SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

KATHRYN CASEY, LAURIE CAGNASSOLA, GERALD COHEN, BETTY FURR, FRANCESCA GAGLIANO, CAROLYN KLEIN, JOSEPH MORGAN, JESSICA SAKS AND KIRK SWANSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs-Respondents, and PAMELA RENNA and VITTINA DEGREZIA a/k/a VITTINA LUPPINO, Plaintiffs-Intervenors, -against- WHITEHOUSE ESTATES, INC., KOEPPEL & KOEPPEL, INC., DUELL 5 MANAGEMENT LLC d/b/a DUELL MANAGEMENT SYSTEMS, WILLIAM W. KOEPPEL AND EASTGATE WHITEHOUSE LLC, Defendants-Appellants.	:	Index No. 111723/11 Appellate Case No. 2020-03001 **AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND FOR A STAY PENDING DETERMINATION OF THE INSTANT MOTION**
WHITEHOUSE ESTATES, INC., EASTGATE WHITEHOUSE LLC AND WILLIAM W. KOEPPEL, Third-Party Plaintiffs-Appellants, -against- ROBERTA L. KOEPPEL, ALEXANDER KOEPPEL AS EXECUTORS AND TRUSTEES OF THE TRUST CREATED UNDER ARTICLE FOURTH OF THE LAST WILL OF ROBERT A. KOEPPEL, KOEPPEL MANAGEMENT COMPANY LLC AND ROBERTA L. KOEPPEL INDIVIDUALLY, Third-Party Defendants.	:	Third-Party Index No. 595472/17

JEFFREY TURKEL, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury pursuant to CPLR 2106:

1. I am a member of Rosenberg & Estis, P.C., attorneys for defendants-appellants and third-party-plaintiffs-appellants Whitehouse Estates, Inc. *et al*. (collectively, "Appellants"). As such, I am fully familiar with the facts and circumstances set forth herein.

2. I submit this affirmation (a) in further support of Appellants' motion for leave to appeal and related relief; and (b) in reply to the September 13, 2021 affirmation in opposition submitted by counsel for plaintiffs-respondents Kathryn Casey *et al.* ("Tenants").

3. For the reasons set forth below, Appellants' motion should be granted in all respects.

LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED

4. Tenants offer no real analysis as to why leave to appeal should not be granted, and instead rely on name-calling, accusations, and misstatements.

5. Tenants argue that "this Court's holding was entirely consistent with its past precedent and the past rulings of the Court of Appeals." Opp., ¶ 11. Tenants, however, fail to acknowledge that Justice Gische, in her vigorous dissent herein, wrote that the majority opinion was directly contrary to (a) three recent First Department decisions -- *Montera v KMR Amsterdam LLC*, 193 AD3d 102 (1st Dept 2021); *Matter of AEJ 534 E. 88th, LLC v New York State Div. of Hous. & Community Renewal*, 194 AD3d 464 (1st Dept 2021); and *Corcoran v Narrows Bayview Co., LLC*, 183 AD3d 511 (1st Dept 2020); as well as (b) the controlling authority herein, *Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020).

6. Tenants also fail to acknowledge that Justice Gische dissented in *Montera, supra*, and dissented from this Court's May 20, 2021 order denying leave to appeal therein.

7. Because the case law in this area is far from settled, even among the Justices of this Court, leave to appeal is warranted.

8. Tenants assert that the default rent formula applies because Appellants committed "fraud" after the October 14, 2007 base date. But such finding was founded on three assumptions, none of which the Court of Appeals has ever endorsed.

9. First, this Court held that for purposes of determining a rent overcharge complaint, "fraud" can include conduct that occurs after the base date -- here, Appellants' 2012 registration of the units. As Appellants have noted, RSC § 2526.1(a)(2)(iv) provides that the default rent formula shall be used where "a fraudulent scheme to destabilize the housing accommodation … rendered unreliable the rent on the base date." Plainly, post-base date conduct cannot render unreliable a rent charged years before.

10. The Court's finding in this regard is premised on such authority as *Kreisler v B-U Realty Corp.*, 164 AD3d 1117 (1st Dept 2018); and *Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498 (1st Dept 2018), both of which pre-date *Regina*. As Justice Gische noted in her dissent in *Montera*, "*Regina*, with its robust requirements for finding fraud in *Roberts* overcharge cases has sub silentio overruled this authority." 193 AD3d at 116.

11. Second, even if *Kreisler* and *Nolte* remain good law, Appellants did exactly what the Courts therein demanded: they promptly registered the subject apartments as stabilized in 2012, shortly after the appeal to the Court of Appeals in *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 (1st Dept 2011), was withdrawn and discontinued on March 6, 2012. 18 NY3d 954 (2012). The Court's ruling herein presumes that post-base date registrations, even if erroneous, can constitute fraud, even though there was no guidance in 2012 as to how to recalculate rents in

Roberts cases, and there would be no guidance until 2020, when the Court of Appeals decided *Regina*.

12. As Justice Gische wrote in her dissent in *Montera*:

> "I fully recognize that an owner's failure to register the premises with DHCR is a violation of the rent stabilization laws and code, but there is an independent statutory remedy for such transgressions:
>
> > 'The failure to properly and timely comply, on or after the base date, with the registration requirements … shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register' (Rent Stabilization Code [RSC] [9 NYCRR] §2528.4).
>
> Once the late registration is filed this 'shall result in the elimination, prospectively, of such penalty' (*id.*). Where the increases in rent were lawful but for the failure to timely register, the rent collected in excess of the LRR at any time period prior to the filing of the late registration is not an overcharge (*id.*). RSL § 26-517(e) specifies the remedy. It provides that '[t]he failure to file a proper and timely … rent registration statement' precludes an owner from collecting rent increases until a registration is filed' (*see Regina* at 358 n 9)."

193 AD3d at 116-17.

13. Third, the Court of Appeals has created only one fraud-based common law exception to the four-year look-back period: where there is a fraudulent scheme to deregulate. Here, Appellants promptly registered the units as *rent stabilized*. To the extent that the Court found fraud herein, it was based on a "fraudulent rent overcharge scheme," a standard first announced in *435 Cent. Park Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 510 (1st Dept 2020).

14. The Court of Appeals has never endorsed the existence of a second fraud-based common law exception to the four-year look-back period. Indeed, it would be difficult to create a broader exception than a fraudulent rent overcharge scheme, which could conceivably

apply to *any* finding of rent overcharge. Appellants respectfully submit that the Court of Appeals should have the opportunity to determine whether anything other than a fraudulent scheme to deregulate allows application of the default rent formula.

15. Tenants spend much of their time arguing that there is a second independent basis for using the default rent formula -- Appellants' alleged failure to "produce" leases in effect on the October 14, 2017 base date. Opp. at ¶ 9.

16. Tenants do not dispute, however, that Appellants produced base date leases for 59 of the 80 apartments in question. Thus, for almost 3/4 of the apartments, Tenants seek artificially low rents and artificially high overcharge awards based on the alleged absence of proof as to base date rents, which proof Appellants handed to Tenants in response to their discovery demands. Tenants are reminded that their motion for summary judgment and related relief was largely premised on Appellants' alleged failure to comply with their discovery obligations to produce all documents necessary to establish the legal rent under the now discredited "reconstruction method" that Supreme Court improperly employed.

APPELLANTS' MOTION FOR A STAY SHOULD BE GRANTED

17. What remains in this case on remand is for the referee to calculate legal rents and purported overcharges from October 14, 2007 forward. Those calculations will be based on this Court's finding that post-base date fraud occurred, such that the default rent formula should be used.

18. But the issues for the Court of Appeals to decide, should leave be granted, concern whether the default rent formula applies in the first place, *i.e.*, where (a) the alleged fraud occurred after the base date; (b) the apartments were promptly registered as rent stabilized, albeit at an erroneously calculated rent; or (c) there was no fraudulent scheme to deregulate.

19. Should leave be granted, and should the Court of Appeals hold that there was no fraud herein, all of the rental calculations to be determined by referee will have been in vain. During these times of a global pandemic, there is no need to waste judicial resources in this matter.

20. In addition, staying the modification of the prior use and occupancy orders will allow Appellants sufficient funds to continue to run the building while any pending appeal is determined. As Appellants' principal, William Koeppel, stated in his August 27, 2021 affidavit in support:

> "The April 2021 U&O reduction order will greatly compound [Appellants'] financial difficulty and will result in financial devastation if the enforcement thereof is not stayed. Indeed, Landlord is on the brink of becoming insolvent, and has already contacted bankruptcy counsel. Moreover, the substantial lack of income will force Landlord to default on its mortgages and ultimately result in foreclosure if landlord cannot obtain relief from its lender.
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> Simply, Landlord was just barely 'keeping its head above water' prior to entry of the April 2021 U&O Reduction Order. Without a stay of its enforcement, especially based upon the recent events that have occurred Court denied a stay pending appeal, landlord will drown and will likely lose the building to foreclosure because it does not have funds to pay the mortgages that are secured by the building."

See August 27, 2001 affidavit of William Koeppel, at pp. 9-10.

CONCLUSION

Based upon all the foregoing, Appellants respectfully requests that this Court grant the instant motion all respects.

Dated: New York, New York
September 17, 2021

JEFFREY TURKEL