SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 27, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2988 404 Park Partners, L.P., Index 600605/09
Plaintiff-Respondent,

-against-

Jack Lerner, et al.,
Defendants,

Anita Grossberg,
Defendant-Appellant.

Auciello Law Group, P.C., Brooklyn (Anthony J. Auciello of counsel), for appellant.

Ephron-Mandel Albin & Howard, L.L.P., New York (Melissa Ephron-Mandel of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered February 17, 2010, which, to the extent appealed from, granted plaintiff summary judgment against defendant Grossberg, unanimously reversed, on the law, without costs, and plaintiff's motion denied with respect to that defendant.

Defendants were guarantors of the tenant's obligations to landlord plaintiff. Defendants Miller and Grossberg signed a guaranty in connection with the lease extension in 2003. In

2005, when the lease was again extended under terms that significantly escalated the rent, the guaranty was then signed by defendants Miller and Lerner.

A guaranty of a tenant's obligations under a lease must be strictly interpreted in order to assure its consistency with the lease terms to which the guarantor actually consented. Since Grossberg did not sign the 2005 guaranty, and the increase in rent and additional financial terms changed the risk assumed in her 2003 guaranty, the IAS court erred in concluding, as a matter of law, that her obligation under the 2003 guaranty continued through the term of the 2005 lease (*Lo-Ho LLC v Batista,* 62 AD3d 558 [2009]). Whether that obligation survives the most recent lease extension, under the terms of Grossberg's original guaranty, remains an issue of fact for trial (*cf. White Rose Food v Saleh*, 99 NY2d 589 [2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 27, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2540 Patriot Exploration, LLC, et al., Index 114436/08
Plaintiffs-Respondents,

-against-

Thompson & Knight LLP,
Defendant-Appellant.

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Thompson & Knight LLP, New York (Brian C. Dunning of counsel), for appellant.

Bernkopf Goodman LLP, Boston, MA (Peter B. McGlynn, of the Massachusetts Bar, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 4, 2009, which denied defendant's motion for dismissal of the action on the ground that New York is an inconvenient forum, affirmed, without costs.

In this legal malpractice action, the motion court did not abuse its discretion in declining to dismiss this action on forum non conveniens grounds (*see Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 175-77 [2004]). Since the court may grant a forum non conveniens motion "on any conditions that may be just" (CPLR 327[a]), which includes the power to impose "reasonable conditions designed to protect plaintiffs' interests" (*Chawafaty v Chase Manhattan Bank*, 288 AD2d 58, 58 [2001], *lv denied* 98 NY2d 607 [2002]), the court could properly condition an inconvenient-forum dismissal on a waiver of the foreign forum's

two-year statute of limitation (*see e.g. Healy v Renaissance Hotel Operating Co.*, 282 AD2d 363, 364 [2001]; *Seung-Min Oh v Gelco Corp.*, 257 AD2d 385, 387 [1999]; *Highgate Pictures v De Paul*, 153 AD2d 126, 129 [1990]).

Nor can defendant prevail on its belated offer, made in its motion for reargument, to waive its potential statute of limitations defense, since the court had also properly found that defendant had not met its burden of establishing that New York was an inconvenient forum and that the matter should be tried in Texas based upon a consideration of factors including potential hardship to proposed witnesses, the location of records and files, the residency of the parties, and the burden imposed upon the New York courts (*see Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied*, 469 US 1108 [1985]).

We have considered defendant's remaining arguments and find them unavailing.

All concur except McGuire and Moskowitz, JJ. who dissent in a memorandum by Moskowitz, J. as follows:

MOSKOWITZ, J. (dissenting)

I dissent and would reverse. This is a legal malpractice action. Plaintiffs and defendant had an ongoing attorney-client relationship commencing in 2004. Plaintiffs moved their offices from New York City to Greenwich, Connecticut in July 2006. According to the complaint, in September 2006, plaintiffs engaged attorneys from defendant's Texas office to represent plaintiffs in connection with certain oil and gas related transactions involving, inter alia, non-party Apollo Resources International, Inc. Plaintiffs claim that defendant committed malpractice when it incorrectly identified Apollo Resources, instead of Apollo Natural Gas Company, LLC, as the record title owner of certain properties thereby causing plaintiffs to pay the wrong entity. On March 21, 2008, plaintiffs commenced an action in a Texas state court to clear title. On May 8, 2008, plaintiffs obtained a default judgment against the Apollo entities and others in the Texas action and cleared its title.

On October 27, 2008, plaintiffs commenced this action for legal malpractice in New York County. On January 20, 2009, defendant moved to dismiss on the grounds of forum non conveniens pursuant to CPLR 327. Defendant did not move to dismiss on statute of limitations grounds pursuant to CPLR 3211(a)(5).

The motion court denied defendant's motion on June 1, 2009, apparently because defendant had refused to agree to the

application of New York's borrowing statute (CPLR 202)[1] in the alternative forum in Texas. Defendant seems to have misunderstood and thought that the motion court was asking it to waive its statute of limitations defense altogether, and that it was reluctant to do because it believed at the time that the action was likely time-barred under Texas law. On the initial motion, defendant did offer to deem the filing date in Texas to be October 27, 2008, the same date that plaintiff filed in New York. Defendant then moved for renewal and reargument in which it reversed its prior position and expressed its "willingness to accept the Supreme Court's condition of a complete waiver of the statute of limitations."

However, on September 29, 2009, the motion court still refused to dismiss. In denying reargument, the court, without explanation, found that defendant failed to set forth any basis upon which the court could "conclude that the original motion would have been granted but for [defendant's] failure to waive the defense of statute of limitations." The court noted that,

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[1] CPLR 202 states:
"An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

just because it considered the waiver issue dispositive, did not mean that the motion was otherwise meritorious.

Defendant appealed the June 1, 2009 decision, arguing that the motion court's order should be reversed, and that its original motion should be granted upon stipulation to a complete waiver of any statute of limitations defense. The court's September 29, 2009 decision denying reargument is not appealable (*see U.S. Bank, N.A. v Russell-Esposito*, 71 AD3d 1127 [2010]). Accordingly, we review only the June 1, 2009 decision that denied defendant's motion to dismiss for forum non conveniens.

A motion to dismiss based on forum non conveniens is left to the sound discretion of the motion court *(Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 175 [2004]). A party seeking to dismiss a complaint on inconvenient forum grounds bears the burden of demonstrating the "relevant private or public interest factors which militate against accepting the litigation" in that forum (*Stravalle v Land Cargo, Inc.,* 39 AD3d 735, 736 [2007]). Among the factors a court must weigh are: (1) residency of the parties, (2) the potential hardship to proposed witnesses, (3) the availability of an alternative forum, (4) the situs of the underlying action and (5) the burden it will impose on the New York courts (*see Prestige Brands, Inc. v Hogan & Hartson, LLP*, 65 AD3d 1028 [2009] [dismissing legal malpractice action on forum non conveniens grounds]). No one single factor controls (*id*).

The availability of an alternative forum is no longer a controlling factor, but remains one of the primary considerations in determining a forum non conveniens motion *(Highgate Pictures, Inc. v De Paul*, 153 AD2d 126, 128-129 [1990]).

In general, there is nothing improper about the motion court's conditioning the dismissal of a case on defendant's waiver of the statute of limitations defense or accepting, for statute of limitations' purposes, the application of New York's borrowing statute (*see e.g. Healy v Renaissance Hotel Operating Co.*, 282 AD2d 363, 364 [2001]; *Seung-Min Oh v Gelco Corp.*, 257 AD2d 385, 387 [1999]; *Highgate Pictures, Inc. v De Paul,* 153 AD2d at 129*; see also Turay v Beam Bros. Trucking Inc.,* 61 AD3d 964, 967 [2009] [waiver condition required "to assure the availability of a forum for the action"]). However, the effect of a conditional order should not place the plaintiff in a better position than it would have been in the original action. Defendant's offer to deem the filing date in the Texas action to be the same date plaintiff filed in New York should have been sufficient. This would have mitigated any prejudice to plaintiff from the lapse between filing the New York action and filing in Texas, while preserving defendant's statute of limitations defense.

The motion court never expressly applied the factors that go into deciding a forum non conveniens motion but seemed to

recognize that this case had little connection to New York. Instead, the court denied the motion because the parties represented that the Texas statute of limitations was shorter than New York's and defendant did not agree to the application of the borrowing statute. Nevertheless, this case clearly does not belong in New York. Defendant maintains an office here, but none of the attorneys at the New York office were involved in the events underlying this case. Plaintiffs' principal places of business are now in Connecticut and virtually all the underlying events occurred, for the most part, after plaintiffs had moved their offices. That plaintiffs previously maintained places of business in New York is not relevant, because the documents and witnesses are no longer within this jurisdiction.

More important, there will likely be a need for testimony from non-party witnesses, such as individuals from the two Apollo entities, who are located in Texas. Plaintiff argues that there will be no need to call anyone from Apollo. I cannot agree. Rather, testimony from Apollo witnesses may be integral to determine whether defendant law firm was negligent in confusing the Apollo entities. For instance, the determination could depend on what someone at one of the Apollo entities communicated to defendant. The lead attorney on the underlying transaction, who lives in Texas, no longer works for defendant, and as with the Apollo witnesses, it is unlikely a New York court itself can

compel his live testimony without assistance from a Texas court. This case thus represents an unnecessary burden on the New York courts. In addition, all records that either Apollo entity has are located in Texas. Further, the events pertinent to this case all occurred outside New York, the documents are in Texas and, as this case concerns what *defendant* did or did not do, all of the relevant witnesses are in Texas. Finally, Texas certainly has an overriding interest in regulating the conduct of the lawyers admitted in that state (*see Sears Tooth v Georgiou*, 69 AD3d 464 [2010]).

In sum, as the motion court recognized, this case has little connection to New York, while Texas has a strong policy interest. All the relevant witnesses and evidence are in Texas. Accordingly, I would reverse the order and grant the motion on the conditions that: (1) defendant waive any statute of limitations defense in the Texas action as it has requested in this appeal and (2) consent to deeming the filing date of the Texas action to be as of October 27, 2008, the date plaintiffs filed this action in New York.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 27, 2010

CLERK

Mazzarelli, J.P., Nardelli, DeGrasse, Richter, JJ.

2924 In re Nicholas Casale, Index 115718/03
Petitioner-Appellant,

-against-

Metropolitan Transportation Authority, et al.,
Respondents-Respondents.

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McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel), for appellant.

Proskauer Rose LLP, New York (Neil H. Abramson of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 12, 2009, which denied petitioner's motion to vacate the hearing officer's determination, following a name-clearing hearing, that petitioner failed to demonstrate the falsity of certain statements in respondent Metropolitan Transportation Authority's letter terminating his employment, and confirmed the determination, affirmed, without costs.

The determination that petitioner failed to prove, by a preponderance of the evidence, that he had not repeatedly mischaracterized his source in the corruption investigation as a confidential informant is rationally based on the record. Contrary to petitioner's contention, in support of which he relies on *World Exch. Bank v Commerce Cas. Ins. Co.* (255 NY 1 [1930]), the hearing officer's conclusion that this conduct was dishonest is not foreclosed as a matter of law by his belief that

petitioner was acting to benefit respondent, rather than for his own personal gain. *World Exch. Bank* contemplates the determination of the issue of an employee's dishonesty by the trier of fact with reference to the employer's general business or the employee's own functions (*id.* at 5-6), and that is precisely what occurred here.

Nor did the hearing officer exceed his jurisdiction in finding that petitioner engaged in a pattern of dishonesty. The terms of the stipulation governing the name-clearing hearing did not limit the inquiry to the fabrication of the existence of a confidential informant.

All concur except Nardelli, J. who concurs in a separate memorandum as follows:

NARDELLI, J. (concurring)

Although I agree that petitioner failed to meet his burden of showing that he did not fabricate the existence of a confidential informant, I believe that the use of the word "dishonesty" in the termination letter can be misconstrued.

It should have been made clear that the "dishonesty" with which he was charged did not involve conduct in which he sought "to gain some benefit for himself" (*World Exch. Bank v Commercial Cas. Ins. Co.*, 255 NY 1, 5 [1930]). While his communication with his superior concerning the evidence of a confidential informant may have lacked the clarity required, it is evident that petitioner had concern about the need for secrecy that led to disingenuity. To the extent he acted dishonestly, he did so in pursuit of what he believed his investigation required, not because he sought a personal gain.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 27, 2010

CLERK

Andrias, J.P., Saxe, Friedman, Nardelli, Acosta, JJ.

3189-
3189A Gwendolyn Wise-Love, et al., Index 113020/04
Plaintiffs-Appellants,

-against-

60 Broad Street LLC, et al.,
Defendants-Respondents.

Pollack Pollack Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Ryan, Brennan & Donnelly LLP, Floral Park (John O. Brennan of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 13, 2009, which, upon reargument, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 16, 2009, unanimously dismissed, without costs, as superseded by the appeal from the October 13, 2009 order.

Defendants' evidence establishes prima facie that they neither created nor had actual or constructive notice of the alleged wet condition that caused plaintiff to slip. Contrary to plaintiffs' contention, defendants' general awareness that it was raining and that water was being tracked into the building is insufficient to raise a triable issue of fact with respect to

notice of a dangerous condition (*Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 106-107 [2000]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1995]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 27, 2010

CLERK

Andrias, J.P., Saxe, Friedman, Nardelli, Acosta, JJ.

3190 Delfy Perez, Index 8535/07
Plaintiff-Respondent,

-against-

George Giouroukos, et al.,
Defendants-Appellants.

Cohen Kuhn & Associates, New York (Steven Balson-Cohen of counsel), for George Giouroukos and Stark Aquarium, appellants.

Thomas Torto, New York (Jason Levine of counsel), for Augustin Puntiel, appellant.

O'Connor, Redd, LLP, White Plains (John P. Grill of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered September 11, 2009, which denied defendants' motions for summary judgment, unanimously reversed, on the law, without costs, the motions granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendants' medical evidence established that plaintiff did not suffer a serious injury causally related to the accident. Their radiologist opined that the herniated discs in plaintiff's lumbar and cervical spine were degenerative and preexisting, and thus not caused by the June 2006 automobile accident. In response, plaintiff's medical expert, while noting that the herniated discs shown on the MRI correlated to his range-of-motion and other studies, failed to address or rule out injury from a preexisting degenerative condition, or to offer competent

medical proof that plaintiff could not perform substantially all of her normal activities for 90 of the first 180 days following the accident (*see Valentin v Pomilla*, 59 AD3d 184 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 27, 2010

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2311 Garvey Rich, Index 113867/07
Plaintiff-Respondent,

-against-

East 10th Street Associates LLC, etc., et al.,
Defendants,

256 East 10th Street NY, LLC,
Defendant-Appellant.

- - - -

Community Housing Improvement
Program, Inc.,
Amicus Curiae.

- - - - - - - - - -

2312 Christopher Scott, Index 100469/08
Plaintiff-Respondent,

-against-

Rockaway Pratt, LLC,
Defendant-Appellant.

- - - -

Community Housing Improvement
Program, Inc.,
Amicus Curiae.

_____

Sidrane & Schwartz-Sidrane, LLP, Hewlett (Steven D. Sidrane of counsel), for appellants.

Christopher D. Lamb, MFY Legal Services, Inc., New York (Kristin M. McNamara of counsel), for Garvey Rich, respondent.

Steven Banks, The Legal Aid Society, Brooklyn (Patrick J. Langhenry of counsel), for Christopher Scott, respondent.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 3, 2009, modified, on the law, to vacate the finding and substitute therefor a finding that the base rent is the rent charged four years before the filing of the overcharge complaint, and otherwise affirmed, without costs.

Order, same court (O. Peter Sherwood, J.), entered July 23, 2009, modified, on the law, to vacate the finding and substitute therefor a finding that the base rent is the rent charged four years before the filing of the overcharge complaint, and otherwise affirmed, without costs.

Opinion by Abdus-Salaam, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

JUL 27 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
John W. Sweeny, Jr.
Eugene Nardelli
Sheila Abdus-Salaam, JJ.

2311-
2312
Index 113867/07
100469/08

Garvey Rich,
Plaintiff-Respondent,

-against-

East 10th Street Associates LLC, etc.,
et al.,
Defendants,

256 East 10th Street NY, LLC,
Defendant-Appellant.

- - - -

Community Housing Improvement
Program, Inc.,
Amicus Curiae.

- - - - - - - - -

Christopher Scott,
Plaintiff-Respondent,

-against-

Rockaway Pratt, LLC,
Defendant-Appellant.

- - - -

Community Housing Improvement
Program, Inc.,
Amicus Curiae.

Defendant 256 East 10th Street NY, LLC appeals from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered March 3, 2009, which denied its motion for summary judgment dismissing the complaint, upon the finding, inter alia, that the legal base rent for purposes of calculating the rent overcharge is the rent charged on April 1, 1993.

Defendant Rockaway Pratt, LLC appeals from an order, same court (O. Peter Sherwood, J.), entered July 23, 2009, which, to the extent appealed from, denied its motion for summary judgment dismissing the complaint, upon the finding, inter alia, that the legal base rent for purposes of calculating the rent overcharge is the rent charged on August 1, 1982.

Sidrane & Schwartz-Sidrane, LLP, Hewlett (Steven D. Sidrane of counsel), for appellants.

Christopher D. Lamb, MFY Legal Services, Inc., New York (Kristin M. McNamara of counsel), for Garvey Rich, respondent.

Steven Banks, The Legal Aid Society, Brooklyn (Patrick Langhenry of counsel), for Christopher Scott, respondent.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber, David Cabrera and Marnie R. Kudon of counsel), for amicus curiae.

ABDUS-SALAAM, J.

In these actions for rent overcharges paid under leases subject to the Rent Stabilization Law of 1969, the motion courts held that rent reduction orders issued prior to the four-year statute of limitations of CPLR 213-a, and remaining in effect during the limitations period, should be used to determine the base rent for purposes of calculating the amount of the overcharges. This was error.

The proper legal regulated rent for purposes of determining an overcharge is deemed to be the rent charged on the base date, plus any subsequent lawful increases or adjustments (Rent Stabilization Code [9 NYCRR] § 2526.1 [a][3][i]). The base date in these cases is four years before the filing of the overcharge complaint (§ 2520.6 [f]).

The Legislature clearly recognized that the rent actually charged on the base date may not be the legal regulated rent, but nonetheless imposed a four-year limitations period that deemed the base rent to be the legal rent. CPLR 213-a, which tracks the language of the Rent Stabilization Law (RSL, New York City Administrative Code § 26-516[a][2]), precludes, with respect to actions on a residential rent overcharge, "examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the

action." Additionally, "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 . . . plus in each case any subsequent lawful increases and adjustments," and where the amount of rent set forth in that annual rent 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]).

By applying the rent that should have been charged on the base date pursuant to the rent reduction order instead of the actual base date rent, the motion courts ran afoul of the foregoing statutory provisions. The legislative scheme forecloses such an analysis, "even where the prior rental history clearly indicates that an unauthorized rent increase had been imposed" (*Matter of Hatanaka v Lynch*, 304 AD2d 325, 326 [2003]). While it would have been appropriate, in calculating the overcharge, to take notice of the rent reduction order and freeze the legal base rent during the period when the rent reduction order was extant (*see e.g. Matter of Cintron v Calogero*, 59 AD3d 345 [2009]), consideration of the rent reduction order issued before the base date for the purpose of readjusting the legal

base rent is not permitted.

The dissent's citation to this Court's decision in *Crimmins v Handler & Co.* (249 AD2d 89 [1998]) is misplaced because the holding there did not involve the issue before us. *Crimmins* simply construed the statutory language of CPLR 213-a to mean that an action for an overcharge must be brought within four years of the first month for which damages are sought to be recovered. In other words, damages can only be recovered for the four-year period preceding the commencement of the action, and not, as argued by the defendants in that case, that an overcharge claim is barred where the overcharge has extended for a period in excess of four years. *Crimmins* did not address the issue here, which is whether the rental history of an apartment prior to the four-year period preceding the filing of the overcharge complaint can be used to calculate the rent overcharge. Therefore, notwithstanding the Second Department's citing of *Crimmins* in *Matter of Condo Units v New York State Div. of Hous. & Community Renewal* (4 AD3d 424 [2004], *lv denied* 5 NY3d 705 [2005]) to support its conclusion that the DHCR was not precluded from examining the rent history beyond the four-year period preceding the complaint in order to calculate the overcharge, this Court's decision in *Crimmins* does not stand for that proposition.

Nor does *Thornton v Baron* (5 NY3d 175 [2005]) support the

dissent's position that the rent reduction order, issued years prior to the four-year period preceding the filing of the complaint, should be used to determine the base date legal rent for purposes of calculating the overcharge. *Thornton* did not involve a rent reduction order, but the fraudulent creation of an illusory tenancy for the purpose of removing an apartment from the protection of the Rent Stabilization Law. The lease was void at its inception, and the rent registration statement filed four years prior to the complaint was a nullity. In this case, there has been neither a finding of fraud nor a declaration that the lease was void and the rent registration a nullity. Moreover, and most significantly, even where the owner's actions in *Thornton* were described as fraudulent, willful and egregious, in establishing the legal regulated rent of the apartment, the Court of Appeals affirmed our holding that a default formula should be used to determine the legal rent *as of four years prior to commencement of the action*, rather than the eight years before commencement, when the illusory tenancy was first created. We had noted in that case that CPLR 213-a "contains no provision for a toll while a dwelling unit is not subject to rent stabilization, either because it is temporarily exempt or because an unlawful rent is being charged" (4 AD3d 258, 259). Nor is there any provision for a toll where a rent reduction order has

been violated and remains extant. The dissent argues that calculating the rent overcharge without applying the rent reduction order to reset the proper legal base date rent rewards the owner for flouting the rent reduction order. However, this is similar to the position taken by the dissenters in *Thornton* (*id.* at 260), and is no more persuasive in this context, where the owner's conduct is not fraudulent.

Furthermore, while the Court of Appeals noted in *Thornton* that this was "not a situation where an order issued prior to the limitations period imposed a continuing obligation on a landlord to reduce rent, such that the statute of limitations would be no defense to an action based on a breach of that duty occurring within the limitations period" (5 NY3d at 180), we do not read this to mean that the rent reduction order should be used to calculate the overcharge by reestablishing a new base rent. The concepts of a limitations period and calculation of a rent overcharge are distinctly different. While we have held in *Crimmins*, consistent with the above-quoted language of *Thornton*, that the statute of limitations does not bar an overcharge complaint when a rent reduction order was issued prior to the four-year limitations period, we have also held that in calculating a rent overcharge, it was proper for DHCR to take notice of the rent reduction order in effect at the relevant time

by freezing the base date rent, but not by reestablishing the base date rent pursuant to the rent reduction order (*see Matter of 462 Amsterdam, LLC v New York State Div. of Hous. & Community Renewal*, 61 AD3d 553 [2009]); *Cintron v Calogero*, 59 AD3d at 346 [2009]). This is premised on the reasoning that a rent reduction order, although a continuing obligation, cannot be applied to reestablish the base date rent, as such an application would run afoul of RSL § 26-516(a)(i).

Contrary to the suggestion of the dissent, we are not, by this holding, contravening the well-settled policy that an administrative order is effectual until vacated by the agency or set aside upon judicial review. Rather, we conclude that a rent reduction order issued beyond the limitations period but still in effect during that period may be considered in overcharge proceedings only insofar as that order is a continuing obligation, freezing the rent as of the base date but not reestablishing the base date rent, because applying the rent reduction order to readjust the base date rent would conflict with the express proscriptions set forth in CPLR 213-a and RSL § 26-516(a)(i).

Accordingly, the order of the Supreme Court, New York County (Michael D. Stallman, J.), entered March 3, 2009, which denied defendant 256 East 10th Street NY's motion for summary judgment

dismissing the complaint, upon the finding, inter alia, that the legal base rent for purposes of calculating the rent overcharge is the rent charged on April 1, 1993, should be modified, on the law, to vacate that finding and substitute therefor a finding that the base rent is the rent charged four years before the filing of the overcharge complaint, and otherwise affirmed, without costs. The order, same court (O. Peter Sherwood, J.), entered July 23, 2009, which, to the extent appealed from, denied defendant Rockaway Pratt's motion for summary judgment dismissing the complaint, upon the finding, inter alia, that the legal base rent for purposes of calculating the rent overcharge is the rent charged on August 1, 1982, should be modified, on the law, to vacate that finding and substitute therefor a finding that the base rent is the rent charged four years before the filing of the overcharge complaint, and otherwise affirmed, without costs.

All concur except Tom, J.P. who dissents in an Opinion.

TOM, J.P. (dissenting)

These actions, consolidated for disposition, seek recovery of rent overcharges in the amount paid under a lease subject to the Rent Stabilization Law of 1969. While the actions are governed by the four-year statute of limitations of CPLR 213-a, the issue to be decided is whether the statutory proscription against "examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" encompasses a rent reduction order that was issued prior to the limitations period.

Resolution of these matters turns upon the operative distinction between examination of the rental history of the rent-stabilized accommodation, which is subject to the four-year statute of limitations, and adherence to the terms of an order, which is not. Though in each instance the rent reduction order was issued prior the four-year period preceding the filing of the rent-overcharge complaint, any such order imposes a continuing obligation upon the landlord to limit the amount of rent charged under the lease that does not abate with the mere passage of time.

In both of these matters, the parties have stipulated to the essential facts. In *Rich*, plaintiff took occupancy of his apartment in March 1992 under a lease reflecting a monthly rent

of $690. In 1994, he and various other tenants filed an administrative complaint against the former building owner with the Division of Housing and Community Renewal (DHCR), alleging a diminution in building services. DHCR found in favor of the tenants, and by order issued December 5, 1994, reduced the legal regulated rent, commencing January 1, 1994, "to the level in effect prior to the most recent guidelines increase for the tenant's lease which commenced before the effective date of this Order." The order also provided that "no rent increase may be collected after the effective date of this rent reduction Order, until a Rent Restoration Order has been issued." It is undisputed that DHCR has never issued a rent restoration order, that the former owner never refunded amounts collected in excess of the reduced rent, that the former owner continued charging and collecting lease renewal rent increases, and that plaintiff paid all rent through and including that due for September 2007 to the former owner. The present owner, defendant 256 East 10th Street NY, which acquired the premises under a deed dated September 6, 2007, immediately applied for a rent restoration order, which DHCR denied in January 2008.

The amended complaint alleged that the tenant who occupied the apartment immediately prior to the commencement of plaintiff's lease had paid a monthly rent of $409.12, and

allowing for a 9% vacancy increase, the initial rent should have been $445.95, not the $690 actually paid by Rich upon commencement of his tenancy. It is further alleged that Rich never received notice of DHCR's December 1994 rent reduction order, and that he would never have discovered the existence of that order but for the action of the landlord in applying for rent restoration. Rich seeks to recover the amount he was overcharged for the four-year period immediately preceding the filing of the complaint, to the extent that the rent he paid exceeded the amount frozen by DHCR's 1994 rent reduction order.

The landlord answered and moved for summary dismissal, contending that the base rent should be determined by the amount contained in the rent registration statement in effect four years prior to the filing of the complaint, which the parties stipulate is $924.33. The landlord relied on the four-year statute of limitations of CPLR 213-a, asserting that it limited the effect of DHCR's rent reduction order to freezing the rent at the amount of the $924.33 base rent.[1] The answer averred that the landlord

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[1] CPLR 213-a provides:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of

has refunded any amount due plaintiff in excess of such base rent, together with interest at the statutory rate.

In opposition, Rich argued that the statute of limitations should be waived based on his allegation that the former owner, by tampering with his mail, fraudulently concealed the issuance of the DHCR rent reduction order freezing the rent at "the level in effect prior to the most recent guidelines increase for the tenant's lease." Rich thus contended that he was entitled to recover all rent paid in excess of $690 a month, which he claimed was the guideline in effect as of the issuance of the rent reduction order.

Supreme Court denied the landlord's motion. The court noted that the duty imposed on a landlord by a rent reduction order is a continuing one (citing *Matter of Condo Units v New York State Div. of Hous. & Community Renewal*, 4 AD3d 424 [2004], *lv denied* 5 NY3d 705 [2005]), concluding that the Legislature did not intend the statute of limitations "to provide an escape route for a landlord seeking to evade the terms of orders for required repairs or services to tenants." The court held that the order incorporating the rent in effect prior to the most recent

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the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

guidelines increase was not subject to the statute of limitations. However, the court observed that the rent level frozen by DHCR's order was not the $690 provided in plaintiff's first lease, which expired March 31, 1993, but rather the rent in effect in the fall of 1993, during the first renewal lease. Because the renewal lease was not contained in the record, the court ruled that determination of this amount must await trial.

In *Scott*, plaintiff took occupancy in January 2004 under a lease commencing January 15, 2004 and providing for a monthly rent of $925. The apartment, however, remained subject to an expulsion order issued by the Conciliation and Appeals Board, predecessor agency to DHCR. The expulsion order found a reduction in services at the subject premises and directed the then owner to reduce the rent to the level in effect prior to the most recent guidelines, retroactive to August 1, 1982. A December 1983 order of the New York City Department of Housing Preservation and Development had set the legal regulated rent for the premises at $179.03 a month. In May 1994, the application of a prior owner for an order restoring the rent was denied, and in September 2008, defendant's application for a rent restoration order was likewise denied.

Scott filed the summons with notice on January 11, 2008. The amended complaint alleged that defendant Rockaway Pratt was

liable for rent overcharges for the four years preceding the commencement of the action representing the amount in excess of the $179.03 at which the monthly rent was frozen.

Rockaway answered and moved for summary judgment dismissing the complaint, asserting that the legal rent must be determined from the base date, January 11, 2004, four years prior to the filing of the complaint; that on the base date, the apartment was vacant; that the rent reserved in the first lease was $925; and that the legal regulated rent for the apartment was thus $925 (citing Rent Stabilization Code [9 NYCRR] § 2526.1[a][3][iii]).

Supreme Court held that the rent order setting the legal regulated rent at $179.03 "imposed a continuing obligation on the landlord to make repairs and provide required services," which was "reaffirmed" when DHCR denied Rockaway's application for restoration of rent in September 2008, "within the limitations period." Because the total amount of rent credits received by Scott was unclear from the record, the court concluded that a hearing was required to calculate the total rent overcharge.

In both appeals, defendant owners rely on CPLR 213—a and the Rent Stabilization Law to obviate any consideration of the respective rent reduction orders in calculating the amount by which plaintiff tenants were overcharged. As pertinent to the matters at bar, Rent Stabilization Law (RSL, New York City

Administrative Code) § 26–516(a)(i) provides that "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 he most recent registration statement."

Tenants contend that the four-year statute of limitations does not relieve owners from their obligation to comply with the respective rent reduction orders. In any event, they argue, the Legislature did not intend such orders to comprise part of the rental history of an apartment.

The primary purpose of the Rent Stabilization Law was to "ameliorate the dislocations and risk of widespread lack of suitable dwellings" (*Manocherian v Lenox Hill Hosp.*, 84 NY2d 385, 395-396 [1994], *cert denied* 514 US 1109 [1995]). To further this policy goal, DHCR was empowered to issue rent reduction orders to compel owners to provide essential services (RSL, § 26-514) so as to preserve and maintain the housing stock in New York City (*see Jenkins v Fieldbridge Assoc., LLC*, 65 AD3d 169, 173 [2009], *appeal dismissed* 13 NY3d 855 [2009]). Under § 26-514, if DHCR determines, upon application of a tenant, that a landlord has failed to maintain required services, the agency may issue a rent reduction order and bar the owner from applying for or collecting future rent increases until services have been restored. DHCR's Operational Bulletin 95-1 (August 21, 1995), sets forth the

agency's general policy including rent reduction orders, and prohibits the collection of any other rent increases after the effective date of a rent reduction order, until the issuance of a rent restoration order.

By calculating the rent overcharge without consideration of the rent reduction order issued prior to the four-year limitations period, the majority would, in effect, frustrate a significant policy goal of the Rent Stabilization Law and encourage unscrupulous property owners to disregard compliance orders that would, by application of the majority's methodology, have a four-year expiration date. Therefore, by allowing the unlawful rents contained in the registration statements filed by owners to establish the lawful regulated rents for tenants' premises, the majority would reward owners for flouting the respective rent reduction orders issued by DHCR and its predecessor agency. As stated by the Court of Appeals, "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 . . . That surely was not the intention of the Legislature when it enacted the R[ent] R[egulation] R[eform] A[ct]. 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" (*Thornton v Baron*, 5 NY3d 175, 181 [2005], citation omitted).

The four-year statute of limitations applicable to rent overcharge calculations was enacted as part of the Omnibus Housing Act of 1983 (L 1983, ch 403, § 35) and was intended to ease the burden on owners by limiting the number of years rental records must be preserved to respond to rent overcharge complaints (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). Previously, owners had been required to retain and produce, on demand, all leases in effect on May 31, 1968 or thereafter (*see Matter of Lavanant v State Div. of Hous. & Community Renewal*, 148 AD2d 185, 190-191 [1989]). The requirement for rent registration (L 1983, ch 403, § 5) and the four-year limitations period were intended to complement the new limit on record maintenance, effective April 1, 1984, as codified in RSL § 26-516(g)[2] (*see Matter of Ador Realty, LLC v Division of Hous. & Community Renewal*, 25 AD3d 128, 135 [2005]). Clearly, the statute was not intended to diminish

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[2] Any owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation.

DHCR's power to enforce the owners' obligation to provide essential services to housing accommodations in New York City.

The RRRA (L 1997, ch 116) "clarified and reinforced the four-year statute of limitations in rent overcharge claims and limited 'examination of the rental history of the housing accommodation prior to the four-year period proceeding the filing of a[n overcharge] complaint'" (*Gilman*, 99 NY2d at 149, quoting § 33 of the enactment, which amended RSL § 26-516[a][2]). Section 33 of the 1997 enactment further amended RSL § 26-516(a)(i) to read as follows: "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" (*see Matter of Muller v New York State Div. of Hous. & Community Renewal*, 263 AD2d 296, 303[3] [2000], *lv denied* 95 NY2d 763 [2000]). The statute of limitations is equally applicable to an adjustment in the amount of the legal regulated rent or to recovery of a rent overcharge (*Gilman*, 99 NY2d at 149).

This Court has held that a tenant may recover the amount paid to the owner in excess of the rent established by a rent

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[3] The amended portion of the Rent Stabilization Law was incorrectly referred to in *Muller* as located in § 26-516 (a)(*ii*).

reduction order, even though the order was issued, and the first overcharge occurred, prior to the four-year limitations period (*Crimmins v Handler & Co.*, 249 AD2d 89, 91 [1998]; *cf. Matter of Brinckerhoff v New York State Div. of Hous. & Community Renewal*, 275 AD2d 622 [2000], *appeal dismissed* 96 NY2d 729 [2001], *lv denied* 96 NY2d 712 [2001], [statute of limitations commences running with first overcharge]). This position has been adopted by the Second Department in *Condo Units* (4 AD3d at 425): "[W]here a duty imposed prior to a limitations period is a continuing one, the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period," the Court concluding that "DHCR properly considered the rent reduction order issued prior to the four-year limitations period, but still in effect at the time of the overcharge complaint, since it imposed a continuing obligation on the landlord to reduce rent"(*id.*).

The Court of Appeals arrived at the same conclusion in *Thornton* (5 NY3d 175, *affg* 4 AD3d 258), where a new legal regulated rent was required to be established because the premises was occupied under an illusory tenancy that we had earlier declared invalid. We held that since the tenants commenced their action over eight years after the last lawful rent had been paid, use of the rental history was precluded by

CPLR 213—a, and the rent had to be determined by means of a default formula employed by DHCR (4 AD3d at 259-260). In endorsing the use of this methodology, the Court of Appeals emphasized that this was "not a situation where an order issued prior to the limitations period imposed a continuing obligation on the landlord to reduce rent, such that the statute of limitations would be no defense to an action based on a breach of that duty occurring within the limitations period" (5 NY3d at 180).

As a further consideration, nothing has been brought to this Court's attention to suggest that the Legislature, by restricting the period during which a rent overcharge can be recovered, intended to abrogate the well settled policy that an administrative order remains in effect until vacated by the agency that issued it or set aside upon judicial review (*see e.g. 520 E. 81st St. Assoc. v Lenox Hill Hosp.*, 38 NY2d 525 [1976] [once court decides that the Rent Stabilization Law is applicable, issues arising under the statute require administrative determination until that remedy is exhausted]; *Ament v Cohen*, 16 AD2d 824 [1962] [Rent Administrator's order setting rent is conclusive and not subject to collateral attack]; *Parisi v Hines*, 131 Misc 2d 582, 584 [1986], *affd for reasons stated below* 134 Misc 2d 20 [App Term 1986], *affd* 134 AD2d 972

[1987], *lv dismissed* 71 NY2d 928 [1988] [DHCR order is binding upon court, subject only to article 78 review]).

Accordingly, the orders should be affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 27, 2010

David Slobogin

CLERK