TO BE ARGUED BY:
DARRYL M. VERNON
COURT OF APPEALS NO. APL-2019-00116 TIME REQUESTED: 30 MINUTES

State of New York
Court of Appeals

ELIZABETH REICH and STANLEE BRIMBERG,
Plaintiffs-Appellants,

-against-

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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THE LANDLORD HAS NOT REFUTED THE GROUNDS FOR REVERSAL OF THE RULING BY THE APPELLATE DIVISION

A. THE APPELLATE DIVISION HAS NOW IN ESSENCE REVERSED ITS OWN RULING IN THE CASE AT BAR BY ITS RECENT HOLDING IN *DUGAN*, APPLYING THE HSTPA TO PENDING APPEALS SUCH AS THIS ONE AND RESOLVING THE SPLIT AMONG THE APPELLATE DIVISION FIRST DEPARTMENT COURT IN DETERMINING OVERCHARGES IN J-51 TAX BENEFIT CASES

The basis of the Appellate Division's ruling in the case at bar was that the Tenants could not go back more than four years from the filing of their overcharge complaint to examine the rent history of the Apartment, and a rent created from an unlawfully deregulated lease would not be questioned, because there was no showing of fraud or other circumstances stopping the Landlord from just using the rent derived from an unlawful lease. However, after the Appellate Division granted leave to appeal to this Court, it recently and clearly ruled that the HSTPA (Housing Stability and Tenant Protection Act) applies to pending appeals, and that the look back period for a proper rent is greater than four years in all circumstances. The Appellate Division in Dugan v. London Terrace Garden, L.P. 2019 Slip Op. 06578 (1st Dept. 2019) ruled that the HSTPA applies to overcharge claims involving J-51 tax benefits, where the HSTPA was passed and became effective after a trial court made its ruling in the case (which commenced in 2009), and the issue of the application of the HSTPA to the action first arose on appeal. As the Appellate Division held in Dugan:

> Of relevance to this appeal is Part F of the HSTPA, which amended RSL §26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The legislation directed that the statutory amendments contained in Part F "shall take effect immediately and shall apply to any claims pending or filed after such date" (HSTPA, Part F, §7). Because plaintiffs' overcharge claims were pending on the effective date of Part F of the HSTPA, the changes made therein are applicable here (Citations omitted). We reject defendant's contention that the complaint should be dismissed as time-barred. The newly-enacted CPLR 213-a provides that "an overcharge claim may be filed at any time," however [n]o overcharge penalties or damages may be awarded for a period more than six years before the action is commenced." Likewise, the amended version of RSL §26-516(a)(2) provides that an overcharge complaint "may be filed with [DHCR] or in a court of competent jurisdiction at any time, however, any recovery of overcharge penalties shall be limited to the six years preceding the complaint." Because both of these statutes provide that an overcharge complaint can be brought "at any time," plaintiffs' claims are timely. However, they may recover for overcharges only as far back as November 13, 2003, six years before the commencement date…

2019 N.Y. Slip Op. 06578 at 3, 4.

Once the HSTPA is applied to this action, this law eviscerates many of the cases cited by the Landlord in their brief, and should result in reversal of the ruling by the Appellate Division in this action, which barred the Tenants from looking back at any rent records or DHCR filings in existence more than four years before the filing of their overcharge complaint and allowed the Landlord to simply transform an unlawfully deregulated rent into a stabilized rent. The 2010 registration relied upon by the Supreme Court in this action, which was the basis of the Supreme Court ruling, is not "reliable in light of all available evidence" under the HSTPA, since its

rent figure was based on the prior illegal deregulated rent from the 2005-2010 five-year illegal deregulated lease. And the finding by the Supreme Court that fraud was required in order to look back more than four years to examine the legal rent and that the overcharge was not timely filed is no longer valid under the HSTPA. The HSTPA, as noted above, does not require a finding of fraud by a landlord to examine the rent history for a period greater than four years from the filing of the overcharge complaint, and further states that an overcharge complaint can be filed at any time.[1]

In sum, prior to the enactment of the HSTPA, there were several rulings from the Appellate Division which were in conflict relating to overcharges and J-51 benefits and how to determine the legal rent for an apartment which was improperly deregulated during the receipt of J-51 benefits. These contradictory rulings resulted in this appeal as well as several other related ones which are now before this Court. The HSTPA now resolves these conflicts and, based on the sections detailed above and discussed later in this reply brief, invalidates the law relied on by the Appellate Division and Supreme Court in this action. Indeed, in this action, the Appellate Division, cited to its holding in Matter of Regina Co., LLC v. New York State Div.

[1] As will be detailed in this brief, there should also not have been a finding of a lack of fraud on the CPLR 3211 motion below, as fraud was sufficiently alleged both in the pleadings and the motion below.

of Housing and Community Renewal, 164 AD3d 420, 425-426 (1st Dept. 2018)[one of the related cases to be heard by this Court] in ruling against the Tenants here. That case, which is scheduled to be argued with this appeal, is no longer good law under the Court's ruling in Dugan v. London Terrace Garden, L.P., 2019 Slip Op. 06578 (1st Dept. 2019), which further held:

> The HSTPA made significant changes in how rents and overcharges should be determined. RSL §26-516 now explicitly provides that a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent (RSL §26-516[a], [h]). Thus, with respect to overcharge claims subject to the HSTPA, these provisions resolve a split in this Department as to what rent records can be reviewed to determine rents and overcharges in Roberts cases. In Taylor v. 72A Realty Assoc., L.P., 151 A.D.3d 95, 53 N.Y.S.3d 309 [1st Dept. 2017], lv granted –- N.Y...3D --, -- N.E.3d --, 2018 WL 6554722 [2018], the Court unanimously concluded that a court is permitted to examine the entire rental history of an apartment to ensure that landlords do not benefit from having collected an illegal market rent. Other panels of this Court, by split benches, reached a different conclusion, limiting review of the rental history to the four-year period preceding the filing of the overcharge complaint (see Raden v. W 7879, LLC, 164 A.D.3d 440, 84 N.Y.S.3d 30 [1st Dept. 2018], lv granted – N.Y.3d --, -- N.Y.S.3d --, -- N.E.3d --, 2018 WL 6057059 [2018]; Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 164 A.D. 3d 420, 424, 84 N.Y.S.3d 91 [1st Dept. 2018], appeal dismissed 32 N.Y.3d 1085, 90 N.Y.S.3d 633, 114 N.E.3d 1086 [2018], lv granted 33 N.Y.3d 1062, 103 N.Y.S.3d 355, 127 N.E.3d 313 [2019]). The new statute resolves this conflict, and makes clear that courts must examine all history necessary to determine the legal regulated rent.

2019 N.Y. Slip Op. 06578 at 3.

The Appellate Division ruling in the case at bar should therefore be reversed on this basis.

B. THE LANDLORD'S FALSE NARRATIVE REGARDING THEIR PURPORTED TREATMENT OF THE TENANTS AS RENT STABILIZED AND THE UNEXPLAINED RENT CHARGED IN THE LEASES GIVEN TO THEM

The Landlord's[2] appellate brief creates a narrative which simply, but incorrectly, claims that they complied with this Court's ruling in Roberts v. Tishman Speyer Properties, LP, 13 NY 3d 270 (2009) by offering the Tenants rent stabilized leases after this Court held that under the Rent Stabilization Code, landlords in buildings in receipt of J-51 benefits cannot deregulate apartments based on a high rent vacancy or luxury deregulation. As a result, the Landlord then argues that the Tenants had to sue the Landlord within four years after the Landlord gave them notice of the Roberts ruling and their right to challenge the lawfulness of their lease (Landlord's brief, pp.6-7).

This narrative is far from the facts and applicable law (e.g. there is no deadline that altogether bars a challenge to regulatory status and overcharges, just a limit on how far back a tenant can collect overcharges). In actuality, the Landlord gave the Tenants illegal leases at illegal rents throughout their tenancy, thus entitling them to recover on their claims for rent overcharge in this action. The five-year deregulated lease for the period of 2005-2010 was renewed in 2010 and thereafter by renewal leases which the Landlord falsely claimed were rent stabilized, even though they

[2] All references to the Landlord refer to both the current and prior Landlord.

charged an illegal rent, did not include the required DHCR Riders and instead included riders with false representations. All of these riders, right through the one ending in 2016, even provided that the Tenants preserve all their rights and remedies. Stated differently, it was agreed anew, with each renewal, that the Tenants preserved their rights to sue – and the Landlord preserved their rights too. Each rider specifically advised the Tenants that the issue of rent stabilization "and the rent to be charged" was left open and was uncertain. The Owner also represented that when "all the issues left open" were finally determined the Owner would adjust the rent if appropriate. (See, e.g. R:85-87). It was only in January 2016 that the Tenants were given yet another non-DHCR sanctioned rider, but this one advising them that the apartment is rent stabilized (and no longer said the issues of the rent were open) and would cease to be rent stabilized on or about June 30, 2016. (R:89-91). With this definitive statement, the Tenants reasonably then took action that same year to enforce their rent stabilized rights. Yet the Landlord now argues that those rights were waived because they were not asserted at an earlier date – an assertion not supported by the applicable case law, let alone the riders that the Landlord wrote and had the Tenants sign. And it is undisputed that an initial rent stabilized lease, as required by law, was never given to the Tenants.

1. The Landlord's Failure to Acknowledge that the Rent Charged Was Simply Lifted from an Unlawfully Deregulated Lease

The Landlord fails to admit to any wrongdoing in illegally deregulating the Tenants' apartment while in receipt of J-51 tax benefits. This is a crucial omission from their brief, because as will be detailed below, they are relying on the result of their wrongdoing - the illegal rent from the initial illegal deregulated 2005 lease that was charged to the Tenants and used as a basis for all subsequent rent increases. The Landlord states that this deregulated lease issued in 2005, while the building was receiving J-51 tax benefits, was consistent "with the then-interpretation of the law in the industry." But, no support is provided for this assertion in the Record or in the Landlord's brief that there was any such practice. There was no evidence as to what percentage of landlords did follow what the law required concerning deregulation while a landlord was receiving J-51 tax benefits. Nor is it even relevant if a majority or all landlords chose to break the law (a landlord would certainly never argue that a tenant could violate the law because that was an industry practice among tenants).

It is well established that ignorance of the law does not excuse criminal or civil liability. Jermine v. Carlisle, McNellie, Rini, Kramer & Ulrich, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed. 2d 519 (2010). Indeed, this Court made clear in Roberts that this improper deregulation of apartments was in violation of the plain language of the relevant laws relating to rent regulation, as well as the legislative history

behind these laws, finding that there was nothing "impossible or even strained about" its reading of the statute. Roberts, 13 N.Y.3d at 286.

2. The Landlord's Continued Noncompliance with the Law After the *Roberts* Ruling

The Landlord's brief creates the impression that after this Court's ruling in Roberts, in 2009, they then complied with the Rent Stabilization Law and Code by registering the apartment with the New York State Division of Housing and Community, giving the Tenants rent stabilized leases at rent stabilized rents, and giving them notice of their right to challenge the rent for the Apartment. The major illegality here – the charging of the illegal rent in the "Renewal Lease Form" dated April 13, 2010 – will be addressed later below. But in addition to charging an illegal rent, the Landlord failed to follow other provisions of the law relating to their overcharge of the Tenants.

First, the Landlord violated Rent Stabilization Code §2522.5 which requires that the Tenants receive an initial rent stabilized lease for the Apartment. All that was provided was a rent renewal lease form labeled rent stabilized, as were subsequent renewal leases given to the Tenants (R:71-91), which all renewed the initial 2005-2010 illegal deregulated lease.

Second, these renewal leases did not contain DHCR riders as required by Rent Stabilization Code §2522.5 (c), which has strict requirements for the contents of the rider. The DHCR rider must be in larger type than the regular lease, include notice

of the prior legal regulated rent which was in effect for the immediate prior tenant, an explanation how the new rent was calculated above the rent amount shown in the most recent rent registration statement and most recent lease, and a statement that the rent increase from the prior rent is in accordance with the adjustments permitted by the Rent Guidelines Board and the Rent Stabilization Code. The landlord must also provide, in the DHCR rider, notice to the tenant that within 60 days of execution of the lease, the tenant may require the landlord to provide documentation directly to the tenant supporting the detailed description given to the tenant in the rider of the rent increase from the rent charged to the prior tenant, with the landlord having to respond to the tenant's demand for documentation within 30 days.

In sum, the legally required DHCR rider helps protect tenants from entering into a lease with an illegal rent and notifies tenants that they can choose either to not enter into the lease, or sign the lease and file an overcharge claim. Indeed, this Court in Grimm v. State Division of Housing and Community Renewal, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010), stated that the landlord's failure to provide the tenant with the DHCR rent rider in the initial lease was a factor in its ruling that the DHCR should investigate the legality of the base date rent in an overcharge complaint rather than indiscriminately using the rent charged on the date four years prior to the filing of the rent overcharge claim (and should also ascertain whether the formula used in

Thornton v. Baron, 5 N.Y.3d 175, 800 N.Y.S.2d 118 (2005) should be used to determine the rent overcharge).

Third, instead of providing proper DHCR riders as required by the Rent Stabilization Code, the Landlord gave the Tenants lease riders in their leases dated April 13, 2010, April 8, 2011, March 2, 2012, February 28, 2013 and June 18, 2014 (R. 71-91) which contained false and misleading information about their rent regulatory rights.

Paragraph 4 of these improper riders stated that this Court's ruling in Roberts "left open" the issue of the rent regulatory status of the apartment. This statement is demonstrably false for the leases of March 2, 2012, February 28, 2013, and June 18, 2014, because the Appellate Division by this time, on August 28, 2011, had already decided in Gersten v. 56 7th Avenue LLC, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dept. 2011) that the Roberts ruling applied retroactively. Thus, the issue of whether or not the Apartment was subject to rent stabilization was not "left open."

Paragraph 5 of these riders states that the rent is being calculated "based upon a good faith calculation as to the rent if the Apartment was now rent stabilized" (R.71-91). That never happened. Nor did the Landlord argue below that it did anything to make some good faith calculation of the rent. The Landlord simply lifted the illegal rent from the prior deregulated lease as a basis for the rents charged under these leases.

And in contrast to the Landlord's claim that the Tenants lost their rights to claim the rent was unlawful, paragraph 7 of these riders, as recently as the renewal dated June 18, 2014 and running through 2016 (including shortly before this case was started), stated that the Tenant "neither makes any admission nor concession and reserves all their rights, remedies and defenses in substance or in its prospective or retroactive effect" (R.71-91). It was only in 2016, when the Landlord alleges that its J-51 benefits would expire, did they then advise the Tenants in their 2016 lease rider that they were definitely rent stabilized, no longer said the issue of the rent was open, and at the same time advised them that their rent stabilized rights would shortly expire. Yet the Landlord now argues that the Tenants' overcharge claims are time-barred.

Fourth, the Landlord did not file proper rent registrations with the DHCR, as required by Rent Stabilization Code §2528, which requires rent registration for each year that the Apartment became subject to rent stabilization, including the rents charged for each of these years. The J-51 benefits began in 1997/1998 and continued thereafter until 2018, thus the Landlord was required to file such rent registrations from 1997/1998 onward. It failed to do so. The first registration that it filed was on July 21, 2010, and even in this filing, it did not go back to 1997 and file the required registrations from 1997-2010, which would be needed to show how it arrived at the exorbitant rent of $20,350.00 that they filed for the Tenants in 2010. Nor did the

Landlord even file the 2010 registration when the Roberts ruling was issued. The Roberts case was decided by this Court on October 22, 2009. The Landlord did not file its 2010 rent registration with the DHCR until July 21, 2010, nine months later. Not only did they fail to file registrations for the prior years of rent stabilization, but as will be detailed below, they filed the 2010 registration and subsequent registrations at an illegal rent.

In sum, the Landlord's switching of its own rider instead of the lawful DHCR rider is really a duplicitous and fraudulent attempt to try to create future options to deregulate the apartment and continue to charge an illegal rent, when the law was already settled in 2011 by the Gersten court that it could not do so. The Landlord waited until the 2016 lease, when it thought (mistakenly), or hoped, it could terminate the tenants rent stabilized rights by a different method – expiration of the J-51 tax benefits – to drop its incorrect statements from the prior riders which they said left open the "rent to be charged" as well as the stabilized status of the apartment.[3] They did not even concede the Tenants were rent stabilized and not subject to termination until after the Tenants filed their lawsuit.

[3] In actuality, the Landlord could not terminate rent stabilization for the apartment after the J-51 tax benefits expired because they did not give notice in each and every one of the Tenants lease riders that the tax benefits would expire. See Rent Stabilization Code §2520.11(o); Gersten v. 56 7th Avenue LLC, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dept. 2011); East West Renovating Co. v. New York State Division of Housing and Community Renewal, 16 A.D.3d 166, 791 N.Y.S.2d 88 (1st Dept. 2005); Lomango v. Division of Housing and Community Renewal, 16 A.D.3d 166, 791 N.Y.S.2d 88 (1st Dept. 2005).

C. THE LANDLORD'S OVERCHARGE OF THE TENANT

1. The Landlord's Failure to Establish or Justify how it Calculated the Illegal Rents Charged to the Tenants

The most significant part of the Landlord's 59 page appellate brief is what it has omitted – *there is no explanation or any cited statute or case on how the Landlord arrived at a lawful first rent stabilized rent in the 2010 lease, nor have they provided one in the Record below*. This is no mere oversight by the Landlord or their counsel – it cannot be disputed that the Landlord simply took the last illegal rent of some $20,000 charged to the Tenants in the five-year illegal deregulated lease dated December 4, 2004, and charged that to the Tenants in the April 13, 2010 renewal lease which the Landlord deemed rent stabilized. The Landlord does not care to highlight this for understandable reasons. The Landlord's own DHCR registration filings (R.96-100) show from 1984-2009, the only time they registered the apartment with the DHCR was for the four-year period of 1990-1994, when they registered the apartment as temporarily exempt.

The Landlord's receipt of J-51 tax benefits starting in 1997/1998-2018 required the Landlord to register the Apartment as rent stabilized with rent stabilized rents from 1997/1998 onward. Roberts v. Tishman Speyer Properties, LP, 13 NY 3d 270 (2009); Rent Stabilization Code §2528. The Landlord violated this law by not registering the apartment as rent stabilized for the period of 1997-2009 as required

by this law, so there is nothing to legally justify their registering of the rent as $20,350 for the Tenants and the Apartment in 2010.[4]

2. Application of the HSTPA to this Action Should Result in Reversal of the Appellate Division Ruling

The Landlord says that the Tenants are barred under CPLR 213-a from going back more than four years from the filing of their overcharge complaint in reviewing the rent history for the apartment. Indeed, this is the provision that the Appellate Division relied upon in affirming the Supreme Court ruling in this action.[5] However, the 2019 Housing Stability and Tenant Protection Act (HSTPA) has modified CPLR 213-a to clearly permit tenants in overcharge complaints to go back as many years as necessary from the date of the filing of the overcharge complaint to determine through the rent history of the apartment and any other relevant records the proper legal regulated rent for the apartment.

The current CPLR 213-a, as enacted by the HSTPA, states:

> No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed,

[4] The Tenants were in no position to know for sure the actual prior rent history or occupancy of the Apartment. They alleged in their Complaint that upon information and belief the apartment was previously occupied by the owner, but the Landlord's registrations list the apartment as temporarily exempt for only the 1990-1994 period. The Landlord never would say in the Record below the prior occupancy or rent history of the Apartment.

[5] The Appellate Division also stated as a ground for limiting the look back period to four years from the filing of the overcharge complaint that the tenant received a rent stabilized lease. In fact, as noted above, this is incorrect, as the lease provided to the Tenants violated multiple provisions of the Rent Stabilization Code.

> however, an overcharge claim may be filed at any time,[6] and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges
> [Emphasis Added].

The directive in CPLR 213-a is that the calculation and determination of the legal rent and overcharge should be made in accordance with the provisions of law governing the determination and calculation of overcharges. These provisions, pursuant to the HSTPA, now include Rent Stabilization Law §26-516(h), added by Ch. 36, part F, §5, 2019 N.Y. Laws (LRS), pp. 13-14, which states:

> Nothing contained in this subdivision 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
> [Emphasis Added].

A second provision of the HSTPA directs the court or the DHCR to "consider all available rent history which is reasonably necessary" to determine a rent

[6] Even under the old law, and contrary to the Landlord's contention, the Tenants' overcharge claim was not time barred, but rather the time limitation just related to the instances where they could look back more than four years from the filing of the overcharge complaint to examine the rent history for the apartment. Landlord cites to Direnna v. Christensen, 57 A.D.3d 408, 869 N.Y.S.2d 505 (1st Dept. 2008) in support of its assertion. That is not relevant because it involved a straightforward overcharge of a subtenant, which was therefore time barred under a four year statute of limitations rule. Moreover, the Appellate Division in Crimmins v. Handler & Co., 249 A.D.2d 89, 91, 671 N.Y.S.2d 469 (1st Dept. 1998) held that while overcharges can only be recovered for the four years prior to the commencement of the action, the overcharge claim is not altogether barred where the overcharge has extended for a period in excess of four years from the date preceding the filing of the overcharge complaint.

overcharge, without any time period limitations. RSL §26-516(a), amended by Ch. 36, pt. F, §4, 2019 N.Y. Laws (LRS), p.12. The HSTPA further eliminates the statutory language that some courts had relied upon to preclude "any look back at a unit's rental history beyond the four-year limitations period." RSL § 26-516(b)(i), amended by Ch. 36, pt. F, § 1, 2019 N.Y. Laws (LRS).

The HSTPA applies to this action since it states that the specific provisions discussed above "shall take effect immediately and shall apply to any claims pending" on or after the effective date, which is June 14, 2019. See Ch.36, pt. F, §7, 2019 N.Y. Laws. The claims in this case are still pending due to this appeal, and even more so since this appeal was allowed by the specific order of the Appellate Division granting leave to the Tenants to appeal to this Court, which has resulted in the Tenants' overcharge claims being heard by, and therefore pending before, this Court.

Even without this provision in the HSTPA applying the Act to pending claims, the HSTPA would apply to this appeal. This Court has stated that where a statute has been amended while a case is up on appeal, the amended statute should be applied to the facts and law up on appeal. Boardwalk & Seashore Corporation v. Murdock, 286 N.Y. 494, 36 N.E.2d 678 (1941). In Boardwalk, the relevant statute was amended while the case was before the Appellate Division, and not brought to the attention of the Appellate Division when the case was before that Court. It was

brought to the attention of the Court of Appeals, which held, in quoting Supreme Court Justice Marshall:

> Parties obtain no vested rights in the orders or judgments of courts while they are subject to review [Citations omitted]. Chief Justice Marshall said: "It is in the general true that the province of an appellate court is only to require whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied…In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

286 N.Y. at 498, 499.

Also see Post v. 120 East End Avenue Corp., 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E. 2d 125 (1984)[Statute amending RPAPL 753(4) to provide a right to cure to a defaulting tenant, which went into effect after the lower court ruling, should be considered in determining the appeal since it is procedural and remedial in nature and should be literally construed to apply its benefits as widely as possible- "It is well settled law, however, that a court applies the law as it exists at the time of appeal, not as it existed at the time of the original determination"]; Tartaglia v. McLaughlin, 297 N.Y. 419, 79 N.E. 809 (1948); 560-568 Audubon Tenants Association v. 560-568 Audubon Realty, LLC, 2019 WL 4459101, -- N.Y.S.3d – (NY Sup Co. 2019)[HSTPA applies to overcharge claim that was dismissed before the law went into effect and should result in reinstatement of the complaint, since

tenants' "claims" remain unresolved until their appeal is decided].

The Landlord argues in its brief that the HSTPA should not apply to this appeal because the HSTPA used the term "claims pending" in stating the applicability of the law to current cases, whereas the term "any action or proceeding" was used in the legislation enacting the Rent Regulation Reform Act of 1997.[7] This is a distinction that is hard to understand since they do not cite one case involving the HSTPA and such a comparison – nor is there anything in the HSTPA or the legislative history of the HSTPA supporting such a claim. The Landlord expects the current Assembly Members and State Senators who drafted and or sponsored the HSTPA to use the identical language used by different legislators more than 20 years ago – but there is no such requirement anywhere in any statute or case law, nor would that be practical. Indeed, the evidence shows that the legislation applies to appeals since the HSTPA states it applies to "claims pending", and obviously, the claims of the parties are pending before this Court. Indeed, if anything, the term "claims pending" is broader than "actions or proceedings", since a claim can include a legal filing prior to or after dismissal of an action or proceeding. But for sure, claims are included in any pending action, including this one.

[7] As noted by the Landlord, the only section where the HSTPA refers to "actions and proceedings" is section M. But that only supports the Tenants' position, since in contrast to the other sections of the HSTPA which amend the Rent Stabilization Law, section M amends the RPL and RPAPL, which involve various notice provisions and other requirements in actions and proceedings brought by landlords or tenants.

The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. U.S. v. Ron Pair Enterprises, Inc, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). Where the language of a statute is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York, 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338 (1976). "The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give to its plain meaning." Matter of Daimler Chrysler Corp. v. Spitzer, 7 N.Y.3d 653, 827 N.Y.S.2d 88, 860 N.E.2d 705 (2006). Here, the plain language of the HSTPA applies the statute to claims pending, which therefore encompasses the claims pending in this appeal.

Indeed, as noted in point A of this Reply Brief, this plain reading of the statute has been confirmed by the only Appellate Court that has ruled on this issue, where the Appellate Division in Dugan v. London Terrace Garden, L.P., supra. Also see N.N. Simpson v. 16-26 East 105, LLC, 2019 N.Y. Slip Op. 07026, 2019 WL 4766388 (1st Dept. 2019), where the Court, in reversing the lower court's denial of a motion for class certification, applied the six year look back period of the amended CPLR 313-a of the HSTPA rather than the old four year look back period of the old CPLR 213-a, and specifically noted it was doing so in a footnote to its ruling.

Therefore, pursuant to the HSTPA provisions discussed above the ruling of the courts below should be reversed.[8]

3. Even Application of the Old Rent Law Should Result in Reversal of the Appellate Division Ruling

Even if the HSTPA had never been enacted, the old rent law would still have warranted a reversal of the rulings by the Appellate Division and New York Supreme Court.

The Courts below did not apply the proper standard in deciding the Landlord's 3211 motion to dismiss. As this Court recently stated in Maddicks v. Big City Properties, 2019 N.Y. Slip Op. 07519, 2019 WL 5353010 (2019):

[8] The Landlord also argues in its brief that the HSTPA may not be applied here for the additional reason that the First Department order is non-final and the Court may answer only the certified question, which must concern only the law at the time. There is no proper support for this inaccurate assertion. The Landlord relies on a 1925 case issued by this Court in McMaster v. Gould, 240 NY 379 (1925). But the main reason the Court in McMaster affirmed its ruling after reargument was not because it refused to consider the amended statute on appeal, but rather because it did consider the amended statute for the first time on appeal and found that it was not constitutional. So if that case has any relevance, it is in the Tenant's favor. Moreover, the cases cited above, decided after McMaster, consistently apply amended statutes for the first time on appeal, and do not cite the finality of an order as a factor in doing so. Indeed, in Post v. 120 East End Avenue Corp., 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984), the appeal was from a non-final order, the Appellate Division granted leave to appeal on a certified question, and this Court applied an amended statute for the first time on the appeal. And although not even relevant, the Appellate Division order in the case at bar is a final order notwithstanding the New York Supreme Court's marking in this action, since The Appellate Division ruled that the Tenants abandoned their cause of action for declaratory and injunctive relief (done because Landlord did not dispute stabilized status below), and the Tenants were denied summary judgment on their two other causes of action for overcharges and attorneys' fees because there could be no such claims with the lower court's ruling of no overcharge. These causes of action could only be revived if this Court rules in the Tenants favor, so the New York Supreme Court should not have subsequently scheduled the case for a preliminary conference.

> Where an appeal arises from a motion to dismiss, the complaint "is to be afforded a liberal construction" (*Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511[1994]). We must "accept the facts as alleged as true, [and] accord plaintiffs the benefit of every possible favorable inference" (*id).* We are also bound to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id*. At 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511); "the criterion is whether [it] has *stated* one" (id. At 88, 614 N.Y.S.2d 972, 638 N.E.2d 511. [emphases added]).
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> 2019 N.Y. Slip Op. at 3.

The Courts below did not apply this strict standard. Even when considering the issue of fraud, the Courts below ignored the Landlord's failure to file registrations for the period of 1997-2010, and the fraudulent leases which, as detailed earlier, violated multiple provisions of the Rent Stabilization Code.

The Landlord argues in its brief that absent a showing of fraud, a tenant is stuck with the rent charged to them four years prior to their filing of an overcharge complaint, even if, as in the case at bar, the rent is an illegal one based on a rent charged in the five-year illegal deregulated lease given to the Tenants here for the period of 2005-2010. This runs contrary to this Court's ruling in Roberts v. Tishman Speyer Properties, LP, 13 NY 3d 270 (2009), as it would render the ruling toothless as to many if not most overcharge claims, allowing landlords to abscond with rent money they were not entitled to under this Court's ruling. Moreover, this Court has never favored a mechanical application of a four-year rule, which would distort the

requirements in the rent regulatory laws of charging affordable rents to tenants.[9]

The Landlord is incorrect in claiming that on the 3211 motion below, there could be a finding of no fraud given the pleadings and assertions in the motions below, and incorrect that absent a finding of fraud by the Landlord, a court cannot look at the rent history or other records in existence more than four years prior to the filing of the overcharge complaint. Courts have looked back beyond the four-year period in various contexts not involving fraud, including rent-reduction orders, longevity increase, and treble damages determinations. See Scott v. Rockaway Pratt, LLC, 17 N.Y.3d 739, 740 (2011)[rent reduction orders]; Matter of Cintron v. Calogero, 15 N.Y.3d 347, 355 (2010)[rent reduction orders]; Matter of H.O. Realty Corp. v. State of N.Y. Div. of Housing & Community Renewal, 46 A.D.3d 103, 109 (1st Dept. 2007)(treble damages); Matter of Ador Realty, LLC v. Division of Housing & Community Renewal, 25 A.D. 3d 128, 136-39 (2nd Dept. 2005)(longevity increases). The rationale behind these rulings is to give meaning to the substantive provisions of the rent regulatory laws so that illegal rents are not charged.

The cases cited by the Landlord's brief are distinguishable. Matter of Boyd v. New York State Division of Housing and Community Renewable, 23 N.Y. 3d 999

[9] And as noted in the Tenant's main brief, even if this Court chooses to go back only four years from the filing of the overcharge complaint to calculate the overcharge, it could use the "sampling method", which looks to the average stabilized rents for comparable apartments in the same building as of the base date.

(2014) involved only the question of whether the tenant had showed sufficient evidence of fraud relating increases for individual apartment improvements, not whether fraud was the only exception to the four year rule. Park v. New York State Division of Housing and Community Renewal, 150 A.D.3d 105, 50 N.Y.S.3d 377 (1st Dept 2017) is cited by the landlord in support of its assertion that the Tenants should be bound by the base date rent charged to them four years prior to the filing of their overcharge complaint, regardless as to whether it is a legal and proper rent. We addressed why that case is not controlling in our main brief at page 16.

Last, the Landlord argues that its filing of rent registrations from 2010 onward shortly after the Roberts ruling was issued distinguishes this case from Taylor. However, the Taylor Court, allowed an examination of the entire rent history for purposes of establishing the base date rent, found the landlord's filing of registrations significant not because of the date of their filing, but rather because of their content. The Court held that the registrations, filed in 2014, (a) did not establish that the 2010 rent it charged the tenants was in accordance with the applicable rent stabilization guidelines; and (b) were only retroactive to 2009, and therefore did not address the period of time from the tenant's initial 2000 lease through 2009. Similarly, the Landlord's registrations in the case at bar have these flaws and (a) do not establish that the 2010 rent of $20,000 and subsequent rents were in accordance with applicable rent stabilization guidelines (the Landlord just took this number from

the prior deregulated lease); and (b) were retroactive only to 2010, and therefore did not address the period of time from the Tenants' initial 2005 lease through 2010. In sum, the Court's ruling in Taylor regarding the rent registrations was on point.

CONCLUSION

For all the foregoing reasons and the reasons stated in the Tenants' main brief, the ruling of the Court below should be reversed, the relief requested in the Tenants' cross-motion for summary judgment should be granted, the Landlord's motion to dismiss should be denied, and the Court should award to the Tenants any other relief that is just and proper.

Dated: New York, New York
November 5, 2019

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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 6,769.

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