[* 1]

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

PRESENT: JOAN M. KENNEY Justice

PART 8

Lerner et al

- v -

W7879 LLC et al

INDEX NO. 109952/10

MOTION DATE

MOTION SEQ. NO. 12/2/11

MOTION CAL. NO. 002

The following papers, numbered 1 to 24 were read on this motion to/to dismiss

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + Memo of Law | 1 - 10 |
| Answering Affidavits — Exhibits X Mohen | 11 - 17 |
| Replying Affidavits + Memo of Law | 18 - 24 |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION**



Dated: 9/13/12

JOAN M. KENNEY J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----------X

EDWARD LERNER AND LEILA LERNER,

Plaintiffs,

-against-

W7879 LLC; N,K et al.,

Defendants.

----------X

DECISION & ORDER
Index No. 109952/2010

**KENNEY, J.:**

In this action for a declaratory judgment, defendants move to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1), (2), (5) and (7), on the grounds of a defense founded upon documentary evidence, the court has not jurisdiction of the subject matter of the cause of action, statute of limitations and the pleading fails to state a cause of action.

Plaintiff cross-moves for an order, pursuant to CPLR 6301, staying the instant action pending the resolution of *Gersten v 56 7th Ave., LLC*[1] before the New York State Court of Appeals.

## FACTUAL BACKGROUND

According to the complaint, plaintiffs Edward Lerner and Leila Lerner are residents of unit 51 of a building located at 229 West 78th Street, New York, New York (subject apartment). Defendants are the fee owners of the building located at 229 West 78th Street, New York, New York (the Premises).

Plaintiffs have been tenants at the subject apartment for several decades. At the beginning of their tenancy, the then owners provided plaintiffs with a rent-stabilized lease. In 1999, defendants' predecessor-in-interest commenced a luxury deregulation proceeding to terminate the subject apartment's rent-stabilization status. Shortly thereafter, the State of New York Division of Housing and Community Renewal (DHCR) issued an order of deregulation under Docket Number

[1] 88 AD3d 189 [1st Dept 2011].

ZHE-410365-LD upon a finding that plaintiffs' monthly rent was over $2,000 and their combined income exceeded $175,000. After the issuance of the order of deregulation, plaintiffs obtained a lease renewal at the market rate. Over the course of the years, plaintiffs' rent has increased to the current rate of $5,800 per month. Plaintiffs argue that the stabilized rent claimed by the landlord and its subsequent claim of luxury decontrol were improper and fraudulent in light of the building's receipt of "J-51" tax benefits during their tenancy. When the subject apartment was deregulated, the defendants were receiving J-51 tax benefits, which should have provided plaintiffs with protection under the New York City Rent Stabilization Code, the Rent Stabilization Law and the Emergency Tenant Protection Act. Due to the loss of said protection, plaintiffs commenced this lawsuit asserting three causes of action seeking: (1) a declaratory judgment that the subject unit is subject to rent stabilization and that defendants are required to charge rent at rent-stabilized rates and not market rates, (2) damages for the rent overcharges collected by defendants, and (3) attorney's fees.

Defendants argue that they are entitled to dismissal because: (1) the court lacks subject matter jurisdiction to set aside DHCR's order of deregulation, dated July 15, 1999; (2) the current action is time-barred under CPLR 213; and (3) plaintiffs failed to identify any actual fraud.

Plaintiffs argue that defendants are not entitled to dismissal because: (1) the documents relied upon by defendants fail to dispose of plaintiffs' claims, and (2) the pleadings are sufficient in that they allege, without ambiguity, claims for various violations of the Rent Stabilization Code, rent overcharges, and damages.

Defendants' motion to dismiss is denied.

As a primary matter, defendants assert that this court lacks subject matter jurisdiction to hear

plaintiffs' claims of a rent overcharge. The Supreme Court has statutory jurisdiction to entertain an action to recover a rent overcharge and power to award treble damages (*see Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441 [1st Dept 2012]; *see* NY CLS Unconsol Ch 249-B, § 12 [f] [Emergency Tenant Protection Act of 1974, Administrative Code § 26-504 (6)]; CPLR 213-a). Furthermore, plaintiffs were not required to exhaust their administrative remedies before commencing this action (*see In re Smith*, 254 AD2d 424, 424 [2d Dept 1998]).

Defendants are not entitled to dismissal pursuant to CPLR 3211 (a) (1). There is a legitimate dispute as to the amount of rent defendants are entitled to charge pursuant to the Rent Stabilization Law, and defendants' submissions fail to dispose of plaintiffs' claims.

In order to prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitely dispose of a plaintiff's claim (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). Defendants argue that the initial lease and its subsequent renewals, the petition for high income rent deregulation, and receipts from J-51 tax benefits satisfy its burden on this motion (Exhibits B, C, D, and E to Affidavit of Evelyn Nagel, dated September 15, 2011) (Nagel Aff.). Defendants also argue that decontrol of the subject apartment was proper because the documents in question illustrate that the subject apartment did not gain rent-stabilized status as a result of the J-51 tax credits; in fact, they argue that the documentary evidence establishes that the subject apartment was subject to rent-stabilization prior to the Premises' receipt of J-51 tax credits. Defendants also point out that their documentary evidence supports said finding pursuant to the provision of the Rent Stabilization Code that allows an owner to charge tenants market rent if a household's income is greater than $150,000 annually, and the tenants' monthly rent exceeds $2,000 a month.

Defendants' reliance on the luxury decontrol provision of the Rent Stabilization Law to declassify the subject apartment as rent-stabilized is improper in light of the building's receipt of J-51 tax benefits (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 283-287 [2009]). The Court of Appeals has held that building owners forfeit their rights to nullify rent-stabilized leases pursuant to the luxury decontrol provision of the Rent Stabilized Law, even if an owner's buildings were subject to the Rent Stabilization Law prior to receiving those benefits (*id.*; *see Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444, 445-6 [1st Dept 2011]; *see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, *supra*). Consequently, defendants' submissions fail to conclusively refute plaintiffs' allegations of a rent overcharge as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Plaintiffs have successfully pled a cause of action to recover damages for an alleged rent overcharge.

"'In considering a motion to dismiss for failure to state a cause of action . . . [t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 1078 [2d Dept 2011] [citations omitted]). The rent registration for the subject apartment's exempt status due to luxury decontrol is not dispositive of whether the rent stated by defendants was the legal rent or whether there was an accompanying rent overcharge (*Gordon v 305 Riverside Corp.*, 93 AD3d 590, 592 [1st Dept 2012]). In 1993, the Legislature enacted the Rent Regulation Reform Act to amend, inter alia, the Rent Stabilization Law (Administrative Code § 26-501 *et seq*; *see Roberts v Tishman Speyer Props.*, L.P., 62 AD3d 71, 77 [1st Dept 2009], *affd* 13 NY3d 270 [2009]). The new sections of the Rent Stabilization Law provided for the deregulation of residential units that became vacant with a legal regulated rent of $2,000 or

more per month (Administrative Code § 26-504.2), or had a legal regulated rent of $2,000 or more per month and whose tenants and occupants had a total income in excess of $250,000 for each of the two preceding calendar years (*see* Administrative Code § 26-504.1; *Roberts*, 62 AD3d at 77). The above referenced sections are commonly referred to as the "high rent" or "luxury decontrol" provisions.

The high rent or luxury decontrol provisions of the Rent Regulation Reform Act., as amended in 1997, now exclude housing accommodations from the scope of the Rent Stabilization Law "when either: the legal regulated rent is $2,000 or more and the combined household income exceeds $175,000 for two consecutive years (Administrative Code § 26-504.1) or the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more (RSL §§ 26-504.2; 26-511 [c] [5-a]).

Furthermore, "[w]here landlords receive a New York City "J-51" tax exemption or abatement for their apartments under New York Real Property Tax Law § 489 (1) (a) and New York City Administrative Code §§ 11-243 and 11-244 (formerly §§ J51-2.5 and J51-5), the apartments are subject to rent regulation, N.Y.C. Admin. Code §§ 11-243 (I) (1), 26-504 (c), and the luxury decontrol provisions do not apply. N.Y.C. Admin. Code §§ 26-403 (e) (2) (j) and (e) (2) (k), 26-504.1, 26-504.2 (a)" (*Dugan v London Terrace Gardens, LP.*, 34 Misc. 2011 NY Sup Ct 52501 [U], 3d 1240[A], [Sup Ct, NY County 2011]).

DHCR's Rent Stabilization Code and its Rent and Eviction Regulations for rent- controlled units, interpreting the luxury decontrol statutes, however, allowed a landlord to avail itself of luxury decontrol of apartments that already were rent-stabilized or controlled when the landlord began receiving a J-51 tax exemption or abatement for these apartments. DHCR's regulations also allowed

a landlord to continue charging market rent for apartments already deregulated under luxury decontrol when the landlord began receiving J-51 tax benefits for the building, but the New York City Department of Housing Preservation and Development (HPD) had reduced them in proportion to the percentage of deregulated apartments in the building (*id.*).

The Court of Appeals determined that this regulatory interpretation, 9 NYCRR § 2520.11 [r] (5) [I] and (s) (2) [I], of the Rent Stabilization Law, Administrative Code §§ 26-504.1 and 26-504.2 (a), was contrary to the statutes' terms that a landlord may not avail itself of luxury decontrol where the apartment "became subject to rent stabilization" by virtue of receiving a J-51 tax exemption or abatement. The statutory terms prohibiting luxury decontrol of rent-controlled apartments receiving J-51 tax benefits, Administrative Code of City of NY § 26-403 (e) (2) (j) and (e) (2) (k), are identical to §§ 26-504.1 and 25-504.2 (a), just as DHCR's regulations misinterpreting each statute are comparable (9 NYCRR §§ 2200.2 [f] [19] [v] and [20] [ii], 2520.11 [r] [5] [I] (*Roberts v Tishman Speyer Props., LLC,* 13 NY3d at 285-6).

Plaintiffs initially signed a rent-stabilized lease with defendants on April 13, 1993, whereby they were required to pay $2,597.53 each month for rent. As stated above, on May 24, 1999, a luxury deregulation petition was filed with DHCR. Included in the petition was an income certification form signed by plaintiffs establishing that their rent exceeded $2,000 per month, and that their household income was over $175,000 for each of the two years preceding the petition. DHCR issued the order of deregulation on July 15, 1999. It is undisputed that defendants received a J-51 tax exemption from 1992 until 2010. For the lease term ending on April 30, 2000, plaintiffs were forced to pay an increase in rent that totaled $3,600. Following subsequent lease renewals, plaintiffs currently pay in excess of $5,600 per month for the subject apartment (Exhibit B to

Affidavit of Evelyn Nagel, dated August 10, 2011) (Nagel Aff.), a sum they argue constitutes an overcharge following the wrongful termination of their rent-stabilized lease. Hence, plaintiffs have sufficiently pled a cause of action for rent overcharges.

Defendants are also seeking dismissal pursuant to CPLR 213, alleging that DHCR's Order of Deregulation, dated July 15, 1999, is no longer subject to reversal by this court because plaintiffs' claims exceed the six-year statute of limitations and are now time-barred. CPLR 213 provides in part:

> "The following actions must be commenced within six years:
>
> 2. an action upon a contractual obligation or liability, express or implied. . .;
>
> 6. an action based upon mistake.

The Rent Regulation Reform Act of 1997 clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims by limiting examinations of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint (*Thorton v Baron*, 5 NY3d 175, 180-81 [2005]; CPLR 213-a). "'Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter'" (*Thorton v Baron*, 5 NY3d at 180; *quoting* Rent Stabilization Law [Administrative Code of the City of NY] § 26-516 [a]). "The four-year Statute of Limitations applicable to both administrative and judicial rent overcharge claims, by its terms, commences to run with the 'first overcharge alleged'" (*Mozes v Shanaman*, 21 AD3d 854, 854-5 [1st Dept 2005]). Where, as here, plaintiffs have instituted an action in court asserting a rent

overcharge claim for a rent-stabilized apartment, the base date is four years prior to commencement of the action (*see Gordon v 305 Riverside Corp.*, 93 AD3d at 592). This action was commenced on June 23, 2011, thereby generating a base date for determining any overcharge at June 23, 2007, a date well within the statute of limitations.

As for plaintiffs' cross claim to stay this action pending the resolution of *Gersten v 56 7th Avenue, LLC,*[2] that appeal has been subsequently withdrawn.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that plaintiffs' cross motion for a stay in the action is denied; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days from the date of this order; and it is further

ORDERED that the parties appear for a compliance conference on November 29, 2012 at 10:00 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.

Dated: September 14, 2012

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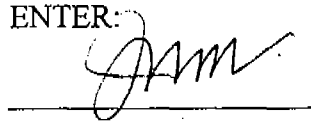

John M. Kenney, J.S.C.



[2]88 AD3d 189, *supra*; 18 NY3d 954 [2012]).