBERTS*, J-51 CASE

In the Court below and in Respondents' brief to this Court on appeal (Pl Brief pp.17-31) Plaintiffs argued that the rent should be frozen at the last registered rent because the owner did not register the apartment as stabilized during the period when, following DHCR direction, it reasonably believed the apartment was exempt. The Court below specifically addressed this argument.

> "We have recognized that in a *Roberts* situation where an owner had discontinued DHCR rent registrations based on a justifiable belief that the apartment was not subject to rent regulation, it should not be penalized by rolling back the rent to the last registered rent registered rent registered rent (*Park*, 150 AD3d at 113, citing *Jazilek v Abart Holdings*, LLC, 72 AD3d 529, 531, 899 NYS2d 198 (1st Dept 2010)." *Taylor supra* at 106).

Plaintiffs did not appeal this finding and cannot challenge it now.

The Court below was echoing what is clearly the majority position on rent freezes in *Roberts* cases.

> "When the owner treated the apartment as deregulated in 2005 and discontinued rent registrations with DHCR, it did so based on a justifiable belief that the apartment was no longer subject to rent regulation and such filings were unnecessary. Preventing the owner from charging what is otherwise a legal rent, solely based on the lack of registration filings during the period before *Roberts* and *Gersten* were decided, would unfairly penalize the owner for action that was taken in good faith, relying upon DHCR's own interpretation of the law, without furthering any legitimate purpose of the rent stabilization laws (see *Dodd v 98 Riverside Dr., LLC*, 2012 NY Slip Op

> 31653[U] [Sup Ct, NY County 2012])." *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 113 (1st Dept 2017)

Multiple other courts have rejected calls for a rent freeze in *Roberts* cases where there was no fraud. Plaintiffs' counsel represented the tenant-plaintiffs in *Stulz supra*, a case that is essentially identical to this one and where the owner did nothing wrong other than deregulate the apartment pursuant to DHCR direction and not register while it had a reasonable belief that the apartment was exempt. The court rejected their claim,

> "… that substantial indicia of fraud by defendant post-*Roberts* and in connection with the IAIs [individual apartment improvements] permitted them to utilize the last legal rent paid by a rent-stabilized tenant in the apartment for the calculation of the current legal rent and overcharges (citations omitted)." *Stulz supra* at 558.

Plaintiffs do not cite a single case where "in a *Roberts* situation" the rent was frozen at the last registered rent in the absence of fraud. Plaintiffs cite *Jazilek v. Abart Holdings, LLC*, 72 AD3d 529 (1st Dept 2010) to justify a freeze. As the quote from above shows, the Court below was aware of *Jazilek* and distinguished it. *Jazilek* dealt with a case where the owner falsely listed tenants and rents on the apartment registrations thereby rendering those earlier registrations nullities. There were no fraudulent registrations in the instant case.

Plaintiffs also give a misleading recitation of the applicable law. In citing RSL § 26-517(e), Plaintiffs (Pl Brief p.19) omitted the second half of the statute which undermines their interpretation that the statute requires a rent freeze and imposition of overcharges in this case. The omitted section reads,

> " . . . **and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration** [boldface added]. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee." § RSL 26-517(e)

Plaintiffs' focus on Defendant's alleged failure to register the apartment is ironic considering that they do not deny that they opposed Defendant's efforts to register the apartment and the DHCR directed Administrative Determination. The DHCR, citing Plaintiffs' objection, rejected that Determination and declined to register the apartment. (Def Brief 15-16, 44)

C. PLAINTIFFS PROVIDE NO GROUNDS FOR DOUBTING THE VALIDITY OF THE IMPROVEMENTS AND RENT INCREASE IN 2000 THAT BROUGHT THE LEGAL RENT ABOVE THE DEREGULATION THRESHOLD

In *Boyd* this Court did not require the owner to document the claimed $39,000 of improvements that had occurred more than four years prior to challenge

in the absence of credible evidence of fraud. In the proceedings below, Defendant submitted voluminous, detailed evidence of the IAIs (individual apartment improvements) that justified the rent increase in 2000 including contemporaneous paid bills and associated cancelled checks, a detailed breakdown of the contractors and suppliers and detailed descriptions of all the improvements. (R. 55-58 & R. 96-129) These were precisely the types of records the court in *Lucas* specified would establish the validity of an earlier rent increase while a J-51 was in effect, namely "bills from a contractor" and "records of payments for the renovations." *Lucas supra* at 402. DHCR routinely accepts these types of records to document IAIs (see DHCR Fact Sheet #12 and DHCR Policy statement 90-10 at R.139-140) as do courts without the need for discovery or trial testimony (See *Matter of Hanjorgiris v. Lynch*, 298 AD2d 251 (1st Dept. 2002)). The records were provided from the Defendants' records kept in the regular course of business by the current managing agent (R.81). She affirmed that the previous managing agent, who was the agent in 1999-2000 when the renovations were performed, had shown her where and how the records were normally kept, informed her of what business practices were followed in the past including the contemporaneous recording of all transactions, occurrences and events, and had become familiar with Defendant's contractors and

their billing practices and learned she could rely on their invoices (R.80-81 & R.214).

Plaintiffs did not provide an iota of evidence to cast doubt on those records, the renovations or the validity of the rent increase. Plaintiffs' complaint that "no evidence was presented as to the condition of the subject premises before the purported renovation" (Pl Brief p.4) is particularly absurd in light of the finding by the Court below that plaintiff,

> "…Jenkins was the first tenant to live in the apartment after the improvements were made. Despite having direct knowledge of the condition of the apartment, **Jenkins fails to identify or contradict a single improvement the owner claims it made**." [emphasis added] *Taylor supra* at 104

The Court below found that the itemized bills and records of payment including cancelled checks that the current managing agent affirmed were obtained from the Defendant's business records, "…are admissible under a hearsay exception and are properly considered on the owner's motion for summary judgment …[and are] sufficient detail to validate the 1/40th increase in the rent attributable to those improvements (citations omitted)." (*Taylor supra* at 104). Plaintiffs have never explained, either below or to this Court, which of these records are unreliable or why.

Instead, Plaintiffs repeat, practically verbatim, the arguments they made to the Court below (Pl Brief 31-40). The Court below rejected those arguments and Plaintiffs did not appeal.

Plaintiffs' arguments for rejecting Defendant's proofs of the IAIs and the validity of the rent increase are little more than innuendo and vague assertions that business records prove nothing and that discovery and a trial with testimony from people with personal knowledge are needed in every case. This Court's decision in

> "*Jemrock* [*Jemrock Realty Co. LLC v Krugman, 13 NY3d 924 (2010)*] does not, as plaintiffs argue, mandate that a hearing must be held each and every time a tenant challenges improvements. …Plaintiffs do not provide any basis for their claim that further discovery will lead to relevant evidence on the issue of fraud." *Taylor supra* at 104-05.

Reversing the Court below on the admissibility and probative value of the records introduced by the Defendant would be an invitation to future plaintiffs to simply wait long enough so that the persons involved in apartment improvements were deceased, commence an action, and then complain that persons with personal knowledge did not confirm the improvements or validate the records. In this case, the Plaintiff Jenkins, "…was given sufficient notice of the increases to the rent at or about the time she accepted the lease and moved in [2000] so as to trigger any rights she had at the time to contest the improvements." (*Taylor supra* at 104). Defendant did nothing to impair her challenging the improvements, the rent, and

the regulatory status before the previous managing agent died in 2008. Instead, the Plaintiff waited until 2014 and now complains that the previous managing agent is unavailable to discuss the IAIs.

D. PLAINTIFFS DID NOT APPEAL AND PROVIDE NO BASIS FOR CHALLENGING THE COURT BELOW'S CONCLUSION THAT DEFENDANT RELIED ON DHCR GUIDANCE

As with their discussion of the IAI records, Plaintiffs now seek to capitalize on their 14 year delay to complain that the previous, now deceased, managing agent is unavailable to confirm that Defendant relied on DHCR guidance when it deregulated the apartment (Pl Brief pp 14, 45-46). As in *Stulz,* where the Plaintiffs' counsel made the exact same arguments, they did not provide any, "...evidence sufficient to raise a question of fact as to defendant's stated reliance on DHCR's policy in decontrolling the apartment (citations omitted)." (*Stulz supra* at 558) Over five years of litigation the Defendant's current managing agent has repeatedly affirmed that she worked with the previous managing agent, was instructed in the building's business practices by him and that the Defendant relied on the DHCR guidance when it deregulated the subject apartment. Plaintiffs have provided nothing to dispute these affirmations or the presumption that many courts have adopted that, unless it is proved otherwise, owners were acting in accordance with

an understanding that "the responsible administrative agency and the real estate industry reasonably shared at the time." *Latipac Corp. v. BMH Realty*, 93 AD3d115, 124 (1st Dept. 2014). As this Court stated in *Borden v. 400 E. 55th St. Assoc. L.P.*, 24 NY3d 382, 398 (2014) "For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units…."

IV. THE COURT BELOW ERRED IN REMANDING TO DETERMINE WILFULNESS AND THE IMPOSITION OF TREBLE DAMAGES AND ATTORNEYS' FEES

The remand by the Court below to determine willfulness and consider the imposition of attorneys' fees was arbitrary, contrary to precedents of this Court and the First Department and based on a misapprehension of the facts (Defendant Brief 38-46). Plaintiffs do not answer Defendant's arguments or consider the reasons the Court below advanced for the remand. Instead, Plaintiffs repeat arguments they made below and their catch-all answer to all legal questions, that everything requires discovery and a trial (Pl Brief p.47).

A. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' CLAIM FOR TREBLE DAMAGES

Plaintiffs do not explain why this Court's decision in *Borden supra* at 398 holding that "a finding of willfulness is generally not applicable to cases arising in

the aftermath of *Roberts*" does not bar treble damages in this case (Defendant Brief pp.38-39). Plaintiffs do not cite any cases finding willfulness where, prior to *Roberts*, an owner deregulated an apartment while receiving a J-51 and the J-51 was not the sole basis for rent regulation.

The sole case Plaintiffs cite, *Matter of Obiora v. New York State Div. of Hous. & Community Renewal*, 77 AD3d 755 (2nd Dept 2010) (Pl. Brief p.46), involved a 5 unit building that had never been subject to regulation and only became subject to stabilization when it received a J-51. Therefore, unlike Defendant's building which was subject to regulation before receiving a J-51, the building in *Obiora* was unequivocally subject to rent stabilization solely by virtue of J-51 receipt. *Obiora* did not involve luxury deregulation. Unlike Defendant who in reliance on the RSC and the DHCR treated the apartment as free market, the *Obiora* landlord claimed ignorance of the law and treated the stabilized apartment as free market – she did not and could not claim she relied on DHCR's interpretation of the statute. Plaintiffs' counsel made similar unsupported claims regarding willfulness in another case that were rejected by Justice Gische.

> "Contrary to Rosenzweig's [Plaintiffs'] claims, this is not simply a case where a landlord is claiming ignorance of the law. Instead, 305 Riverside [Defendants] claims is [sic] was relying upon the interpretation of law made by the agency charged with its enforcement. This reliance was widely

accepted within the residential real estate community at the time. Nor is the claim of willfulness salvaged by Rosenzwieg's [Plaintiffs'] argument that once *Roberts* was decided, 305 Riverside's [Defendants'] failure to charge a correct rent was 'willful.'" *Rosenzweig v. 305 Riverside Corp.*, 2012 Slip Op. 51103(U) (S.Ct. NY Co.)

B. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' CLAIMS FOR ATTORNEYS' FEES

1. Plaintiffs Cannot Collect Fees Under RPL § 234 or the Lease in this Case Where the Lease Provision Does Not Allow Recovery for Declaratory Judgments or Overcharge Complaints

"The outcome of any claim pursuant to Real Property Law § 234 depends upon an analysis of the specific language of the lease provision at issue in each case to discern its meaning and import (citation omitted)." *Graham Ct. Owner's Corp. v. Taylor*, 115 AD3d 50, 56 (1st Dept. 2014)

"To be sure, an attorneys' fee clause in a lease may be narrowly tailored to permit fees only under certain circumstances, or for particular types of proceedings. Awards of fees under such provisions should be limited to the situations for which they are provided under the lease. This is true whether the landlord is seeking fees, or whether the tenant is seeking fees pursuant to the reciprocal right to fees under Real Property Law §234." *Id* at 57

In this case the lease clause narrowly limits the types of proceedings for which fees are recoverable: "The successful party in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment may recover reasonable legal fees and costs from the other party." (Lease Attorneys' fee clause ¶27, R.142). This case is neither an action to recover possession nor a non-payment case. Therefore, Plaintiffs cannot recover fees.

Plaintiffs ignore *Rossman v. Windermere Owner LLC*, 111 AD3d 429 (1st Dept. 2013) where the fact pattern and lease clause regarding attorneys' fees were identical to this case. *Rossman* held that attorney's fees were not available under the lease or RPL § 234 (Defendant Brief 44-45).

Instead, Plaintiffs bring up the earlier, inapposite case of *Marsh v. 300 West 106th St. Corp.*, 95 AD 3d 560 (1st Dept 2012) (Pl Brief 48). *Marsh* is easily distinguished from the instant case because it involved a tenant's claim for a breach of a covenant of the lease (the warranty of habitability). Neither this case nor *Rossman* involved a breach of a lease covenant.

2. Plaintiffs Should Not Collect Fees Under RSL § 26-516(a)(4) or RSC § 2526.1(d)

Award of attorneys' fees is not mandatory under either RSL § 26-516(a)(4) or RSC § 2526.1(d) and is in the nature of an additional penalty. Fees "may be assessed." Courts are free to exercise their discretion. *Matter of Waverly Assoc. v. New York State Div. of Hous. & Community Renewal*, 12 AD3d 272 (1st Dept. 2004) (affirming discretionary denial of tenant's claim for attorneys' fees against landlord in overcharge); *Matter of Mountbatten Equities v. New York State Div. of Hous. & Community Renewal*, 226 AD2d 128 (1st Dept. 1996) (affirming DHCR's discretion under RSL and RSC in denying attorney fees in an overcharge case).

Fees under these sections are unavailable here where there was no overcharge. Even if any overcharge is found, it would be manifestly unfair to levy fees in this case where Defendant-owner demonstrated, and the Court below found, that it relied on the DHCR, there was no fraud and the increase that brought the rent above the deregulation threshold was valid (Defendant. Brief pp.45-46).

Plaintiff tries to mislead this Court with its claim that, "Notably, in *Lucas*, the Appellate Division restored the tenant's claim for attorney's fees against the instant Defendant (who was also Sandra Lucas' landlord)." (Pl Brief 48) Plaintiff fails to mention that in *72A Realty Assoc. v. Lucas*, 32 Misc.3d 47 (App. Term 1st Dept 2011) the Appellate Term found it would be "manifestly unfair" to award attorney fees under either RSL § 26-516(a)(4) or RSC § 2526.1(d). The Appellate Division did not reverse that ruling. It only remanded, "to determine whether there is a clause in the lease that would entitle tenant to an award of attorneys' fees under Real Property Law §234 as a prevailing party." (101 AD3d 401).

V. SUMMARY JUDGMENT SHOULD BE GRANTED TO THE DEFENDANT-APPELLANT

Defendant-owner's detailed business records (paid bills, cancelled checks, registration statements, leases, correspondence) and affidavits established a prima facie case that the rent increase was valid, that Defendant relied on the DHCR and

that there was no fraud. The burden then shifted to Plaintiffs to establish through competent evidence that there remained a material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Plaintiffs were required to lay bare their proofs *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Throughout five plus years of litigation Plaintiffs have never laid bare any proofs disputing Defendants' submissions or any evidence establishing a material issue of fact. They have never even offered affidavits from the Plaintiff-tenants who have personal knowledge of the of the building and the subject apartment from before 2000 to the present. Instead, Plaintiffs have provided a hodgepodge of innuendo and repeated, unsupported claims of illegality and fraud as if mere repetition of those words could substitute for evidence.

There is no need to have a trial as Plaintiffs repeatedly request. The Supreme Court below found "In large part, the facts are undisputed." (R.8) The Appellate Division below concluded, "…plaintiffs failed to raise any issue of fact requiring a trial or further discovery." (*Taylor supra* at 103) It made specific findings that the Plaintiffs did not appeal. Despite ample opportunity, Plaintiffs have not made a substantive challenge to Defendants submissions or explained what additional information would be gleaned by further inquiry.

CONCLUSION

For all the reasons set forth above, it is respectfully requested that this Court reverse the portions of the Decision and Order of the Appellate Division, which 1) denied Defendants' motion for summary judgment dismissing all claims for overcharges, attorneys fees, and the penalty of treble damges; and 2) granted Plaintiffs' cross-motion declaring that Plaintiffs' apartment remains subject to rent stabilization and declaring that the Plaintiffs are the rent stabilized tenants thereof; and strike the arguments made by Plaintiffs to reverse those portions of the Decision and Order of the Appellate Division that were adverse to Plaintiffs that Plaintiffs did not appeal; and that this Court should grant such other and further relief as it deems just and proper.

Dated: New York, NY
July 1, 2019

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using WordPerfect.
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Dated: July 1, 2019

Murray Shactman