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FILE

October 16, 2019

John P. Asiello, Chief Clerk
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

VIA FEDEX

Re: *James Taylor and Tamara Jenkins v. 72A Realty Associates, L.P., et al.*
APL-2018-00226

Dear Sir/Madam:

As you are aware, our firm represents Plaintiffs-Respondents James Taylor and Tamara Jenkins in connection with the above referenced appeal. This letter is respectfully submitted on behalf of Plaintiffs-Respondents in response to the Court's letter dated September 17, 2019, to address the impact of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") on this appeal.

Rather than waste the Court's time repeating arguments already raised by Plaintiffs-Respondents, we respectfully incorporate by reference, and respectfully direct the Court's attention to, the contents of Plaintiffs-Respondents letter dated August 12, 2019, a true copy of which is annexed hereto as **Exhibit A**. The following responds to the issues raised by the Court's September 17, 2019 letter.

The HSTPA applies to the instant appeal.

There is no question that the HSTPA applies to the instant appeal, because the legislation expressly states so. The HSTPA was specifically enacted by the New York State Legislature to "take effect immediately and apply to any claims pending or filed on and after such date . . . [emphasis added]." HSTPA, Part F, § 7. Inasmuch as the Plaintiffs' case is still pending (the instant appeal from a non-final order involves the method used to set the rent – this case will require a remand to compute the overcharges and claims), the HSTPA expressly requires its application to this case.

Judicial economy and the need for consistent determinations strongly support the determination of issues involved in this appeal before this case is remanded.

The instant proceeding has been pending for over five (5) years. Justice Gische's rent-setting determination in this case, while fair, violates the rent stabilization laws because it rejects the primacy of proper registration to set the legal rent for rent stabilized apartments. This argument was raised and fully briefed Plaintiffs (*See*, Brief for Plaintiffs-Respondents, at Point III) – the legal

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rent is frozen where the landlord fails to file an initial, or annual, rent registration statement with DHCR. *Id.*

Rent Stabilization Law §26-516 has always determined that the legal rent, for purposes of overcharge, depends on registration and the registration history of the housing accommodation at issue. At the time this action was commenced, Rent Stabilization Law §26-516 stated, in pertinent and relevant part:

> the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. RSL §26-516(a)(i) (exp. June 13, 2019).

The former law incorporated two factors. First, proper initial and annual registrations are necessary and determinative of the legal rent. Second, the former four (4) years statute of limitation, and the prohibition against reviewing the rental history of an apartment for more than four (4) years prior to a complaint of overcharge, required that the rent could not be challenged after those four (4) years expired.

There were, of course, exceptions. *See e.g., 72A Realty Assoc. v Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dept, 2012) (rejecting blind acceptance of a base date market rent as the legal rent where a rent stabilized apartment was treated as an exempt unit while the building received J-51 tax benefits more than four years prior to the tenant contesting the regulatory status and legal rent); and *Grimm v. DHCR*, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010)(rejecting blind acceptance of the base date rent where the tenant alleged colorable claim(s) of fraud).

The state of appellate precedent created uncertainty as to whether a tenant *must* demonstrate fraud in order to look back more than four (4) years to set a legal rent where an apartment was wrongfully treated as deregulated more than four (4) years prior to the complaint, resulting in a market rent as the base date history – a rent that was not registered and had no relationship to rent stabilization or to the rental history of the apartment prior to a landlord's unlawful conduct – which may not have included fraud, but rather, an alleged "reliance" on prior DHCR policy. The related cases before the Court, calendared for argument in January, 2020 resulted in three disparate rulings: one that accepted the market rent on the base date as the legal base date rent (*Raden v. W 7879*, LLC, 164 A.D.3d 44084 N.Y.S.3d 30 [1st Dept. 2018]); one that rejected the four (4) year prohibition on examination of the rental history and instead, sought a reliable rent registration statement, then bridged the gap by applying increases as if the landlord complied with the law, to arrive at a base

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date rent (this case - *Taylor v. 72A Realty Assoc.*, L.P., 151 A.D.3d 95, 53 N.Y.S.3d 309 [1st Dept. 2017]); and one that rejected the *Taylor* and *Raden* approaches, and instead, remanded to DHCR, recognizing that DHCR was free to consider other methods (such as an averaging method under a default formula procedure (*Regina Metropolitan Co., LLC v. DHCR*, 164 A.D.3d 420, 84 N.Y.S.3d 91 (1st Dept. 2018) (*citing 160 East 84th Street Associates LLC v. DHCR*, 160 A.D.3d 474, 75 N.Y.S.3d 141 (1st Dept. 2018).

The HSTPA definitively resolved this conflict. Rent Stabilization Law §26-516 mandated a new method of setting the rent that: a) requires a "reliable" rent registration statement, b) requires rejection of a legal rent that resulted from fraud *or an unexplained increase in rent*, c) removed any bar to examination of the rental history, and instead, requires an examination as far back as reasonably necessary to arrive at a reliable annual rent registration, from which only lawful increases were applied going forward.

The new RSL §26-516 states, in pertinent part:

> the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. The division of housing and community renewal or a court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determinations. RSL §26-516 (June 14, 2019).

Moreover, the new law provides for DHCR and the Courts to consider "whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to *whether an unexplained increase in the registered or lease rents*, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable. . .." RSL §26-516(h)(i).

The HSTPA legislatively vindicates the entirety of Plaintiffs-Respondents' position in this matter.

First, the law clearly rejects the use of a base date market rent to set the base date legal rent.

Second, the law vindicates part of Justice Gische's holding in the instant case, by requiring that the DHCR and courts look back at least six (6) years, and as far back as necessary, to find the "most recent reliable annual registration statement" to set the rent.

Third, the HSTPA requires that only lawful increases and adjustments may be added to the rent set forth in that reliable annual registration statement going forward, to arrive at the base date rent. This

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provision prohibits the second part of Justice Gische's determination in this case – to permit all increases to the stabilized rent set forth in the most recent reliable annual rent registration to arrive at the base date rent, as if the landlord had complied with the law, instead of violating it.

In the instant case, RSL §26-516(a)(i) requires that the Courts use the last reliable rent registration filed on 1999, showing a legal rent of $1,464.00, to set the February 21, 2008 base date rent. However, RSL §26-517(e) stands clearly in the way of permitting any further increases, as the Defendant-landlord's 2000 annual rent registration statement, reporting the subject premises to be exempt from registration is false and unlawful, and thus, a nullity. *Thornton v. Baron,* 5 N.Y.3d 175 (2005) Thornton v. Baron, *Jazilek v Abart Holdings, LLC*, 72 AD3d 529 (1st Dept 2010). Moreover, the Defendant-landlord failed to file annual rent registration statements from 2001 through 2009. RSL §26-517(e), which imposes a rent freeze in the absence of even one proper and timely annual rent registration statement, clearly bars any further increase.

Notably, the HSTPA also effectively changed the base date from February 21, 2010 to February 21, 2008, and expanded the Plaintiffs' claims for 2 more years, by changing the statute of limitations for rent overcharge, and base date, from four (4) years to six (6) years prior to the filing of the complaint in this case. CPLR §213-a. The HSTPA also made attorney's fees mandatory, and increased the treble damages to apply to all overcharges, rather than beginning with two years prior to an overcharge complaint. Plaintiffs intend to move to amend their complaint to add the additional two years upon remand.

A recent case providing an in-depth analysis and application of the HSTPA to an overcharge defense/counterclaim with unfiled DHCR annual registration statements, entitled *Gold Rivka 2 LLC v. Rodriguez*, 2019 N.Y. Slip Op. 51341(U) (Civ.Ct. Bronx Co. 2019) is annexed hereto as **Exhibit B**. Notably, the court there agreed with Plaintiffs-Respondents, that RSL §26-517(e) barred increases from the reliable registration forward, in the absence of properly filed registration statements. *Id,* at *5 ("Upon permanently exempting the apartment from rent stabilization in 2010, and ceasing to register the apartment altogether, Petitioner is plainly prohibited from collecting any increases.") We respectfully request that this Court consider, and follow, this analysis and application of the HSTPA in the determination of this case.

We cannot overstate the importance of determining this issue now. Three disparate determinations from the Appellate Division, First Department – all resolved by the HSTPA, have become a legal nightmare for tenants, landlords and their counsel involved in overcharge cases, particularly in cases where J-51 and other units were wrongfully treated as exempt from rent stabilization, prior to the applicable statute of limitations. Addressing these issues now with binding and clear precedent will remove the uncertainty and, instead, permit confident, speedy and accurate resolutions of literally hundreds, if not thousands, of these cases.

We thank the Court for considering the foregoing.

Very truly yours,

Daphna Zekaria, Esq.

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cc.: Murray Shactman, Esq., *attorney for Defendant-Respondent*
James Taylor and Tamara Jenkins

EXHIBIT A

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August 12, 2019

John P. Asiello, Chief Clerk
New York State Court of Appeals
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VIA EXPRESS MAIL: EF 178823532 US

Re: *James Taylor and Tamara Jenkins v. 72A Realty Associates, L.P., et al.*
APL-2018-00226

Dear Sir/Madam:

As you are aware, our firm represents Plaintiffs-Respondents James Taylor and Tamara Jenkins in connection with the above referenced appeal. This letter is respectfully submitted on behalf of Plaintiffs-Respondents pursuant to Rule 500.6 of the Court of Appeals in response to Defendant-Appellant 72A Realty Associates Letter dated July 29, 2019, wherein Defendant-Appellant discusses the applicability of the rent amendments to the rent laws contained within the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") to the instant appeal. In their Letter dated July 29, 2019, a copy of which is attached hereto as **Exhibit A**, Defendant-Appellant argues that the new rent laws should not be applied to the instant proceeding. This argument directly contradicts the express, unambiguous language of the HSTPA.

On June 14, 2019, the New York State Legislature passed the Housing Stability and Tenant Protection Act of 2019, which was also signed by Governor Cuomo and became law on June 14, 2019. The HSTPA made several changes to New York's housing laws that are relevant to the issues raised in this appeal, including, *inter alia*, extending the statute of limitations for rent overcharge from four (4) years to six (6) years, providing the method to set the maximum legal regulated rent for rent stabilized apartments, extending lookback period for setting the maximum legal rent and determining overcharge claims, changing the base date from four (4) to six (6) years prior to an overcharge complaint, providing the standard(s) to be employed to determine whether a base date rent is reliable, and amending attorneys' fees and treble damages provisions. Many HSTPA provisions directly affect the issues involved in this proceeding, and the time periods and methods to be employed by the Court in determining the Plaintiffs-Respondents' claims. Notably, the HSTPA was specifically enacted to "take effect immediately and [shall] *apply to any claims pending* or filed on and after such date . . . [emphasis added]." As such, the HSTPA must be applied to this appeal.

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In its Letter, Defendant-Appellant claims that applying the HSTPA to the instant proceeding, as the New York State Legislature intended, would be "grossly unfair to honest owners like Defendant Appellant in post *Roberts cases...*" First and foremost, Plaintiffs-Respondents vigorously dispute Defendant-Appellant's characterization of itself as an "honest owner." In its letter, Defendant-Appellant claims to have relied upon "DHCR directions" when it unlawfully deregulated the subject premises in 2000 while in receipt of J-51 tax benefits. Yet, Defendant-Appellant conveniently omits that it blatantly violated 28 RCNY §5-03(f), the very code pursuant to which Defendant received said J-51 tax benefits, which unequivocally states that dwelling units in a building receiving J-51 tax benefits are to remain rent regulated for at least as long as the J-51 tax period.

Defendant-Appellant further claims that landlords receiving J-51 benefits prior to *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009) "had no reason to think they were limited to rent stabilization increases and that by exceeding them they were overcharging tenants." This directly contradicts the Appellate Division, First Department's decision in *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dept. 2011). In *Gersten*, this Court squarely held that *Roberts* did not constitute a change in law, and thus, was entitled to retroactive effect. *Gersten, supra,* at 197-98. Specifically, the *Gersten* Court found that:

> Although *Roberts*'s interpretation of the statute is inconsistent with regulations promulgated by DHCR, *the Court has not enunciated a new principle of law* [emphasis added]. Instead, as in *Gurnee*, the decision in *Roberts* was based on a pure statutory analysis, "dependent only on [an] accurate apprehension of legislative intent" (*Roberts,* 13 N.Y.3d at 285, 890 N.Y.S.2d 388, 918 N.E.2d 900, quoting *Kurcsics,* 49 N.Y.2d at 459, 426 N.Y.S.2d 454, 403 N.E.2d 159 [1980]). As such, *Roberts did not establish a new legal principle*, but rather "merely construed a statute that had been in effect for a number of years" [emphasis added] (*Gurnee,* 55 N.Y.2d at 192, 448 N.Y.S.2d 145, 433 N.E.2d 128). *Id.*

Moreover, the *Gersten* Court noted that "the ruling in *Roberts* was clearly foreshadowed in view of the clear language of the statute." *Id.* at 198. According to the Appellate Division, the *Roberts* decision did not change the law, it merely construed the unambiguous language of a statute that had been in effect for a number of years. Defendant-Appellant's attempt to characterize *Roberts* as an unforeseeable change in the law is merely an attempt to evoke undeserved sympathy for an unscrupulous landlord that refused to comply with the Rent Stabilization Laws.

Defendant-Appellant, like many landlords in New York City, faced, at best, conflicting laws, one of which permitted the landlord luxury deregulation while receiving J-51 benefits, and the balance of which required that the entire building remain rent stabilized while in receipt of J-51 tax benefits. At any time, the Defendant-Appellant could have brought a declaratory action to clarify the discrepancy between the J-51 laws and regulations and DHCR policy, which would have avoided this litigation altogether. Instead, Defendant-Appellant, like many other landlords, disregarded the conflict of laws and took a risk deregulating while in receipt of J-51 benefits, because that was the

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path that brought them more money. Then they reached, argued and/or waited for more excuses and defenses to their circumvention of the rent stabilization system, rather than complying with the law in 2009, when *Roberts* was decided. Ten (10) years after *Roberts*, Defendant-Appellant is now asking this Court to interfere with the new legislation's clear mandate that the HSTPA apply to all pending proceedings, continuing its two (2) decade quest to evade the Rent Stabilization Laws. Mistake of law is not a proper defense, and Defendant-Appellant should not be surprised that its risky venture failed.

Next, Defendant-Appellant argues that the retroactive application of the HSTPA to the instant appeal is unconstitutional under both the United States and New York State Constitutions. In *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 65 N.Y.S.3d 94 (2017), this Court squarely held that "the test of due process for retroactive legislation 'is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose' (*Pension Benefit Guaranty Corporation v R. A. Gray & Co.*, 467 US 717, 730 [1984])." *Id.* at 158. "'A challenged statute will survive rational basis review so long as it is rationally related to any conceivable legitimate State purpose' (Myers v Schneiderman, 30 NY3d 1, 15 [2017] [internal quotation marks omitted and emphasis added])." *Id.* In *American Economy Ins. Co.*, this Court further noted that:

> As the Supreme Court has stated, "the constitutional impediments to retroactive civil legislation are now modest" (*Landgraf*, 511 US at 272 [emphasis omitted]). "Absent a violation" of a specific constitutional provision, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope" (id. at 267).
>
> Moreover, "'[i]t is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality'" (*Matter of County of Chemung v Shah*, 28 NY3d 244, 262 [2016], quoting *Cohen v Cuomo*, 19 NY3d 196, 201 [2012]; see *Farrington v Pinckney*, 1 NY2d 74, 78 [1956]). Plaintiffs bear the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt (see *County of Chemung*, 28 NY3d at 262; *Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 593 [2013], cert denied 571 US 1071 [2013]; *LaValle v Hayden*, 98 NY2d 155, 161 [2002]; *Cook v City of Binghamton*, 48 NY2d 323, 330 [1979]). *Id.* at 149.

The retroactive application of the HSTPA is sufficiently justified by a rational legislative purpose to withstand Defendant-Appellant's due process challenge. The legislative purpose underlying the HSTPA can be summarized as follows:

> Legislative findings and declaration of emergency. The legislature hereby finds and declares that the serious public emergency which led to the enactment of the existing laws regulating residential rents and evictions continues to exist; that such laws would better serve the public interest if certain changes were made thereto,

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> including the continued regulation of certain housing accommodations that become vacant.
>
> The legislature further recognizes that severe disruption of the rental housing market has occurred and threatens to be exacerbated as a result of the present state of the law in relation to the deregulation of housing accommodations upon vacancy. The situation has permitted speculative and profiteering practices and has brought about the loss of vital and irreplaceable affordable housing for working persons and families.
>
> The legislature therefore declares that in order to prevent uncertainty, potential hardship and dislocation of tenants living in housing accommodations subject to government regulations as to rentals and continued occupancy as well as those not subject to such regulation, the provisions of this act are necessary to protect the public health, safety and general welfare. The necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination. HSTPA, Part D, § 1, 2019 Sess. Law News of N.Y. Ch. 36 (S. 6458) (McKINNEY'S).

As the Court can see, the legislative purpose underlying the HSTPA is to preserve affordable housing and alleviate a housing crisis that the New York State Legislature describes as a "serious public emergency." The HSTPA furthers this purpose by providing tenants with meaningful legal recourse against landlords, like Defendant-Appellant, who unlawfully deregulate rent stabilized units and charge rent stabilized tenants an unlawful market rate rent. Providing tenants with meaningful legal recourse against landlords who evade rent regulation preserves affordable housing by protecting rent stabilized units from unlawful deregulations and ensuring rent stabilized tenants are charged a lawful, regulated rent. It bears emphasis that rent stabilized tenants are the primary enforcement mechanism of the rent stabilization laws, not government actors. Based on the foregoing, the retroactive application of the HSTPA is justified by a rational legislative purpose.

Defendant-Appellant argues that the retroactive application of the HSTPA is unfair because it will subject Defendant-Appellant to greater liability than under the prior Rent Stabilization Laws. However, in *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 444 N.Y.S.2d 571 (1981), this Court squarely held, in the context of amending a complaint after trial, that an increase in liability alone is not prejudicial to a litigant. In *Loomis*, this Court held that "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position..." *Id.* at 23.

It also bears emphasis that the Courts of this jurisdiction have retroactively applied amendments to the Rent Stabilization Laws that shortened the statute of limitations against tenants in the context of a pending rent overcharge complaint, which has been found not to violate tenants' due process rights. For example, in *Brinckerhoff v. NYS DHCR*, 275 A.D.2d 622, 713 N.Y.S.2d 56 (A.D. 1st

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Dept. 2000) (leave denied 96 N.Y.2d 712), the Appellate Division, First Department:

> reject[ed] petitioners' claim that the retroactive application of the amendments to Rent Stabilization Law § 26-516 (a) (2), which effectively shortened the limitations period for their already pending rent overcharge complaints, denied them due process (*see, id.*, at 463-465; *Matter of Gelston v New York State Div. of *623 Hous. & Community Renewal*, 177 Misc 2d 431, 438; *cf., Zafra v Pilkes, supra*). *Id.* at 622-23.

Defendant-Appellant cites *James Sq. Assoc. LP v. Mullen*, 21 N.Y.3d 233, 970 N.Y.S.2d 888 (2013) in support of its argument that the three (3) factor balancing of the equities test pronounced in *Replan Dev. v. Dept. of Hous. Preserv. & Dev. of City of N.Y.*, 70 N.Y.2d 451, 522 N.Y.S.2d 485 (1987) should be employed to determine whether retroactive application of the HSTPA violates Defendant-Appellant's due process rights. However, this multi-factor test specifically applies in the context of retroactivity provisions of a tax statute, which the HSTPA is unequivocally not. This Court has not extended the three (3) factor test employed in *James Sq. Assoc. LP* and *Replan Dev.* to any other retroactive provision of law outside the realm of tax statutes. The standard to determine whether retroactive application of the HSTPA violates Defendant-Appellant's due process rights is whether the retroactive application of the HSTPA is justified by a rational legislative purpose, as set forth in *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 65 N.Y.S.3d 94 (2017). As discussed above, the HSTPA is sufficiently justified by a rational legislative purpose to withstand Defendant-Appellant's due process challenge.

Defendant-Appellant repeatedly claims that it did not overcharge Plaintiffs-Respondents under the prior Rent Stabilization Laws because it adopted the free market rent that it unlawfully charged Plaintiffs-Respondents on the base date as the legal regulated rent. However, the Appellate Division, First Department rejected Defendant-Appellant's argument in this regard *while the prior law was still in effect. See Taylor v. 72A Realty Assoc., L.P.*, 151 A.D.3d 95, 53 N.Y.S.3d 95 (A.D. 1st Dept. 2017). Under the old rent laws, the Court below properly declined to set the legal rent on summary judgment based on the following:

> While there is no evidence of fraud by the owner in setting plaintiffs' initial rent in 2000, and the base date for setting the rent is February 21, 2010 (*cf. Grimm*, 15 NY3d 358), the owner's motion for summary judgment was properly denied. The owner is still required to prove what the legally regulated rent was on the base date (*Grimm* at 365, citing 9 NYCRR 2520.6 [e], [f] [1]; 2526.1 [a] [3] [i]). At bar, the owner simply claims that because it charged plaintiffs $3,500 a month in rent pursuant to a lease and it later registered that rent with DHCR, that amount should be accepted as the legal, regulated rent for the apartment and used by the court to decide plaintiffs' overcharge claims. We know, however, that the rent set in that lease was based on the owner's misapprehension that apartment 5M was not subject to rent stabilization. Although the owner could charge plaintiffs a rent greater than $2,000 per month in 2000, this did not withdraw the apartment from rent

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stabilization; it remained rent-stabilized despite a rent in excess of $2,000. This was due to the fact that the same tenants (plaintiffs) remained in occupancy throughout the relevant time. Rent stabilization, at a minimum, entitled plaintiffs to renewal leases at capped increases in rent (*Park*, 150 AD3d at 111). There is no evidence in this record that the rent owner charged thereafter was limited to lawful rent guidelines increases rather than fair market, unregulated rent. We cannot reconcile a mechanical application of CPLR 213-a and give effect to the retroactive application of *Roberts*, as we must (*Gersten*, 88 AD3d at 198), without considering the permitted rent stabilization increases after the expiration of the 2000 lease and preceding February 21, 2010. Only in this manner can it be determined whether the rent the owner charged plaintiffs on the base date bears any relation to a permissible, rent-stabilized rent. In other words, a contrary ruling would essentially allow the owner to collect rent that might be in excess of what it could have otherwise charged plaintiffs, based upon its own misapprehension of the law (*id.*). Therefore, a determination of the legally permissible rent-stabilized rent that plaintiffs should have been charged on the base date requires a mathematical calculation of the applicable rent guidelines (and any other) legally permissible increases since February 2002, the expiration date of the first lease.

Although the owner filed retroactive DHCR registrations in 2014, these registrations do not establish that the 2010 rent it charged plaintiffs was in accordance with the applicable rent stabilization guidelines. These registrations were filed less than four years before the filing of plaintiffs' complaint and they are only retroactive to 2009. They do not address the period of time after Jenkins's initial lease through 2009. Thus, they are subject to dispute. We have recognized that in a *Roberts* situation where an owner had discontinued DHCR rent registrations based upon a justifiable belief that the apartment was not subject to rent regulation, it should not be penalized by rolling the rent back to the last registered rent (*Park*, 150 AD3d at 113, citing *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]). However, on the other hand, an owner cannot use the lack of registration or misapprehension of the law as a sword to establish a rent that clearly bears no relation to the appropriate parameters of rent regulation.

The timing of these retroactive registrations may play a role in this case on the issue of willfulness. We have recognized that at least by March 2012 the law clearly required the retroactive return of apartments like these to rent regulation (*Park*, 150 AD3d at 110). In the *Lucas* decision involving this very owner and the same building (101 AD3d 401), we made it clear that an improperly deregulated apartment was required to be returned to rent stabilization and that the base date rent should not have been set at the market rate (*id.* at 402). The owner here failed to register apartment 5M and readjust the rent until 2014 when faced with this litigation. These facts preclude any determination at this time about whether an overcharge, if any, was willful, and the owner should be allowed the opportunity to

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> explain the reasons for such delay and the steps, if any, it undertook to bring itself in compliance. Legal fees also cannot be determined without the underlying issues of overcharge and penalty being decided. *Id.* at 105-07.

The HSTPA's changes to the Rent Stabilization Laws are remedial in nature, in that they are designed to cure defects and loopholes in the prior laws that exacerbated the affordable housing crisis by allowing landlords to circumvent rent regulation. In short, many of the more stringent limitations for rent overcharge claims and the time periods employed to look back and determine the legal rent involved in those claims, emanating from both prior legislation and binding case law, have been overruled, supplanted and/or modified by the New York Legislature. For example, in *Thornton v. Baron,* 5 N.Y.3d 175, 181 (2005), this Court expressed concern that under the prior laws

> a landlord whose fraud remains undetected for four years—however willful or egregious the violation—would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases. Indeed, an unscrupulous landlord in collusion with a tenant could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature when it enacted the RRRA. Its purpose was to alleviate the burden on honest landlords to retain rent records indefinitely (see Gilman, 99 N.Y.2d at 149, 753 N.Y.S.2d 1, 782 N.E.2d 1137), not to immunize dishonest ones from compliance with the law. *Id.*

The HSTPA codified a solution to this loophole that allowed landlords to legalize an unlawful, market rate rent after just four (4) years by authorizing Courts to determine whether the base date rent is reliable before adopting it as the legal regulated rent. These remedial provisions ensure that rent stabilized tenants are charged true, stabilized rents rather than a free market rent that was in effect on the base date but that bears no relation to the unit's actual legal regulated rent. Moreover, pursuant to *Grimm v. DHCR*, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010), in the absence of fraud Courts were prohibited from examining the rent history beyond four (4) years in order to set the legal regulated rent for a rent stabilized unit. In enacting the HSTPA, the Legislature affirmatively rejected the application of *Grimm* to these types of cases, by empowering the Courts to review an apartment's rent history as reasonably necessary to set a reliable, legal regulated rent.

Contrary to Defendant-Appellant's claims, the HSTPA was not designed to penalize landlords for previously lawful conduct. The HSTPA was designed to preserve affordable housing and protect the integrity of the rent stabilization system by eliminating loopholes in the prior laws that enabled landlords to evade the requirements of rent regulation.

LAW OFFICE OF
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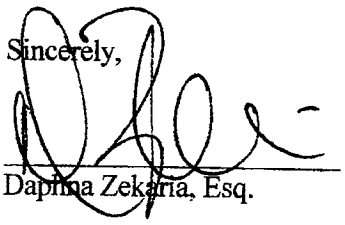
Based on the foregoing, this Court should honor the Legislature's express, unambiguous intention and apply the HSTPA to this pending appeal.

Thank you for your attention to this matter. Please contact our office with any questions.

Sincerely,



Daphna Zekaria, Esq.

cc.: Murray Shactman, Esq., *attorney for Defendant-Respondent*
James Taylor and Tamara Jenkins

Ex. A

Murray Shactman
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July 29, 2019

John P. Asiello, Chief Clerk
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: **Taylor v. 72A Realty Associates**
APL-2018-00226

This letter is respectfully submitted on behalf of Defendant-Appellant 72A Realty Associates pursuant to Rule 500.6 of the Court of Appeals to discuss whether the recent amendments to the rent laws contained in the Housing Stability and Tenant Protection Act of 2019 (HSTPA) should be applied to the appeal of *Taylor v. 72A Realty Assoc., L.P.*, 151 AD3d 95 (1st Dept. 2017) (found at R.265-284). The statute says it should be applied to pending cases.

The new rent law should not be applied to this case which started in 2014 and was decided in 2017 because it is grossly unfair to honest owners like Defendant-Appellant in post *Roberts* overcharge cases and is unconstitutional under both the U.S. and New York State constitutions. The new statute significantly expands overcharge liability in pending cases for owners who did nothing wrong other than follow DHCR directions in luxury deregulating apartments while J-51 exemptions were in effect. Unlike the usual overcharge case where an owner has all the information to calculate legal rents and avoid an overcharge, J-51 owners before *Roberts* had no reason to think they were limited to rent stabilization rent increases and that by exceeding them they were overcharging tenants. As this Court observed in *Borden v 44th E. 55th St. Assoc. L.P.*, 24 NY3d 382, 398 (2014), unlike the usual overcharge case, "a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*."

The new statute expands liability for past conduct by:

1. expanding overcharge liability from four to six years;

2. changing the way overcharges are calculated, moving the calculation of the base date rent from the four-year rule (i.e., the rent charged on the four-year base date) – to a new method of calculation and base date in § RSL 26-516:

   "the legal regulated rent for purposes of determining an overcharge, shall be the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, ...plus in each case any subsequent lawful increases and adjustments. ...[Courts and the DHCR] shall consider all available rent history which is reasonably necessary to make such determinations."

3. expanding liability for the penalty of treble damages from two to six years; and

4. changing the penalty of attorneys' fees from discretionary to mandatory.

The new statute will also unconstitutionally penalize owners for failure to maintain records from the entire rental history when for the previous 22 years the statute, this Court, and the relevant administrative agency (DHCR) assured owners they need not maintain rental records beyond four years.

In *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136 (2017) this Court, relying on *Landgraf v. USI Film Products,* 511 US 244, held that,

> "A statute has 'retroactive effect,' however, if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (*Id* [*Landgraf*] at 280)." *American Economy* at 147.

Applying the HSTPA to this case clearly fills the retroactive bill.

Due process challenges to retroactive legislation must satisfy a test that "...requires 'a legitimate legislative purpose furthered by rational means.' (*General Motors Corp.*, 503 US at 191)." *American Economy supra* at 157-158. "[T]he justifications that suffice for the prospective nature of a legislative enactment may not suffice for its retroactive nature..." *Id* at 158. The general question of whether or not the HSTPA is a rational means to address a legitimate legislative purpose is the subject of a recently filed action in the federal District Court for the Eastern

District of New York. Regardless of the outcome of that case, there has been no showing or articulation by the legislature, "that the *retroactive* application of the legislation is itself justified by a rational legislative purpose." (emphasis added) *American Economy supra* at 158. This is quite different than the 1997 amendments to the rent law where the legislature made clear it was amending the statute and applying it to pending cases to counter mistaken court decisions that permitted examination of the rental history before the four-year period in overcharge cases (Defendant-Appellant's 2/6/2019 Brief to this Court pp.5-6; hereinafter Def Brief). The 1997 amendments were remedial. Unlike the HSTPA, they did not change the substance of the statute.

Applying the statute to pending post *Roberts*, J-51 cases will do nothing to accomplish the putative purpose of the new statute, preserving affordable housing. No tenants will be restored to apartments, no tenants will be spared eviction. All application to these pending cases will do is punish owners who relied on the DHCR with higher overcharges, much higher treble damages, and the added imposition of mandatory attorneys' fees.

> "The United States Supreme Court stated in *Landgraf v USI Film Products* that '[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted' (511 U.S. 244, 265 [1994]). *James Sq. Assoc. LP v. Mullen*, 21 NY3d 233, 246 (2013)

In *James Sq., supra,* this Court held that retroactivity provisions of tax statutes,

> "...are not necessarily unconstitutional and are generally tolerated and considered valid if for a short period (*Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 N.Y.2d 451, 455 [1987]). ...In *Replan,* this Court laid out a multi-factor balancing-of-equities test to determine whether a retroactive tax infringes on a taxpayer's due process rights (*see* 70 NY2d at 456). The important factors in determining whether a retroactive tax transgresses the constitutional limitation are (1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness of ... reliance on the old law,' (2) 'the length of the retroactive period,' and

(3) 'the public purpose for retroactive application' (*id.*)."
James Sq. supra at 246.

Applying this three factor test, this Court in *James Sq.* ruled against the state and found the retroactive amendments unconstitutional because the plaintiff did not have forewarning of a change in the law and no opportunity to alter their behavior in anticipation of the amendments; the period of retroactivity – 16-32 months – was excessive; and the State failed

> "to set forth a valid public purpose for the retroactive application of the 2009 amendments. ...It was not correcting an error in the tax code as in *Carlton*, or to prevent 'the loss of [single room occupancy] housing and to discourage the precipitous eviction of tenants' as in *Replan* (70 NY2d at 457)." *James Sq. supra* at 249.

While the rent law at issue in this case is not a tax statute, the same three factor test applies to make retroactive application of the HSTPA to this pending case unconstitutional. Defendant-appellant had no forewarning of this complete overhaul of the rent statute and had no opportunity to alter its behavior once it became clear to Defendant in 2013, after the final denial of permission to appeal in *72A Realty v. Lucas,* that Plaintiff-tenants had to be considered rent stabilized (Def Brief pp.14, 42). Defendant, relying on the previous statute and multiple decisions of this Court and the First Department thought it had to go back to the four-year base date rent to determine if there were any overcharges. Defendant calculated that there was no overcharge and no need to adjust the rent because all the rent increases in the previous four years were within the statutory guidelines (Def Brief pp.14-15). It offered the Plaintiffs a rent stabilized lease at the same rent *before* the Plaintiffs commenced this action. The new statute changes the base date from four to six years and the mechanism for calculating the base date rent which, if applied to this case, will result in an overcharge and mandatory attorneys' fees. Had the Defendant anticipated in 2013 that a new rent law would be enacted in 2019 it would have adjusted the rent based on a six-year rather than four-year base date and refunded overcharges, if any, thereby avoided several years of overcharges, a large treble damages penalty and the instant litigation which under the new statute will result in an attorneys' fee penalty.

Like the retroactive statute in *James Sq.*, the retroactive period of the HSTPA is excessive. Transactions that are many years or decades old will have to be re-examined. In the instant case rent recalculations will stretch back to 2000 – 19 years ago.

Finally, as outlined above, the legislature failed "to set forth a valid public purpose for the retroactive application" to pending cases of the new statute.

Imposing the new penalties in the HSTPA to pending, post *Roberts* cases is manifestly unfair and unconstitutional. Owners, including Defendant-Appellant, will be penalized for raising rents and failing to register an apartment at a time when, relying on the DHCR, they reasonably believed the subject apartment was permanently exempt and could not be registered.

Applying the new statute to this particular case will be especially unfair and unconstitutional because it will change this case from one where there should be no overcharge and therefore, no attorneys' fees and no treble damages (Def Brief pp.8, 14-15, 43-45) to a case where there is an overcharge. That will unconstitutionally subject the Defendant to retroactive penalties of mandatory attorneys' fees and treble damages.

The new statute changes the base date and the way overcharges are calculated. Under the old statute, in the absence of fraud, the base date rent was the rent in effect four years prior to the commencement of the overcharge action (see *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 365 (2010); *Matter of Boyd v, New York State Div. of Hous. & Community Renewal* 23 NY3d 999 (2014); RSC § 2526.1(a)(3)(i) & RSC § 2520.6(e); Def Brief pp.20-22). Plaintiff-Respondents have never contested that there would be no overcharge in this case with that method (Def Brief p.8). The new statute changes the base date from four to six years and says the entire rent history should be used to ascertain a "reliable" rent on the base date which will result in there being an overcharge in this case which would require the Defendant to pay overcharges and be subject to the penalty of treble damages.

Applying the new statute to this case will also subject Defendant-Appellant to the penalty of attorneys' fees, despite the fact that the Court below found that the Defendant proved the validity of its improvements to bring the rent over the deregulation threshold, proved it relied on the DHCR to deregulate the apartment, and proved that there were no indicia of fraud. The new statute amends § RSL 26-516(a)(4) to change attorneys' fees in overcharge cases from discretionary (owner "may" be assessed) to mandatory ("shall" be assessed). If moving from a four to a six-year base date and changing the method of calculating the base date rent changes this case from one where there were no overcharges to one where there are overcharges, the new statute will unconstitutionally penalize the Defendant by imposing attorneys' fees.

In *Landgraf supra*, a new statute creating a right to recover compensatory and punitive damages for discrimination – the Civil Rights Act of 1991 - became law while a petitioner's appeal of an earlier civil rights action was pending. The Court held that the subsection authorizing retroactive punitive damages "would raise a serious constitutional question."

> "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. See *Turner Elkhorn,* 428 U.S. at 17 (Court would 'hesitate to approve the retrospective imposition of liability on any theory of deterrence...or blameworthiness'); *De Veau v. Braisted,* 363 U.S. 144, 160, 4 L. Ed. 2d 1109, 80 S. Ct. 1146 (1960) ('The mark of an *ex post facto* law is the imposition of what can be fairly designated punishment for past acts'). See also *Louis Vuitton S.A. v. Spencer Handbags Corp.,* 765 F.2d 966, 972 (CA2 1985) (**retroactive application of punitive treble damages provisions** of the Trademark Counterfeiting Act of 1984 'would present a potential *ex post facto* problem')." (emphasis added) *Landgraf supra* at 281.

The Supreme Court later clarified that.

> "A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." (citations omitted) *Smith v. Doe*, 538 U.S. 84, 92-93 (2002)

The rent statue explicitly labels both overcharges and treble damages as a "penalty" (RSL § 26-516(a)). While regular overcharges can be conceived of as compensation, it is impossible to describe treble damages as anything other than punitive or a penalty. "By any reasonable measure, treble damages amount to a substantial penalty. It is punitive in nature and obviously designed to severely punish owners who deliberately and systematically charge tenants unlawful rents...." *Matter of H.O. Realty Corp. v. DHCR*, 46 AD3d 103,108 (1st Dept. 2007). Yet, as this Court recognized in *Borden supra*, in J-51 cases in general, owners who relied on the DHCR did not "deliberately and systematically" overcharge. In this case in particular, the Court below found that the Defendant-Owner relied on the DHCR, documented all the improvements and there was no evidence of fraud (*Taylor* supra at 98-99, 103-105). Nevertheless, the Court below ignored *Borden* and remanded for a determination of willfulness and the possible

imposition of treble damages and attorneys' fees (Def Brief 8-9, 38-39). Unlike *Borden,* where the tenant-plaintiffs sought to waive the treble damages penalty, the Plaintiffs in this case specifically sought treble damages (R.24-25).

It would also be hard to describe the mandatory imposition of attorneys' fees as anything other than punitive or a penalty (RSC § 2526.1(d) describes overcharge attorneys' fees as "an additional penalty"; *Matter of Mountbatten Equities v New York State Div. of Hous. & Community Renewal*, 226 A.D.2d 128, 130 (1st Dept. 1996) describes the attorneys' fees in RSC § 2526.1(d) and RSL § 26-516(a)(4) as a "sanction").

Since applying the new statute rather than the old statute will change this case from one where there was no overcharge to one where there is an overcharge that will subject Defendant to penalties of treble damages and mandatory attorney's fees, it would create an *ex post facto*, constitutional problem.

In addition, the new statute retroactively expands the period for overcharges in pending cases from four to six years and increases the liability for "a **penalty** equal to three times the amount of such overcharge" from two to six years. This too raises "a serious constitutional question."

In *Lacidem Realty Corp. v. Graves*, 288 NY 354, 357 (1942) this Court held,

> "'Whether a statute which by its express terms is retroactive will be sustained is usually a question of degree' (*People ex rel. Beck v. Graves,* 280 NY 405, 409). The situation here is sufficiently like that in *People ex rel. Beck v. Graves* (*supra*) to require a similar result."

The case involved 1941 amendments taxing landlords' submetering operations that the legislature made retroactive to 1937. This Court held,

> "Under the circumstances we hold that this provision for full retroactivity 'is so harsh and oppressive as to transgress the constitutional limitation.' (*Welch v. Henry,* 305 U.S. 134, 137) We do not think this is a case where 'adequate forewarning' answers the question." *Lacidem supra* at 357.

If making taxes retroactive for four years was "harsh and oppressive" then expanding overcharge liability from four to six years, extending treble damage liability from two to six years and turning a case where there was no overcharge

into one where there is an overcharge with mandatory attorneys' fees and a possible treble damages "penalty" is certainly "harsh and oppressive."

Under the old four-year rule liability for years five and six prior to the complaint was time barred. This new statute extend the statute of limitations and revives the Plaintiffs' cause of action for years five and six. This Court addressed whether the legislature could constitutionally revive a cause of action which had been barred prior to an amended statute in *Gallewski v. H.Hentz & Co.*, 301 NY 164 (1950).

> "...the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated." *Gallewski supra* at 174.

In *Gallewski*, where a brokerage firm made an unauthorized sale of securities owned by a man trapped in the Netherlands by the Nazi invasion who was subsequently murdered in a concentration camp, the case was indeed exceptional and denying recovery would have been a serious injustice. But there is nothing remotely resembling those circumstances in this case.

Similarly, in *Hymowitz v. Eli Lilly & Co.*, 73 NY2d 487, 507-508 (1989), this Court found that legislature "consciously created... a legislative response reviving previously barred actions" for hundreds of cases of women who suffered life threatening injuries from exposure to the drug DES. The long latency period between exposure and illness meant that these women were time barred and left without a remedy. This Court stressed "that the DES situation is a singular case" and presents an "unusual scenario, [in which] it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than those who were injured by the use...." *Hymowitz supra* at 508. The Court found that the "exceptional circumstances" presented satisfied the requirements for the constitutionality of the claim revival statute under the New York State constitution (*Hymowitz supra* at 513-514).

This case is not even remotely like *Hymowitz*. The only damage Plaintiffs might have suffered would be a small amount of money. They were not physically injured or displaced from their apartment. Moreover, unlike *Hymowitz*, there are no concerns about latency that impaired Plaintiffs' rights. The Court below found Plaintiffs had all the notice and information they needed in 2000 to challenge the rent increase over the deregulation threshold, challenge the DHCR policy of luxury

deregulation while a J-51 was in effect or claim an overcharge (*Taylor supra* at 103-104). The Defendant had provided most of this information to the Plaintiffs and the rest was available through public records. The Defendant did nothing to hide relevant information or impede Plaintiffs' legal rights. Yet Plaintiffs waited 14 years to commence an action.

More recently, this Court held that, "...a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litigation,* 30 NY3d 377, 400 (2017). But there is little injustice to remedy in this pending, post *Roberts* case. Unlike the run of the mill overcharge case, post *Roberts* cases involve the luxury deregulation of apartments under the direction of the relevant administrative agency (DHCR) for tenants who for the last 30 years, until this new statute, the legislature had determined didn't need the protection of rent stabilization. The only class of people the new law will protect from injustice in post *Roberts* J-51 cases is the wealthy who were luxury deregulated. The fact that the legislature has now decided that people making more than $200,000 a year need rent stabilization protection does not turn the possibility that some wealthy tenants who were mistakenly luxury deregulated while a J-51 was in effect and may have paid a little more than they should have into a grave "injustice." The Plaintiff-tenants in the instant case have never denied that they are successful, Oscar winning screenwriters and directors who sought and could easily afford the subject apartment at market rates (Def Brief p.11; R.55). Nor is the new statute, which not only extends the statute of limitations but also expands compensatory and treble damage liability, turns cases like the instant one from no overcharge to positive overcharge, and then mandates attorneys' fees, a "reasonable" response where the Defendant did nothing wrong other than follow DHCR direction.

Unlike the claim revival statutes at issue in *World Trade Center*, *Gallewski,* and *Hymowitz* which only extended the statute of limitations, the HSTPA combines a change the base date from four to six years and the period of liability from four to six years with a change in the substantive law to which that limitations period applies – i.e., how the legal regulated rent is determined and overcharges computed along with a new, longer liability period for treble damages. It would be as if the legislature simultaneously changed the statute of limitations for medical malpractice, the definition of malpractice and how damages are calculated. Simultaneously changing the statute of limitation and the substantive law in a pending case is neither "reasonable" nor a rational means of addressing legitimate legislative concerns in pending cases.

Finally, it should be noted that the new statute will likely be unconstitutional as applied in many pending and even future cases. The old statute and multiple decisions of this Court and the First Department held that the rental history prior to the four-year base date could not be consulted to calculate an overcharge in the absence of fraud (Def Brief pp.20-28). Landlords were told they could discard older records. (See *Thornton v. Baron*, 5 NY3d 175, 181 (holding that the "purpose [of the four-year rule] was to alleviate the burden on honest landlords to retain rent records indefinitely"); *Matter of Boyd, supra* (holding that in the absence of fraud an owner need not produce renovation records to justify a rent increase more than four years prior to the overcharge complaint)).

The new statute in the amended RSL § 26-516(h) says that DHCR or a court, "shall consider all available rent history which is reasonably necessary" to determine the legal regulated rents and overcharges. The statute explains at length that this includes all registrations or other public records and private records maintained by the owner or tenants. While the new statute amends § RSL 26-516(g) to purportedly change the number of years an owner is required to maintain or produce records from four to six it cautions, "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." This gives tenant-litigants license and the incentive to challenge every past registration and rent increase, no matter how old. The evidentiary burden is completely on the owner. Any owner who, in reliance on the old statute, discarded records, may now not have the records to document the legal rents and registrations and may be penalized by having the rent revert to an ancient registered rent or determination by a default formula resulting in the penalties of treble damages and attorneys' fees. This violates,

> "... the basic protection against 'judgments without notice' afforded by the Due Process Clause, *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (STEVENS, J., concurring in judgment), is implicated by civil penalties." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 n.22 (1996).

See also, Cox v. Louisiana, 379 U.S. 559, 571 (1965) (unconstitutional to prosecute defendant where defendant reasonably relied on representations by police that statute permitted conduct in question).

Had the Court below followed the statute and every other appellate court in the state and set the four-year base date rent properly in 2017 there would have been no overcharge and this appeal would not be pending before this Court.

Two days before the Appellate Division decision in this case a different Appellate Division First Department panel correctly applied the four-year rule in *Stulz v. 305 Riverside Corp.*, 150 AD3d 558 (1st Dept 2017). The fact patterns in *Stulz* and this case are virtually identical with the difference that applying the four-year rule in *Stulz* resulted in there being a small overcharge while there would be no overcharge in this case. The Appellate Division in *Stulz* denied the Plaintiff-Tenant's motion for permission to appeal and this Court denied the Plaintiff-Tenant's motion for leave to appeal (*Stulz v 305 Riverside Corp.*, 30 NY3d 909 (1/11/2018)). In the instant case, *Taylor*, the Appellate Division denied the Plaintiff-Appellant's motion for re-argument or permission to appeal in 2017. It only granted permission in 2019 after two additional cases, *Regina Metropolitan* and *Raden*, agreed with *Stulz* and correctly applied the four-year rule.

Defendant-Appellant respectfully requests that this Court not compound the error and injustice in this case by applying the new rent statute to this appeal.

Very truly yours

Murray Shactman

MS:of
see affidavit of service attached

EXHIBIT B

Unreported Disposition
Slip Copy, 64 Misc.3d 1228(A), 2019 WL 3921994 (Table), 2019 N.Y. Slip Op. 51341(U)

*1 Gold Rivka 2 LLC, Petitioner,
v.
Santiago Rodriguez, Ysabel Manzanillo, Respondents.

Civil Court of the City of New York, Bronx County
43271/2016
Decided on August 13, 2019

CITE TITLE AS: Gold Rivka 2 LLC v Rodriguez

ABSTRACT

Landlord and Tenant
Rent Regulation
Calculation of rent overcharge claim under Housing Stability and Tenant Protection Act of 2019

Damages
Treble Damages
Treble damages awarded to tenant where overcharge was willful

Gold Rivka 2 LLC v Rodriguez, 2019 NY Slip Op 51341(U). Landlord and Tenant—Rent Regulation—Calculation of rent overcharge claim under Housing Stability and Tenant Protection Act of 2019. Damages—Treble Damages—Treble damages awarded to tenant where overcharge was willful. (Civ Ct, Bronx County, Aug. 13, 2019, Bacdayan, J.)

APPEARANCES OF COUNSEL

Todd Rothenberg, Esq.- for the Petitioner
Bronx Legal Services, by Angela DeVolld, Esq - for the Respondent

OPINION OF THE COURT

Karen May Bacdayan, J.

In addition to the papers considered in rendering the Court's June 17th order, the following papers were considered in rendering this decision and order:

Papers Numbered

Respondent's Supplemental Affirmation in Support and annexed Exhibits (A - H) 1

Petitioner's Supplemental Affirmation in Support and annexed Exhibits (1 - 11) 2

Respondent's Supplemental Reply Affirmation 3

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

BACKGROUND, PROCEDURAL HISTORY, AND FACTS

Having already issued a decision granting Respondent summary judgment dismissing the Petition and on her claim against Petitioner for a willful overcharge, the only question remaining before the Court is the calculation and amount of the overcharge award. In order to answer that question, the Court must examine the prevailing case law on the issue in light of the recent amendments to the Rent Stabilization Law enacted by the state legislature in June 2019.

The Prior Decision

In July 2016, Gold Rivka 2 LLC ("Petitioner"), sued Santiago Rodriguez and Ysabel Manzanillo for nonpayment of rent. Ms. Manzanillo ("Respondent") is represented by Bronx Legal Services.[1] Respondent moved into the premises pursuant to a purportedly fair-market lease for $2,000.00 per month with Petitioner's predecessor-in-interest in November 2014. Petitioner acquired title to the building in June 2015. In 2016, when Respondent retained counsel, she discovered she was a rent-stabilized tenant and that she was being charged more than the legal regulated rent for the premises. She then began withholding her rent payments.

In February 2017, Respondent was granted leave to conduct discovery. Twenty-two months later, Petitioner moved to restore the proceeding to the Court's calendar for trial. In

response, Respondent cross-moved for summary judgment dismissing the Petition for Petitioner's failure to properly plead the rent stabilized regulatory status of the premises and on the basis that the rent demand served pursuant to RPAPL 711 (2) was defective. Respondent also moved for summary judgment on her defense and counterclaim that Petitioner willfully charged her, and she had paid, a rent in excess of the monthly legal regulated rent for the premises. Respondent sought to have the rent set pursuant to the "default formula," more fully described below, and requested treble damages be assessed. Respondent further sought relief under CPLR 3126 for Petitioner's willful disobedience of court-ordered discovery deadlines. Argument was heard on May 22, 2019.

On June 17, 2019, the Court partially decided Respondent's motion and dismissed the Petition on the basis that Petitioner *conceded* that the premises is rent stabilized and failed to plead it as such, and on the basis that Petitioner had *conceded* that the rent charged was more than the legal regulated rent, and, therefore, the rent demand was defective. The Court further held that Petitioner is liable to Respondent for an intentional overcharge, Petitioner having utterly failed to explicate any prejudice, rebut the presumption of willfulness, or to explain the significant increase in rent between 2006 and 2007 after two years of litigation. Petitioner was also precluded from submitting any additional evidence or documentation in support of its opposition to Respondent's proposed calculation of the overcharge. Preclusion was based on Petitioner's extensive delays in complying with discovery orders, and its stipulation on the record that all available documents had already been provided, and that Petitioner had no further information to offer to the Respondent or to the Court.

Changes in the Law

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") was signed into law. The new law effects sweeping changes in the law regarding overcharge claims and to the methodology for determining the base date rent upon which to calculate an overcharge award. The HSTPA applies to all pending proceedings, including this one. The altogether new language states, in relevant part:

> "The division of housing and community renewal, and the courts, in investigating complaints of overcharge and in determining legal regulated rents, *shall consider all available rent history which is reasonably necessary to make such determinations*, including but not limited to (i) *any rent registration or other records* filed with the state division of housing and community renewal, or any other state, municipal or federal agency, *regardless of the date to which the information on such registration refers* . . . . Nothing contained in this paragraph shall limit the examination of rent history relevant to a determination as to: (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including, but not limited to, *whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable* . . . ."

(Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516 [h], as amended by L 2019, ch 36, part F, § 5 [June 2019] [emphasis added].)

CPLR 213-a was also amended by the HSTPA. As amended, it now provides that, "an overcharge claim may be filed at any time, and the calculation and determination of the legal ***2** rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges." (CPLR 213-a, as amended by L 2019, ch 36, part F, § 6 [June 2019] [emphasis added].)

Along with the statute of limitations, the portions of section 26-516 of the Rent Stabilization Law ("RSL") relevant to CPLR 213-a were amended by the HSTPA and now state:

> "[T]he legal regulated rent for purposes of determining an overcharge, *shall be the rent indicated in the most recent reliable annual registration statement* filed and served upon the tenant six or more years prior to the most recent registration statement . . . . [I]n investigating complaints of overcharge and in determining legal regulated rent, [a court] shall consider all available rent history which is reasonably necessary to make such determinations."

(Administrative Code § 26-516 [a], as amended by L 2019 ch 36, part F, § 5 [June 2019] [emphasis added].)

While the HSTPA does not in any way affect this Court's June 17, 2019 decision, it raises questions for the Court about the continued applicability of the default formula when determining the base date rent upon which to calculate an overcharge. Thus, the Court issued the decision as set forth above, but asked the parties to provide additional briefing

on the discrete issue of how to now calculate the amount of the willful overcharge. The parties were further directed to provide the Court with specific, numerical calculations supported by their arguments. The proceeding was adjourned for oral argument limited to the narrow issue of law as set forth above.

SUPPLEMENTAL ARGUMENTS

The parties agree, both in their papers and at oral argument, that the last reliable rent registration is that from 2006 which states that the legal regulated rent at that time was $646.77. (Supplemental affirmation of Respondent's counsel at 3; supplemental affirmation of Petitioner's counsel at 5.) This registration immediately preceded the significant increase in the registered rent in 2007 which Petitioner has not attempted to explain. The unexplained increase portended the Petitioner's registration of the premises as permanently exempted from rent stabilization in 2010. The apartment has not been registered since it was improperly deregulated. (Respondent's supplemental exhibit G.) None of these facts are disputed in the submissions relied upon in the June 17, 2019 decision, nor is a dispute as to these facts raised in the supplemental papers.

The parties diverge, however, on the methodology for calculation of the overcharge. Citing to section 26-517 (e) of the Rent Stabilization Law ("RSL"), Respondent argues that the rent should be set at the last reliable registration amount of $646.77, and "frozen" at that amount until Petitioner files a proper registration reflecting this legal regulated rent. (*See also* Rent Stabilization Code [9 NYCRR] § 2528.4.) Petitioner argues, as it did before, that the legal regulated rent should be set at the last reliable registration amount of $646.77, *plus* Rent Guidelines Board Order increases for each of the registered and unregistered lease terms thereafter. Petitioner bases the amount of the Rent Guidelines Board Order ("RGBO") increases it should be allowed to take on the leases and the terms therein which were provided through discovery. (Supplemental affirmation of Petitioner's counsel at 5-22.) As before, Petitioner cites no legal authority for its position.

In reply, Respondent argues that the increases in the leases between 2006 and 2009 are not lawful, and that the leases provided by Petitioner are void as against public policy and cannot form the basis for allowing Petitioner to benefit from subsequent increases. (Supplemental ***3** affirmation in reply of Respondent's counsel at 9.) Respondent argues that, as of 2010 when Petitioner concededly unlawfully deregulated the premises and ceased filing annual rent registrations with the Division of Housing and Community Renewal ("DHCR"), no additional increases may be added. (Supplemental affirmation in reply of Respondent's counsel at 15.)

Respondent originally argued that, because of Petitioner's willful, fraudulent actions, the DHCR "default formula" should be employed to determine the base date rent upon which to calculate the overcharge award herein. For the following reasons, the Court subscribes to the calculation methodology now advocated by Respondent in her supplemental papers, and does not apply the default formula. DISCUSSION

A Brief History of the DHCR Default Formula

In 1997, the legislature enacted the Rent Regulation Reform Act ("RRRA") which amended RSL § 26-516 and buttressed the former four-year statute of limitations applicable to overcharge claims contained in CPLR 213-a. Read together, and as interpreted by the courts, these provisions instructed that when analyzing overcharge claims courts could not look beyond four years to determine the base date rent. In other words, the four-year statute of limitations began to run as of the first alleged overcharge, and examination of the rent history prior to the four years preceding the interposition of the overcharge complaint was precluded. Initially, courts adhered strictly to this rule. For instance, in *Brinckerhoff v New York State Div. of Hous. & Community Renewal* (275 AD2d 622 [1st Dept 2000]), the Court held that the tenant's overcharge claim interposed in April 1989 was time-barred as the first overcharge occurred August 1985 *despite* allegations of fraud on the landlord's part which the Court also found to be time-barred. (*See also Silver v Lynch*, 283 AD2d 213 [1st Dept 2001] [reversing the lower court finding of overcharge because the base rent is the rent charged *exactly* 4 years prior to the *complaint*, not the registration *on file* four years prior to most recent registration]; *Pechock v New York State Div. of Hous. & Community Renewal*, 253 AD2d 655 [1st Dept 1998] [holding that consideration of rental history more than four years prior to the complaint was barred despite improper registration in the fourth year].)

Then, in 2005, after years of unforgiving determinations based on an exacting interpretation of the four-year rule, the case of *Thornton v Baron* (5 NY3d 175 [2005]), reached the Court of Appeals. The *Thornton* Court opined that, in some instances, the practical effect of the four-year limitation

was to protect unscrupulous landlords. Having found that the landlord in that case had engaged in an elaborate illusory tenancy scheme to circumvent the rent stabilization laws which began with an unlawful lease eight years prior to the interposition of the overcharge claim, the Court declined to read the four-year limitation period in a way that would allow "a landlord whose fraud remains undetected for four years--however willful or egregious the violation-- [to], simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases . . . . That surely was not the intention of the legislature when it enacted the RRRA. Its purpose was to alleviate the burden on honest landlords to retain rent records indefinitely not to immunize dishonest ones from compliance with the law." (*Id.* at 181 [internal citations omitted].) Thus, the *Thornton* Court held that an uncodified default formula used by DHCR should be employed to ***4** calculate the base date rent in overcharge cases where no reliable rent records are available.[2] (*Id.*) Accordingly, the Court held that the base date rent was not the rent registered four years prior to the interposition of the overcharge claim, but rather was the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building eight years before, immediately prior to lease that created the illusory tenancy scheme, and well beyond the four-year look-back period established by the 1997 amendments. (*Id.* at 180.)

After *Thornton*, Courts were more receptive to challenges to the four-year rule. Use of the DHCR default formula became more widespread and application was no longer limited to factual scenarios involving illusory tenancy schemes. Five years after *Thornton*, in *Grimm v State of New York Div. of Hous. and Community Renewal*, (15 NY3d 358 [2010]), the Court confirmed that its holding in *Thornton* was not restricted to the narrow circumstances in that case and held, without specifically finding that use of the default formula was warranted, that the base rent may be challenged when it was demonstrated that "a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date." (*Id.* at 367.) Then in *Matter of Pehrson v Div. of Hous. & Community. Renewal of State of NY* (34 Misc 3d 1220[A], 2011 NY Slip Op 52487[U] [Sup Ct, NY County 2011]), the court fashioned a three-factor test, purportedly (but not obviously) derived from *Grimm*, which courts and DHCR subsequently applied to ascertain whether allegations of fraud require use of the default formula:

> "(1) The tenant alleges circumstances that indicate the landlord's violation of the RSL and RSC in addition to charging an illegal rent. (2) The evidence indicates a fraudulent scheme to remove the rental unit from rent regulation. (3) The rent registration history is inconsistent with the lease history."

(*See e.g. FAV 45 LLC v McBain*, 42 Misc 3d 1231[A], 2014 NY Slip Op 50292 [U] [Civ Ct, NY County 2014].) Whether all factors were necessary to warrant application of the default formula, or whether any of them would satisfy the test, was not made clear.

In the years following *Grimm* and *Pehrson*, courts found fraud warranting use of the still uncodified DHCR default formula based on a broadening range of factors including missing vacancy lease riders, improper lease forms, and absent or inaccurate rent registrations. However, not all courts, even when fraud factors were satisfied, applied the default formula, choosing instead to freeze the rent at the last reliable rent registration. (*See e.g. Butterworth v 281 St Nichols Partners LLC*, 160 AD3d 434 [1st Dept 2018].) Other courts declined to use the default formula finding that under varying factual scenarios "sufficient" indicia of fraud had not been established as to warrant application of the default formula. (*See e.g. Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]; *Trainer v New York State Div. of Hous. & Community Renewal*, 162 AD3d 461 [1st Dept 2018].) The eventual codification of the default formula as part of the 2014 amendments to the RSC did not help to simplify the analysis. Instead, the amendments expanded on *Thornton* and *Grimm* and provided *alternate* methods for determining the rent upon which to calculate an overcharge when the base date rent was not reliable.[3]

Altogether, this created a patchwork of decisions for attorneys and judges to construe.

Calculation of Overcharges Under the Housing Stability and Tenant Protection Act

With the passage of the HSTPA the default formula is relegated to an alternate means by which to determine "whether the legality of a rental amount charged or registered is reliable in light of all available evidence." (Administrative Code § 26-516 [h] [i], as amended by L 2019, ch 36, part F, § 5 [June 2019].) Calculation of overcharge awards is now greatly simplified, and more consistency might be expected from the

courts. Use of the default formula is no longer necessary, or desirable.

The amendments to CPLR 213-a and RSL § 26-516, when read together, clarify and reinforce one another and the plain text of the amendments leave this Court with little or no room for interpretation. Moreover, in construing the amendments, "the spirit and purpose of the act and the objects to be accomplished must be considered." (*Meegan v Brown*, 16 NY3d 395, 403, [2011].) As stated in the committee report, the new law is intended to "[eliminate] the ability of an owner to escape punitive damages where the overcharges were willful." (NY Comm Report, 2019 New York Senate Bill S6458.)

Courts are now instructed to look back as far as necessary to find the most reliable rent registration upon which to base its determination regarding an overcharge claim. Now, an unexplained increase in rent alone is sufficient to render a rent unreliable, and "[t]he legal regulated rent for purposes of determining an overcharge, *shall* be the rent indicated in the most recent *reliable* annual registration statement filed and served upon the tenant six *or more* years prior to the most recent registration statement." (Administrative Code § 26-516 [a], as amended by L 2019, ch 36, part F, § 4 [June 2019].) As the parties concede that the most recent reliable annual registration is that from 2006, the law requires the Court to find that $646.77 is the base rent for the purposes of determining the overcharge herein. (*Id.*)

Petitioner's argument that RGBO increases should be added to the last reliable registered rent of $646.77 founders on the plain language of the HSTPA and controlling case law. In calculating the rent for determining a rent overcharge, the HSTPA allows for the addition only of "subsequent *lawful* increases and adjustments" to the amount of the most recent reliable annual registration statement. (*Id.* [emphasis added].)[4]

Section 26-517 of the RSL, which governs registration of rent stabilized apartments states, "[t]he failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement." (Administrative Code § 26-517 [e]; *see also* RSC [9 NYCRR] § 2528.4 [a] ["The late filing of a registration shall result in the elimination, prospectively, of such penalty, ***5** provided that the increases in the legal regulated rent were lawful except for the failure to file a timely registration"]; *215 W. 88th St. Holdings, LLC v NY State Div. of Hous. and Community Renewal*, 43 AD3d 652 [1st Dept 2016] [finding that a landlord may not retroactively claim increases to the rent upon filing missing or late registrations where the rent was unlawful for reasons beyond the failure to file a proper registration].)

After the last most reliable registration in 2006, Petitioner concededly entered into numerous unlawful leases and registered only two. These leases and registrations cannot serve as the basis for the addition of subsequent lawful increases. The 2007 lease, a two-year lease, which contained the unexplained increase from $646.77 to $1,480, is clearly a nullity because this lease contained an increase that was not lawful within the meaning of the RSL. A lease which attempts to evade the RSL, and contains an illegal rent, is void at its inception, and the rent registration statement listing this illegal rent is also a nullity. (*See Thornton*, 5 NY3d at 181.)

In addition to the incorrect rent increase in the 2009 lease, the rent amount in the 2009 registration is inconsistent with that lease, and likewise cannot serve as the basis for the addition of subsequent lawful increases. (*See Jazilek v Abart Holdings LLC*, 72 AD3d 529 [1st Dept 2010] [holding that an owner's false registration listing improper lease amounts barred the lower court from applying periodic rent increases in determining the amount of rent overcharge]; *Enriquez v NY State Div. of Hous. & Community Renewal*, 166 AD3d 404, 404 [1st Dept 2018] [defining a "proper" rent registration statement as one that "record[s] the actual amount of rent charged to the tenant" and is "not the product of fraudulent leases or otherwise" a "legal 'nullit[y]'"]; *see also John Manning Irrevocable Trust v Biggart*, 2019 NY Slip Op 31256[U] [Sup Ct, NY County 2019].)[5]

Upon permanently exempting the apartment from rent stabilization in 2010, and ceasing to register the apartment altogether, Petitioner is plainly prohibited from collecting any increases. (Administrative Code § 26-517 [e]; RSC [9 NYCRR] § 2528.4 [a]; *215 W. 88th St. Holdings, LLC*, 143 AD3d 652; *Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434 [1st Dept 2018].) Accordingly, because no subsequent lawful increases are warranted given that the increase taken in the 2007 lease represented an unlawful attempt to circumvent the RSL, the registration of the 2009 lease is inconsistent with that lease, and no registrations exist after the unlawful exemption of the apartment, the rent is

frozen at $646.77 until Petitioner offers Respondent a lease and properly registers the premises.

Petitioner's argument on the record that had it not taken illegal increases it could have taken the legal increases provided for by the RGBO, is not sound or based in law. A landlord who initially seeks to evade the rent stabilization laws should not benefit from what would have ***6** been lawful increases once it admits to wrongdoing, and, as here, is found liable for a willful overcharge. This was true under the old law and continues to be true. Other recent amendments to the RSL reinforce this public policy of deterring landlords from attempting to evade the law, and penalizing those who do. For example, the "safe harbor" provision which allowed landlords to avoid a finding of willfulness by immediately reimbursing a tenant for all overcharges has been eliminated. The statute now reads: "After a complaint of rent overcharge has been filed and served on an owner, the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered by the Division of Housing and Community Renewal or a court of competent jurisdiction as evidence that the overcharge was not willful." (Administrative Code § 26-516 [a], as amended by L 2019, ch 36, part F, § 4 [June 2019] [emphasis added].) [6]

Indeed, calculating subsequent increases under the present circumstances has been held to be contrary to law. As the Court stated in *215 W. 88th St. Holdings LLC*, referring to a fact-pattern where the base date rent was set by the default formula, but which is equally applicable to a base date rent set under the HSTPA:

> "The practice of imposing a 'rent freeze' . . . based on the . . . base rent, without adjustments, throughout the relevant period--is not a matter merely of customary practice that the agency may deviate from when equitable considerations so demand. Rather, it reflects a statutory requirement. RSC § 2528.4 provides that an owner who filed an improper rent registration is barred from collecting rent in excess of the base date rent, and is retroactively relieved of that penalty upon filing a proper registration only when 'increases in the legal regulated rent were lawful except for the failure to file a timely registration.' That clearly is not the case here . . . . Thus, notwithstanding the arguably harsh result here, the agency did not have the discretion to add RGBO increases."

(143 AD3d at 653; *see also Hargrove v Division of Hous. & Community Renewal*, 244 AD2d 241 [1st Dept 1997].)

The Overcharge Award

The rent ledger provided and relied upon by Petitioner for its suggested calculations begins with an opening balance in May 2015 of "0.00." The next entry is dated June 1, 2015 and reflects a charge for the unlawful monthly rent of $2,000. The very next entry, also dated June 1, 2015 reflects an unexplained lump sum charge of $4,000 characterized as a "Balance FWD." (Petitioner's exhibit 13.) In its supplemental papers, Petitioner does not admit that this money was paid, but neither does Petitioner state unequivocally that it was not. Petitioner states that "assuming arguendo [that] Respondent paid in (sic) $2,000.00/month from November 2014 through May 2015," then "Respondent paid a total of $45,100.00" between November 2014, the commencement of her tenancy, and October 2016, when she began withholding her rent upon ***7** interposition of the overcharge claim. (Petitioner's supplemental affirmation in opposition at 26.) In fact, the breakdown reflects another zero balance opening December 2015, which indicates the carryover balance was satisfied.

Accordingly, the Court awards Respondent $90,672.87 as follows:

Since Respondent took possession of the premises in November 2014, and prior to her withholding her rent as of October 2016, $14,875.71 in rent accrued at what has been determined to be the legal regulated monthly rent of $646.77 (November 2014 -- September 2016 = 23 months at $646.77 per month = $14,875.71). During this same time-period, $45,100 was paid. (Petitioner's exhibit 13.) This amount was not paid in every month; on several occasions Respondent paid nothing in one month but paid additional rent in subsequent months. Using Petitioner's own accounting practices, as evidenced by its rent breakdown and the predicate rent demand served in the now-dismissed Petition, Petitioner applied these payments first to rent arrears and then to current rent. Thus, in the months where rent was applied to arrears, an overcharge occurred when Petitioner used the late payments to satisfy the unlawful rent charged for prior months.

The Court finds that the actual overcharge is $30,223.79 ($45,100 - $14,875.71 = $30,224.29). Trebling this amount because the overcharge is willful results in an award to Respondent of $ 90,672.87. [7] The Court does not credit

Respondent's argument that interest must be assessed based on the amendment to the new law. (*See* Administrative Code § 26-516 [a] [4], as amended by L 2019, ch 36, part F, § 4 [June 2019].) The substitution of the word "shall" for "may" in this section simply brought that provision in line with other provisions which provide that where willfulness is not found, the penalty is the actual overcharge plus interest. On the other hand, where the overcharge is found to be willful, treble damages will be assessed. Here the overcharge is willful and Respondent is awarded treble damages. No calculation of interest upon this award is required by law or warranted. (*Mohassel v Fenwick*, 5 NY3d 44 [2005].)

CONCLUSION

Accordingly, the Clerk of the Court is directed to enter a money judgment in favor of ***8** Respondent and against Petitioner in the sum of $90,672.87 on her rent overcharge counterclaim.

This constitutes the Decision and Order of this Court.

Dated: August 13, 2019

Bronx, New York

HON. KAREN MAY BACDAYAN

Judge, Housing Part

FOOTNOTES

Footnotes

1 Hereinafter, Ms. Manzanillo is the only Respondent to which this decision refers.

2 At the time, section 2522.6 (b) of the Rent Stabilization Code ("RSC"), by its plain terms, applied only to judicial sales, bankruptcy proceedings and mortgage foreclosure actions.

3 The codified default formula, arguably inconsistent with *Thornton* and *Grimm*, provided that the rent shall be established at the lowest of the following: "(i) the lowest rent registered pursuant to section 2528.3 of this Title 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 Title; 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 subparagraphs (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 [9 NYCRR] § 2522.6 [b] [3].)

4 Although much of the language regarding overcharge claims was amended by the HSTPA, the language allowing for the addition of subsequent lawful increases was not changed. (*See* Administrative Code § 26-516 [former [a]], as added by L 1985, ch 907, § 1.) Accordingly, the cases interpreting when such increases should be calculated -- and when they should not be -- remain relevant.

5 Only the 2007 lease containing the significant jump in rent was properly registered with DHCR in that the registration reflected the actual amount charged. However, because that lease charged an unlawful amount of rent, it cannot now serve as the basis for an increase. Although the 2009 lease was registered in 2009, the registration does not contain a tenant's name, nor does it accurately reflect the monthly rent of the lease actually in effect at the time. The Petitioner registered a legal regulated rent of $1,546 per month, but the provided lease is for a purported preferential rent of $1,575 and a legal regulated rent of $1794.05. (Respondent's supplemental exhibit G; Petitioner supplemental exhibit 3.)

6 In this case, not only did Petitioner not voluntarily offer a refund of overcharges, it moved in February 2017 to amend the pleadings to reflect the subject apartment as rent stabilized and then *withdrew* that motion "renewing its claim that the apartment is deregulated." (*Gold Rivka 2 LLC v Rodriguez*, Civ Ct, Bronx County, Feb. 22, 2017, J. McClanahan, index no. 43271/2016.) Not until the imposition of Respondent's current motion did Petitioner admit the rent stabilized status of the premises.

7 Petitioner has disregarded the Court's admonition not to raise additional arguments in the requested supplemental briefing. Petitioner had previously argued that if the Court subtracted the rent paid over the course of the tenancy from the rent that had come due using what has now been found to the be the legal regulated rent, then in fact it is Respondent who owes Petitioner money, and, consequently, there is no basis for a finding of overcharge, or for the assessment of treble damages. Petitioner improperly attempts to reargue the Court's finding that there is no basis in law for Respondent

to be penalized for withholding her rent once the overcharge was discovered and was being litigated. Petitioner previously cited no authority for this proposition.

Now, without explanation for why it was not raised before, Petitioner cites to one case, *Curry v Battistotti* (12 Misc 3d 129[A], 2006 NY Slip Op 51030[U] [App Term, 1st Dept 2006]), which affirmed a lower court decision in which the court calculated the rent in the manner Petitioner suggests. (*See Curry v Battistotti*, 5 Misc 3d 1012[A], 2004 NY Slip Op 51355[U] [Civ Ct, NY County 2004].) However, that was not the subject of the appeal or the affirmance. (*Compare Roker Realty Corp. v Gross* (163 Misc 2d 766 [App Term, 1st Dept 1995]) [tenants withheld their rent when they discovered that they were being overcharged, and the court calculated the overcharge based on the rent collected each month before the tenant began withholding her rent; *Johnson v Block* (65 Misc 2d 634 [App Term, 1st Dept 1971] [the lower court was upheld where treble damages were awarded on the basis that the landlord induced the tenant, who had begun withholding his rent upon discovery an overcharge, to continue to pay the overcharge amount during litigation].)

COURT OF APPEALS OF THE STATE OF NEW YORK

JAMES TAYLOR and TAMARA JENKINS,	:	New York County Index No.: 151560/2014
	:	Court of Appeals Index No. APL-2018-00226
Plaintiffs-Respondents,	:	
	:	**AFFIRMATION OF SERVICE**
- against -	:	
	:	
72A REALTY ASSOCIATES, L.P.	:	
	:	
Defendant-Appellant.	:	

DEREK J. VENEZIA, ESQ., an attorney duly admitted to practice before all of the Courts of the State of New York, affirms to be true and correct, under the penalties of perjury and pursuant to CPLR 2106, the following: I am not a party to the action, I am over 18 years of age and I work at 305 Broadway, Suite 1004, New York, New York. On October 16, 2019 I served three copies of the within Letter dated October 16, 2019 upon the following:

Murray Shactman, Esq.
68 West 10th Street #27
New York, New York 10011
(212) 477-4785

via email to: eagle477@gmail.com and via first class mail postage prepaid deposited in the care and custody of the United States Postal Service.

Affirmed: October 16, 2019
New York, New York

DEREK J. VENEZIA, ESQ.