| **Cates-Reither v 160 E. 48th St. II Owner LLC** |
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| 2017 NY Slip Op 30809(U) |
| April 18, 2017 |
| Supreme Court, New York County |
| Docket Number: 153550/16 |
| Judge: Gerald Lebovits |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 7**

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GEORGE CATES-REITHER and
JEANNA CATES-REITHER,

Plaintiffs,

Index No.: 153550/16
**DECISION/ORDER**

-against-

160 EAST 48TH STREET II OWNER LLC,

Defendant.

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Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment.

| **Papers** | **Numbered** |
|---|---|
| Plaintiffs' Notice of Motion | 1 |
| Plaintiffs' Memorandum of Law | 2 |
| Defendant's Notice of Cross-Motion | 3 |
| Defendant's Memorandum of Law in Opposition | 4 |
| Plaintiffs' Reply Memorandum of Law | 5 |

*Lawrence W. Rader, Esq.*, New York (Lawrence W. Rader of counsel), for plaintiffs.
*Rosenberg & Estis, P.C.*, New York (Michael E. Feinstein of counsel), for defendant.

Gerald Lebovits, J.

In this residential landlord-tenant action for rent overcharge, plaintiffs move for summary judgment on their complaint and to dismiss defendant's first counterclaim, and defendant cross-moves for summary judgment to dismiss the complaint and on its first counterclaim (motion sequence number 001). For the following reasons, the motion is granted in part and denied in part, and the cross-motion is denied.

BACKGROUND

Plaintiffs, George and Jeanna Cates-Reither, are the tenants of apartment 12Q in a building located at 160 East 48th Street in the New York County (the building). *See* notice of motion, exhibit A (complaint), ¶ 2. Defendant 160 East 48th Street II Owner LLC (landlord) is the building's owner. *Id.*, ¶ 3.

Plaintiffs originally took possession of apartment 12Q pursuant to a market-rate lease for a term that commenced in 2010 and expired in January 2011. *See* notice of motion, Cates-Reither affidavit, ¶ 3. Plaintiffs state that they renewed their leasehold four times after that, for either one-year or two-year terms. Plaintiffs further state that their initial rent was $2750 a month and

that their latest rent was $3450 a month. *Id.*, ¶ 4. Plaintiffs allege that in February 2016, the landlord informed them that it had decided not to renew their lease when it expired, in April 2016, and that the landlord has refused to accept the rent payments that plaintiffs have tendered since that date. *Id.*, ¶ 5. Plaintiffs further allege that after conducting an investigation at the New York State Division of Housing and Community Renewal (DHCR), they learned that apartment 12Q had previously been registered as a rent-stabilized unit and been occupied by David Orloff, from August 2001 through July 2009, under rent-stabilized leases, the last of which specified a monthly rent of $1740.33. *Id.*, exhibit A (complaint), ¶¶ 14-17. Plaintiffs allege that when Orloff vacated apartment 12Q before they took possession of the unit, the landlord re-registered the unit to remove it from rent stabilization under high rent/vacancy deregulation. *Id.*, ¶¶ 18-20. Plaintiffs allege, however, that because Orloff's last rent was less than $2000 a month, apartment 12Q was, accordingly, rent stabilized when they took possession of it. *Id.*, ¶¶ 21-24. Plaintiffs have presented copies of the relevant DHCR registration statements. *Id.*, exhibits C, D. The landlord asserts that apartment 12Q was properly deregulated. *See* notice of cross motion, Shatz aff, ¶¶ 6-10. Landlord has presented copies of all of the leases for apartment 12Q during the relevant time period, as well as copies of the rent-payment history associated with the unit. *Id.*, exhibits A-G.

Plaintiffs commenced this action on April 27, 2016, by filing a summons and complaint that sets forth causes of action for (1) a declaratory judgment and (2) money damages for rent overcharge. *See* notice of motion, exhibit A. On August 11, 2016, landlord filed an answer with affirmative defenses that also included a counterclaim for attorney fees. *Id.*, exhibit B. Now before the court are the parties' respective motions for summary judgment (motion sequence number 001).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once the movant makes this showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact requiring a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, the first branch of plaintiffs' motion seeks summary judgment on their cause of action for declaratory relief.

Declaratory judgment is a discretionary remedy that may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *accord Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 682 (1st Dept 1999). In an action for declaratory judgment, the court may properly determine the respective rights of all the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). Here, plaintiffs request declarations that:

29. . . . . the premises remain subject to the Rent Stabilization Code and Regulations.

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33. . . . . [an increase of 20% of the last rent paid by Orloff] is the maximum permissible increase at this time.

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35. . . . . until such time as [landlord] tenders a lease which conforms with the requirements of the [Rent Stabilization] Code and Regulations, and registers the premises as a rent stabilized apartment with the DHCR, the legal monthly rent remains at the last rent paid by Orloff.

*See* notice of motion, exhibit A (complaint), ¶¶ 29, 33, 35. The court will consider each of the three proposed declarations in turn.

Regarding the first of these declarations, plaintiffs argue that they are entitled to a declaration that apartment 12Q is rent stabilized. They argue that the landlord's purported 2010 deregulation of the unit was invalid, as a matter of law, under the decision of the Appellate Division, First Department, in *Altman v 285 W. Fourth, LLC* (127 AD3d 654 [1st Dept 2015]). *See* plaintiffs' memorandum of law at 1-5. That case held as follows:

> "The motion court erred in dismissing plaintiff's complaint, and declaring that the apartment is not subject to the Rent Stabilization Law (*see* Administrative Code of City of NY § 26-504.2 [a]). Although defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000 (*see* Administrative Code §§ 26-504.2, 26-511[c] [5-a]; *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 77 [1st Dept 2009], *affd* 13 NY3d 270, 280 [2009])."

*Id.* at 655. The *Altman* Court's decision interpreted the language of New York City Administrative Code § 26-504.2, which provides as follows:

> "a. 'Housing accommodations' shall not include: any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven and before the effective date of the rent act of 2011 and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month; or, for any housing accommodation which is or becomes vacant on or after the effective date of the rent regulation reform act of 1997 and before the effective date of the rent act of 2011, with a legal regulated rent of two thousand dollars or more per month . . .. Starting on January 1, 2016, and annually

> thereafter, the maximum legal regulated rent for this deregulation threshold, shall also be increased by the same percent as the most recent one year renewal adjustment, adopted by the New York city rent guidelines board pursuant to the rent stabilization law. This exclusion shall apply regardless of whether the next tenant in occupancy or any subsequent tenant in occupancy is charged or pays less than two thousand dollars a month . . . Provided however, that an exclusion pursuant to this subdivision shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section four hundred twenty-one-a or four hundred eighty-nine of the real property tax law, except as otherwise provided in subparagraph (i) of paragraph (f) of subdivision two of section four hundred twenty-one-a of the real property tax law, or (b) by virtue of article seven-C of the multiple dwelling law. This section shall not apply, however, to or become effective with respect to housing accommodations which the commissioner determines or finds that the landlord or any person acting on his or her behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including, but not limited to, interruption or discontinuance of required services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his or her use or occupancy of the housing accommodations and in connection with such course of conduct, any other general enforcement provision of this law shall also apply."

New York City Administrative Code § 26-504.2. Here, plaintiffs have presented proof that apartment 12Q's previous tenant, Orloff, was paying a monthly rent of $1740.33 until July 31, 2009, and that plaintiffs began paying a monthly rent of $3125 when their own tenancy commenced in February 2010 (after paying a preferential rent of $2,750 for several months). *See* notice of motion, exhibits C, D. Plaintiffs note that this disparity reflects a rent increase much greater than the 20% increase permitted after a vacancy (which, in this case, would be $348.06, for a total rent of $2088.39). *See* plaintiffs' mem of law at 4-5. Plaintiffs also argue that, in any event, the *Altman* holding precluded a landlord from factoring in any vacancy increase amount to raise the legal rent over $2000 a month and thereby remove apartment 12Q from rent stabilization. *Id.* at 1-4. The landlord responds that the *Altman* holding is inapplicable to this case. The landlord argues that it properly effectuated the luxury deregulation of apartment 12Q under the "second clause" of the above code provision. *See* defendant's mem of law at 14. The "two clauses" that the landlord refers to in its argument state, as follows:

> "'Housing accommodations' shall not include: any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven and before the effective date of the

> rent act of 2011 *and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month . . .*"
>
> "'Housing accommodations' shall not include: . . . any housing accommodation which is or becomes vacant on or after the effective date of the rent regulation reform act of 1997 and before the effective date of the rent act of 2011, *with a legal regulated rent of two thousand dollars or more per month . . .*"

New York City Administrative Code § 26-504.2. The landlord argues that under the "second clause," it need only be *entitled* to collect a monthly rent of more than $2000 to deregulate an apartment and that it is not necessary that such a rent be *in effect*. *See* defendant's mem of law at 7-9. The landlord cites the decision of the Appellate Term, First Department, in *233 E. 5th St. LLC v Smith* (54 Misc 3d 79 [App Term, 1st Dept 2016]), in which the court found that

> "[W]e do not interpret the contents of a single sentence in the decision in *Altman v 285 W Fourth, LLC* so broadly as to effectuate a sea change in nearly two decades of settled statutory and decisional law — that allowed an owner to deregulate an apartment after a vacancy, if the legal rent plus any lawful increases and adjustments to the rent, such as the vacancy allowance, exceeded $2,000 — particularly given the absence of any expressed intention by the *Altman* Court to do so."

54 Misc 3d at 81 (internal citations omitted).

The Appellate Division and the Appellate Term both cited the seminal Court of Appeals decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), to justify their respective decisions. Both the decision of the Court of Appeals in *Roberts* and the underlying decision of the Appellate Division, First Department (62 AD3d 71 [1st Dept 2009]), acknowledged that the statute distinguished between several circumstances in which a rent-stabilized apartment unit might become deregulated, although they both found that deregulation was unavailable where an apartment building was receiving J-51 tax relief benefits. Here, it is not known whether the subject building receives, or ever has received, such benefits, and neither party has argued the issue. It is also clear that there is tension between the First Department's holding in *Altman* and the Appellate Term's holding in *Smith*. The court is further mindful that the Court of Appeals has granted leave for the parties to appeal *Altman*, albeit on different grounds. *See Altman v 285 W. Fourth LLC*, 142 AD3d 415 (1st Dept 2016), *lv granted* 2017 NY Slip Op 68889 (2017). It is therefore possible that this tension will be resolved at some point in the future. This court, however, is bound by the First Department's first decision in *Altman,* holding that a 20% vacancy increase may *not* be considered for the purposes of establishing a legal rent that is above the threshold for luxury deregulation. 127 AD3d at 664. The court is constrained to award the plaintiffs the first declaration that they seek — a ruling that apartment 12Q is subject to rent stabilization.

Plaintiffs next request a declaration that an increase of 20% of the last rent paid by Orloff "is the maximum permissible increase at this time." *See* notice of motion, exhibit A (complaint), ¶ 33. The landlord does not present in its cross-motion any argument in opposition. Plaintiffs do not present any argument specifically to address this request. Instead, they argue that "the legal regulated rent is $1,740.33," which was the last rent that Orloff paid for apartment 12Q. *See* plaintiffs' mem of law at 5-8. Plaintiffs' argument goes to plaintiffs' second cause of action, for rent overcharge, and not to their claim for declaratory relief. Therefore, it appears that plaintiffs have abandoned this request. The court also notes that nearly seven years have passed since plaintiffs took possession of apartment 12Q, during which plaintiffs executed five renewal leases. New York City Administrative Code § 26-504.2 provides that "the maximum legal regulated rent . . . shall also be increased by the same percent as the most recent one year renewal adjustment, adopted by the New York city rent guidelines board pursuant to the rent stabilization law" in situations when deregulation is unavailable. The statute does not support plaintiffs' contention that the only permissible rental increase for apartment 12Q was the 20% vacancy increase in 2010. The court denies plaintiffs' request.

Plaintiffs' third proposed declaration is that "until such time as [landlord] tenders a lease which conforms with the requirements of the [Rent Stabilization] Code and Regulations, and registers the premises as a rent stabilized apartment with the DHCR, the legal monthly rent remains at the last rent paid by Orloff." *See* notice of motion, exhibit A (complaint), ¶ 35. The landlord does not raise any argument in opposition. Plaintiffs cite the decision of the Appellate Division, First Department, in *Jazilek v Abart Holdings, LLC* (72 AD3d 529 [1st Dept 2010]), which interpreted Administrative Code § 26-517 (e) to mandate that "[a] landlord's failure to file a 'proper and timely' annual rent registration statement results in the rent being frozen at the level of the 'legal regulated rent in effect on the date of the last preceding registration statement.'" 72 AD3d at 531. The landlord responds that "once it is understood that the premises were properly deregulated, all of tenants' claims must fail." *See* defendant's mem of law at 15. But the landlord's argument is unavailing. The court has already determined that, pursuant to the first *Altman* holding, apartment 12Q was not properly deregulated. Therefore, by operation of Administrative Code § 26-517 (e), the court finds that plaintiffs are entitled to summary judgment awarding them a declaration that, for the duration of this action, their legal monthly rent is apartment 12Q's last rent-stabilized rent: $1740.33 a month.

The balance of plaintiffs' first cause of action seeks injunctions directing the landlord to issue them a rent-stabilized lease, and to register apartment 12Q with the DHCR as a rent-stabilized unit. *See* notice of motion, exhibit A (complaint), ¶¶ 31, 34. The Court of Appeals has held that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). But plaintiffs' moving papers are devoid of any argument that relates to these elements. The court denies plaintiffs' motion to the extent that they seek summary judgment on their requests for injunctive relief. Because it appears that plaintiffs are entitled to this relief, plaintiffs may renew this request, with proper evidentiary and legal

support, as part of their eventual motion to confirm or deny the Special Referee's report, discussed below.

Plaintiffs' second cause of action seeks money damages for rent overcharge. *See* notice of motion, exhibit A (complaint), ¶¶ 36-43. Plaintiffs argue that "the legal regulated rent is $1,740.33." *See* plaintiffs' mem of law at 5-8. This argument specifically asserts that, as a result of the landlord's "illegal" deregulation of apartment 12Q in 2010, the court should use Orloff's last rent stabilized rent of $1,740.33 a month as the unit's legal base rent to establish how much the landlord overcharged them during that time. *Id.* Plaintiffs also argue that the overcharge amount should be trebled because the landlord's actions were "willful." *Id.* at 9-11. The landlord responds by alleging that plaintiffs' calculations are incorrect and that the landlord's actions were not "willful." *See* defendant's mem of law at 15-19. The court finds that both these arguments gloss over the governing law.

A cause of action for rent overcharge is subject to a four-year statute of limitations. Administrative Code § 26-516. Here, plaintiffs allege that the landlord began overcharging them when they took possession of apartment 12Q in February 2010, more than seven years ago. But in their brief, plaintiffs explain that they are seeking only a money judgment for rent overcharge since 2012, for the four-year period before this action was commenced in April 2016. *See* plaintiffs' mem of law at 9-11. Plaintiffs have submitted a spreadsheet that calculates the purported overcharge based on a legal rent of $1740.33 a month, plus 9% statutory interest from April 2012, as well as treble damages for "willfulness" from April 2014, going forward. *See* notice of motion, exhibit D. The landlord has submitted its own spreadsheet, in which the landlord calculates a lower overcharge amount and omits treble damages. *See* notice of cross motion, exhibit G. Plaintiffs nevertheless argue that this court should apply the holding of the Appellate Division, First Department, in *Jazilek* that "[a] landlord's failure to file a 'proper and timely' annual rent registration statement results in the rent being frozen at the level of the 'legal regulated rent in effect on the date of the last preceding registration statement.'" 72 AD3d at 531 [citation omitted]. Here, the landlord does not cite any caselaw that contradicts *Jazilek*, a case rooted in the language of Administrative Code § 26-517 (e) and appears to be well settled. *See Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681 (1st Dept 2011). The parties' divergent spreadsheets indicate that an issue of fact exists about the correct calculation of the overcharge. The court finds that this matter should be submitted to a Special Referee to hear and report.

With respect to the issue of willfulness, plaintiffs correctly note that the law imposes a presumption that any rent overcharge was willful unless "the owner establishes by a preponderance of the evidence that the overcharge was not." Administrative Code § Code § 26-516 (a), *accord Altschuler v Jobman 478/480, LLC*, 135 AD3d 439, 441 (1st Dept 2016). The landlord argues that it has overcome this presumption. *See* defendant's mem of law at 16-19. First, it refers to the First Department's holding in the second *Altman* decision, currently on appeal, that the landlord therein "failed to rebut the presumption of wilfulness arising from the fact of the overcharge, [because] [i]t submitted no affidavit by a person with knowledge justifying the rent increase." *Id.*, 143 AD3d at 415 [internal citation omitted]. The landlord then notes that it has submitted affidavits from both its own managing agent and the managing agent

of its predecessor in interest to the building, each of which aver that the landlord effectuated what it believed to be a proper and legal luxury deregulation of apartment 12Q, before the First Department issued the first *Altman* decision in 2015. *See* notice of cross motion, Shatz affidavit, Sass affidavit. In their reply memorandum, plaintiffs challenge the qualifications and personal knowledge of these individuals. *See* plaintiffs' reply mem at 6-9. This dispute raises an issue of witness credibility, an issue this court may not resolve on a motion for summary judgment. *See Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 (1st Dept 2002). Therefore, the Special Referee is directed to hear and report on the issue of willfulness.

The balance of plaintiffs' motion and the landlord's cross motion concerns the landlord's counterclaim for attorney fees. Plaintiffs argue that they are entitled to attorney fees under Administrative Code § 26-516 (a) (4) because they have prevailed on their overcharge claim. *See* plaintiffs' mem of law at 12-14. The landlord responds that, because it is the prevailing party herein, it is entitled to summary judgment on its counterclaim for attorney fees under paragraph 19 (A) (5) of the parties' most recently expired renewal lease. *See* defendant's mem of law at 15. The court notes that the overcharge issue has not yet been resolved, and will not be resolved until after the forthcoming motions to confirm/deny the Special Referee's report have been decided. It would be improvident to rule on the issue of attorney fees at this juncture. The court denies so much of the instant motion and cross-motion seeking this relief.

Accordingly, it is hereby

ORDERED that plaintiffs' summary-judgment motion is granted in part and denied in part: plaintiffs motion which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action, is granted solely to the extent that it is ADJUDGED and DECLARED that apartment unit 12Q, in the residential apartment building located at 160 East 48th Street in the County, City and State of New York, is a rent-stabilized unit, and that for the duration of this action, plaintiffs' legal monthly rent is apartment 12Q's last rent-stabilized rent, $1,740.33 a month; plaintiffs' motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion, which seeks summary judgment on their requests for injunctive relief, is denied without prejudice; and it is further

ORDERED that the cross-motion, pursuant to CPLR 3212, of defendant 160 East 48th Street II Owner LLC, is denied; and it is further

ORDERED that a Special Referee shall be designated to hear and report to this court the following issues: (1) the correct calculation of the plaintiffs' rent overcharge; and (2) whether the rent overcharge was willfull; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the

"References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including al witnesses and evidence they seek to present, and shall be ready to proceed, on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury, CPLR 4320 (a) — in that the proceeding will be recorded by a court reporter, the rules of evidence apply, etc — and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the balance of this action shall continue.

Dated: April 18, 2017

J.S.C.
**HON. GERALD LEBOVITS**
**J.S.C.**