

Austin v 25 Grove St. LLC
2021 NY Slip Op 34293(U)
August 23, 2021
Supreme Court, New York County
Docket Number: Index No. 155570/2020
Judge: Phillip Hom
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. Phillip Hom PART 2

Justice

-----X

MAIRE SHELIA AUSTIN, FRANCIS AUSTIN

Plaintiff,

- v -

25 GROVE STREET LLC,

Defendant.

-----X

INDEX NO. 155570/2020

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this residential landlord/tenant action seeking declaratory relief, the Defendant, 25 Grove Street LLC (the Landlord), moves (Motion Seq. 002) (Doc No. 22)1 for partial summary judgment (CPLR § 3212 [e]) dismissing the Second Cause of Action for rent overcharge and trebles damages.

Plaintiffs, Maire Shelia Theodora Austin and Francis Ian Austin (collectively, the "Tenants"), cross-move (Doc No. 31) for summary judgment (CPLR § 3212) on the First Cause of Action for declaratory judgment and a permanent injunction; the Second Cause of Action for rent overcharge and treble damages; and the Third Cause of Action for attorneys' fees.

1 References to "Doc No." followed by a number refers to documents filed in NYSCEF.

FACTUAL AND PROCEDURAL BACKGROUND

In the Amended Verified Complaint (the “Amended Complaint”) (Doc No. 14), it is asserted that on or about May 4, 2013, the Landlord’s predecessor, William C. Taplitz (“Taplitz”)² and the Tenants executed a one-year “Residential Apartment Lease” (the “Lease”) (Doc No. 35) for the \$2,950.00/month rental of Apartment #1 (the “Apartment”), located at 25 Grove Street, New York, NY (the “Building”). The Lease term was from June 1, 2013 through May 31, 2014. Together with the Lease, the Tenants received a “NOTICE TO FIRST TENANT OF APARTMENT DEREGULATED AFTER VACANCY DUE TO A RENT OF \$2,500 OR MORE” (the “Deregulation Notice”) (Doc No. 33). The Deregulation Notice states:

“The owner of the building where you have commenced, or you are about to commence, occupancy is required to provide this notice to the first tenant of a previously rent regulated apartment. This apartment is not subject to rent regulation pursuant to any City, State or Federal law.”

According to the Deregulation Notice: (a) the regulated rent for the Apartment prior to vacancy was “\$572.46;” (b) the “vacancy increase” allowance for the Apartment was “\$239.82;” and (c) the Apartment “improvement increase” was “\$2,256.25.” The Tenants were also advised by the Deregulation Notice that they “may verify the prior regulated rent by contacting the New York State Division of Housing and Community Renewal” office. Additionally, paragraph 19 of the Lease states:

“LEGAL FEES ... Renter shall be liable to Owner in the event Owner incurs legal fees in the enforcement of any of Owner's rights under this lease or pursuant to law, and Owner shall be liable to Renter in the event Renter incurs legal fees in the enforcement of any of Renter's rights under this lease or pursuant to law. In the event Renter is liable to Owner for such fees, Renter shall be liable for such legal fees and/or court costs as added rent.” (The attorneys’ fees provision of the Lease).

² The Amended Complaint alleges at ¶ 9 that pursuant to a “single deed dated June 11, 2015” the Landlord acquired ownership of the Building. A copy of the referenced deed was not presented to the Court.

After the Lease expired by its terms on May 31, 2014, the Tenants aver that they remained in possession of the Apartment and “renewed” the Lease with a continued rental payment of \$2,950.00/month for the period commencing June 1, 2014 and ending May 31, 2015 (the “2014 Renewal period”) (see Amended Complaint at ¶ 19). Plaintiff, Maire Shelia Theodora Austin (“M. Austin”) asserts in her affidavit (Doc No. 32) that Taplitz, the prior owner of the Apartment, “did not *immediately* offer us a renewal lease” (emphasis added) (see M. Austin’s aff at ¶ 5) and in fact, no lease renewal was offered for the 2014 Renewal period (see affirmation of the Tenants’ attorney at ¶ 12, Doc No. 37).

The Tenants aver, however, that they were eventually offered a lease renewal a year later, in 2015. This time, the Tenants and Taplitz, as “Managing Agent” for the Landlord, executed a one-year “Renewal Lease Form” (the “2015 Renewal Lease”)³ (Doc No. 26) at an agreed rental payment of \$2,979.50/month commencing June 1, 2015 and ending May 31, 2016. Contrary to the Lease, which identified the Apartment as a being “deregulated” and therefore not subject to any “rent regulation pursuant to any City, State or Federal law” (see Notice of Deregulation), the 2015 Renewal Lease was issued pursuant to § 2523.5 (a) of the New York City Rent Stabilization Code and notes that the Apartment *was* rent-stabilized. Together with the 2015 Renewal Lease, the Tenants received a “J-51 RIDER FOR RENT STABILIZED LEASES” (the “J-51 Rider”) (Doc No. 35) notifying the Tenants of the following terms and conditions made part of the lease:

“EXPIRATION OF RENT STABILIZATION DUE TO EXPIRATION OF J-51 TAX BENEFITS: It is understood that the Premises is subject to the Rent Stabilization Law, as amended, and The Rent Stabilization Code, as amended, by virtue of the building's current participation in the tax abatement/exemption program of Section 11-243 (formerly and commonly known as J51-2.5) or section

³ The 2015 Renewal Lease states that this “lease will expire on: 5/31/15” – presumably referencing the 2014 Renewal period as the Tenants assert no actual renewal lease was executed for that period of their tenancy in the Apartment.

11-244 (formerly and commonly known as J51-5) of the Administrative Code of the City of New York. Pursuant to Sections 11-243 and 11-244 of the Administrative Code, the Premises shall remain subject to the Rent Stabilization Law, as amended, and the Rent Stabilization Code, as amended, only during the period of the tax abatement/exemption (which expires on or about June 30, 2018). At the expiration of the Lease or Renewal Lease that is in effect on the date the tax abatement/exemption expires, the premises will no longer be subject to either the Rent Stabilization Law or Code and the Owner may, at that time, charge a market rental rate for the Premises. Additionally, when the tax abatement/exemption expires, the Owner will no longer be obligated to offer the Tenant a renewal lease.”

The Tenants executed the J-51 Rider and “accepted, approved and agreed” to its terms (*id.*). Additionally, on June 26, 2015, the Tenants executed a document with the Landlord, 25 Grove Street LLC entitled, “TENANTS RENT CONCENT [sic] FORM” which states, as follows:

“I, Mr. Frank Austin and Ms. Sheila Austin are occupying apartment #1 at 25 Grove Street, New York, NY 10014. I accept and acknowledge the current legal rent is \$3,099.32 for a one-year lease. My preferential rent of \$2,979.50 agreed upon and do wave any right to protest. The landlord can increase my rent on the anniversary of my lease by the legal amount.”

The 2015 Renewal Lease expired on May 31, 2016. The Tenants’ attorneys affirm that there is no written lease in effect for the years 2017, 2018 and 2019, and the Tenants continued to occupy the Apartment at the rental rate of \$2,979.50/month (see Doc No. 37 at ¶ 18).

Approximately five years after executing the 2015 Renewal Lease, the Tenants, on or about March 11, 2020, obtained from the New York State Division of Housing and Community Renewal (“DHCR”) a copy of the Apartment’s rental history (“DHCR Rental History”) (Doc No. 36), which the Tenants contend demonstrate that, for several years, the Landlord failed to file and/or inaccurately filed the required annual registrations for the Apartment with DHCR. Specifically, the Tenants allege that a DHCR filing in 2018 inaccurately states that the Tenants had a one-year lease commencing June 1, 2017 through May 31, 2018, with a monthly rent of

\$3,099.92 (see affirmation of the Tenants' attorneys at ¶ 22, Doc No. 37). Plaintiff, M. Austin reasserts that other than the Lease and the 2015 Renewal Lease "there have been no other leases between" the Tenants and the Landlord (see M. Austin's aff at ¶ 10) and that the Tenants have been month to month tenants paying a monthly rent of \$2,979.50 since 2015.

The Tenants also aver that the DHCR Rental History reveals that "the last registered tenant of the Apartment prior to Plaintiffs was 'Howard Spiegel,' whose last lease expired on July 31, 2011, with a monthly rent of \$572.46" (see affirmation of Tenants' attorney at ¶ 27, Doc No. 37). This amount of \$575.46 was disclosed and referenced in the Deregulation Notice. The DHCR Rental History additionally confirmed that the Building has received a J-51 real estate tax credit from the City of New York (the "J-51 tax credit"), but this tax benefit was in effect since 2007 – a fact omitted from the Lease. The Tenants aver that this omission was an intentional and/or fraudulent misrepresentation of the status of the Apartment as "deregulated" when in fact the Apartment was subject to the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC").

On or about July 21, 2020, the Tenants commenced the instant action challenging the rent-stabilization status of the Apartment and the legality of the rental payments, asserting that they were overcharged rent from the inception of their tenancy in 2013 to the present since the Landlord did not properly deregulate the Apartment based on a qualifying Individual Apartment Improvements ("IAIs"), as noted in the DHCR Rental History, in an amount sufficient to increase the rent past the deregulation threshold of \$2,500.00. In its Amended Complaint, the Tenants seek an order: (1) directing the Landlord to issue a proper rent-stabilized lease to the Tenants and properly register the subject tenancy with DHCR and declaring the tenancy subject to the RSL, entitling the Tenants to all the benefits and protections of the RSL and RSC (the First

Cause of Action); (2) establishing the legal regulated rent for the Apartment and granting the Tenants a money judgment against the Landlord for rent overcharges, including pre-judgment interest and treble damages for a willful rent overcharge (the Second Cause of Action); and (3) granting the Tenants an award of attorney's fees pursuant to the attorneys' fees provision of the Lease, RPL § 234, RSL § 26-516 (a) (4) and RSC § 2526.1(d).

In response, on or about November 18, 2020, the Landlord filed and served its Amended Answer (Doc No. 21) generally denying the allegations in the Amended Complaint and asserting the following affirmative defenses and counterclaims: (1) the Tenants are precluded from recovering money damages because the action is time barred by the pertinent four year statute of limitations as they failed to commence the instant rent overcharge claim within four years from the alleged overcharge occurrence (First Affirmative Defense); (2) there is a defense founded upon documentary evidence (Second Affirmative Defense); (3) the Tenants are in arrears in their obligations to pay rent, entitling the Landlord to a judgment of possession (Third Affirmative Defense and First Counterclaim); (4) the Landlord is entitled to an order of ejectment for the Tenants' failure pay rent (Fourth Affirmative Defense and Second Counterclaim); (5) a declaratory judgment determining that the legal rent for the Apartment is \$2,979.50/month, the amount the Tenants plead they have paid in rent for at least forty-eight consecutive months (Third Counterclaim); and (6) an award of legal fees (Fourth Counterclaim).

ARGUMENTS

The Landlord contends that its application for partial summary judgment must be granted and the Second Cause of Action for rent overcharge and trebles damages must be dismissed because: (1) as a matter of law, claims for rent overcharge must be brought within 4 years of the

occurrence of the alleged overcharge and the Tenants failed to do so here; (2) the four-year statute of limitations bars review of rental history beyond four years to determine and calculate a rent overcharge; (3) the Tenants are not entitled to a “look back” period exception beyond the four-year statute of limitations to calculate the legal regulated rent to the Apartment because they failed to properly plead fraud and/or the existence of a fraudulent scheme; and (4) the base rent for the Apartment is \$2,979.00, the rent amount the Tenants have paid for at least 48 months immediately prior to the commencement of this action.

In opposition to the motion-in-chief, the Tenants argue the Landlord’s application for partial summary judgment must be denied because: (1) the Landlord did not establish a *prima facie* entitlement to the relief sought, as a matter of law, having failed to present facts and/or documentary evidence such as: (a) copies of leases establishing the legal base rent; (b) proof of rental payments to establish the legal rent; (c) copies of the DHCR registrations for the relevant period; (d) the rent rolls for the Building; and (e) the rental history for the Apartment; (2) the “look back” exception to the four-year statute of limitations is appropriate in order to calculate the legal-regulated rent because the Landlord: (i) issued fraudulent leases to the Tenants, (ii) fraudulently registered the Apartment with DHCR as evidenced by the Lease showing the Apartment was “deregulated” when in fact it was rent stabilized, (iii) inaccurately registering the Apartment with DHCR, (iv) failing to register the Apartment with DHCR for the certain years, demonstrates the existence of a fraudulent scheme “tainting the reliability of the base-date rent” which requires that the base-date rent be re-set; and (3) at minimum, factual disputes may exist respecting the base rent and the legality of all rents charged thereafter, warranting denial of the Landlord’s partial summary judgment application.

Furthermore, the Tenants argue that their cross-motion application for summary judgment on the First Cause of Action for a declaratory judgment and a permanent injunction must be granted because: (1) the Landlord does not dispute that the Apartment is a rent-stabilized apartment and subject to the RSL and RSC; (2) the Landlord received a J-51 tax benefit for the Building, entitling the Tenants to a judgment declaring the Apartment subject to RSL; (3) the Apartment was improperly “deregulated;” (4) the Building registrations filed with the DHCR are false, improper, and fraudulent because, pursuant to RSL § 26-504.2, to deregulate a tenancy under the “high rent” exemption of RSL § 26-504.2, the Landlord would need to spend more than \$60,000.00 in Individual Apartment Improvements (IAIs) to reach the “high-rent” deregulation threshold and the Landlord failed to perform qualifying IAIs in an amount sufficient to increase the rent past the deregulation threshold of \$2,500; and (5) pursuant to NYCRR § 2522.6(b)(2), the base rent is unreliable as evidenced by the Lease’s representation as a “free-market” vacancy apartment, mandating an injunction directing the Landlord to issue a proper rent-stabilized lease and properly register the tenancy with DHCR.

The Tenants further argue that their cross-motion application for summary judgment on the Second Cause of Action for rent overcharge and treble damages must be granted on grounds that: (1) the Landlord knowingly and illegally charged rent for the Apartment in excess of the legal-regulated rent; (2) the Landlord engaged in a fraudulent scheme to increase the rent and deregulate the Apartment as evidenced by the fact that the Landlord failed to file annual registrations with DHCR and failed to issue the Tenants a rent-stabilized lease that incorporates all of the riders required by DHCR, tainting the reliability of the base date; and (3) the willful actions and conduct of the Landlord entitles the Tenant to an award of treble damages, pursuant

to RSC §2526.1 (a) (1), in an amount to be determined by the court, plus pre-judgment interest on any non-treble portion of the rent overcharge, pursuant to CPLR §5004.

Lastly, the Tenants contend that their cross-motion application for summary judgment on the Third Cause of Action for attorneys' fees must be granted on grounds that: (i) The Tenants are entitled to the mandatory attorney's fees, pursuant to RSL § 26-517.1 and RSC § 2526.1(d) and/or RPL § 234, and ¶ 19 of the Lease because the Landlord perpetuated a fraudulent scheme to increase the rent and deregulate the Apartment which must result in a determination in the Tenants' favor that the Apartment is rent stabilized and a money judgment in the amount of the illegally collected rent overcharge.

In opposition to the Tenant's cross-motion, and in reply to its motion-in-chief, the Landlord contends that: (1) "from the very commencement of this lawsuit, [the Landlord] has conceded and acknowledged" the rent-stabilization status of the Apartment because the Building received J-51 tax benefits, rendering the application for summary judgment on the First Cause of Action for a declaratory judgment "superfluous;" (2) the Tenants are not entitled to money damages for anything that occurred more than four years prior to their filing of the instant complaint due to the applicable four-year statute of limitations; (3) there is no basis supporting an exemption allowing the Tenants to pierce the four year "lookback" period to determine the legal-regulated rent for the Apartment based upon an insufficiently pled fraud allegation and/or absent a fraudulent scheme and therefore a review of the entire rent history need not be examined; (4) the Landlord's alleged failure to provide the Tenants' with a rent-stabilized renewal lease, is insufficient to subject the Landlord to liability for an alleged rent overcharge claim; (5) the initial free-market standard lease/the Lease provided by the Landlord's predecessor was renewed as a rent stabilized lease with the issuance of the 2015 Renewal Lease which did

include the J-51 Rider subsequently executed by the Tenants; (6) there has not been an increase in rent and therefore a rent overcharge claim cannot stand since the relevant rent based date is July 21, 2016 – four years prior to the filing of the instant proceeding commenced on July 21, 2020 and it is undisputed that the rent charged in 2016 is the same rental amount the Tenants assert they are paying of \$2,979.50/month; (7) the alleged inaccuracy of the 2015 DHCR registration bears no weight on the rent-overcharge claim because the Tenants never paid more than \$2,979.50/month in rent from the base date in 2016 through to the present; (8) the DHCR registration amount may have reflected the legal regulated rent amount the Landlord was entitled to collect pursuant to rent increase guidelines; (9) DHCR requires the entry of lease commencement and termination dates to process the Building registration; and (10) the Tenants failed to specify the sufficiency of the IAIs performed during the period of vacancy following the vacatur of the last rent stabilized tenant, Howard Spiegel, in 2011.

In reply to their cross motion, the Tenants maintain that: (1) the court is permitted to look at the rent history beyond 2016 to determine the legal regulated rent because the Landlord engaged in a fraudulent scheme to deregulate the Apartment; (2) the Landlord's failure to properly register the Building with DHCR is sufficient to indicate that there was a fraud and warrants review of the apartment history beyond the four-year lookback period to determine the legal regulated rent; and (3) the Landlord's admission that the Apartment is rent-stabilized, coupled with the free-market lease/the Lease proves that the Landlord engaged in a fraudulent scheme to deregulate the Apartment and renders the base date unreliable necessitating a reset of the legal- regulated rent.

DISCUSSION

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

MOTION TO DISMISS THE SECOND CAUSE OF ACTION:

The statutory provision upon which the Landlord seeks relief is CPLR §3212 (e) which states, in pertinent part, as follows:

“(e) Partial summary judgment ... summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just.”

The Landlord seeks an order dismissing, as time barred, the Second Cause of Action commenced on July 21, 2020, on grounds that the latest an overcharge claim could have been commenced was June 1, 2020 because the four-year statute of limitations accrued on June 1, 2016, the date the Lease was executed.

CPLR § 213-a states in pertinent part:

“§ 213-a. Residential rent overcharge.

No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, however, an

overcharge claim may be filed at any time, and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges.”

This statutory provision was revised as part of the Housing Stability and Tenant Protection Act of 2019 (“HSTPA”). Previous to the 2019 revision, CPLR §213-a formerly read, as follows:

“An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.”

Prior to HSTPA “the statute of limitations on rent-overcharge claims for “improperly decontrolled” apartments were “governed by Administrative Code of the City of New York former § 26–516(a)(2) and former CPLR § 213–a, which prescribed a four-year statute of limitations for examination of rental history to determine legal rent. If there were no reliable rent records within the four-year limitations period or if the building owner had engaged in ‘a fraudulent scheme to deregulate the apartment’ (9 NYCRR 2522.6 [b][2][iii]), or engaged in certain practices proscribed by 9 NYCRR 2525.3(b), (c), or (d), the rent would be determined by a ‘default formula’” (*see, Gridley v Turnbury Vil, LLC*, 196 AD3d 95, 98 [2nd Dept 2021]).

The current CPLR § 213-a provision and HSTPA, permits a claim for rent overcharge to be filed at “any time.” Additionally, recovery for any overcharges is limited to within six years of the date the complaint was filed and there is no longer a “four-year lookback rule” to calculate the rent overcharges. The court may now review an apartment’s entire rental history without a time frame limitation at all, to calculate the overcharge amount and determine the legal-regulated rent.

The Landlord, relying on *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020), maintains that the 2019 revision to CPLR § 213-a and HSTPA cannot be retroactively applied in this case. The New York Court of Appeals in *Regina* held that the overcharge calculation provisions of the HSTPA cannot be applied retroactively to New York City apartments that were “improperly removed from rent stabilization during receipt of J-51 benefits prior to the New York Court of Appeals’ 2009 decision in” *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]) and would instead be governed by the laws in effect at that time which, pursuant to CPLR § 213-a and Rent Stabilization Law § 26-516, expressly applied a four-year statute of limitations and limited the court’s review of the rental history to that same four-year limit, unless the plaintiff was entitled to go beyond the four-year lookback period with evidence that the rent overcharge was occasioned by defendants’ fraud or willful misconduct (*see Montera v KMR Amsterdam LLC*, 193 Ad3d 102, 106 [1st Dept 2021]); and *see generally*, *Matter of Graham Court Owners Corp. v Division of Housing and Community Renewal*, 71 AD3d 515 [1st Dept 2010]).

The Court of Appeals in *Regina*, therefore, narrowed the scope of HSTPA’s retroactive application stating, “we have no occasion to address the prospective application of any portion of the HSTPA” (*Regina*, 35 NY3d at 363). Even if the court were to apply the pre-HSTPA four-year statute of limitations in this case, *Regina* highlighted that the four-year lookback rule and standard method of calculating the legal rent in a rent overcharge claim would not be applicable, were there a substantiated fraud allegation against the Landlord (*Regina*, 130 NYS3d at 361). Here, as further discussed below, the Tenants presented a *prima facie* entitlement to a finding of fraud against the Landlord, carving out the exception to the four-year lookback time frame were it to have been applicable to this case in the first instance. In other words, this court would have

reached the same conclusion herein even under the four-year statute of limitations analysis since the Tenants presented an exception to that “lookback” time-frame parameter.

The DHCR Rental History demonstrates that the Building was receiving J-51 benefits as early as 2007 (see Doc No. 36), however, the Apartment was allegedly “deregulated” and exempt from having a legal regulated rent allowing for a high rent vacancy increase on or about June 1, 2013, which was after the issuance of the 2009 *Roberts v Tishman Speyer Props., L.P.*, decision. Notably, the Landlord made no affirmative statement that it relied upon “pre-*Roberts* framework” of 2009 to “deregulate” the Apartment in 2013 (see *Montera*, 193 Ad3d at 105-106).

Moreover, the current CPLR § 213-a provision and HSTPA is applicable in this action which was not a “pending” matter at the time of the enactment of HSTPA in 2019 since the Tenants commenced this action in 2020 (*Regina*, 35 NY3d at 374). Under the facts in this case, the Landlord’s application to dismiss the Second Cause of Action for rent overcharge and treble damages based upon the defense that this cause of action is time barred by a four-year statute of limitations, the pre-HSTPA statute of limitations period, is denied.

CROSS MOTION FOR SUMMARY JUDGMENT:

The Tenant’s cross motion application for summary judgment on their First Cause of Action for a declaratory judgment and injunctive relief, is granted. 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 also *Long Is. Light. Co v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006]).

The J-51 Rider executed by the Tenants, states, in pertinent part, that the:

“tax abatement/exemption ([] expires on or about June 30, 2018). At the expiration of the Lease or Renewal Lease that is in effect on the date the tax abatement/exemption expires, the premises will no longer be subject to either the Rent Stabilization Law or Code and the Owner may, at that time, charge a market rental rate for the Premises. Additionally, when the tax abatement/exemption expires, the Owner will no longer be obligated to offer the Tenant a renewal lease.”

Contrary to this fully executed J-51 Rider to the 2015 Renewal Lease, the Landlord insists that the Apartment is currently rent stabilized and subject to the RSL and RSC. The Landlord contends that “from the very beginning” it never contested the status of the Apartment as a rent stabilized residential unit, yet the Amended Answer does not reflect this factual assertion in its general denial, affirmative defenses, and counterclaims to the Amended Complaint. There is no dispute that “[w]here the landlords receive a New York City ‘J-51’ tax exemption or abatement for their apartments under New York Real Property Tax Law § 489 (1) (a) and New York City Administrative Code §§ 11-243 and 11-44 9 formerly §§ J-51-2.5), the apartments are subject to rent regulation...” (see *Dugan v. London Terrace Gardens, L.P.*, 34 Misc. 3d 1240 (A), 2011 NY Slip Op. 52501(U) (Sup. Ct., NY County 2011), aff’d, 101 AD3d 648 [1st Dept 2012]).

Although the J-51 Rider states that the tax benefits would expire in 2018, the last entry on the DHCR Rental History reflecting this tax benefit was in 2011. Nevertheless, as the Landlord does not challenge the Tenants’ contention that the Apartment is subject to RSL and RSC, nor does the Landlord present any arguments against the issuance of an injunction directing the Landlord to properly register the subject tenancy with DHCR and issue the Tenants a rent-stabilized lease (see affirmation of the Landlord’s counsel at ¶ 2, Doc No. 23), the Tenants’ application for summary judgment on their First Cause of Action is granted, on consent and without substantive opposition by the Landlord.

The Court also awards summary judgment in the Tenant's favor on their Second Cause of Action which seeks a finding of overcharge and treble damages on numerous grounds. The Tenants presented a *prima facie* entitlement to a rent overcharge claim by submitting documentary evidence showing that the Apartment was "deregulated" and not subject to RSL and RSC as evidenced by the Lease in 2013 (Doc No. 33) and submitting a copy of the 2015 Renewal Lease (Doc No. 34) demonstrating that the Apartment *was* subject to RSL and RSC as a rent-stabilized residential premises. There have been rent increases from 2013 to the present and there is no dispute that there was a substantial increase in rent from 2011 to 2013, the period when the prior owner of the Building allegedly made IAs which resulted in the "deregulation" of the Apartment. The Tenants do dispute that qualifying IAs were made in light of the differing leases which reflected that the Apartment was a deregulated residential unit one year (2013), and several years later (in 2016) the Apartment was deemed to have been a rent-stabilized apartment.

The contention that the subsequent issuance of a rent-stabilized lease after the issuance of a "free market" lease is not sufficient to render the Landlord liable for rent overcharge, is without merit. The Landlord did not dispute, with any evidentiary proof or affirmative statement by someone with personal knowledge of the facts, that the Apartment was properly deregulated by virtue of a high-rent deregulation before the Tenant executed the Lease in 2013 and that the Landlord's IAs to the Apartment were sufficient to offer a "free market standard" residential lease to the Tenants (*see generally, Chekowsky v Windemere Owners, LLC*, 114 AD3d 541 [1st Dept 2014]; and *Aimco 322 E. 61st St., LLC v. Brosius*, 50 Misc 3d 10 [App Term, 1st Dept 2015]). Moreover, the Landlord did not seek leave of court to conduct discovery in order to rebut the Tenants' factual assertions in support of their application for judgment on the Second Cause

of Action (*see, Bailey v New York City Tr. Auth.*, 270 AD2d 156, [1st Dept.2000]; and CPLR § 3212[f]).

The Landlord failed to meet its burden to rebut the Tenant's *prima facie* entitlement to summary judgment on the Second Cause of Action. The Landlord did not produce evidentiary proof, setting forth any triable issue of fact, such as the production of rent records or other documentation showing, that there were no rent overcharges. Contrary to the Landlord's argument, the Tenants have not made a "barebone" assertion that the "deregulation threshold" was not met. Indeed, this Apartment went from having a "free market" lease to a "rent regulated" lease, facially placing in doubt the Apartment's status as a "deregulated" apartment based on IAs.

Even prior to the enactment of HSTPA (L 2019, ch 36, part F), courts "uniformly held that landlords must prove the change in an apartment's status from rent-stabilized to unregulated even beyond the four-year statute of limitations for rent overcharge claims" (*Widsam Realty Corp. v Joyner*, 66 Misc.3d 132(A) [App. Term 1st Dept 2019]), quoting *Gersten v. 56 7th Ave. LLC*, 88 AD3d 189, 199 [2011], *appeal withdrawn* 18 NY3d 954 [2012]). With no documentary proof that the Apartment's status properly changed from a rent-stabilized residence (prior to 2011), to a "deregulated" residence (in 2013), back to rent-stabilized residence (2015), the Landlord failed to meet its own *prima facie* entitlement to a dismissal of the Second Cause of Action. Moreover, the Landlord has failed to raise a factual dispute sufficient enough to rebut the Tenants' entitlement to judgment as a matter of law on the rent overcharge claim.

The additional argument that the Tenants' rent has not increased because they have paid the same rent for at least 48 consecutive months, is similarly without merit and rebuffed by the DHCR Rental History (Doc No. 36) showing rent registrations in the amount of \$572.46 in 2013,

\$2,950.00 between 2013 through 2015, no rent registration in 2016 (the pertinent base year the Landlord asserts the Court should calculate the rent date) and another rent increase in 2017 of \$3,099.00 based upon a lease that the Tenants assert, and the Landlord does not dispute, was never executed. There can be no dispute that the documentary evidence presented by the Tenants (i.e., the “deregulated” Lease of 2013, the rent-stabilized Renewal Lease of 2015 and the DHCR Rental History), demonstrates a rent overcharge has occurred as reflected by the rent increases stemming from 2013 through the present.

The Tenants also seek a finding of overcharge on grounds that the Landlord failed to register the leases and corresponding rent with DHCR. At this juncture, the undisputed fact that the Landlord improperly filed and/or fraudulently filed and/or failed to file DHCR registrations, is sufficient to substantiate a rent overcharge claim and/or claim that there was an improper deregulation of the Apartment. Moreover, the Landlord did not justify the failure to register with DHCR the rent for the Apartment during the subject tenancy as reflected in the 2015 Renewal Lease and failed to explain the lack of registration altogether for several years. The failure to timely and properly file rent registrations with DHCR bars the Landlord from collecting rent in excess of the base rent - though that penalty may be lifted upon the filing of proper registrations when “increases in legal rent were lawful” (*Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498, 498–499 [1st Dept 2018]). Here, the DHCR Rental History makes no reference to the preferential rent altogether for the missing rent registration years, rendering the rent registrations that were reflected as filed, a nullity (*Thornton v Baron*, 5 NY3d 175, 181 [2005]).

The Court finds that the continued failure to register the Apartment, together with the undisputed facts respecting the Apartments’ “deregulation” history, is sufficient indicia of fraud/illegal scheme to deregulate the apartment in this instance (see *Montera*, 193 AD3d at 103

and 104; *Roberts* 13 NY3d 270; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011], appeal withdrawn 18 NY3d 954 [2012]; *Matter of Pehrson v Div. of Hous. & Community Renewal of the State of NY*, 34 Misc 3d 1220[A], [Sup. Ct., NY County 2011], citing *Grimm* 15 NY3d at 366; and *Regina*, 130 NYS3d at 355). As referenced above, to calculate the legal regulated rent for the Apartment, the post-HTSPA law is applicable here where a “deregulation” of the Apartment occurred after the 2009 *Roberts* case, and was not “pending” having commenced in 2020, after the enactment of HTSPA. The “lookback” period for overcharge claims are now six years and review of the entire rent history, beyond the “lookback” period in determining the legal-regulated rent is now permissible (*see generally, Simpson v. 16-26 East 105, LLC*, 176 AD3d 418, 2019 NY Slip Op 07026 n 1 [1st Dept 2019]).

In applying the post-HSTPA law to calculate the legal regulated rent for the Apartment, the Court may review the entire rent history of the subject residential unit (*see, Widsam Realty Corp., v Joyner*, 66 Misc 3d 132 (A), 2019 NY Slip Op 52097 (U), *2 [App Term, 1st Dept 2019], quoting *Simpson v 16-26 East 105, LLC*, 176 AD3d 418, 2019 NY Slip Op 07026 n 1 [1st Dept 2019]). The amended CPLR § 213-a, together with RSL § 26-516, allows the courts to “consider all available rent history” necessary to determine the legal rent and any overcharge that may have occurred (*Dugan* 177 AD3d at 9-10). The RSL § 26-516(a) states, in pertinent part, that:

"the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement...plus in each case any subsequent lawful increases and adjustments. The division of housing and community renewal or a court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determinations."

According to HSTPA, the lawful rent increase is the amount the Tenants paid under the original lease dated 2013. Part F, section 5 of the HSTPA amended the Rent Stabilization Law of 1969 (RSL) and codified as Administrative Code of City of NY § 26-516 states, as follows:

“h. The division of housing and community renewal, and the courts, in investigating complaints of overcharge and in determining legal regulated rents, shall consider all available rent history which is reasonably necessary to make such determinations, including but not limited to (i) any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers; (ii) any order issued by any state, municipal or federal agency; (iii) any records maintained by the owner or tenants; and (iv) any public record kept in the regular course of business by any state, municipal or federal agency. Nothing contained in this subdivision shall limit the examination of rent history relevant to a determination as to:

- (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable;
- (ii) whether an accommodation is subject to the emergency tenant protection act or the rent stabilization law;
- (iii) whether an order issued by the division of housing and community renewal or by a court, including, but not limited to an order issued pursuant to section 26-514 of this chapter, or any regulatory agreement or other contract with any governmental agency, and remaining in effect within six years of the filing of a complaint pursuant to this section, affects or limits the amount of rent that may be charged or collected;
- (iv) whether an overcharge was or was not willful;
- (v) whether a rent adjustment that requires information regarding the length of occupancy by a present or prior tenant was lawful;
- (vi) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged a preferential rent;
- (vii) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or
- (viii) the amount of the legal regulated rent where the apartment was vacant or temporarily exempt on the date six years prior to a tenant's complaint.”

Additionally, Part E, § 1 of the HSTPA states, in pertinent part, as follows:

“Any tenant who is subject to a lease on or after the effective date of a chapter of the laws of two thousand nineteen which amended this subdivision, or is or was

entitled to receive a renewal or vacancy lease on or after such date, upon renewal of such lease, the amount of rent for such housing accommodation that may be charged and paid shall be no more than the rent charged to and paid by the tenant prior to that renewal.”

Here, the Tenants were paying rent of \$2,950.00/month when they originally executed the Lease back in 2013. The DHCR Rental History reflects that the Apartment was registered with a “high rent” vacancy exemption to the legal regulated rent based upon “IMPRVMNT” or IAs to the Apartment from June 1, 2013 through May 31, 2015. Prior to 2013, the Apartment was in a “rent stabilized” vacancy status from 2012 through 2013, and prior to that, the Apartment was a rent stabilized apartment occupied by “Howard Spiegel.”

Previous to the “deregulation” of the Apartment, from 2011 to 2013, before the Tenants executed the Lease, the legal regulated rent was \$572.46. Again, the Tenants maintain that during their occupancy from 2013 through 2015, the time frame the purported “improvements” were made to deregulate the Apartment, the Landlord did not properly deregulate the residential unit as the Landlord “did not perform qualifying IAs in the Apartment in an amount sufficient to increase the rent for the Apartment past the deregulation threshold” (Amended Complaint ¶ 32). Since the 2013 deregulation of the Apartment happened during the effective period of the Rent Act of 2011 but before the Rent Act of 2015 was in effect, the deregulation threshold was \$2,500.00 (*see Matter of B.G.R. Realty LLC v Stein*, 194 AD3d 634, 635 [1st Dept 2021]). Nowhere on the DHCR Rental History is the rent amount of \$2,500.00 recorded and that may be because the Lease never reflected the “RS” a/k/a “rent stabilized” status of the apartment as noted in the DHCR document itself. To the contrary, the Lease, the Tenants aver, was fraudulent presented and executed as a “free market” lease not subject to the RSL or the RSC.

There can be no dispute that the Tenants are entitled to judgment on the issue of liability respecting an overcharge claim and that the Landlord failed to present documentary evidence

and/or statements from someone with personal knowledge of the facts to support a finding that the Apartment was properly deregulated and that an overcharge in fact, did not occur. Absent a showing by the Landlord that the Apartment was properly deregulated – apparently only for a span of three years as the Landlord insists the Apartment is a rent-stabilized apartment – a rent-stabilized lease should have been offered to the Tenants in 2013.

The “high rent” vacancy IAs exemption to the legal regulated rent was reflected in the DHCR Rental History, but the amount registered surpassed the standard deregulation threshold of \$2,500.00. The Landlord has offered no rebuttal evidence to demonstrate that an amount beyond the \$2,500.00 was correctly assessed based on qualifying improvements warranting a higher rent amount. Therefore, the Tenants should have been offered a rent-stabilized lease back in 2013 at the rate of \$2,500.00/month consistent with the fact that eventually in 2015 they were offered a rent-stabilized lease, albeit with an inappropriately overcharged rent amount.

Incidentally, RSC § 2522.5 (g) (1) provides that a proper lease renewal must be offered “on the same terms and conditions” as the expired lease. Clearly, the 2015 Lease Renewal was not at all “on the same terms and conditions” as the Lease dated 2013. Additionally, to the extent there is any waiver language in either leases, it is noted that tenants, in accordance with the RSL § 2520.13, cannot waive benefits under the rent stabilization laws and such waivers are generally considered void (*see Riverside Syndicate, Inc. v Munroe*, 39 AD3d 256, 257 [1st Dept 2007], *affd* 10 NY3d 18 [2008]).

Having examined “all the available rent history which is reasonably necessary” to determine the legal regulated rent in investigating the rent overcharge claim, pursuant to NYC Administrative Code § 26-516(h) which specifies that,

“[n]othing contained in this subdivision shall limit the examination of rent history relevant to a determination as to:

- (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable,”

This Court finds that the appropriate rent that the Tenant should have originally been offered (had they been offered the proper legal rent-stabilized lease they were entitled to received) was \$2,500.00.

In accordance with RSL § 26-516 (a) (2), overcharge penalties are limited to six years prior to the date of the Complaint, making July 21, 2014 the base date starting point as this action was commenced on July 21, 2020. Hence, in July of 2014, it is undisputed that the Tenants were paying rent, as follows:

- June 21, 2014 to May 31, 2015 at the rental rate of \$2,950.00/month⁴
- June 1, 2015 to May 31, 2016 at the rental rate of \$2,979.00/month⁵
- June 1, 2016 to July 21, 2020 at the rental rate of \$2,979.00/month.⁶

The total rent amount the Tenants paid within six years prior to the commencement of this action was, \$214,488.00. The legal regulated rent on the base date of July 21, 2014, should have been \$2,500.00 had the Tenants appropriately been issued a rent regulated lease as they were entitled to receive. The total rental amount that should have been paid from July 21, 2014 to July 21, 2020, is \$180,000.00. The difference between what the Landlord was owed

⁴ From June 1, 2013 to May 31, 2014 the rental rate of \$2,950.00/month was paid pursuant to the “free market” 2013 original the Lease. No lease was executed from 2014 to 2015, but there is no dispute that the Tenants continued to pay rent at the rate of \$2,960.00/month.

⁵ Pursuant to the “rent stabilized” 2015 Renewal Lease.

⁶ No lease has been executed since 2016 and the same rental amount of \$2,979.50/month has been paid in rent up to the commencement of this action on July 21, 2020.

(\$180,000.00) and what the Landlord was paid (\$214,140.00), is \$34,140.00 which reflects the overcharge amount collected by the Landlord.

To the extent that the Landlord failed to rebut the presumption of willfulness on the rent overcharge claim, the Tenants are entitled to treble damages (see, Administrative Code of City of N.Y. § 26-517[e]; *Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 684, [1st Dept. 2011]); *Matter of Sohn v New York State Div. of Hous. & Community Renewal*, 258 AD2d 384, 685 [1st Dept. 1999]; *Matter of 125 St. James Place LLC v New York State Div. of Hous. & Community Renewal*, 158 AD3d 417 [1st Dept. 2018]; and, *Matter of Pamela Equities Corp. v Environmental Control Bd. of the City of N.Y.*, 171 AD3d 623, 624 [1st Dept. 2019]). Indeed, the Landlord did not present any evidence that the overcharge amount was not willful.

It is further noted that the Landlord, as a successor owner, did not present any evidence that it was not covered by the protections found in RSC § 2526.1[f][2][i] which could have relieved it of any overcharge liability. Treble damages, in accordance with RSL §26-516(a)(2), are therefore warranted in this case upon “all overcharges willfully collected by the owner starting six years before the complaint is filed” (*Grady v Hessert Realty LP*, 178 AD3d 401, 405 [1st Dept 2019]).

“Generally, RSC § 2526.1(f)(2)(i) provides that ‘a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner.’ RSC § 2526.1(f)(2)(i) may, however, shield a current owner from overcharges collected by a predecessor owner where the current owner is a purchaser or successor to a purchaser at a judicial sale, ‘in the absence of collusion or any relationship between such owner and any prior owner’ and ‘where no records sufficient to establish the legal regulated rent were provided at [the] judicial sale ...’ (RSC § 2526.1[f][2][i]” (*Fordham Fulton Realty Corp., v DeLeon*, 65 Misc

3d 141(A), [App Tm, Sup Ct, NY County 2019], quoting, *Matter of Gaines v. New York State Div. of Hous. & Community Renewal*, 90 NY2d 545 [1997]). Here, no exception to liability on treble damages has been presented by the Landlord. Also, the failure to register pertinent rent registrations with DHCR occurred while the Landlord was the owner of the Building. Treble damages are therefore warranted in this case.

The amount subject to treble damages is \$34,140.00 as treble damages in an overcharge case are calculated from the amount the Tenant overpaid and trebling this amount, the Tenant is entitled to an award of \$102,420.00 in treble damages. No interest upon this award is granted nor required (*id.*). The Tenants are also not entitled to pre-judgment interest on treble damages and interest awarded from the date of the court's decision moving forward (*Mohassel v. Fenwick*, 5 NY3d 44, 50, 799 [2005]).

The Tenants' application for summary judgment on their Third Cause of Action for attorneys' fees, is granted. As the prevailing party and in accordance with RSL § 26-517.1 and RSC § 2526.1(d) and/or RPL § 234, and ¶ 19 of the Lease, the Tenants are also entitled to an award of attorneys' fees (*see DiLorenzo v Windermere Owners LLC*, 189 A.D.3d 664, 665 [1st Dept 2020]).

CONCLUSION

Accordingly, it is

ORDERED that the application (Motion Seq. 002) by defendant, 25 Grove Street LLC, for partial summary judgment (CPLR §3212 [e]) dismissing the Second Cause of Action, is denied, in its entirety; and it is further

ORDERED that the cross- motion application for summary judgment (CPLR §3212) by plaintiffs, Maire Shelia Theodora Austin and Francis Ian Austin, is granted; and it is further

ORDERED that the Clerk of the Court shall render judgment in favor of Plaintiffs Maire Shelia Theodora Austin and Francis Ian Austin and against Defendant, 25 Grove Street LLC in the amount of \$34,140.00, plus interest, costs and disbursements; and it is further

ORDERED that the Clerk of the Court shall render judgment in favor of Plaintiffs, Maire Shelia Theodora Austin and Francis Ian Austin and against Defendant, 25 Grove Street LLC, in the amount of \$102,420.00, representing treble damages; and it is further

ORDERED, DECLARED and ADJUDGED that Apartment #1, located at 25 Grove Street, New York, NY, is a rent-stabilized apartment subject to the Rent Stabilization Law and the Rent Stabilization Code; and it is further

ORDERED and ADJUDGED that the legal regulated rent for Apartment #1, located at 25 Grove Street, New York, NY, is \$2,500.00/month; and it is further

ORDERED and ADJUDGED that Defendant, 25 Grove Street LLC, shall present Plaintiffs, Maire Shelia Theodora Austin and Francis Ian Austin, with a proper rent-stabilized lease reflected the rent of \$2,500.00/month and properly register the Apartment with DHCR; within thirty days after service of a copy of this order with Notice of Entry; and it is further

ORDERED that that portion of the Plaintiffs' action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees Plaintiffs, Maire Shelia Theodora Austin and Francis Ian Austin, may recover against the Defendant, 25 Grove Street LLC, is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for Plaintiffs shall, within 30 days from the date of this order, serve a copy of this Order with Notice of Entry, together with a completed Information Sheet⁷,

⁷ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).

upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date.

Phillip Hom
202108231436477001MEDCA178E07A9F72B0749A3A1E65274D

<u>8/23/2021</u>			<u>Phillip Hom, JSC</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE	