SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART** 59
Justice

Index Number : 161021/2014
KREISLER, STUART
vs
B-U REALTY CORP.
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is granted in part and the cross motion is granted part in accordance with attached Memorandum Decision and Order dated April 27, 2017.

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

Dated: APR 27 2017

_____, J.S.C.
DEBRA A. JAMES

1. CHECK ONE: ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. CHECK AS APPROPRIATE: .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. CHECK IF APPROPRIATE: ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☒ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

----------x

STUART KREISLER, ELIZABETH TRACY BONBREST and KEGA-SP LTD.,

Plaintiffs,

Index No.: 161021/2014

-against-

B-U REALTY CORP., PAUL BOGONI and IRENE BOGONI,

DECISION and ORDER

Defendants.

----------x

DEBRA A. JAMES, J.S.C.:

In this residential landlord/tenant action, plaintiffs Stuart Kreisler, Elizabeth Tracy Bonbrest and Kega-SP Ltd. (plaintiffs) move for summary judgment on their complaint, and defendants B-U Realty Corp., Paul Bogoni and Irene Bogoni (defendants) cross move for summary judgment dismissing same. (motion sequence number 001). For the following reasons, both the motion and the cross motion are each granted in part and otherwise held in abeyance, for a hearing.

BACKGROUND

Plaintiffs Stuart Kreisler and Elizabeth Tracy Bonbrest are the occupants of apartment 9C in a building (the building) located at 945 West End Avenue in the County, City and State of New York. Kega-SP Ltd. (Kega) is a limited partnership that Stuart Kreisler formed, and that is the tenant of record of apartment 9C.

Defendant B-U Realty Corp. (B-U) is the building's owner, and co-defendants Paul Bogoni and Irene Bogoni are the principals

of B-U Realty Corp.

Plaintiffs allege that both the building and apartment 9C are subject to the Rent Stabilization Law (RSL), but that defendants have improperly removed their apartment from rent stabilized status, and, as a result, have overcharged them an illegally high monthly rent since their tenancy began.

Plaintiffs state that they initially took possession of apartment 9C on February 1, 2010 pursuant to a one-year lease between B-U and Kega, and that they thereafter executed one-year renewal leases during the years 2011, 2012, and 2013, and a two-year renewal lease for 2014-2016. Plaintiffs also state that these leases specified monthly rental charges of $4,700.00 (2010), $4,829.14 (2011), $4,998.16 (2012), $5,123.11 (2013) and $5,520.03 (2014-2016), respectively. Plaintiffs annex copies of these leases to their moving papers.

Plaintiffs also attach a copy of a letter from defendants' counsel, dated October 21, 2014, in which defendants admit that they improperly registered apartment 9C with the New York State Division of Housing and Community Renewal (DHCR) as non rent-regulated after 2008, despite their having also secured a J-51 tax abatement for the building in 2005. Defendants admit these facts, although they contend that apartment 9C was rent controlled before 2008, and that they used the proper DHCR luxury decontrol procedures prior to renting it to plaintiffs.

The dispute in this action regards the manner in which plaintiffs' current rent-stabilized rent is to be calculated, and whether plaintiffs are entitled to money damages.

On November 5, 2014, plaintiffs commenced this action, seeking a declaratory judgment and monetary damages in the form of the return of rent overcharges, and reimbursement of court costs and attorney's fees. Issue was joined on December 11, 2014 with the filing of an answer by the defendants.

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 this showing has been made, 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 which require 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).

Plaintiffs' first cause of action seeks declaratory relief; specifically, a declaration that:

> (a) [plaintiffs'] apartment, tenancy and leases are subject to the RSL;

(b) establishing the past and current legal regulated rent for the apartment;

© compelling defendants to offer plaintiffs a rent stabilized lease on such terms as are lawful and equitable under the RSL; and

(d) enjoining defendants from terminating or taking any steps to terminate plaintiffs' tenancy or bringing any action or proceeding to recover possession of the apartment, pending the outcome of this proceeding.

A declaratory judgment is a discretionary remedy which 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; see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. See Leibowitz v Bickford's Lunch Sys., 241 NY 489 (1926).

Initially, defendants concede that plaintiffs are entitled to their first proposed declaration - i.e., a judgment that plaintiffs' apartment, tenancy and leases are subject to the RSL. Defendants specifically admit that: 1) apartment 9C was originally subject to the Rent Control Law; 2) the building began receiving a J-51 tax abatement in 2005; 3) the last rent controlled tenant vacated apartment 9C in December 2008; 4) defendants filed a vacancy decontrol report for apartment 9C in January 2009, but did not register apartment 9C as rent stabilized; and 5) plaintiffs took possession of apartment 9C

pursuant to a "market rate" lease in February 2010. Moreover, as correctly argued by plaintiffs, pursuant to RCNY § 5-03 (f) (1), a building's participation in the J-51 tax abatement program subjects all of the apartments therein to rent regulation. Since the building had been enrolled in the J-51 tax abatement program in 2005, apartment 9C, which was rent controlled at that time, became rent stabilized by operation of law when its last rent controlled tenant vacated it in 2008. *See* Administrative Code of the City of New York (NYC Admin Code) § 11-243 (I) (l). In addition, as the building remains enrolled in the J-51 tax abatement program, defendants' attempt to decontrol apartment 9C in 2009 was null and void and had no legal effect. See NYC Admin Code §§ 26-504.1; 26-504.2 (a). Therefore, under the controlling law, plaintiffs are entitled to summary judgment awarding them a declaration that their apartment, tenancy and leases are subject to the RSL.

Plaintiffs next pursue a declaration "establishing the past and current legal regulated rent for the apartment." Plaintiffs argue that the rent for apartment 9C "should be set using the 'default formula' set forth in 9 NYCRR § 2522.6 (b) due to defendants' fraudulent scheme of deregulation." Plaintiffs base this argument on their assertion that defendants engaged in a "fraudulent scheme to deregulate the building." In Thornton v Baron (5 NY3d 175 [2005]), the Court of Appeals indeed held that,

where a landlord has engaged in "fraudulent conduct" in an "attempt to circumvent the [RSL]," the four-year statute of limitations that is normally applicable to rent overcharge claims (NYC Admin Code § 36-516 [a]) is inapplicable, and "the default formula used by DHCR to set the rent where no reliable rent records are available [is] the appropriate vehicle for fixing the base date rent." 5 NY3d at 181. In Levinson v 390 W. End Assoc., L.L.C. (22 AD3d 397 [1st Dept 2005]), a case that followed the Thornton rule, the Appellate Division, First Department, found that:

> Here, as in *Thornton*, a default formula must be used to determine the current legal rent, since it is conceded that the rent actually charged on the base date was unlawful, and the statute of limitations does not permit us to use any rental history prior to the base date in setting the current legal rent. Contrary to landlord's contention, notwithstanding that Levinson (unlike the *Thornton* tenant) is the first rent-stabilized tenant, the adjustment of Levinson's rent is not governed by the provisions applicable to a Fair Market Rent Appeal (FMRA) (Rent Stabilization Code [RSC] [9 NYCRR] § 2522.3), because Levinson's time in which to bring an FMRA expired four years after his tenancy began (see RSC § 2522.3[c][2]).5 fn 5. (*Thornton* precludes any argument that the four-year statute of limitations bars Levinson's present action to the extent it seeks to recover rent overcharges paid during the four years immediately preceding the filing of his complaint, and to set a legal rent prospectively.) [internal citations omitted].

22 AD3d at 401. Here, as was discussed above, plaintiffs have demonstrated, and defendants have admitted, that apartment 9C was never registered as rent stabilized after its last rent controlled tenant vacated it, in violation of the requirements of

the J-51 tax abatement program. As a result, the $4,700.00 monthly base rent that was charged to defendants when they took possession of apartment 9C was clearly unlawful. Consequently, Thornton and its progeny mandate that the default formula set forth in 9 NYCRR § 2522.6 (b) be used to calculate defendants' past and present legal regulated rent. Defendants nevertheless raise several arguments in opposition.

First, defendants argue that "plaintiffs' claims must be dismissed for lack of subject matter jurisdiction" because plaintiffs' only vehicle to pursue the relief that they seek is to commence a Fair Market Rent Appeal (FMRA) before the DHCR, which, they assert, has exclusive original jurisdiction in such cases. This court disagrees. The First Department specifically rejected this argument in actions where illegal deregulation of an apartment had been established. See Levinson v 390 W. End Assoc., L.L.C., 22 AD3d at 401, supra.

Defendants next argue that "the claims against Paul Bogoni and Irene Bogoni must be dismissed" because both of them are "disclosed agents" of B-U. Plaintiffs counter that the court should "pierce the corporate veil" of B-U and find the Bogonis personally liable in this action because B-U is merely their "corporate alter ego." Plaintiffs allege that both of the Bogonis admitted in their moving papers that "together, they exercise complete and exclusive control over [B-U]." In fact,

defendants respective affidavits merely allege that they are B-U's corporate officers, and there is no dispute that the Bogonis are B-U's sole officers. However, upon review, all of plaintiffs' leases name Paul Bogoni as landlord rather than B-U, that Paul Bogoni signed all of them in his own name rather than using any corporate title or signing on behalf of B-U; Irene Bogoni did not sign any of the leases. Under well settled New York law, "an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal.'" Crimmins v Handler & Co., 249 AD2d 89, 91-92 (1st Dept 1998), citing Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 4 (1964), quoting Mencher v Weiss, 306 NY 1, 4 (1953). Here, there is evidence that Paul Bogoni did intend to do so, since he indicated that he - rather than B-U - was the landlord on all of the leases at bar, and signed using his own name rather than as a corporate officer. As a result, while Irene Bogoni is insulated from personal liability in this action under the doctrine of disclosed agency, Paul Bogoni is not. Therefore, the court rejects this argument with respect to Paul Bogoni, but shall grant defendants' cross motion to the extent of dismissing the complaint as against Irene Bogoni.

Next, defendants argue that "the court must deny plaintiffs'

motion for summary judgment" because "defendants followed the pre-Roberts framework for luxury deregulation." Defendants contend specifically that they "had a mistaken belief that luxury deregulation was still available for apartments that were previously subject to rent regulation prior to the receipt of J-51 benefits." Defendants' ignorance of the law is to no avail. argument is disingenuous. In Roberts v Tishman Speyer Props., L.P. (13 NY3d 270 [2009]), which was decided in 2009, the Court of Appeals noted that the regulations forbidding luxury decontrol in buildings that receive a J-51 tax abatement "became effective on December 20, 2000." 13 NY3d at 281. Therefore, defendants arguments - that the *Roberts* decision itself decreed the unavailability of luxury decontrol in 2009, or that there was a "pre-*Roberts* framework for luxury deregulation" that applies to the building, are in error. Luxury decontrol became unavailable to the building on December 20, 2000, and defendants' act of filing a vacancy decontrol notice in January 2009 was illegal. The court also rejects defendants' argument that they "were permitted to charge a market rent" on the same basis.

Defendants next argue that "plaintiffs have failed to make a showing of fraud." Defendants cite the Court of Appeals decision in Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin. (15 NY3d 358 [2010]) which held that:

> Generally, 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. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

15 NY3d at 367. Defendants state that they "unequivocally deny an intent to defraud," and argue that they "made mistakes as to the applicability of luxury deregulation following the receipt of J-51 tax benefits." They also assert that, beyond the increase to the monthly rent reflected in the 2010 lease for apartment 9C, which is insufficient under Grimm, plaintiffs have presented no evidence of a "fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization."

For their part, plaintiffs dispute defendants' allegation that there is no evidence of a "scheme to defraud," presenting a copy of the DHCR rent registration history for the entire building through 2014 that shows that defendants, in fact, filed vacancy decontrol notices for 27 of the building's apartments after it had begun receiving J-51 tax benefits in 2005. Plaintiffs have also presented copies of pleadings in separate actions by a number of the tenants of these apartments who are seeking to assert overcharge claims against defendants. Under these circumstances - i.e., a clearly illegal rent increase coupled with similar contemporaneous increases to the rents of

other apartments in the building pursuant to illegal decontrol filings, plaintiffs have prima facie met the criteria set forth in Grimm for finding the existence of a "scheme to defraud".

Defendants finally argue that "utilization of the default formula [to calculate the legal base rent for apartment 9C] is unwarranted." However, defendants argument is contrary to law. Plaintiffs took possession of apartment 9C in February 2010, and their ability to commence a FMRA expired four years later. Further, their initial $4,700.00 monthly rent charge was clearly illicit. Under these circumstances, the "default formula" set forth in 9 NYCRR § 2522.6 (b) is the proper, and the only, method to be used to calculate the legal base rent for apartment 9C. See Levinson v 390 W. End Assoc., L.L.C., 22 AD3d at 401, *supra*. Plaintiffs are entitled to summary judgment awarding them a declaration "establishing the past and current legal regulated rent for the apartment", however, the matter of the calculation of the past and current regulated rent shall be referred to a Special Referee to hear and report.

Defendants, request a declaratory judgment "compelling defendants to offer plaintiffs a rent stabilized lease on such terms as are lawful and equitable under the RSL." Defendants are entitled to summary judgment awarding them this declaration. Such declaration shall await the calculation of the appropriate base rent by the Special Referee. The court shall also order

plaintiffs to submit a proposed rent stabilized lease reflecting the Special Referee's recommendations on their motion to confirm the Special Referee's report. Upon further deliberation after oral argument on this matter, it is permissible for plaintiffs to name Kega as the tenant of record of apartment 9C, in lieu of naming the occupants Kreisler and Elizabeth Tracy Bonbrest. See e.g. Matter of Schwartz Landes Assoc. v New York City Conciliation & Appeals Bd.,117 AD2d 74 (1st Dept 1986). However, as Schwartz Landes Assoc., supra, makes clear, New York law requires that Kega specifically designate the individuals who are permitted to occupy apartment 9C, and that such individuals must make apartment 9C their primary residence, or risk losing Rent Stabilization protection. *Id.*

Finally, plaintiffs seek a declaration "enjoining defendants from terminating or taking any steps to terminate plaintiffs' tenancy or bringing any action or proceeding to recover possession of the apartment, pending the outcome of this proceeding." Plaintiffs make no argument in their supporting concerning this proposed declaration; nor do they allege that they have been served with any notice of termination or that they are currently parties to any litigation seeking to remove them from apartment 9C. Therefore, the court such declaration as premature or abandoned, and denies so much of their motion as seeks such relief.

Plaintiffs' second cause of action alleges a rent overcharge in violation of 9 NYCRR § 2526.1 (a) (1), and seeks both money damages from defendants and the imposition of treble damages because the overcharge was "willful." Plaintiffs assert that they "are entitled to judgment of at least $390,760.59, plus interest." They also assert that "an overcharge, by definition, is the amount of rent collected over the legal regulated rent ... and is presumed to be willful." *Id.* Plaintiffs are not correct. Once an overcharge has been established, the burden shifts to the landlord to prove, by a fair preponderance of the credible evidence, that that overcharge was not willful. See e.g. Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 103 (1st Dept 2007). Here, however, the overcharge has not yet been established, but must await a motion to confirm or deny the forthcoming Special Referee's report. Here, too, unlike in Matter of H.O. Realty Corp. where the landlord presented evidence on the issue of "willfulness" to the DHCR, defendants has done so here. Thus, defendants must do so, in the first instance, at a hearing before this court, after the amount of overcharge has been established. Plaintiffs' motion and defendants' cross motion shall both be held in abeyance with respect to plaintiffs' second cause of action.

Plaintiffs' final cause of action seeks court costs and attorney's fees. Under statutory precedent, such damages are

awarded to the party that prevails in landlord tenant litigation involving a rent regulated lease. Here, however, at this juncture, no determination of the prevailing party in this action can be determined until the hearing on the discrepancies in rent and willfulness.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the branch of the motion, pursuant to CPLR 3212, of plaintiffs Stuart Kreisler, Elizabeth Tracy Bonbrest and Kega-SP Ltd. (motion sequence number 001) which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action is granted to the extent that it is

ADJUDGED and DECLARED that said plaintiffs' apartment (apartment 9C in the building known as 945 West End Avenue located in the County, City and State of New York), tenancy and leases are all subject to the protections of the Rent Stabilization Law; and it is further

ORDERED that the branch of the motion, pursuant to CPLR 3212, of plaintiffs Stuart Kreisler, Elizabeth Tracy Bonbrest and Kega-SP Ltd. (motion sequence number 001) which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action is granted to the extent that the issues of "establishing the past and current legal regulated

rent for the apartment" and "compelling defendants B-U Realty Corp. and Paul Bogoni to offer plaintiffs a rent stabilized lease on such terms as are lawful and equitable under the RSL" are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the branch of the motion, pursuant to CPLR 3212, of plaintiffs Stuart Kreisler, Elizabeth Tracy Bonbrest and Kega-SP Ltd. (motion sequence number 001) which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action is denied without prejudice to renewal with respect to its proposed declaration "enjoining defendants from terminating or taking any steps to terminate plaintiffs' tenancy or bringing any action or proceeding to recover possession of the apartment", and it is further

ORDERED that the balance of this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that either counsel shall, within 30 days from the

date of entry of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, with proof of service, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants B-U Realty Corp., Paul Bogoni and Irene Bogoni is granted solely to the extent that the complaint is dismissed and severed as to defendant Irene Bogoni with costs and disbursements to such defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 27, 2017

ENTER:

J.S.C.
DEBRA A. JAMES