Supreme Court, Appellate Division, Second Department, New York.
ROCKAWAY ONE COMPANY, LLC, Petitioner-Respondent,
v.
Deborah WIGGINS, Respondent-Appellant.
No. 2004-08794.
January 10, 2005.

Appellant's Brief

April A. Newbauer, Esq., Attorney-in-Charge, the Legal Aid Society, Robert R. Desir Jr., of counsel, Queens Neighborhood Office, 120-46 Queens Boulevard, Kew Gardens NY 11415, Tel: (718) 286-2466, Attorneys for Appellant.

***i** STATEMENTPURSUANT TO CPLR § 5531

1. The index number of this case in the Court below is 2002-1662 QC. The trial court index number is Queens L&T 78545/98.

2. The original named parties were Rockaway One Company, LLC and Deborah Wiggins. Deborah Wiggins now appeals to this Court.

3. The action was originally a residential nonpayment of rent proceeding commenced by service of a petition and notice of petition on or about November 23, 1998. Respondent-Appellant appeared by prior counsel, District Council 37, Municipal Employees Legal Services and the matter was set down for trial on February 18, 1999 and concluded on February 19, 1999.

4. The appeal to the Appellate Term was commenced by Petitioner-Respondent's filing of a Notice of Appeal on April 2, 1999. Petitioner-Respondent appealed an Order of the Civil Court dated March 22, 1999. Petitioner-Respondent filed an Appellant Brief ***ii** with the Court below on or about January 14, 2003. Respondent-Appellant filed a brief in opposition on March 13, 2003.

5. Respondent-Appellant is appealing a decision and order of the Court below dated March 4, 2004, which reversed the Queens Civil Court judgment and order, granted Petitioner-Respondent's motion to sever and dismiss Respondent Appellant's counterclaim challenging the propriety of the rent increase imposed pursuant to an individual apartment increase and increased the final judgment amount awarded to Petitioner-Respondent's.

6. This appeal is upon the original record as authorized by 22 NYC RR 670.9(d) (1) (i)

***iii** *TABLE OF CONTENTS*

TABLE OF AUTHORITIES ... i-iv

QUESTION PRESENTED ... 1

PRELIMINARY STATEMENT ... 1-2

STATEMENT OF THE FACTS ... 2-6

ARGUMENT ... 6-26

POINT ONE: *THE COURT BELOW ERRED IN RULING THAT THE CIVIL COURT CANNOT MAINTAIN JURISDICTION OVER AN INDIVIDUAL APARTMENT INCREASE CHALLENGE WHEN IT IS FIRST RAISED IN A SUMMARY PROCEEDING.*

POINT TWO: *THE LEGISLATURE INTENDED THAT THE CIVIL COURT MAINTAIN JURISDICTION OVER IAI INCREASES*

CONCLUSION ... 26

APPENDIX ... A1

a. The Order and Decision of the Court below denying leave ... A1-A2

b. The Order and Decision of the Court below ... A3-A12

c. The order of the Civil Court modifying the March 22, 1999 Decision ... A13

d. The Decision of the Civil Court ... A14-A17

Note: Table of Contents page numbers missing in original document

***i** *TABLE OF AUTHORITIES*

New York State Constitution Provisions

McKinney's Const. Art. 6, § 7(b) ... 6

New York State Statutory Provisions

McKinney's NY City Civ. Ct. Act § 110(a) (5) ... 7

Emergency Tenant Protection Act of 1974 12(a)(f) ... 7

RPAPL § 743 ... 7

RPAPL § 741 (4) ... 8

RSC § 2522.4(a) (1) ... 12

RSC § 2522.4(a) (4) ... 12, 15

RSC § 2522.4(a) (6) ... 16, 22

RSC § 2522.4(a) (13) ... 17

RSC § 2522.4(a) (8) ... 1 7

RSC § 2522.4(a) (2) ... 18, 20

RSC § 2524.5(a) (2) (i) ... 21

***ii** *New York State Case Law*

2505 Bedford Realty Co. v. Woodson, 152 Misc. 2d 897 (Civ. Ct., Kings County 1992) ... 17, 19, 23, 24, 25

212 W. 22 Realty, LLC v. Fogarty, 1 Misc.3d 905, 781 N.Y.S.2d 629 (N.Y. Civ. Ct. 2003) ... 11

30 West 70th St. Corp. v. Sylvor, 27 HCR 141A, N.Y.L.J. March 12, 1999 p. 26, col. 1 (App. Term 1st Jud. Dist.) ... 11

61 5th Avenue Realty Corp. v. Reyes, 19 HCR 318, N.Y.L.J. May 29, 1991, p. 30, col.1 (N.Y. Civ. Ct.) ... 18

1460 Grand Concourse Assoc. v. Martinez, 22 HCR 269B, N.Y.L.J. May 5, 1994 p. 1, col. 3 (App. Term 1st Jud. Dist.) ... 8, 10

100 Mosholu Pkwy. Assocs. V. Hughes, 24 HCR 134A, N.Y.L.J. March 13, 1996, p. 26, col. 6 (N.Y. Civ. Ct.) ... 9, 14

310 West End Ave. Owners Corp. v. Rosenberg, 19 HCR 528, N.Y.L.J. August 28, 1991, p. 21, col. 3(App. Term 1st Jud. Dist.) ... 9, 10

Classic Equities, LLC v. Garrity, No. 01-310 (N.Y. Sup. Ct. 1st Dep't Dec. 12, 2001) ... 9

Chan Brother Realty Corp. v. Kilpatrick, 19 HCR 145, N.Y.L.J. March 13, 1991, p. 22, col. 4. (N.Y.Civ. Ct.) ... 19

Coronet Properties Co., v. Lederer, 14 HCR 57, N.Y.L.J. February 21, 1986, p. 12, col. 2 (App. Term 1st Jud. Dist.) ... 11

Dabalsa v. Crino, 541 N.Y.S.2d 144 (N. Y. City Civ. Ct. 1989) ... 9, 10

***iii** *Dara Realty Associates, LLC., v. Schachter,* Misc.2d 29, 751 N.Y.S.2d 677 (App. Term, 2nd Dep't 2002) ... 18

E&W Rlty. Co. v. Fettner, 25 HCR 443A, N.Y.L.J. August 22, 1997 p. 21, col. 2 (App. Term 1st Jud. Dist.) ... 11

Fifth Ave Assocs. V. Rodriguez, 20 HCR 296, N.Y.L.J. May 20, 1992 p. 25, col. 4 (N.Y. Civ. Ct.) ... 9, 11, 13, 18

Franklin Associates v. Klusman, 20 HCR 2, N.Y.L.J. July 7, 1990, p. 21 col. 4 (App. Term 1st Jud. Dist.) ... 9, 10

Ft. Greene Assets, Inc v. Delanie, 23 HCR 159A, N.Y.L.J. March 27, 1995, p.30, col.3 (App. Term 2nd and 11th Jud. Dists.) ... 10, 11

Global Management v. Richards, 152 Misc. 2d 759 (App. Term, 2d & 11th Jud. Dists. 1992) ... 19, 20, 23, 24, 25

Graham Court Owners Corp. v. Allen, 22 HCR 488A, N.Y.L.J. August 17, 1994 p. 22, col. 6 (N.Y. Civ. Ct.) ... 12

H&L Hotel Corp v. Ramos, 18 HCR 516, N.Y.L.J. October 31, 1990(N.Y. Civ. Ct.) ... 11, 12, 13

Haskell v. Surita, 109 Misc.2d 409, 439 N.Y.S.2d 990 (N.Y. Civ. Ct. 1981) ... 10

Lombardo v. Santevecchi, 651 N.Y.S.2d 998 (N.Y. Civ. Ct., 1996) ... 10

Mali Realty Corp. v. Rivera, 23 HCR 498A, N.Y.L.J. August 9, 1995 p. 24, col. 4 (N.Y. Civ. Ct.) ... 12

Matter of Michael Linden v. DHCR, 629 N.Y.S.2d 32 (1st Dep't 1995) ... 19

Pioneer Syndicate v. Shore, 20 HCR 296, N.Y.L.J. May 20, 1992 p. 23, col. 4 (N.Y. Civ. Ct.) ... 9, 10

***iv** *Smitten v. 56 MacDougal Street Co.,* 561 N.Y.S.2d 585 (1st Dep't.1990) ... 9

Sohn v. Calderon, 78 N.Y.2d 755, 587 N.E.2d 807 (Ct. of Appeals, 1991) ... 21, 22

Solow v. Wellner, 154 Misc.2d 737 (N.Y.Sup. 1992) ... 9

State of New York v. Winter, 15 HCR 254B N.Y.L.J. November 24, 1987 (N.Y. Sup. Ct. N.Y. County) ... 19

Sutton Fifty Six Company, v. Fridecky, 93 A.D.2d 720, 461 N.Y.S.2d 14 (2nd Dep't 1983) ... 10

Trio Realty Co. v. Cofield, 151 Misc.2d 244, N.Y.S.2d 228(N.Y. Civ. Ct. 1991) ... 20

Wadsworth Assocs. V. Poole, 20 HCR 128, N.Y.L.J. March 11, 1992, p. 22, col. 3 (N.Y. Civ. Ct.) ... 20

Wolfisch v. Mailman, 182 A.D.2d 533, 582 N.Y.S.2d (1st Dep't 1992) ... 8

Yanni v. Bruce Brandwen Productions, Inc., 160 Misc.2d 109, 609 N.Y.S.2d 758 (N.Y. Civ. Ct. 1994) ... 11

***1** *QUESTION PRESENTED*

Whether the Civil Court of the City of New York has concurrent jurisdiction with the New York State Department of Housing and Community Renewal (hereinafter "DHCR") over a rent overcharge defense or counterclaim based on a challenge to an individual apartment improvement (hereinafter "IAI") rent increase when it is originally raised in a Civil Court residential nonpayment of rent proceeding. The Court below answered in the negative.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the Appellate Term, Second and Eleventh Judicial Districts vacating a Housing Part order denying Respondent Owner's (hereinafter "Respondent") oral motion to sever and dismiss Appellant Tenant's (hereinafter "Appellant") counterclaim challenging an IAI rent increase. The Court below ruled that the Civil Court is incompetent to entertain such a defense or counterclaim even when interposed in a nonpayment of rent proceeding. The Civil Court awarded Appellant judgment on her overcharge defense and counterclaim after finding that the owner failed to justify the increase added to Appellant's monthly stabilized rent based on several ***2** alleged improvements made to the apartment prior to Appellant's occupancy.

In this appeal, Appellant argues that the Appellate Term, Second and Eleventh Judicial Districts erred in ruling that jurisdiction over the lawfulness of an IAI rent increase and any tenant challenges to such increases rests exclusively with DHCR. To the contrary, the Civil Court is competent and indeed, is the better forum if a nonpayment proceeding is commenced, to entertain a defense or counterclaim that challenges the propriety of an IAI rent increase. Longstanding precedent demonstrates that the Courts have ably exercised jurisdiction over these issues and have not expressed any inadequacy or hesitancy in doing so. Further, the governing statutory schemes that can give rise to a rent overcharge claim based on an IAI indicate a legislative intent to allow Civil Court jurisdiction over rent overcharge issues arising under IAI rent increases. Accordingly, the decision rendered below should be reversed.

STATEMENT OF FACTS

The Appellant, Ms. Deborah Wiggins, first took possession of the subject premises, a studio apartment located at 20-21 Seagirt Boulevard,

#6B, Far Rockaway, NY ***3** 11691, on or about July 15,1997 under a vacancy lease issued pursuant to the Rent Stabilization Law and Code. At that time, the monthly rent was $525.38.

On or about September 1998, Respondent initiated a summary proceeding against Ms. Wiggins in the Civil Court City of New York, Housing Part under L/T index number 78545/98 (hereinafter "Civil Court") alleging non payment of rent. Appellant answered, interposing a defense and counterclaim based on having been charged a rent in excess of the lawful stabilized rent for the premises since the inception of her tenancy. Specifically, Ms. Wiggins alleged that the owner was not entitled to impose the rent increase that Respondent predicated upon repairs and improvements alleged to have been commenced within the subject premises prior to the Appellant taking possession. Before the trial, Respondent moved the Civil Court to sever and dismiss Appellant's overcharge defense and counterclaim. (R. 3) The Civil Court issued an oral order denying Respondent's motion. (R. 4) At trial, Respondent's agent, Mr. Goldfrab, testified that the rent increase was for installation of a new refrigerator, sink, stove, floor and sub-floor in the kitchen and new plumbing fixtures, a light fixture, outlet covers, switch covers, switches and outlets in the bathroom. (R. 15-18)

***4** After trial, the Civil Court held that Respondent failed to establish entitlement to the rent increase imposed. The Court found the Respondent's documentary evidence wholly inadequate to substantiate the rent increase. Thus, the Civil Court disallowed the rent increase and ordered tenant's rent be reduced by $118.91 per month for every month since the inception of her tenancy. The Civil Court later modified this judgment, lowering the judgment amount to reflect a payment Ms. Wiggins made.

Respondent appealed this judgment to the Appellate Term of the Supreme Court of the State of New York 2nd and 11th Judicial Districts (hereinafter "Appellate Term") contending that the Civil Court erred in finding that the landlord did not sufficiently demonstrate an entitlement to the IAI rent increase. Respondent further asserted that the Civil Court improperly exercised subject matter jurisdiction over Appellant's rent overcharge defense and counterclaim, that the motion to sever and dismiss Appellant's rent overcharge defense and counterclaim should have been granted.

The Appellate Term vacated the Civil Court oral order denying Respondent's motion to sever and dismiss Appellant's overcharge defense and counterclaim. The ***5** Appellate Term ruled that DHCR has exclusive jurisdiction to hear IAI challenges. Ms. Wiggins now appeals from that decision.

***6** *ARGUMENT*

POINT I

THE COURT BELOW ERRED IN RULING THAT THE CIVIL COURT CANNOT MAINTAIN JURISDICTION OVER AN INDIVIDUAL APARTMENT INCREASE CHALLENGE WHEN IT IS FIRST RAISED IN A SUMMARY PROCEEDING.

The New York State Constitution and New York State Law, the Real Property Actions and Proceedings Law (herinafter "RPAPL"), provide the authority for the Civil Court's exercise of jurisdiction over an IAI based rent overcharge challenge. Article VI, § 7 of the N.Y. Constitution designates the Supreme Court as "one of general jurisdiction in law and equity." Article VI, § 7 also declares that:

If the legislature shall create new classes of actions and

proceedings, the Supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.

McKinney's Const. Art. 6, § 7(b).

The Housing Part of the Civil Court exercises jurisdiction over residential nonpayment of rent actions under the authority granted in the Civil Court Act which provides the following:

(5) Actions and proceedings under article seven-A of the real property actions and proceedings law, and all summary proceedings to recover possession of residential premises to remove tenants there from, and to render judgment for rent due, including without limitation those cases in which a tenant alleges a defense under section seven hundred fifty-five of the real property actions and proceedings law, relating to ***7** stay or proceedings or action for rent upon failure to make repairs, section three hundred two-a of the multiple dwelling law, relating to the abatement of rent in case of certain violations of section D26-41.21 of such housing maintenance code.

McKinney's NY City Civ. Ct. Act § 110(a)(5).

Authority for the Court's jurisdiction over a tenant's overcharge claim is also found in the Emergency Tenant Protection Act of 1974 (hereinafter "ETPA") as amended in 1983, which is the authority by which the DHCR enforces the provisions of the New York City Rent Stabilization Law. Section 12(a)(f) of the ETPA states as follows:

Unless a tenant shall have filed a complaint or overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages equal to the overcharge and the penalty provided for in this section, including interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules, plus the statutory costs and allowable disbursements in connection with the proceeding. Such action must be commenced or counterclaim interposed within four years of the date of the alleged overcharge but no recovery of three times the amount of the overcharge may be awarded with respect to any overcharge which had occurred more than two years before the action is commenced or counterclaim is interposed.

Further, RPAPL § 743 provides that the where a tenant answers a petition in a nonpayment of rent proceeding, "The ***8** answer may contain any legal or equitable defense or counterclaim. The Court may render judgment for the amount found due on the counterclaim." A challenge to a rent increase based on an IAI or any perceived overcharge is a direct attack to the claim for rent that forms the basis of the nonpayment proceeding.

In raising a defense or counterclaim for overcharge, the tenant is alerting the Court that cause exists by which the owner should not be awarded a judgment of possession on the amount claimed due. This claim also advises the Court that the petition may misstate the legal rent and thus not properly "state the facts on which the special proceeding is based." RPAPL § 741(4). Therefore, proper adjudication necessitates a determination of whether the rent claimed due is in fact the legal rent for the subject premises.

In adherence to this principle, the Civil Court has long exercised concurrent jurisdiction with DHCR over allegations of overcharge in the monthly rent of rent stabilized units. *Wolfisch v. Mailman,* 182 A.D.2d 533, 582 N.Y.S.2d (1st Dep't 1992)(Supreme Court has statutory jurisdiction to entertain an action to recover a rent overcharge); *1460 Grand Concourse Assoc. v. Martinez,* 22 HCR 269B, N.Y.L.J. May 5, 1994 p. 1, col. 3(App. Term 1st Jud. Dist.) (relegating the tenant at this juncture to an ***9** administrative proceeding would frustrate the expeditious resolution of commonplace issues in dispute); *310 West End Ave. Owners Corp. v. Rosenberg,* 19 HCR 528, N.Y.L.J. August 28, 1991, p. 21, col. 3(App. Term 1st Jud. Dist.) (determining that the lower court properly exercised its discretion over tenant's rent overcharge counterclaim); *Smitten v. 56 MacDougal Street Co.,* 561 N.Y.S.2d 585(1st Dep't.1990) *reversed on other grounds,; Lombardo v. Santevecchi,* 651 N.Y.S.2d 998(N.Y. Civ.Ct., 1996); 100 *Mosholu Pkwy. Assocs. V. Hughes,* 24 HCR 134A, N.Y.L.J. March 13, 1996, p. 26, col. 6 (N.Y. Civ. Ct.)("the law is clear that jurisdiction for overcharge issues lies in both the Court and DHCR"); *Solow v. Wellner,* 154 Misc.2d 737 (N.Y.Sup. 1992); *Classic Equities, LLC v. Garrity,* No. 01-310 (N.Y. Sup. Ct. 1st Dep't Dec. 12, 2001); *see also, Fifth Ave Assocs. V. Rodriguez,* 20 HCR 296, N.Y.L.J. May 20, 1992 p. 25, col. 4 (N.Y. Civ. Ct.) ("this court is of the opinion that Housing Court has concurrent jurisdiction with DHCR to determine if work done constituted a repair or renovation"); *Pioneer Syndicate v. Shore,* 20 HCR 296, N.Y.L.J. May 20, 1992 p. 23, col. 4 (N.Y. Civ. Ct.); *Franklin Associates v. Klusman,* 20 HCR 2, N.Y.L.J. July 7, 1990, p. 21 col. 4(App. Term 1st Jud. Dist.); *Dabalsa v. Crino,* 541 N.Y.S.2d 144 (N.Y. Civ.Ct.1989).

***10** The Court have found the exercise of such jurisdiction to be particularly appropriate where the tenant first lodges this complaint as a defense or counterclaim to a nonpayment proceeding before the Civil Court. *Rosenberg,* 19 HCR at 528, ("Unless a tenant has filed a residential overcharge complaint with the DHCR, a tenant is entitled to bring an action or interpose a counterclaim in a court of competent jurisdiction to recover damages for a rent overcharge"); Ft. *Greene Assets, Inc v. Delanie,* 23 HCR 159A, N.Y.L.J. March 27, 1995, p.30, col.3(App. Term 2nd and 11th Jud. Dists.); *Crino,* 541 N.Y.S.2d at 144 ; see *also Klusman,* 20 HCR at 2; *Shore,* 20 HCR at 296; *Martinez,* 22 HCR at 270; *Santevecchi,* 651 N.Y.S.2d at 999.

The Court should always consider all the relevant facts when rendering decision. The determination of whether an owner improperly imposed an IAI is potentially dispositive of a nonpayment proceeding. As many Courts have recognized, defenses and counterclaims bearing a direct effect on the outcome of the controversy should not be stricken or severed. *Sutton Fifty Six Company, v. Fridecky,* 93 A.D.2d 720, 461 N.Y.S.2d 14 (2nd Dep't 1983); *Yanni v. Bruce Brandwen Productions, Inc.,* 160 Misc.2d 109, 609 N.Y.S.2d 758 (N.Y. Civ. Ct. 1994); *Haskell v. Surita,* ***11** 109 Misc.2d 409, 439 N.Y.S.2d 990 (N.Y. Civ. Ct. 1981); but *see Coronet Properties Co., v. Lederer,* 14 HCR 57, N.Y.L.J. February 21, 1986, p. 12, col. 2(App. Term 1st Jud. Dist.); *Delanie,* 23 HCR at 159A(the counterclaim is not related and does not constitute a defense to petitioner's simple cause of action for rent...")

As with a general overcharge, the Housing Court is of competent jurisdiction to determine the propriety of an IAI rent increase. Similarly, the Courts that have considered the propriety of an IAI increase have expressed no disinclination or difficulty in doing so. *See generally, H&L Hotel Corp v. Ramos,* 18 HCR 516, N.Y.L.J. October 31, 1990(N.Y. Civ. Ct.); *Rodriguez,* 20 HCR at 297 ("the *instant case, however, involves only a single apartment* and this Court need only determine whether the work performed after a fire constituted a repair for which no increase would be allowed or a renovation for which a 1/40 increase is collectible" (emphasis added)); *See also,* 212 W. 22 Realty,

LLC v. Fogarty, 1 Misc.3d 905, 781 N.Y.S.2d 629 (N.Y. Civ. Ct. 2003); *30 West 70th St. Corp. v. Sylvor,* 27 HCR 141A, N.Y.L.J. March 12, 1999 p. 26, col. 1(App. Term 1st Jud. Dist.); *E&W Rlty. Co. v. Fettner,* 25 HCR 443A, N.Y.L.J. August 22, 1997 p. 21, col. 2(App. Term 1st Jud. Dist.); *Mali Realty Corp. v. Rivera,* 23 HCR 498A, N.Y.L.J. ***12** August 9, 1995 p. 24, col. 4 (N.Y. Civ. Ct.); *Graham Court Owners Corp. v. Allen,* 22 HCR 488A, N.Y.L.J. August 17, 1994 p. 22, col. 6 (N.Y. Civ. Ct.).

The Rent Stabilization Code very basically indicates the formula by which an owner may charge an increase in the monthly stabilized rent pursuant to an IAI.

RSC § 2522.4(a)(1) specifies that:

> An owner is entitled to a rent increase where there has been a substantial increase...of dwelling space or an increase in the services, or installation of new equipment or improvements provided in or to the tenant's housing accommodation...
>
> (a) (4) The increase in the monthly stabilization rent for the affected accommodations when authorized pursuant to paragraph (1) of this subdivision (a) shall be 1/40th of the total cost, including installation but excluding finance charges.

With respect to an overcharge counterclaim not arising out an IAI, the Court in *Ramos* noted that the determination requires a mathematical calculation in accordance with a formula spelled out in the Board's published orders." *Id.* The determination of the propriety of an IAI requires a similar calculation. The Court in *Rodriguez* commented that a determination of whether work performed in an apartment constituted a repair or a renovation appears to be much less complex than the ***13** adjudication of a rent overcharge complaint for which the Court also has concurrent jurisdiction. *Rodriguez,* 20 HCR at 997. As remarked in *Ramos,* it is not "beyond the capabilities of a Civil Court judge equipped with a calculator." *Ramos,* 18 HCR at 516. The determination of whether work performed in an apartment constituted a repair or a renovation is at least as simple as the adjudication of a rent overcharge complaint for which the Court also has concurrent jurisdiction and such a determination is limited in scope and does not require special expertise which is exclusively possessed by the agency. *Rodriguez* 20 HCR at 297.

The cases cited above wherein the Court recognized that exercising jurisdiction was appropriate and even necessary are similar to the case at bar. Hence, the counterclaim raised in the case at bar is appropriate for the Court's jurisdiction. Further, an overcharge pursuant to an improperly assessed IAI presents a defense that is "inextricably intertwined" with a claim for nonpayment of rent, and thus within the Housing Court's expertise and competence. In cases involving an IAI challenge, the Courts have recognized that a decision on the landlord's entitlement to the rent claimed due in the petition could not be properly rendered without a determination of whether ***14** the landlord was in fact entitled to that claimed rent.

Complete and efficient, as opposed to piecemeal disposal of a controversy is always preferable. See *eg., Hughes,* 24 HCR at 135(if respondent is evicted because of her inability to pay a judgment rendered in a summary proceeding, it will be of little consolation to her if she discovers, after she loses her home that the rent is illegal"). Eviction is Appellant's fate if it is determined that the Court cannot maintain jurisdiction over her overcharge defense and counterclaim. The Civil Court, after determination of all relevant evidence, determined that Respondent improperly imposed an IAI upon Appellant. In accordance with all relevant statutory provisions, the breadth of supporting case law and the interest of justice, the Civil

Court properly and lawfully entertained Respondent's counterclaim. Accordingly, the Appellate Term decision should be reversed and that of the Civil Court be affirmed.

***15** *POINT II*

THE LEGISLATURE INTENDED THAT THE CIVIL COURT MAINTAIN JURISDICTION OVER IAI INCREASES

While there are cursory similarities between the legislature's treatment of the IAI and the major capital improvement (hereinafter "MCI"), the distinctions the legislature draws between them are remarkable and determinative. The degree to which DCHR oversees an owner's actions is determinant of the Court's jurisdiction. The legislature's disinclination to enact any rent stabilization code provisions that would act as a prior restraint to owner actions in the IAI process, is indicative of its' intent to allow Civil Court jurisdiction over any issues concerning this action that may arise in a judicial proceeding. Negligible is the rent setting power of the agency.

Although, numerous statutory provisions of the Rent Stabilization Code and Rent Stabilization Law of New York City relate to both MCI and IAI increases, it is the process by which these increases are imposed that signals the legislative intent. RSC § 2522.4(a)(4) proscribes the manner by which an increase of the monthly stabilized rent can be arrived at, addressing IAI and MCI rent increases in tandem. Further, and as noted by the Appellate Term, RSC ***16** § 2522.4(a) (6), as it generally speaks to the legal regulated rent, can be construed to encompass an IAI rent increase.

The Appellate Term erroneously construed these provisions and the like as marginalizing the Court's jurisdiction over the propriety of an IAI rent increase and expanded this concept far beyond its useful life. With respect to a MCI, the Rent Stabilization Code states that "the DHCR shall not grant an owner's application for a rental adjustment pursuant to subdivision (a) if the agency determines that the owner is not maintaining all required services." RSC § 2522.4(a)(13). This section, the Appellate Term opines, is a manifestation of the legislative intent that DHCR jurisdiction subordinate that of the Court in deciding the propriety of an IAI rent increase. To the contrary, this is precisely what distinguishes an IAI from a MCI rent increase and allows for Civil Court jurisdiction over the former and limits Civil Court jurisdiction over the latter to CPLR § 7801 review. There is no such DHCR approval process for an IAI rent increase.

The New York State legislature imposes countless additional DHCR governed control measures where an owner seeks a rent increase pursuant to a MCI, none of which are ***17** applicable to the IAI. For instance, the owner's application for a MCI related rent increase must be denied if DCHR determines that the owner is not maintaining all required services or that there are currently immediately hazardous violations of any... state or federal law which relate to the maintenance of such services. RSC § 2522.4(a) (13); *See also,* RSC § 2522.4(a) (8).

Yet, the legislature declined to impose any similar mechanism for or any modicum of control over the process by which an owner can impose an IAI rent increase. *See eg. 2505 Bedford Realty Co. v. Woodson,* 152 Misc. 2d 897, 899 (N.Y. Civ. Ct. 1992) The legislature's careful demarcation of the directives governing a MCI rent increase from those of an IAI is very telling of the intention to maintain Civil Court jurisdiction over controversies surrounding the latter class of rent increase.

Evidently, the legislature sought to maintain meticulous DHCR control

over an owner's actions with respect to a MCI. An owner seeking to increase the legal regulated rent, claiming to have made a MCI, must submit an application to DCHR on forms prescribed by DHCR and demonstrate that there has been a MCI that:

(a) is deemed depreciable by the Internal revenue Code, other than for ordinary repairs

***18** (b) is for the operation, preservation and maintenance of the structure

(c) is an improvement to the building or building complex which inures directly or indirectly to the benefit of all tenants and which includes the same work performed in similar components of the building or building complex, unless the owner can satisfactorily demonstrate to the DCHR that certain similar components did not require improvement and;

(d) the item being replaced meets the requirements set forth in the useful life schedule, except with DHCR approval of a waiver as set forth in (e) of this subparagraph RSC § 2522.4(a) (2)

That jurisdiction over the propriety of a rent increase pursuant to a MCI is primarily subject to administrative review has been aptly recognized by the Courts. *Rodriguez,* 20 HCR at 297(this Court lacks the administrative expertise as well as the authority to approve a MCI); *61 5th Avenue Realty Corp. v. Reyes,* 19 HCR 318, N.Y.L.J. May 29, 1991, p. 30, col.1 (N.Y. Civ. Ct.) (the matter is marked off the Court's calendar for parties to seek DHCR determination of whether the alleged improvements were undertaken as a MCI that would be within the expertise and authority of DHCR); *Dara Realty Associates, LLC., v. Schachter,* Misc.2d 29, 751 N.Y.S.2d 677 (App. Term,2nd Dep't 2002) ("contrary to tenant's contention, the Housing Court correctly refused to entertain tenant's challenge to the legality of the orders awarding rent increases for major capital ***19** improvements('MCIs')"). The Courts have uniformly acted in deference to DHCR when called upon to decide the propriety of a MCI.

In contrast, owners are not required to submit any application for pre-approval where they seek to increase the legal regulated rent based on an IAI increase in any one apartment. There is no prior restraint on imposing an IAI rent increase. In this regard, it has been noted that "it was an administrative decision by DHCR that increases for an IAI, unlike a MCI which involve the whole building be self-effectuating, without the involvement of the DHCR in the first instance." *Woodson,* 152 Misc. 2d at 899. An owner can begin charging the attendant increase at the moment the work is completed.

The only applicable prior restraint applies where the tenant is in possession prior to the owner's undertaking of the alleged improvement. The tenant must only grant the owner permission to commence the work and assent in writing to the resultant rent increase. *See, eg., Matter of Michael Linden v. DHCR,* 629 N.Y.S.2d 32 (1st Dep't 1995); *State of New York v. Winter,* 121 A.D.2d 287, 503 N.Y.S.2d 384 (1st Dep't 1986); *Chan Brother Realty Corp. v. Kilpatrick,* 19 HCR 145, N.Y.L.J. March 13, 1991, p. 22, col. 4. (N.Y. Civ. Ct.) However, this process involves ***20** only the owner and the tenant. Nothing is filed with DHCR either before or after permission is given. The owner is not required to include DHCR in any manner. Where the work forming the basis for an IAI is commenced prior to the tenant taking occupancy, but not completed until after the tenant takes occupancy, the owner need not seek the tenant's permission or notify the tenant. An owner is never required to seek DHCR authorization before imposing an IAI rent increase. [FN1] *Global Management v. Richards,* 152 Misc. 2d 759, 761 (App. Term, 2d & 11th Jud. Dists. 1992); *Trio Realty Co. v. Cofield,* 151 Misc.2d 244, N.Y.S.2d

228(N.Y. Civ. Ct. 1991) (there is no question but that under the Rent Stabilization Code itself the increase would be authorized without a DHCR order.); *Wadsworth Assocs. V. Poole,* 20 HCR 128, N.Y.L.J. March 11, 1992, p. 22, col. 3 (N.Y. Civ. Ct.).

FN1. Though owners are never required to notify DHCR beforehand, they must note the increase on the Annual Apartment Registration Form. Poole, 20 HCR AT 128

The strikingly different procedure for imposing an increase based on an IAI is further evident in the language of the Rent Stabilization Code. *See* eg. RSC § 2522.4(a)(1), RSC § 2522.4(a)(2). The section authorizing imposition of IAI rent increases states that an owner is "entitled" whereas the language addressing a MCI states that an owner ***21** "may file an application." The owner's actions with respect to an IAI rent increase is not subject to any scrutiny prior to imposition. It is only subject to challenge after the action has already been taken. Noticeably, imposing an IAI increase is not subject to the same rigorous scrutiny an owner would face in attempting to impose a MCI.

Sohn v. Calderon, 78 N.Y.2d 755, 587 N.E.2d 807 (Ct. of Appeals, 1991) is illustrative of the legislature's intent in distinguishing regulatory provisions which require an owner to seek DHCR approval prior to taking action and those that can be taken without prior DHCR approval. The Court found that the legislature intended to grant DHCR exercise primary jurisdiction over the former class of actions. *Sohn* did not involve a rent increase, but rather what the rent stabilization code required of an owner seeking to demolish a building. *Id.* at 761. Noting that NYCRR § 2524.5(a)(2)(i) [FN2] supplies the rules that an owner seeking to demolish a building must follow, the Court ***22** reasoned that because the Legislature required an owner to meet certain prescribed conditions, subject to DHCR approval, prior to being issued a certificate of eviction the legislative intent was to cede exclusive original jurisdiction to DHCR. *Sohn,* 78 N.Y.2d at 768. In so ruling, the Court clearly distinguished two classes of owner actions, those which require prior approval and those which do not. *Id.* at 765. The Court scrutinized the various Rent Stabilization Code and Rent Control provisions that govern a landlord's right to demolish a building. *Id.* The Court further pointed out that the Rent Stabilization Code reserves judgment on compliance with these rules to DHCR. *Id.* Upon these factors, the Court determined that concurrent jurisdiction was not contemplated by the legislature and thus inappropriate. *Id.* at 768.

FN2. the section provides that (a) an owner shall not be required to offer a renewal lease to a tenant or continue a hotel tenancy and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the expiring lease term of the existing lease upon any of the following grounds: (i) the owner seeks to demolish the building. Until the owner has submitted proof of its financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate City agency, an order approving such application shall not be issued.

The Appellate Term incorrectly concluded that because RSC § 2522.4(a)(6) addresses both MCI and IAI rent increases, it follows that examination of both increases must be first reserved for DHCR administrative review. Careful scrutiny of the statutory standard compels the opposite conclusion. The legislature's intention was to continue to allow for the Court's concurrent jurisdiction over IAI rent increase challenges while limiting judicial scrutiny over MCI rent increases. The distinction is made ***23** manifest by review of the divergent statutory treatment of the MCI and the IAI and the primary

indicator of the legislative intent with respect to the Court's jurisdiction is not the rent setting power of the agency, but the pre-imposition process. All issues arising under a dispute of the legal regulated rent involve the rent setting power of the agency. An owner who simply increases the monthly stabilized rent after a rental unit becomes vacant must do so in accordance within DHCR approved guidelines but is not bound to seek DHCR approval. An owner's actions in this context are subject to the rent setting powers of the agency. The owner's increase of the rent pursuant to a renewal lease is equally governable by DHCR. Neither of these rent increases mandate exclusive DHCR jurisdiction.

It is not the simple jurisdiction of the agency, but the degree to which DHCR exclusively oversees an owner's action which is determinative of the Legislature's intent regarding the relative power of the Courts. Accordingly, *Richards,* 152 Misc. 2d 759, and *Woodson,* 152 Misc. 2d 897, do not support the Appellate Term contention that DHCR has exclusive jurisdiction over challenges to IAI increases. The Courts in these cases merely mentioned the available administrative remedy, and did not find that it was absolute or exclusive.

***24** *Richards* considered whether an IAI rent increase required prior DCHR approval. *Richards,* 152 Misc. 2d at 760. In postscript reflection, the Court mentioned DHCR as a forum for addressing such grievances. *Id.* at 762. This was largely tangential since the Court's decision never addressed the Court's jurisdiction over the propriety of an IAI. This issue was not presented to the Court.

The Court in *Woodson* similarly considered whether an IAI rent increase required prior DHCR approval. In dicta, the Court noted that a tenant who doubts the costs of the improvements or even whether any work was done may file an overcharge complaint with DHCR. *Id.* at 900. Resort to DCHR adjudication was not stated as a remedy to the exclusion of asserting this challenge as a defense or counterclaim in a Housing Part proceeding. In fact, the Court rendered a decision upon the tenant's rent overcharge counterclaim and determined that the IAI increase imposed did not require DCHR approval. *Id.*

Evidently, the Courts' statements in *Richards* and *Woodson* did not speak to the case before it or the case at bar, situations where, a tenant in present Civil Court litigation claims for the first time they are being charged a rent in excess of the lawfully stabilized rent that the owner justifies based on an IAI. These cases did not ***25** purport to temper judicial scrutiny of an IAI. Instead, the *Richards* and *Woodson* Courts merely sought to allay concerns and generally reiterate that a tenant's inability to initiate a Housing Court action does not mean the tenant has to wait to be sued for nonpayment of rent to seek redress of a perceived overcharge in the monthly rent.

In sum, the Legislature has shown its inclination in many aspects of the state rent regulatory law to grant exclusive control to DHCR and limit the role of the Courts. The Legislature could have required the landlord to seek prior approval for an IAI as it did with MCI, Fair Market Rent Appeal and Certificates of Eviction. If the Legislature had also intended to specifically limit IAI jurisdiction to DHCR, it would have done so in the original design of the statutory scheme or by amendment following case law interpreting the statute. It is not a secret that the Courts have been exercising jurisdiction over these determinations; the Legislature has allowed this practice to continue, unchallenged for several decades.

In this case, however, the Appellate Term attempted to subvert the role of the legislature and substitute its judgment. In stating, "since both the criteria and procedures prescribed by the agency for the

determination ***26** of IAI challenges are administrative in nature, concurrent judical jurisdiction could not have been attended," the court below improvidently asserted its own view of the respective roles of the agency and the Courts and its decision must be reversed.

CONCLUSION

For the foregoing reasons, the order and judgment of the Appellate Term of the Second Eleventh Judicial Department should be reversed and the decision and order of the Civil Court should be affirmed.