Fox v 12 E. 88th LLC
2016 NY Slip Op 31953(U)
October 13, 2016
Supreme Court, New York County
Docket Number: 154841/2014
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

BARRY FOX and MBE, LTD,

Plaintiffs,

- against-

12 EAST 88TH LLC and NOSTRA REALTY CORP.,

Defendants.

INDEX NO. 154841/14

MOTION SEQ. NO. 001

The following papers were read on this motion by defendants for summary judgment and a cross-motion by the plaintiff for partial summary judgment.

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

Cross-Motion: ■ Yes ☐ No

Defendants 12 East 88th LLC (12 East 88th) and Nostra Realty Corp. (Nostra) move, pursuant to CPLR 3212, for summary judgment against plaintiffs Barry Fox (Fox) and MBE, Ltd. (MBE) (collectively, plaintiffs) on their counterclaims and to dismiss the complaint. Plaintiffs cross-move for partial summary judgment on their first and fourth causes of action.

BACKGROUND

This action involves plaintiffs' allegations of illegal deregulation of, and rent overcharges for, their apartment located at 12 East 88th St., New York, NY (the Building). It is undisputed that Fox became a tenant in around 1975, residing in Penthouse A in the Building, when it was owned by Nostra. In 1996, the tenant in Penthouse B died. Whether at the suggestion of Nostra, or at Fox's request, in 1996, it was agreed that Fox would rent both Penthouse B and Penthouse A, and would combine the two penthouses into one apartment. At the time, both penthouses were subject to the Rent Stabilization Law (RSL), with Penthouse A having a rent of approximately $926 per month, and Penthouse B having a rent of approximately $1,700 per

month.

A rider to the lease for the combined apartments entered into between Nostra and Fox (the 1996 Lease) stated that:

> "Tenant understands that his apartment is not subject to Rent Stabilization, Rent Control, or any other rent regulation and, as such, Landlord may, at his sole option, choose not to renew this lease or to renew it on such terms as Landlord deems appropriate including charging a fair market rent. This is an integral part of this Agreement" (1996 Lease, Rider, ¶ 40, annexed to complaint as exhibit A).

The Rider also provided that Fox agreed to spend a minimum of $250,000 to renovate the combined apartments into one unit and would be responsible for filing all plans to legalize the combined unit. According to Fox, he actually spent $500,000 to combine the two apartments, which were together identified as PH.

As provided in the Rider, the initial rent of the combined unit would be $9,500 per year, with two additional options to renew into 2002, with a stated formula for increases in rent for each of those option periods. The lease also provided Fox with a right of first renewal after the final option period, with a provision that, if Fox was not in default of any terms of the lease and did not choose to exercise his right of first renewal, Nostra would reimburse him in the amount of $50,000 for the improvements he had made to the combined apartment.

Fox contends that in addition, Nostra's principal promised him that "he would always offer me the option to renew my lease, that he would never sell the building, and that any rent increases would be reasonable" (Affidavit of Barry Fox, ¶ 9).

Over the next few years Fox continued to renew his lease at increasingly higher amounts of rent until 2008, when Nostra offered Fox a renewal lease which included a $5,000 rent increase, bringing the rent to $25,000 per month for the first year and $26,500 per month for the second year (*see* 2003 Lease and 2008 Lease, Goldman Affirmation, exhibits G & H). Fox alleges that, because of his ill health, in 2008, he requested that MBE, of which he is the

sole shareholder, become the signatory to the lease, with him as guarantor. Although the lease did not specify who would reside in the apartment, according to Fox, Nostra understood that he would continue to reside in the apartment, the tenant information sheet he filled out in connection with the 2008 Lease lists Fox and Malla Perry as tenants (*see* Fox Aff, exhibit 1 at 1) and, in fact, the apartment continued to be his primary residence. Defendants have not submitted any evidence suggesting that this has not been Fox's primary residence.

In 2014, the Building was purchased by 12 East 88th, which planned to convert it to condominiums. According to Fox, in 2014, he was informed by his new landlord that when the existing lease for his apartment expired on May 31, 2014, he would not be offered a new lease. Fox then consulted an attorney and learned that, in 1996, when he agreed to the 1996 Lease, Nostra was receiving J-51 tax benefits for the Building (*see* Administrative Code of the City of NY (Administrative Code) § 11-243).

The J-51 program affords building owners "tax incentives designed to encourage rehabilitation and improvements . . . [allowing] property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years" (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 280 [2009]). "Rental units in buildings receiving these exemptions and/or abatements must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J–51 benefits are in force (*see* 28 RCNY 5–03[f])" (*id.*). According to defendants, those J-51 tax benefits expired in 1997.

After Fox learned about the previous J-51 benefits, on May 16, 2014, he initiated this action, alleging the following four causes of action: 1) illegal termination of the Rent Stabilized status of the PH unit; 2) breach of contract; 3) promissory estoppel; and 4) attorneys' fees. On October 24, 2014, defendants answered and asserted what they describe as five counterclaims, four of which seek declaratory relief to establish their versions of the applicable

law, including the basis for calculating rent overcharges, if any. The counterclaims seek declarations in the alternative that: 1) assuming that the apartment was not deregulated in 1996, the 2008 Lease effected deregulation of the apartment; 2) assuming that the apartment was not deregulated in 1996, back rent should not be calculated under the formula established in *Thornton v Baron* (5 NY3d 175 [2005]); 3) assuming that the apartment is subject to rent stabilization, the four-year statute of limitations should be applied to determine any overcharge and the court should conclude that no overcharge exists; 4) assuming that the apartment is subject to rent stabilization, based upon the understanding that the first combined rent was a lawful rent, given a four-year statute of limitation, the amount of overcharge for the period from June 1, 2010 through May 31, 2012 was $309,393.60; and 5) the owner's offer of a lease agreement in 2014 (the 2014 Lease Agreement) is a proper offer for which MBE has 60 days from the making of the offer to exercise its option.[1]

Defendants now move for summary judgment in their favor on their counterclaims and to dismiss the complaint. Plaintiffs cross-move for summary judgment on their first and fourth causes of action.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving

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[1] On November 6, 2014, 12 East 88th offered MBE a rent stabilized lease to begin on March 1, 2015 at a regulated rent of $14,470.45 per month for a one-year renewal, or $14,721.17 per month for a two-year renewal. Because of an error in the lease, a new lease with similar terms was offered on January 5, 2015.

for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

STATUTORY AND REGULATORY BACKGROUND

In 1993, the Legislature enacted legislation, termed "luxury decontrol," to provide for the deregulation of certain rent-regulated apartments (*see* Rent Regulation Reform Act (RRRA) (L.

1993, ch. 253). Under that legislation, apartments renting for more than $2,000 per month could be deregulated: 1) if they became vacant; or 2) if the combined annual income of all occupants exceeded $250,000 per year[2] (RSL, Administrative Code §§ 26–504.1, 26–504.2). The RRRA carved out an exception to luxury decontrol, which stated: "this exclusion [i.e., luxury decontrol] shall not apply to housing accommodations which became or become subject to this law [i.e., the RSL] (a) by virtue of receiving tax benefits pursuant to section . . . four hundred eighty-nine of the real property tax law [J–51 benefits]" (RSL §§ 26–504.1, 26–504.2[a]; *Roberts,* 13 NY3d at 281).

In January 1996, however, DHCR "issued an advisory opinion, which stated that participation in the J–51 program only precluded luxury decontrol 'where the receipt of such benefits is the *sole reason* for the accommodation being subject to rent regulation' (emphasis added)" (*id.* at 281). Possibly as a result of the DHCR advisory opinion, at least some landlords concluded that, where the building was already rent stabilized prior to receiving J-51 benefits, the provisions for luxury decontrol remained unaffected by the receipt of the J-51 benefits. In *Roberts v Tishman Speyer Props., L.P.*, however, the Court of Appeals held that, under a proper interpretation of the Rent Stabilization Act, regardless of whether the apartment was subject to rent regulation prior to, or as a result of, receiving J-51 benefits, as long as those benefits were being received, the provisions of luxury decontrol did not apply. The court recognized that its ruling was likely to cause "years of litigation over many novel questions to deal with the fallout from today's decision" (*id.* at 287 [internal quotation marks and citation omitted]). This litigation is part of that fallout.

The receipt of J-51 benefits does not forever preclude the application of luxury

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[2] The amount of annual income which triggered deregulation was reduced in 1997 to $175,000 (L. 1997) and then raised in 2003 to $200,000 (L. 2003) and in succeeding years has been raised further. In 1997, the Legislature also allowed post-vacancy improvements to be counted toward the $2,000 rent threshold triggering deregulation.

decontrol. At the end of the tax abatement period, if the landlord follows the proper procedures, an apartment may be removed from rent stabilization if it meets the statutory requirements for luxury decontrol and proper procedures are followed.

Where an apartment has become rent stabilized by virtue of the receipt of J-51 benefits, when those benefits end, the apartment may become deregulated in one of two ways. The apartment may be deregulated if the landlord includes a rider in each successive lease, stating that the apartment will be deregulated at the end of the renewal period following the expiration of benefits. If the lease does not include such a notice, the apartment will remain rent regulated until it becomes vacant after the termination of the benefits (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 194 [1st Dept 2011]).

Where the apartment was regulated prior to the receipt of J-51 benefits, no such notice regarding the receipt of J-51 benefits is required, as "landlords have no affirmative duty to provide such written disclosure except to tenants who are subject to rent stabilization *solely* because of the receipt of J-51 benefits" (*id.* at 203). Rather, once the J-51 benefits have expired, if the rent exceeds the luxury decontrol threshold the landlord may seek to have the apartment deregulated by providing the tenant with an income certification form, and filing such form with the DHCR to obtain an order of deregulation from the agency (*see* Administrative Code § 26-504.3). Where the tenant certifies that the combined household income is below the luxury decontrol threshold and that certification is challenged by the landlord, elaborate procedures exist, including the ability of the tenant to seek review of a DHCR ruling (*see Gersten v 56 7th Ave. LLC*, 88 AD3d at 202-203).

DISCUSSION

Where, as here, there is both a motion by defendants and a cross-motion by plaintiffs, normally the Court would address defendants' motion first. However, because the issues raised by both parties first requires a determination of whether the initial 1996 Lease effected a

legal deregulation of the apartment, the Court will consider the various issues without regard to whether they were first addressed in defendants' motion or plaintiffs' cross-motion.

Plaintiffs' first cause of action alleges that the rent stabilized status of their apartment was illegally terminated in 1996. It is clear that Nostra was receiving J-51 benefits when it entered into the 1996 Lease with Fox for the combined penthouses. Although in the 1996 Lease and successive leases Fox agreed that the apartment was not subject to rent stabilization, parties to a rent-stabilized lease may not contract out of rent stabilization, even when the agreement benefits the tenant (*Gersten v 56 7th Ave. LLC,* 88 AD3d at 199). "The prohibition against avoiding, by agreement, protection afforded by the rent stabilization scheme could not be stated more plainly. Rent Stabilization Code (9 NYCRR) § 2520.13 provides: 'An agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code is void'" (*Drucker v Mauro*, 30 AD3d 37, 40 [1st Dept 2006]).

Although the combined rent of the two penthouses was above the $2,000 threshold for luxury deregulation, because Nostra was receiving J-51 benefits when the 1996 Lease was signed, luxury deregulation was not permissible at that time (*Roberts*, 13 NY3d 270). As a result, the apartment continued to be rent stabilized, despite the 1996 Lease. Thus, the provision in the 1996 Lease agreeing that the combined apartments were no longer rent stabilized was invalid. Defendants argue, however, that even if the 1996 Lease failed to deregulate the apartment, Fox's rent stabilized tenancy ended in 2008 when he requested that the lease be issued in the name of MBE rather than his own name. Defendants contend that, when Fox asked to substitute the name of his corporation, MBE, for his name on the lease, he ended his tenancy, thereby ending the rent stabilized status of the apartment. Defendants cite a series of DHCR decisions in which the agency ruled that when a tenant who was a signatory to a lease vacated an apartment or an additional tenant moved in and was added to the lease, the landlord was entitled to statutorily provided vacancy increase on the new lease (*see e.g.*

Matter of Purpura, DHCR Admin Rev Docket S121009RO [Oct. 1, 2004]; *Matter of Ramirez and Ventura,* DHCR Admin Rev Docket OK410056RO [Dec. 15, 2000]). Here, in contrast, there is no evidence that Fox vacated the apartment and that a new tenant moved in. Rather, he requested, and the landlord agreed, that the tenant of record would be in the name of his corporation, and he was named as a guarantor and was listed as tenant on the information sheet. Thus, no new tenancy was created.

Citing *Matter of Cale Dev. Co. v Conciliation & Appeals Bd.* (94 AD2d 229 [1st Dept 1983], *affd* 61 NY2d 976 [1984]), defendants also contend that a corporate entity cannot be a rent-stabilized tenant with a right to a renewal lease without having a natural person named as co-tenant on the lease. Although the Court in *Cale Dev. Co.* stated that "rent stabilization was never intended to place such a tenant's leasehold estate in perpetual trust for the benefit of whomever, at a particular point in time, might happen to occupy a corporate office," (*id.* at 234-235), the Court further stated that "[a] corporate tenant which leases an apartment for the use and occupancy of an officer, director or employee is entitled to a renewal lease, provided it can meet the primary residence test set forth in subdivision (e) of section 54 of the Rent Stabilization Code" (*id.* at 232). The Court recognized however, that

> "[w]hile an apartment lease confers the same rights and imposes the same obligations upon a corporate tenant as upon an individual, it is a fiction that such a lease contemplates actual occupancy of the apartment as a private dwelling by the corporation, an artificial 'person' created by law. Only the individual for whose benefit the fiction is created can occupy an apartment as a dwelling" (*id.* at 233).

Here, there is no question that Fox was the individual for whose benefit the fiction was created, and there is no evidence that he did not continue living in the apartment as his primary residence (*see in contrast Matter of Sommer v New York City Conciliation & Appeals Bd.* (93 AD2d 481 [1st Dept 1983], *affd* 61 NY2d 973 [1984]), where the Court ruled that the corporate tenant was not entitled to a renewal lease for the rent-stabilized apartment because the persons

who were listed on a rider to the lease as the tenants did not meet the primary residence test.

Although Fox is not listed on the lease, he is named as tenant on the tenant information sheet, he has stated in his affidavit that throughout, the apartment has been and continues to be his primary residence, and defendants have not provided evidence that would indicate that the apartment has not been his primary residence. Mere speculation by defendants that the apartment is not Fox's primary residence is insufficient. Furthermore, given that Fox did not know that the apartment was improperly destabilized, he should not be penalized for his failure to have his name included as a tenant on the face of the lease. Thus, the 2008 Lease between MBE and Nostra did not terminate the rent-stabilized status of the apartment and plaintiffs' cross-motion for summary judgment is granted, to the extent that they seek a declaration that the Apartment is subject to rent control and defendants' motion for summary judgment in their favor on their first counterclaim is denied.

It remains to be determined, however, how rent overcharges, if any, should be calculated. Normally, there is a four-year statute of limitations, or look-back period, for calculating rent overcharges, with the base date being the rent charged four years prior to the filing of the lawsuit (*see* RSL § 26–516[a]). There is an exception to that four-year period where a colorable claim of fraud exists (*Thornton v Baron,* 5 NY3d 175). Citing *Thornton*, plaintiffs contend that the rent should be calculated, beginning four years before the filing of this action, employing the default formula used by DHCR to set the base date rent where no reliable rent records exist. "This formula uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*id.* n 1). Here, it is not clear that the use of such a formula would be feasible since the apartment at issue is made up of two combined penthouses with combined terraces.[3] A formula based on merely counting the number of rooms in the apartment would be unlikely to provide an appropriate comparison.

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[3] According to defendants, the combined apartments created one newly created 3,378 sq. ft. penthouse apartment with a 1,900 sq. ft. terrace.

Moreover, as defendants argue, the *Thornton* case was hardly a garden-variety rent overcharge case. There the landlord developed a fraudulent scheme to remove a number of apartments from rent stabilization, creating illusory tenancies using the non-primary residence exception to the rent control law. The owner got the various illusory tenants to agree in their leases not to use their apartments as a primary residence, setting rents far above the rent stabilized rents. The owner then sublet the apartments to tenants who did use their apartments as their primary residence, but at an even higher rent. Finally, the owner sought to obtain the imprimatur of the court for his unlawful scheme by filing declaratory judgment actions in Supreme Court to obtain a declaration that the apartments were no longer rent-stabilized. According to the Court of Appeals, at least six such illusory leases were found in the building, "undermining the statute's very purpose of preserving a stock of affordable housing" (*id.* at 182).

Here, in contrast, although Nostra plainly did not follow proper procedures to trigger luxury decontrol of the combined penthouse apartments, when Nostra and Fox entered into the 1996 Lease for the combined apartments, the rent of the combined apartments exceeded the $2,000 threshold, triggering the availability of luxury decontrol.[4] At that time, so long as the apartment was not rent stabilized solely because of the receipt of those benefits, it was the position of DHCR that even where a landlord was receiving J-51 benefits, it could utilize the provisions of luxury decontrol to remove an apartment from rent stabilization. As the Court of Appeals noted in *Borden v 400 E. 55th St. Assoc., L.P.* (24 NY3d 382, 390 [2014]),

> "[p]rior to *Roberts*, the New York State Division of Housing and Community Renewal (DHCR) took the position that where participation in the J-51 program

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[4] Furthermore, the rent for the newly combined apartment could properly have been set at a higher amount as a "new rent." "[W]here the prior rent history of the apartment can no longer be utilized because that prior apartment no longer exists, the DHCR has adopted a rational policy under which a 'first rent' may then be charged" (*Matter of 300 W. 49th St. Assoc. v New York State Div. Of Hous. & Community Renewal, Off. of Rent Admin.*, 212 AD2d 250, 255 [1st Dept 1995]). "The policy applies only when the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless" (*id.* at 253).

> 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."

Since, at the time the 1996 Lease was entered into, Fox was an attorney, and according to defendants, employed by a major New York law firm, it is highly likely that his income would have exceeded the amount triggering luxury decontrol. Thus, given DHCR's interpretation of the luxury decontrol provisions at the time, had Nostra followed proper procedures, DHCR would likely have approved the removal of the combined penthouses from the rent stabilization rolls. Only after the 2009 decision of the Court of Appeals in *Roberts* would it have become clear that the penthouse could not legally be removed from rent stabilization in 1996, though it could have been removed one year later when Nostra's receipt of J-51 benefits ended.

As stated above, however, Nostra failed to follow proper procedures, failing to provide an income verification form to Fox or filing the form with the DHCR to obtain an order of deregulation of the apartment. Though improper, Nostra's actions are a far cry from the fraudulent scheme described in *Thornton.*

Plaintiffs contend that when the two penthouses were combined, they created a new apartment that was no longer rent stabilized and, therefore, became stabilized only because of the receipt of J-51 benefits and could not be removed from rent stabilization even when the receipt of J-51 benefits ended because the landlord failed to provide Fox with the appropriate J-51 notice. Even assuming the apartment were treated as a new apartment for those purposes, the agreement in the 1996 Lease to consider it as outside of rent stabilization does not constitute the type of fraudulent scheme that concerned the Court in *Thornton.*

Nor are general allegations of fraud sufficient to trigger the *Thornton* formula. As the Court of Appeals stated in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, 367 [2010]),

> "[g]enerally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,' and a mere allegation of fraud alone, without more, will

> not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization."

The Court concludes, therefore, that, here, the use of the "default" or *Thornton* formula is inappropriate to determine the base rent for the purposes of calculating overcharges, and to that extent, plaintiffs' cross-motion is denied and defendants' second counterclaim is granted.

Rather, the more appropriate method of calculating the overcharge is that used by DHCR in the case of *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal* (16 AD3d 166 [1st Dept 2005]). There, the apartment in question was rent stabilized due to the fact that the landlord was receiving J-51 benefits; however, the landlord failed to include a notice in the lease indicating that the apartment was to become deregulated when the benefits expired, so the protections of rent stabilization were improperly terminated. In calculating the rent overcharges, DHCR set a base rent of four years prior to the date of filing of the rent overcharge complaint, calculating the lawful increases based upon the market rent that was charged on that date. Here, the rent should be calculated based upon the rent being charged in May 2010. To that extent, defendants' request for summary judgment on their third counterclaim is granted and their request for summary judgment on their fourth counterclaim, which sets forth an alternative method of calculation of overcharges, is denied.

While this litigation was pending, defendants offered MBE a rent-stabilized lease at the rates of $14,470.15 for a one-year lease or $14,721.17 for a two-year lease. In their fifth "counterclaim," defendants seek a declaration that, if the apartment is rent-stabilized, then the lease agreement that they offered MBE in November 2014 is a proper offer that MBE was required to exercise its option within 60 days from the making of the offer. The Court notes that the rent offered in that lease is lower than the base rent found to be appropriate above; nonetheless, because this Court has ruled that the original protections of the rent stabilization law were improperly terminated, those protections are reinstated regardless of the lease offered in November 2014 and the 60-day period in which to exercise the option will not be enforced by

the Court. Therefore, defendants' fifth counterclaim is denied.

In addition to moving for summary judgment on their counterclaims, defendants have moved to dismiss plaintiffs' complaint. The Court must, therefore, consider the merits of plaintiffs' second and third causes of action for which plaintiffs have not sought summary judgment, as well as plaintiffs' fourth cause of action for attorneys' fees on which they requested summary judgment.

Plaintiffs' second cause of action for breach of contract alleges that the 1996 Lease provided for renewal options and unlimited renewal rights. Plaintiffs allege that Nostra "assured Mr. Fox that he would always be entitled to occupy the apartment, under set lease amounts for the first six years, and then rights of renewal thereafter" (Complaint, ¶ 12). Plaintiffs seek a declaratory judgment and specific performance of the alleged oral agreement that they have a right to unlimited renewals of the lease with reasonable rent increases, as well as damages. Plaintiffs' assertion, however, is in direct conflict with the language of the lease which, while providing for two renewals at specified rents and an option to renew after the second renewal, expressly states that the right of first renewal is "as to the first subsequent renewal lease after the third option." Rider to Lease, ¶ 43. Moreover, the lease itself states that:

> "[a]ll understandings and agreements made between Landlord and Tenant before this Lease was signed are written in this Lease, which fully and completely states the agreement between Landlord and Tenant. Any agreement made after this Lease is signed by Landlord and Tenant shall not change or end it in any way unless such agreement is in writing and signed by both Landlord and Tenant" (1996 Lease, ¶16).
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> "Parol evidence - evidence outside the four corners of the document - is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement. This rule gives stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate the extrinsic evidence. Furthermore, where a contract contains a merger clause, a court is obliged to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (*Schron v*

> *Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] [internal quotation marks and citations omitted]).

There is no ambiguity in the 1996 Lease or the succeeding leases, therefore, parole evidence of an alleged oral promise is inadmissible. Moreover, the language of the lease itself specifically states that:

> "Tenant understands that his apartment is not subject to Rent Stabilization, Rent Control or any other rent regulation and, as such, Landlord may, at his sole option, choose not to renew this lease or to renew it on such terms as the Landlord deems appropriate including charging a fair market rent" (Rider to 1996 Lease, ¶ 40).

Although, as discussed above, that paragraph cannot serve to waive the protections of the Rent Stabilization Law, it is certainly in direct conflict with Fox's claim that Nostra promised him unlimited rights of renewal of his lease. For these reasons, plaintiffs' second cause of action is dismissed.

Plaintiffs' third cause of action, for promissory estoppel, is based upon the same 1996 promise that they allege in their second cause of action for breach of contract. Plaintiffs' claims for promissory estoppel "are precluded by the fact that a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract - i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself - has been violated" (*Brown v Brown*, 12 AD3d 176, 177-178 [1st Dept 2004], citing *Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). No such independent duty has been alleged. Plaintiffs' promissory estoppel claims are merely duplicative of those breach of contract claims and must also be dismissed (*id.*).

In their fourth cause of action, Fox and MBE seek attorneys' fees based upon section 234 of the Real Property Law, which provides for damages on a reciprocal basis when the lease provides attorneys' fees to the landlord in an action or proceeding brought against the tenant, and upon section 2526.1(d) of the Rent Stabilization Code which provides that attorneys' fees may be charged, as an additional penalty, where a landlord is found by DHCR to have

overcharged a tenant.

Here, as defendants have argued, the attorneys' fees provisions of the 2008, 2010, and 2012 leases between MBE and Nostra were struck from the leases and, therefore, there is no basis for attorneys' fees for plaintiffs, pursuant to Real Property Law § 234 (*see* 2008, 2010 and 2012 Lease Agreements, annexed to Affirmation of Jeffrey L. Goldman, dated December 23, 2014, as exhibits H, ¶ 19(5); J, ¶¶ 17(3) & 19(5); and K, ¶¶ 17 (3) & 19(5)).

Although the 1996 and 2003 Leases do contain provisions for legal fees to the owner (*see* Goldman affirmation, exhibit C at ¶ 26 and exhibit G, ¶ 26), those leases were, at Fox's request, superseded by the 2008, 2010, and 2012 leases in the name of MBE. Here, although the 1996 Lease improperly treated the newly combined apartments as no longer governed by rent stabilization, the calculation of rent overcharges, if any, is based on the four-year look-back and therefore governed by the 2010 Lease Agreement which contains no provision for attorneys' fees. For that reason, the Court concludes that the normal American Rule that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" should apply, and plaintiffs' request for attorneys' fees is denied (*Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002] [internal quotation marks and citation omitted]).

With respect to section 2526.1(d) of the Rent Stabilization Code, that section provides that attorneys' fees be awarded as an additional penalty when DHCR finds that there has been an overcharge. Since neither party sought a ruling from DHCR, that provision is not applicable here.

Therefore, defendants' motion to dismiss the fourth cause of action is granted and plaintiffs' cross-motion for partial summary judgment in their favor is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants 12 East 88th LLC and Nostra Realty Corp. is decided as follows:

1) summary judgment in their favor on their second and third counterclaims is granted and the issue regarding the amount of rent overcharges, if any, after calculating the permissible rent increases from the base date of May 16, 2010 shall be referred to a Special Referee to hear and determine;

2) summary judgment in their favor on their first, fourth and fifth counterclaims is denied;

3) their motion to dismiss plaintiffs' second, third and fourth causes of action is granted;

And it is further,

ORDERED and ADJUDGED that the cross-motion of plaintiffs Barry Fox and MBE Ltd. for partial summary judgment is granted as follows and is otherwise denied:

1) It is hereby ADJUDGED that the Penthouse Apartment located at 12 East 88th Street is subject to the Rent Stabilization Law and Code and the current legal rent and any arrears are calculated in conformity with the opinion set forth above; and it is further,

ORDERED that counsel for the plaintiffs is directed to serve a copy of this Order with Notice of Entry upon the defendants and upon the on the Special Referee Clerk of the General Clerk's Office (Room 119) to arrange a date for the reference to a Special Referee.

This constitutes the Decision and Order of the Court.

Dated: 10/13/16 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**