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This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 182
Lorraine Borden &c., et al.,
Respondents,
v.
400 East 55th Street Associates, L.P.,
Appellant.

No. 183
Yanella Gudz &c.,
Respondent,
v.
Jemrock Realty Company, LLC,
Appellant.

No. 184
Elisa Downing, et al.,
Respondents,
v,
First Lenox Terrace Associates, et al.,
Appellants.

Case No. 182:
Jeffrey Turkel, for appellant.
Christian Siebott, for respondents.

Case No. 183:
Magda L. Cruz, for appellant.
Christian Siebott, for respondent.

Case No. 184:
Todd E. Soloway, for appellants.
Matthew D. Brinckerhoff, for respondents.

LIPPMAN, Chief Judge:

We hold that CPLR 901 (b) permits otherwise qualified plaintiffs to utilize the class action mechanism to recover

compensatory overcharges under Roberts v Tishman Speyer Props., LP (13 NY3d 270 [2009]), even though Rent Stabilization Law § 26-516 (RSL) does not specifically authorize class action recovery and imposes treble damages upon a finding of willful violation. We find the recovery of the base amount of rent overcharge to be actual, compensatory damages, not a penalty, within the meaning of CPLR 901 (b). We also do not believe it contravenes the letter or the spirit of the RSL or CPLR 901 (b) to permit tenants to waive treble damages in these circumstances -- when done unilaterally and through counsel.

Facts And Procedural History

In all three of these putative class actions, plaintiffs are current or former tenants of separate apartment buildings in New York City who seek damages for rent overcharges. They allege that their units were decontrolled in contravention of RSL § 26–516 (a) because their landlords accept tax benefits pursuant to New York City's J-51 tax abatement program (now Administrative Code of New York § 11-243). To qualify for the J-51 program exemption, landlords must relinquish their rights under the decontrol provisions of the RSL while they benefit from the exemption.

Plaintiffs' claims arose out of this Court's decision in Roberts, where we held that a landlord receiving the benefit of a J–51 tax abatement may not deregulate any apartment in the building pursuant to the luxury decontrol laws (13 NY3d at 286).

Prior to Roberts, the New York State Division of Housing and Community Renewal (DHCR) took the position that where participation in the J–51 program was not the sole reason for the rent regulated status of a building, particular apartments could be luxury decontrolled. As a consequence, many landlords decontrolled particular apartments in their buildings, charging tenants market rents, while at the same time receiving J–51 tax abatements. In Roberts, we did not address the legitimacy of the putative class action, but we now address the issue.

All plaintiffs initially sought treble damages in their complaints, but then waived that demand through attorney affirmation. Because of the number of plaintiffs from each building who seek damages for rent overcharges, the question arises whether these claims can properly be brought as class actions.

The Borden defendant appeals from a unanimous Appellate Division order affirming a Supreme Court grant of plaintiffs' motion for class certification (Borden v 400 E. 55th St. Associates, LP, 105 AD3d 630 [1st Dept 2013]). The Supreme Court held that CPLR 901 (b) permits waiver of penalties and "allow[s] the claims for compensatory damages only to continue" (Borden v 400 E. 55th St. Assoc. LP, 34 Misc. 3d 1202(A), 941 NYS2d 536 [Sup Ct, NY County 2011]). The court found that treble damages are not mandatory because the "trebling penalty is not available where a landlord can prove that the overcharge was not willful,"

and "the post Roberts jurisprudence has rejected the trebling of damages because the market rents were charged in accordance with DHCR rules and regulations" (id. at 5). Further, any class member wanting to seek treble damages would be able to opt out of the class to protect his or her interests (id. at 4). The Appellate Division agreed, concluding that plaintiffs properly waived treble damages under RSL § 26–516 (a), and the waiver permitted them to bring their claims as a class action under CPLR 901 (b) (Borden, 105 AD3d 630 [1st Dept 2013]).

In Gudz, defendant appeals an Appellate Division order affirming, by a 3-2 vote, the Supreme Court grant of class certification (Gudz v Jemrock Realty Co., LLC, 105 AD3d 625 [1st Dept 2013]). As the record in Gudz indicates, Supreme Court also rejected the argument that the RSL mandates treble damages, remarking that "courts have consistently held that plaintiffs may waive the penalty portion of a statute that would otherwise render the action ineligible for class certification." The Appellate Division majority concluded the same, finding that waiver of the treble damages provision does not violate CPLR 901 (b) or the RSL because CPLR 901 (b) allows waiver of a penalty, and the RSL does not mandate treble damages (see Gudz, 105 AD3d at 625-626). Because "treble damages are not the sole measure of recovery" and a landlord may overcome the presumption of willfulness, the penalty was not mandatory and plaintiffs' claim for overcharges and interest did not fall within the definition

of a penalty under CPLR 901 (b) (id. at 625-626). "[E]ven though such recovery is denominated a penalty by the RSL," it is not a penalty "because [claims for overcharges and interest] lack a punitive, deterrent and litigation-incentivizing purpose and are, in fact, compensatory" (id. at 626). The dissenting justices contended that plaintiffs' waiver of the treble damages remedy "circumvent[ed] the clear intent of CPLR 901 (b), which is to preclude the maintenance of a class action suit seeking a penalty" (id. at 627). Conceding that plaintiffs' request for the first third (the base amount) of the treble damages award was compensatory, the dissenters maintained, however, that the RSL mandated the imposition of treble damages pursuant to the presumption that an overcharge is willful and asserted that any waiver of the RSL's provisions was void (id. at 627-628). They also disputed the protection that an opt-out clause would provide, contending that members may be bound by a waiver they did not make and be unable to take advantage of all the remedies available to them (id. at 629).

The Downing defendants appeal an Appellate Division order reversing the Supreme Court dismissal of plaintiffs' complaint. In granting defendants' motion to dismiss, Supreme Court asserted that CPLR 901 (b) prohibited class actions for claims seeking penalties, and the RSL forbade waiver of treble damages. In reversing and reinstating the complaint, the Appellate Division majority held that the class action could be

brought under CPLR 901 (b) because plaintiffs waived treble damages and "even where a statute creates or imposes a penalty, the restriction of CPLR 901 (b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class" provided that class members have the opportunity to opt out of the class to seek punitive damages (Downing v First Lenox Terrace Assoc., et al., 107 AD3d 86, 89 [1st Dept 2013]). The court also concluded that a unilateral waiver complies with the Code's prohibition of any agreement to waive its provisions (see id. at 89-90). The majority remanded for further proceedings to evaluate whether the allegations satisfy factors for class certification under CPLR 901 (a).

In each case, the Appellate Division certified a question to this Court.

Discussion

Rent Stabilization Law § 26–516 (a) states, in relevant part, that any landlord "found . . . to have collected an overcharge above the rent authorized for a housing accommodation . . . shall be liable to the tenant for a penalty equal to three times the amount of such overcharge" but "[i]f the owner establishes by a preponderance of the evidence that the overcharge was not willful, the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest" (RSL § 26-516 [a]). It provides

that "[i]n no event shall such treble damage penalty be assessed against an owner based solely on said owner's failure to file a timely or proper initial or annual rent registration statement" (RSL § 26-516 [a]). Further, "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed" and "[n]o penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed" (RSL § 26-516 [a] [2]).

CPLR 901 (b) prohibits any claim for penalties to be brought as a class action. It states, "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" (CPLR 901 [b]). The language of CPLR 901 (b) itself says it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover the penalty.

This view is bolstered by the legislative history of CPLR 901 (b), which provides that the statute requires a liberal reading and allows class-action recovery of actual damages despite a statute's additional provision of treble damages (Sponsor's Mem, Bill Jacket, L 1975, ch 207). Assemblyman Fink,

the bill's sponsor, explained the purpose of CPLR 901 (b), stating that “[t]he bill . . . precludes a class action based on a statute creating or imposing a penalty . . . unless the specific statute allows for a class action,” but “[a] statutory class action for actual damages would still be permissible” (Sponsor's Mem, Bill Jacket, L 1975, ch 207 [emphasis added]). In other words, "if the members of a class who would be entitled to a penalty sue only for their actual damages, they may do so in a class action" (Mem of State Consumer Protection Bd, Bill Jacket, L 1975, ch 207). Waiver does not circumvent CPLR 901 (b); on the contrary, the drafters not only foresaw but intended to enable plaintiffs to waive penalties to recover through a class action. Citing this Court's decision in Moore v Metropolitan Life Ins. Co. (33 NY2d 304, 313 [1973]), in which we commended the legislature for its "comprehensive proposal to provide a broadened scope and more liberal procedure for class actions," the legislature intended for CPLR 901 (b) to be interpreted liberally, and be a stark contrast from the former statute "which fail[ed] to accommodate pressing needs for an effective, flexible and balanced group remedy" (Sponsor's Mem, Bill Jacket, L 1975, ch 207; see also City of New York v Maul, 14 NY3d 499, 509 [2010] [requiring liberal interpretation of class action statute]).

The legislature paid particular attention to the Banking Association and Empire State Chamber of Commerce when

devising CPLR 901 (b) and their fear that plaintiffs would receive penalties far above their "actual damages sustained" (Mem of Empire State Chamber of Commerce, Bill Jacket, L 1975, ch 207; see Mem of New York State Bankers Association, Bill Jacket, L 1975, ch 207). The legislature added CPLR 901 (b) specifically to address this fear, intending to limit class actions to actual damages. It is abundantly clear that plaintiffs seek a refund, i.e. actual damages, which CPLR 901 (b) did not intend to bar.

From a policy standpoint, permitting plaintiffs to bring these claims as a class accomplishes the purpose of CPLR 901 (b). Preemptively responding to the argument raised by defendants here, the State Consumer Protection Board emphasized the importance of class actions: "The class action device responds to the problem of inadequate information as well as to the need for economies of scale" for ". . . a person contemplating illegal action will not be able to rely on the fact that most people will be unaware of their rights -- if even one typical person files a class action, the suit will go forward and the other members of the class will be notified of the action either during the proceedings or after a judgment is rendered in their favor" (Mem of State Consumer Protection Bd, Bill Jacket, L 1975, ch 207).

Where a statute imposes a non-mandatory penalty, plaintiffs may waive the penalty in order to bring the claim as a class action – such as was the case for consumer fraud actions

brought under Section 349 (h)[1] of the General Business Law in the case of Cox v Microsoft (8 AD3d 39 [1st Dept 2004]; see also Ridge Meadows Homeowners' Ass'n, Inc. v Tara Development Co., 242 AD2d 947 [4th Dept 1997]; Super Glue Corp. v Avis Rent A Car System, Inc., 132 AD2d 604, 606 [2d Dept 1987]). Although the statute prescribed $50 minimum damages to be awarded for a violation, the plaintiffs only sought actual damages, rendering CPLR 901 (b) inapplicable. Although CPLR 901 (b) intended to restrict the types of cases that could be brought as class actions, in our cases the CPLR is not contravened by allowing waiver because plaintiffs will not receive a windfall. They will only receive compensatory damages in the form of a refund of rent overcharges. In addition to prohibiting treble damages where the landlord disproves willfulness, the RSL carves out other instances where treble damages may not be applied, such as for rent registration filing errors (RSL § 26-516 [a]).

Defendants compare the language of the RSL to other statutes to support their contention that waiver is unavailable because the RSL mandates the assessment of treble damages. They

[1] General Business Law § 349 makes deceptive acts and practices unlawful, stating that "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section."

contend that unless the landlord proves the overcharges were not willful, treble damages must be assessed, and this lack of discretion implies that no party may waive treble damages. However, the RSL's treble damages are only applied where defendant fails to disprove willfulness under the low standard of preponderance of the evidence in contrast to a statute like General Business Law § 340 (5),[2] where treble damages are the sole measure of recovery available to a private party and are awarded upon a finding of liability alone (GBL § 340 [5]). Notably, in another Appellate Division case, a plaintiff in a General Business Law Section § 340 (5) case could not waive the treble damages provision to be certified as a class, the court saying "[treble damages] are mandatory, i.e., not discretionary or contingent upon a finding of bad faith" (Asher v Abbott Labs., 290 AD2d 208, 209 [1st Dept 2002]; see also Sperry v Crompton Corp., 8 NY3d 204, 213 [2007] [finding treble damages under GBL § 340(5) to be a penalty within the meaning of CPLR 901 (b) but not addressing waiver]).

While RSL § 26-516 designates both the rent overcharge and treble damages as "penalties," the Code and the DHCR simultaneously refer to the rent overcharge as an "overcharge award" (RSL § 26-516 [a] [2]; DHCR Policy Statement 95-1 [Dec 6,

[2] General Business Law § 340(5) prohibits monopolies and states that "any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees."

1995]) and a "refund payment" (New York City Code § 26-413 [referring to rent control as opposed to rent stabilization]). The RSL also clearly distinguishes between the compensatory "award" for which a four-year statute of limitations applies and the "penalty of three times the overcharge" for which a two-year statute of limitations applies (RSL 26-516 [a] [2]). A plaintiff bringing an overcharge claim outside the two-year statute of limitations window would be prohibited from recovering treble damages, but could still recover actual damages.

Regardless of the nomenclature, even if the Code and policy statement had consistently called the compensatory overcharge a penalty, the Administrative Code's terminology alone would not be dispositive. Judge Cardozo eruditely observed that although a statute spoke of a payment due "as a penalty," it is only so "in a loose sense" and "[f]orms and phrases of this kind, accurate enough for rough identification or convenient description, do not carry us very far" in determining the statutory meaning (Cox v Lykes Bros., 237 NY 376, 380 [1924]). Continuing, he cautioned us to "to remember that the same provision may be penal as to the offender and remedial as to the sufferer" and "[t]he nature of the problem will determine whether we are to take one viewpoint or the other" (id. at 380). As Judge Cardozo alluded, the word penalty does have a specific definition that does not apply to actual damages. "[A] statute imposes a penalty when the amount of damages that may be exacted

from the defendant would exceed the injured party's actual damages" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 901 at 104 [2006 ed]).

This Court signaled that the "determination of whether a certain provision constitutes a penalty may vary depending on the context" (Sperry, 8 NY3d at 213). In Sperry, where we found the treble damages provision of General Business Law § 340 (5) constituted a penalty, we also found that "one third of the award unquestionably compensates a plaintiff for actual damages" while "the remainder necessarily punishes...violations, deters such behavior (the traditional purposes of penalties) or encourages plaintiffs to commence litigation" (Sperry, 8 NY3d at 214). We disallowed class action recovery in Sperry, but the plaintiff plainly sought treble damages, refusing to waive the penalty (id. at 215). Plaintiffs here seek that first third of the treble damages award, which we have determined is a compensatory form of relief.

This Court has already found the same provision of the RSL to provide compensatory forms of relief -- the provision serves to make the tenant whole, in addition to granting a separate punitive award of treble damages. As we stated in Mohassel v Fenwick, the provisions of RSL § 26-516 (a), which "establish the penalty as the amount of the overcharge plus interest . . . are designed . . . *to compensate the tenant* . . ." (5 NY3d 44, 50 [2005] [emphasis added]). There, we held that

"[t]he imposition of prejudgment interest ensures that injured tenants will be made whole . . ." (Fenwick, 5 NY3d at 51). Reading the interest provision as punitive would be "inconsistent with the purpose of overcharge proceedings to fully compensate tenants when owners fail to comply with rent stabilization requirements . . ." (Fenwick, 5 NY3d at 51). We emphasized that the award refunded the tenant since the landlord "had the use of the tenant's money . . . while the tenant was deprived of it" (Fenwick, 5 NY3d at 52). The same circumstance arises here where the landlord overcharges a tenant, holds that money for a time, and then must pay it back. When a store overcharges a customer who later brings in the receipt seeking a refund of the overcharge, no one could argue that repayment penalizes the store -- the money always belonged to the customer. As we found in Fenwick, we find here that the first third of the treble damages award merely compensates the tenant and CPLR 901 (b) does not apply to such a nonpunitive claim.

It is ironic that landlords here argue that tenants must bring multiple actions for the greatest (treble) damages. They also cite the state's long history of protecting tenants' rights when arguing that waiver contravenes the purpose of the RSL.

Defendants alternatively argue that even if treble damages are not mandatory, tenants' waiver of the provision contravenes the language and intent of Section 2520.13 of the

Code, which prohibits an agreement waiving any provisions of the RSL (9 NY Comp. Codes R. & Regs. 2520.13). But tenants may waive a provision unilaterally (not through an agreement with the landlord), and still comply with the letter and the spirit of the law. The code says as much when it allows tenants to withdraw claims through a negotiated settlement, or with the approval of the DHCR or a court, or where the tenant is represented by counsel (9 NY Comp. Codes R. & Regs. 2520.13). Where courts have denied a tenant's waiver, the evidence demonstrated that the landlord and tenant were either colluding to de-regulate apartments or that the tenants were being manipulated by contracts of adhesion (see Drucker v Mauro, 30 AD3d 37, 39 [1st Dept 2006]).

Here, there is no evidence that tenants are being coerced to waive the treble damages provision or that there is any collusion between the landlords and the tenants. The tenants by themselves, and in opposition to the landlords' wishes, are opting to waive treble damages because they believe they will be more protected through a class action that finds that deregulation was illegal and gives them compensation for the overcharges. This protects tenants and preserves rent regulation, fulfilling the most significant purpose of the RSL. The tenant's waiver here is unilateral, supported by court order, and made with representation by counsel.

As the lower courts noted, treble damages would be unavailable to the tenants because a finding of willfulness is generally not applicable to cases arising in the aftermath of Roberts. For Roberts cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units, so there is little possibility of a finding of willfulness (Borden, 23 Misc. 3d 1202(A), 941 NYS2d 536 [Sup Ct, NY County 2011]). Only after the Roberts decision did the DHCR's guidance become invalid.

Although the dissenters in Roberts predicted numerous cases would arise out of the Roberts decision, the ubiquity of the wrong must be addressed, and that their foresight has proven correct supports class certification for reasons of judicial economy.

As to the question of whether the putative classes meet the standards for class certification, the nature of CPLR 901 (a) places determination of those factors "within the sound discretion of the trial court" (Small v Lorillard Tobacco Co., 94 NY2d 43, 52-53 [1999]) and "we may review only for an abuse of discretion" (Corsello v Verizon New York, Inc., 18 NY3d 777, 791 reargument denied, 19 NY3d 937 [2012]; City of New York v Maul, 14 NY3d 499, 509 [2010]). In Borden and Gudz, the courts below thoroughly evaluated the five prerequisites that CPLR § 901 (a) requires to be satisfied before a class may be certified, and thus the Appellate Division did not abuse its discretion in

affirming those determinations. The prerequisites are: "(1) the class is so numerous that joinder of all members . . . is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical . . . of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (see CPLR 901 [a]).

As to the first factor, numerosity, the legislature contemplated classes involving as few as 18 members (Mem of State Consumer Protection Bd, Bill Jacket L 1975, ch 207, n. 11) where the members would have difficulty communicating with each other, such as where "barriers of distance, cost, language, income, education of lack of information prevent those who are aware of their rights from communicating with others similarly situated" (Mem of State Consumer Protection Bd, Bill Jacket, L 1975, ch 207, at 3). Such reasoning would apply to the cases here, where tenants have moved out of the building. In these cases, the classes range in size from 53 to over 500 members, well above the numerosity threshold contemplated by the legislature and approved by courts (Consol. Rail Corp. v Town of Hyde Park, 47 F3d 473, 483 [2d Cir 1995] ["numerosity is presumed at a level of 40 members"]).

As to predominance and typicality, the predominant legal question involves one that applies to the entire class -- whether the apartments were unlawfully deregulated pursuant to the Roberts decision (Borden, 105 AD3d at 631). It should be noted that the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating "the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class if the important legal or factual issues involving liability are common to the class" (Mem of State Consumer Protection Bd, Bill Jacket, L 1975, ch 207, at 3).

The courts' evaluation of the adequacy of each representative was more than sufficient. Having found no substantiated conflicts between the tenants and a representative with "adequate understanding of the case," and competent attorneys (Borden, 105 AD3d at 631), we conclude that allowing tenants to opt out of the class avoids any question of the adequacy of the class representation pursuant to CPLR 901 (a) (Pesantez v Boyle Envtl. Servs., Inc., 251 AD2d 11, 12 [1st Dept 1998]). Finally, to preserve judicial resources, class certification is superior to having these claims adjudicated individually.

In conclusion, maintaining the actions as class actions does not contravene the letter or the spirit of the CPLR or Rent

Stabilization Law. Accordingly, in each case, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Matter of Lorraine Borden v 400 East 55th Street Associates, L.P
Yanella Gudz v Jemrock Realty Company, LLC
Elise Downing v First Lenox Terrace Associates

Nos. 182,183,184

SMITH, J.(dissenting):

Defendants argue that these are actions "to recover a penalty" because the treble damage remedy in Rent Stabilization Law (RSL) § 26-516 (a) is not waivable; because even if it were waivable under the statute that authorizes it, Rent Stabilization Code § 2520.13 prohibits a waiver; and because in any event, even without trebling, the remedy provided by RSL § 26-516 (a) is a penalty. None of these arguments is without merit, but I will not stop to consider the first two, because I am satisfied that the third is correct. An action under CPLR 26-516 (a) to recover a rent overcharge, whether trebled or not, is "an action to recover a penalty . . . created or imposed by statute" and therefore "may not be maintained in a class action" (CPLR 901 [b]). (It is not disputed that the RSL, though technically a chapter of the New York City Administrative Code [Title 26, Chapter 4], is a "statute" within the meaning of the CPLR provision.)

The simplest and best reason to hold that even the untrebled remedy is a penalty is that the statute says it is. Section 26-516 (a) says:

> "Subject to the conditions and limitations of this subdivision, any owner of housing accommodations who . . . is found . . . to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. . . . If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest"

(emphasis added).

It could hardly be said more plainly that the authors of the RSL considered "the amount of the overcharge plus interest" -- without trebling -- to be a "penalty."

Our cases make clear that, in deciding whether a particular remedy is a penalty or not, the label chosen by the authors of the legislation in question is ordinarily dispositive. "[T]his Court has stated that, where a statute expressly denominates an enhanced damages provision to be compensatory in nature, it will not be deemed a penalty" (Sperry v Crompton Corp., 8 NY3d 204, 212-213 [2007] [citing cases]). The reverse should also be true; where the statute says a remedy is a penalty, it is one. At least, we would not be justified in rejecting the legislative label unless it were plain that it is a misnomer -- that the single overcharge remedy, though called a penalty, is in fact a purely compensatory remedy. Here, there is ample justification for the legislative choice to call this remedy a penalty.

While of course single-damages remedies are usually compensatory, the remedy provided by this RSL provision is unusual, because it awards monetary relief to people who have not, in economic reality, been damaged by the landlord misconduct of which they complain. In fact, these plaintiffs and others similarly situated are in a real sense beneficiaries of that misconduct. Where, as here, a landlord illegally charges a free-market rent for a rent-stabilized apartment, the result is that the apartment will be rented to someone able and willing to pay the market rent. If the landlord had complied with the law, the apartment would have been more affordable and many more tenants would have been happy to rent it -- assuming that it had become vacant at all. It is most unlikely that any of the present plaintiffs, all of whom signed market-rent leases for their apartments, could have obtained the same apartments at the legal rent. But the statute, by requiring the overcharge to be refunded to them, effectively gives them what they could not have obtained; they are getting not compensation, but a significant windfall.

I am not criticizing the legislative choice to give this windfall to these plaintiffs. The choice makes sense -- but only if the statute is seen not as compensating injured tenants, but as penalizing landlords. By being deprived of the money they have illegally received, the landlords are punished for their unlawful conduct (though, because the misconduct was not wilful,

the punishment is only one-third as severe as it would otherwise be) and they and other landlords are deterred from future violations of the law. The result of this penalty, in the legislative scheme, is that landlords will be induced to comply with the rent limitations imposed by law and people who -- unlike the present plaintiffs -- cannot pay market rents will be able to find affordable housing.

I therefore conclude that the authors of RSL § 26-516 (a) had, at least, a reasonable basis for calling the untrebled remedy that plaintiffs here are seeking a "penalty." Because it is a penalty, it may not be recovered in a class action.

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For Case No. 182: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Lippman. Judges Graffeo and Rivera concur. Judge Read concurs in result for reasons stated in the memorandum at the Appellate Division (105 AD3d 630 [2013]). Judge Smith dissents in an opinion in which Judge Pigott concurs. Judge Abdus-Salaam took no part.

For Case No. 183: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Lippman. Judges Graffeo and Rivera concur. Judge Read concurs in result for reasons stated in the memorandum at the Appellate Division (105 AD3d 625 [2013]). Judge Smith dissents in an opinion in which Judge Pigott concurs. Judge Abdus-Salaam took no part.

For Case No. 184: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Lippman. Judges Graffeo and Rivera concur. Judge Read concurs in result for reasons stated by Justice Richard T. Andrias at the Appellate Division (107 AD3d 86 [2013]). Judge Smith dissents in an opinion in which Judge Pigott concurs. Judge Abdus-Salaam took no part.

Decided November 24, 2014