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| Pascaud v B-U Realty Corp. |
| 2021 NY Slip Op 32362(U) |
| November 19, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 161824/2014 |
| Judge: Barbara Jaffe |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

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SYLVAIN PASCAUD, LESLIE PASCAUD, JEANNE
GOFFI,

Plaintiffs,

- v -

B-U REALTY CORP., PAUL BOGONI,

Defendants.

INDEX NO. 161824/2014

MOTION DATE _____

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 110-206
were read on this motion for summary judgment.

By notice of motion, plaintiff Goffi moves pursuant to CPLR 3212 for an order granting her partial summary judgment: (1) on her second cause of action, declaring that her apartment, tenancy, and lease are subject to the Rent Stabilization Law and that defendant must offer her a renewal lease; (2) on her fourth and sixth causes of action, granting her a judgment in the amount of her rent overcharges, plus treble damages; and (3) on her eighth cause of action, granting her a judgment for her attorney fees. Defendant opposes.

I. PERTINENT UNDISPUTED BACKGROUND

Defendant, owner of the subject building since at least 1974, has received three J-51 tax abatements, one from 1974 to 1984, one from 1989 to 2000, and one from 2005 to 2019.

Plaintiff moved into the building pursuant to a two-year lease beginning on September 1, 2002 at a monthly rent of \$2,000.34. Since then, she has signed 11 more one-year renewal leases at free market rates, most recently for 2014 to 2015, at a monthly rent of \$2,892.44. None of the leases provide for a rent-stabilized tenancy.

In January 2015, defendant, for the first time, registered plaintiff's apartment with the Department of Housing and Community Renewal (DHCR), providing a history of the apartment dating back to 1984. In 1984, the apartment was rent-controlled, and from 1985 to 2002, it was listed as rent-stabilized. The history reflects that from January 2002 to December 2003, a rent-stabilized tenant lived in the apartment and paid a monthly rent of \$1,600.45. The registration also reflects that as of June 20, 2003 and through May 5, 2004, the apartment was exempt temporarily as it was being used for commercial/professional purposes, that as of July 21, 2005, it was exempt permanently due to a high-rent vacancy, and as of 2006, it was exempt and thus, registration with the DHCR was not required. (NYSCEF 130).

In July 2017, defendant filed an amended registration for the apartment, inhabited by plaintiff in 2003 and 2004, although the legal regulated rent for the apartment in 2003 and 2004 is listed as "amt miss[ing]." In 2005, the apartment is listed as vacant and exempt pursuant to a high-rent vacancy, and beginning in 2006, plaintiff is listed as the tenant, with a legal regulated rent in 2006 of \$2,203.34. (*Id.*).

In December 2014, plaintiff commenced the instant action. There have been at least nine other lawsuits brought by 28 current or former tenants of the building, alleging overcharges by defendant. (NYSCEF 111).

II. OTHER CASES INVOLVING DEFENDANT

In *Kreiser v B-U Realty Corp.*, the trial court's determination denying defendants' motion to dismiss was upheld on the ground that:

[t]he record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated *Roberts v*

Tishman Speyer Props., L.P. (13 NY3d 270 [2009]), came to light in connection with an anonymous complaint . . .

(164 AD3d 1117 [1st Dept 2018], *lv dismiss* 32 NY3d 1090 [2018]). The Court also rejected defendants' attempt to justify their fraud on the "pre-*Roberts*" state of the law as the fraud occurred in 2010, after *Roberts* was decided. Moreover, the Court found relevant other actions brought by plaintiff's co-tenants against defendants alleging the same or similar misconduct and probative of a fraudulent scheme to deregulate. (164 AD3d at 1118).

In a more recent decision in the *Kreisler* matter, the court reviewed the trial court's order granting plaintiff a judgment for rent overcharges and treble damages, and held that as the tenancy at issue was governed by the law in effect before the Housing Stability Tenant Protection Act was passed in 2019, plaintiff was not entitled to overcharges preceding by more than four years before the filing of the complaint or more than two years before for treble damages. Moreover, it stated, the overcharges should have been calculated based on the rent charged on the applicable base date and should have been frozen at that rate, as the overcharges resulted from the charging of a free market rent rather than from nonregistration. (198 AD3d 568 [1st Dept 2021]).

In *Townsend v B-U Realty Corp.*, another justice of this court found that the plaintiff had established that defendant had engaged in a fraudulent scheme to de-regulate his apartment. (67 Misc 3d 1228[A] [Sup Ct, New York County 2020]; *see also Aras v B-U Realty Corp.*, 2021 WL 3741619 [Sup Ct, New York County 2021] [same]). And in this action, the previously presiding justice granted plaintiff Pascaud's motion for partial summary judgment to the extent of finding that defendant had improperly de-regulated the apartment, and had failed to rebut the presumption that any overcharges were willful, thereby entitling plaintiffs to treble damages. (NYSCEF 95).

III. ANALYSIS

A. Rent-stabilized lease and renewal

Defendant does not dispute that plaintiff is entitled to a rent-stabilized renewal lease.

B. Fraud and treble damages

As other trial courts have determined that defendant engaged in a building-wide scheme to deregulate the building fraudulently, with the Appellate Division affirming the trial court's findings in *Kreiser*, and absent a sufficient basis shown by defendant for distinguishing its conduct toward plaintiff from that at issue in the other cases, plaintiff establishes that defendant engaged in fraud, warranting an award of treble damages. Moreover, defendant cites no authority in support of its claim that its attempt to refund any alleged overcharges moots plaintiff's claims here. In any event, it did not offer plaintiff the amount due her.

C. Rent overcharges

Based on the recent decision in *Kreiser v B-U Realty Corp.*, 198 AD3d 568 (1st Dept 2021), and absent a reason for using an analysis that differs from that employed therein in calculating plaintiff's request for rent overcharges, plaintiff is entitled to overcharges beginning four years from before the date that she filed her complaint, which was in December 2014. Pursuant to *Kreiser*, where the overcharges resulted from the improper charging of free market rent, rather than from nonregistration, the proper calculation is based on the rent charged on the base date, which is then frozen at that rate, entitling plaintiff to a refund of any increases beyond that rate. (*Cf. Casey v Whitehouse Estates, Inc.*, 197 AD3d 401 [1st Dept 2021] [overcharges to be calculated using default formula given fraudulent scheme to deregulate and absent evidence as to actual rent charged on base date]).

Defendant agreed at oral argument that a determination that it had engaged in fraud would warrant employment of the default formula set forth in 9 NYCRR § 2522.6. (NYSCEF 206).

Pursuant to 9 NYCRR § 2522.6, where the legal regulated rent or a fact necessary to determine the legal regulated rent is in dispute, the court may decide the rent, and where the base date rent is the product of a fraudulent scheme to deregulate the apartment, the base date rent is either:

- (b)(3)(i) the lowest rent registered for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or
- (ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8; or
- (iii) the last registered rent paid by the prior tenant (if within the four year period of review)

Here, plaintiff asserts that the base date rate should be set by using the lowest rent for a comparable apartment, and as her tenancy of the three-room apartment commenced in 2002, the most comparable apartment in the building is apartment 2D, a four-room apartment, for which the monthly rent in 2002 was \$611.44. (NYSCEF 157). The document submitted by plaintiff in support of her argument does not reflect the rent paid by the tenant of apartment 2D in 2002, as the rental history begins in 2008. Moreover, the document shows that between 2008 and 2010, the legal regulated rent for the apartment was \$1,174.90, although the tenant paid \$616.44 through the SCRIE program. The SCRIE (Senior Citizen Rent Increase Exemption) program provides rent increase exemption orders to senior citizen tenants. (*Jadam Equities, Ltd. v Stupp*, 182 Misc 2d 666 [Sup Ct, New York County 1999]). There is no evidence here that plaintiff is eligible for the SCRIE program and while apartment 2D may be comparable to plaintiff's apartment and its rent before application of the SCRIE benefit would be probative of the legal regulated rent, plaintiff does not offer that figure for the year 2008.

Absent a comparable apartment in the building, plaintiff does not establish that her base date rent should be based on comparability. And, as the last registered rent paid by the prior tenant is not within the four-year lookback period, that factor is also not pertinent. Therefore, the base date rent must be based on plaintiff's initial rent of \$2,003.34 in 2002, minus a 20 percent vacancy increase pursuant to 9 NYCRR § 2522.8, resulting in a base date rent amount of \$1,602.67.

As neither party calculated plaintiff's damages, based on a base date rent amount of \$1,602.67, the parties are directed to do so in a supplemental briefing, detailed below.

D. Attorney fees

There is no dispute that plaintiff is entitled to attorney fees as she is the prevailing party.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment is granted as follows:

- (1) on her second cause of action, it is declared that plaintiff's apartment, tenancy, and lease are subject to the Rent Stabilization Law, and defendant is directed to offer her a proper renewal lease within 30 days of the date of this order;
- (2) on her fourth and sixth causes of action, a judgment is granted in plaintiff's favor as against defendant, and the parties are directed to submit proposed orders and judgments containing a calculation of the amounts owed for plaintiff's overcharges and treble damages, along with a letter explaining same. Plaintiff is directed to e-file her proposed order and judgment within 30 days of the date of this order, and defendant is directed to file its proposed order and judgment within 30 days of receipt of plaintiff's submission; and it is further

(3) on her eighth cause of action for attorney fees, the parties are directed to indicate in their letters to the court whether a hearing must be held on plaintiff's request for attorney fees or whether they consent to have the fees application decided on papers.

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11/19/2021
DATE

BARBARA JAFFE, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| | <input type="checkbox"/> | SETTLE ORDER | DENIED | SUBMIT ORDER | OTHER |
| APPLICATION: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | FIDUCIARY APPOINTMENT | REFERENCE |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | | | | |