[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Trabucchi, Andy

-v-

Housing & Community Renewal

INDEX NO. 117029/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is denied per attached

FILED
JUL 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/10/09

EJG

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

In the Matter of the Application of ALDA TRABUCCHI,

Petitioner,

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

–against-

Index No.: 117029/07

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

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In the Matter of the Application of ISABELITA
GONZALEZ, MICHAEL JAMES, EMADELDIN
OMAR, and LUISE TRABUCCHI,

Petitioners,

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

–against-

Index No.: 400151/08

DIVISION OF HOUSING AND COMMUNITY
RENEWAL OF THE STATE OF NEW YORK,
168-170 WEST 25TH STREET ASSOCIATES,
and IRVING LEDEREICH,

Respondents.

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EMILY JANE GOODMAN, J.S.C.:

Petitioners bring two separate petitions, pursuant to CPLR Article 78, in which they seek to vacate and annul an order and opinion dated November 19, 2007 made by the respondent Division of Housing and Community Renewal of the State of New York (DHCR), denying their

two petitions for administrative review, and affirming a January 11, 2007 order of the Rent Administrator, which had determined that the building in which the petitioners live, 170 West 25th Street (a/k/a 261 Seventh Avenue), New York, New York (the building), was exempt from rent regulation based upon a substantial rehabilitation of the building carried out in the late 1980's.

Counsel for the parties agreed, by stipulation dated March 11, 2008, to consolidate the two petitions, and have filed a single set of papers with a double caption. However, the stipulation was never so-ordered by the court, and, by order dated December 11, 2008, filed in the *Trabucchi* proceeding, the court denied a request for consolidation, but stated that the two proceedings would be decided simultaneously. Accordingly, two separate, although identical, judgments must be awarded in each proceeding.

The building is a four-story structure with commercial premises on the ground floor and nine residential apartments on the remaining three floors. Petitioner Alda Trabucchi lives in Apt. 3C. Petitioners Isabelita Gonzalez, Michael James, Emadeldin Omar and Luise Trabucchi (hereinafter, the Gonzalez petitioners) live in Apts. 2C, 2A, 4A and 4C, respectively. The five petitioners are all long-term tenants of the building; the average length of their tenancy is over 15 years.

In March 2005, petitioner Isabelita Gonzalez filed an overcharge complaint with DHCR (No. TC410251R) and a harassment complaint (No. TD410004HL) against the owner of the building, Irving Ledereich. In response to those proceedings, the owner asserted that the building was not subject to rent regulation due to a substantial rehabilitation of the building allegedly performed between 1986 and 1989, and thus, the building was not under the jurisdiction of

DHCR. Thereafter, DHCR initiated a separate proceeding (No. TE410002UC) in May 2005 to determine whether the building was exempt from rent stabilization.

In an affirmation dated May 9, 2005 and submitted to DHCR in response to the harassment complaint, the owner alleged that he purchased the building in August 1984, in order to obtain possession of its vacant store for his fabric business. He claimed that, at the time he purchased the building, it had six apartments and one store, all of which were vacant because they were in an unrentable condition. The owner sold a neighboring building in 1987 in order to have sufficient funds to renovate the building. An alteration application was filed with the Department of Buildings (DOB) in 1986 (No. 1637/86), and a work permit was issued in 1987. In addition to changing the number of apartments from six to nine apartments, the owner claimed that the building had been substantially rehabilitated. *See* Return, B-3.

Section 2520.11(e) of the Rent Stabilization Code exempts from rent regulation housing accommodations in buildings completed or substantially rehabilitated as family units after January 1, 1974. 9 NYCRR § 2520.11 (e). Pursuant to DHCR's Operational Bulletin 95-2, the building must meet the following criteria to qualify for substantial rehabilitation:

> (a) the rehabilitation must have been commenced in a building that was in a substandard or seriously deteriorated condition; an 80% vacancy-rate for residential tenants equals a presumption that this requirement is met;
>
> (b) at least 75% of the following building-wide and apartment systems must have been completely replaced with new systems: plumbing, heating, gas supply, electrical wiring, intercoms, windows, roof, elevators, incinerators or waste compactors, fire escapes, interior stairways, kitchens, bathrooms, floors, ceilings and wall surfaces, pointing or exterior surface repair as needed, and all doors and frames including replacement of non-fire-rated items with fire-rated ones;
>
> (c) all building systems must comply with all applicable building codes and requirements; and

> (d) all ceiling, flooring and wall surfaces in common areas must have been replaced and all ceiling, flooring and wall surfaces in apartment must have, if not replaced, been made as new.

However, the 75% number may be, on a limited and case-by-case basis and for good cause shown, reduced "where the owner demonstrates that a particular component of the building or system has recently been installed or upgraded so that it is structurally sound and does not require replacement, . . ."

In support of his exemption application, the owner submitted two affidavits from his architect, Ilona Tihanyi; the six pages of alteration plans prepared by Ms. Tihanyi and filed with the DOB, various receipts and bills for flooring, kitchen cabinets, wiring and intercom, demolition, windows, and bathroom and kitchen duct work; and a Certificate of Occupancy (No. 93612) for the building issued on February 6, 1989.

The Rent Administrator (RA) issued an Order and Determination on or about January 11, 2007, finding that the building had been substantially rehabilitated between 1986 and 1989 and, therefore, was exempt from rent regulation and not under the jurisdiction of DHCR. The RA credited the owner's claim that the building was vacant when it was purchased in August 1984, and that the evidence he submitted established that 75% of the building wide and apartment systems were replaced, specifically "plumbing, heating (the system was converted from oil to gas), gas supply, electrical wiring, intercoms, windows, roof, fire escapes (brought to code), interior stairways, kitchens, bathrooms, floors, ceiling and wall surfaces, doors and frames. Common areas were also rehabilitated." The RA rejected the tenants' argument that the owner had not met his burden of proof and had waited too long in seeking an exemption, on the basis that Operational Bulletin 95-2 does not set a time limit for seeking an exemption after

completion of the rehabilitation work.

On February 20, 2007, the Gonzalez petitioners filed a petition for administrative review (PAR) of the RA's order. A second PAR was filed on behalf of petitioner Alda Trabucchi in March 2007. The tenants argued that the owner had failed to meet the requirements of Operational Bulletin 95-2 by failing to provide sufficient evidentiary proof that he had completely replaced at least 75% or 12 of the 15 eligible systems in the building.[1] Specifically, the tenants challenged the affidavits submitted by the owner's architect, Ilona Tihanyi, as conclusory and lacking in detail. In a supplemental PAR filed in July 2007, after having reviewed DHCR's complete file pursuant to a FOIL request, the tenants offered an affidavit of Edward Perry Winston, an architect retained by them. Based on his review of the architectural plans and other documentation submitted to the DOB in support of the owner's alteration application, Mr. Winston questioned whether the building was vacant at the time of the rehabilitation, whether new roofing was installed, whether a new heating system was installed, whether the heating system was converted from oil to gas, whether new fire escapes were installed and whether the owner's architect actually supervised the work. In addition, the tenants argued that the owner has always treated the tenants as rent-stabilized, as evidenced by the offering of rent-stabilized vacancy leases and renewal leases and by representing the building as subject to the Rent Stabilization Law of 1969, as amended, and duly registered with DHCR in various landlord-tenant proceedings in Housing Court.

In an Order and Opinion issued on November 19, 2007, DHCR Deputy Commissioner

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[1]The RA found, and all parties agree, that the since the building has no elevators or incinerators, only 15 of the systems listed in Operational Bulletin 95-2 are relevant to this matter.

Leslie Torres denied both PARs (hereinafter, Order Denying PARs), and affirmed the RA's January 11, 2007 order. Commissioner Torres addressed all of the tenant's objections and factual and legal arguments against regulatory exemption of the building, and found that the affidavit of the tenants' architect, Mr. Winston, did not raise enough concerns to justify a remand to the RA for further consideration. Commissioner Torres rejected the tenants' laches argument on the ground that there is no statute of limitations for an owner to file for deregulation under section 2520.11 (c) of the Rent Stabilization Code and/or Operational Bulletin 95-2. The tenants' equitable estoppel argument was also rejected on the ground that rent regulation does not attach by anything the owner may have done (i.e., offering the tenant rent-stabilized leases and representing that certain apartments in the building were subject to rent stabilization in Housing Court), any is only created by application of law.

CPLR 7803 (3) provides that the following question may be raised with respect to an administrative proceeding: "whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974). A rational or reasonable basis for the agency's determination exists if there is evidence in the record to support its conclusion. *See Sewell v New York*, 182 AD2d 469, 473 (1st Dept 1992). "If the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion." *West Village Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 (1st Dept 2000); *see also Matter of Fernandez v New*

York State Div. of Hous. and Community Renewal, 3 AD3d 366, 367-68 (1st Dept 2004).

The Gonzalez petition challenges DHCR's acceptance of the owner's contention that the building was vacant when he bought it in 1984. As noted by DHCR's Commissioner Torres, "[t]here is little or no evidence that this was not the case." Order Denying PARs, at 3. The fact that the DOB required the owner's architect to submit a "Tenant Safety Plan" to supplement the alteration application, an issue raised by the tenant's architect, Mr. Winston, was addressed by Commissioner Torres, who found the language of the safety plan to be merely "pro forma" and did not refute the sworn statement of the owner's architect who inspected the building prior to the work being commenced. That the building was vacant is also supported by (1) a DOB inspection report describing the entrance to the building as being padlocked and inaccessible on February 25, 1987, and (2) the fact that, since every floor was altered to add one additional apartment, ordinary residential occupancy would not be possible under such circumstances. Thus, DHCR's finding that the building was in a substandard or seriously deteriorated condition is rationally-based.

The RA also found that the owner had sufficiently established that 14 of the 17 building-wide and apartment systems listed in Operation Bulletin 95-2 had been replaced, thus meeting the 75% requirement. Petitioners concede that the building's interior stairways, kitchens, bathrooms, electrical wiring, and doors were replaced; conclusive documentary evidence shows that the windows and intercoms were replaced (*see* Return, B-3, Exhs. J and D); and petitioners fail to establish that DHCR's conclusions with respect to the remaining systems lacks a rational basis.

For example, the Gonzalez petitioners contend it was irrational for DHCR to credit the

assertions of the owner and Ms. Tihanyi that a new roof was installed for two reasons. First, the architectural plans submitted by Ms. Tihanyi do not show the installation of a new roof. Second, the tenants' architect, Mr. Winston, contended that either a new roof was not installed or was incompetently done, based on the lack of evidence and documentation that would normally be necessary and his own July 16, 2007 inspection of the building. However, petitioners do not challenge Commissioner Torres' statement that "[p]lans and permits are not required for the replacement of a roof." Order Denying PARs, at 5. In addition, both the owner's records and documents on file with the DOB show that new roof vents and new drains were installed, and that a staircase extended through the roof with a bulkhead (*see* Return, B-3, Exh. F; C-7, Exh. F; D-10, Exh. F), rendering it unlikely that the roof surface was not changed. Mr. Winston primarily challenges the lack of documentation concerning asbestos testing and removal for "roof removal and replacement." Return, D-14, Exh. A. But DHCR contends that flat roofs are preserved, rather than replaced, wherein the asbestos is safely encapsulated, which is consistent with Mr. Winston's observation that the old roofing still remains under a more recent top layer.

Another system that petitioners argue was not completely replaced was the building's fire escapes. Despite Ms. Tihanyi's sworn statement that "[n]ew fire escapes installed and painted for each apartment," (Return, A-17), they contend that the architectural plans Ms. Tihanyi filed indicate that the fire escapes were merely extended to cover the new apartment on each floor, and were not replaced. DHCR contends that this argument is based on a strained reading of the plans, which, by necessity, must show existing structures and the intended changes superimposed thereon. DHCR also points out that it would be far more expensive and time consuming to mount and join, far above the sidewalk, two additional extensions of the fire escape rather than

construct the entire fire escape on the ground and mount it once. In addition, photographs submitted by petitioners (Return, C-17, Exh. M) appear to support DHCR's contention that the fire escapes are one continuous piece of construction. However, even if the fire escapes were merely extended and then painted, if the original fire escapes were structurally sound and met all building code requirements, this should be sufficient to satisfy the "substantial rehabilitation" requirements of Operational Bulletin 95-2. Cf. *Eastern Pork Products Co. v New York State Div. of Hous. & Community Renewal*, 187 AD2d 320, 323 (1st Dept 1992).

Petitioners challenge DHCR's rejection of their argument that the record was inadequate regarding the replacement of the oil burning boiler with a gas burner. There is indisputable documentary evidence from the New York City Department of Environmental Protection that the old boiler, oil tank and piping was removed (*see* Return, C-7, Exh. C), and that DOB records indicate that the "gas Insp. OK (Heating) Completed -- Satisfactory." *See* Return, C-38.

DHCR's conclusions regarding both the replacement of the building's roof, fire escapes and heating system was supported by evidence and rationally-based. In short, petitioners fail to establish that DHCR's determination accepting the owner's claim that a gut renovation of the building was performed in the late 1980's was arbitrary or capricious. While petitioners pick at certain gaps in the owner's documentary proof, they fail to challenge the documented fact that the renovation converted the six residential apartments into nine apartments (from two per floor to three per floor) and two stores instead of one store on the ground level. *See* Gonzalez Petition, Exh. C thereto. This is work that would necessarily involve a total or gut renovation of each of the four stories in the building and the construction of new rooms, including kitchens and bathrooms, with their attendant plumbing, electrical and structural concerns.

As noted by both the Rent Administrator and Deputy Commissioner Torres, it is significant that two of the nine tenants in the building (William Morse in Apt. 2B and Michael Jalbert in Apt. 3A) responded to the exemption proceeding by affirming to DHCR that, when they first moved into their apartments, both the common areas and apartments seemed brand new. *See* Return, A-20, A-22. At a conference before DHCR held on May 24, 2005 in response to Isabelita Gonzalez' harassment complaint, this petitioner "conceded that when she took occupancy in 1992 that the apartment appeared 'new' and had been advertised as 'recently renovated.'" Return, C-9.

DHCR's determination that 75% of the building-wide and apartment systems had been replaced is rational, and must be upheld by this court.

Relying on the equitable doctrine of laches, petitioners contend that they have been unfairly prejudiced by the owner's 20-year delay in seeking to have the building de-registered with DHCR, and that the Legislature could not have meant to provide an unlimited period of time for an owner to claim its rights under a successful rehabilitation application. The court is mindful that the passage of this amount of time clearly limited the availability of documentary proof for both sides, and may well have hampered the petitioners' ability to locate former tenants and neighbors who were there before and during the renovation work and who could confirm or contradict the owner's version of the facts.

Nevertheless, as the RA noted, "Operational Bulletin 95-2 does not set a time limit in which as owner must file after the completion of the work. It only stipulates that the work must be completed after January 1, 1974." The RA also noted that Operational Bulletin 95-2, issued in 1995, contemplates that owners may apply for an order confirming the deregulation of a building

where the rehabilitation project was completed between 1974 and 1995, and that any deficiencies in the documentation required by the Operational Bulletin may be excused where undue hardship or prejudice would result. In *Various Tenants of 123 Guernsey v New York State Div. Hous. and Community Renewal* (19 AD3d 503 [2d Dept 2005]), a deregulation order was upheld fifteen years after the work was completed.

In addition, there is no requirement in the law that an application be made to DHCR to confirm a building's deregulation. Section 2520 (e) of the Rent Stabilization Code merely eliminates properties substantially rehabilitated after January 1, 1974 from DHCR's jurisdiction. According to DHCR, it has not been empowered to promulgate regulations regarding such buildings and has merely tried to make the boundaries of its jurisdiction clear through Operational Bulletin 95-2. Recognizing that a substantial rehabilitation requires a significant financial commitment, Operational Bulletin merely provides that an owner "may apply to the DHCR for an advisory prior opinion that the building qualifies for the exemption . . .." The issue of substantial rehabilitation often arises only when a dispute ensues between the owner and a tenant over rent stabilization protection. *See, e.g.*, *Woodcrest Mgt. Corp. v Div. of Hous. and Community Renewal*, 2002 WL 34358150 (Sup Ct, NY County Aug. 28, 2002) (application filed with DHCR 12 years after alleged substantial rehabilitation in 1983 necessitated when several tenants claimed to be rent-stabilized, resulting in DHCR's determination that the building was not exempt from rent stabilization due to lack of evidence of substantial rehabilitation), *affd* 2 AD3d 172 (1st Dept 2003); *81 Russell Street Assoc. v Scott*, 163 Misc 2d 984 (App Term, 2d Dept 1995) (issue of substantial rehabilitation raised in non-payment proceeding in Civil Court). Indeed, the issue of the building's exemption from rent regulation was not initiated by the owner,

but by DHCR in response to the harassment complaint made by Isabelita Gonzalez. Accordingly, petitioners' claim that the six-year Statute of Limitations of CPLR 213, which posits a period of six years for commencing "an action for which no limitations is specifically prescribed by law," should be applied to DHCR Pro. No. TE410002UC is misplaced.

Petitioners' final challenge to DHCR's determination is based on the defense of equitable estoppel. They contend that the owner led the tenants of the building into believing that they were covered by rent stabilization by giving them rent-stabilized leases and by making sworn statements in certain Housing Court proceedings that the building is subject to rent stabilization and duly registered with DHCR. Counsel for the Gonzalez petitioners, Susan M. Cohen, Esq. argues that, as a result of the owner's deception, her clients did not seek housing at a time when it was still possible to find such accommodations at a reasonable price. While DHCR Deputy Commissioner Torres appears to have accepted these factual predicates of the tenants' estoppel defense, and rejected this defense solely on legal grounds, the court is not convinced that a claim of equitable estoppel was even properly presented to DHCR.

While Ms. Cohen, in the Gonzalez PAR, represented that the owner "gave most of [the tenants] rent-stabilized leases" (Return, D-1: PAR, ¶ 33), the documentary evidence submitted to DHCR is not conclusive. With respect to Isabelita Gonzalez, the first lease offered is dated June 1, 1992. It is a standard Blumberg Form, number A 53, and specifically states: "*Use with Blumberg 326 Rent Stabilization Rider.* " Return, D-14, Exh. B. It also provides that an "ATTACHED RIDER SETS FORTH RIGHTS AND OBLIGATIONS OF TENANTS AND LANDLORDS UNDER THE RENT STABILIZATION LAW," but there is no attached rider. The lease for petitioner Michael James, dated September 1, 1993, and Luise Trabucchi, dated

November 14, 1994, is the same Blumberg A 53 form and again, the rent stabilization rider is missing. *Id.* In support of her harassment complaint (Pro. No. TD410004HL), petitioner Isabelita Gonzalez' offered a second lease, dated July 1, 1998. This lease is entitled the "Standard Form of Apartment Lease" from the Real Estate Board of New York. It, too, does not provide that the apartment is governed by the Rent Stabilization Code. *See* Return, C-1.

As for the Housing Court documents, the only pleadings offered where the owner or his attorney represents that an apartment occupied by any of the petitioners is subject to rent stabilization are with respect to only two of the five petitioners: (1) a non-payment petition filed against petitioner Isabelita Gonzalez in November 2004, and (2) non-payment petitions filed against petitioner Emadeldin Omar between 1995 and 1998. *See* Return, D-14, Exh. C. It is undisputed that the owner did not register any of the apartments with DHCR, did not file any annual rent registration statements, and that no tenant filed an overcharge complaint until 2005.

In any event, DHCR Deputy Commissioner Torres correctly ruled that rent regulation cannot be created, modified or terminated by agreement, and exists only by application of law. *See Oxford Towers Co., LLC v Wagner*, 58 AD3d 422 (1st Dept 2009); *Drucker v Mauro*, 30 AD3d 37, 38-40 (1st Dept 2006). "That the parties may have treated the premises as subject to rent stabilization does not defeat the statutory exclusion from regulation. 'Such an exemption is not subject to waiver or equitable estoppel.'" *546 West 156th Street HDFC v Smalls*, 43 AD3d 7, 11 (1st Dept 2007), quoting *512 East 11th Street HDFC v Grimmet*, 181 AD2d 488, 489 (1st Dept 1992); *see also Gregory v Colonial DPC Corp., III*, 234 AD2d 419 (2d Dept 1996) ("coverage under a rent regulatory scheme is governed by statute and cannot be created by waiver or equitable estoppel"). Thus, "[i]n determining whether a dwelling unit is subject to rent

regulation, what the parties think might be its status or even what they agree to be its status is not dispositive; what is controlling is whether the premises meet the statutory criteria for protection under the applicable regulatory statute." *546 West 156th Street HDFC v Smalls*, 43 AD3d at 12; *see also Ruiz v Chwatt Assoc.*, 247 AD2d 308 (1st Dept 1998) (that the landlord mistakenly registered the apartment as stabilized and over the years often asked for rent increases that conformed to stabilization guidelines could not be used by the tenant to claim rent stabilization protections, because it is a matter of statutory right and cannot be created by waiver or estoppel).

Petitioners argue that their estoppel defense is directed against the owner, not against DHCR, in an attempt to distinguish cases such as *Schorr v New York City Dept. of Hous. Preservation and Dev.* (10 NY3d 766 [2008]), wherein the Court of Appeals held that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties. But the issue of whether the building or even just the petitioners' five apartments are subject to rent stabilization necessarily involves DHCR's involvement in setting the initial legal registered rent and any disputes over authorized increases.

The court recognizes the likelihood that the lives of the current tenants may be disrupted. However, looking at the record as a whole, DHCR's determination that the owner of 170 West 25th Street, New York, New York fulfilled the statutory and regulatory criterion to qualify for an exemption of the building from rent stabilization due to a substantial renovation of the building after January 1, 1974 has a rational basis in law and fact, and is not arbitrary or capricious. Although appears unwise for the Legislature to allow for an unlimited period of time for an owner to claim deregulation based on substantial rehabilitation and to fail to require that an owner make an application to DHCR to confirm such deregulation within a certain period of

time, this court cannot remedy such deficiencies.

Accordingly, for these reasons, it is

ORDERED that respondent landlord in each proceeding submit, forthwith, a separate proposed Judgment directly to Chambers (Room 551) indicating that the court adjudges that the petition is denied and the proceeding is dismissed.

This Constitutes the Decision and Order of the Court.

Dated: July 10, 2009

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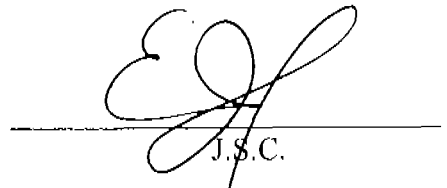

J.S.C.

EMILY JANE GOODMAN