SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD **PART** 35

Justice

----------X

ALEXANDRA DADISMAN, NANCY O'MALLEY, SHEILA FALLIK, ALAN SALANT, MICHAEL BERL, ANNETTE HAYWOOD-CARTER, KENNETH CARTER, JESSE EISMAN, JOSHUA MICLEY, CHRISTINA HENSLER, KEVIN FITZPATRICK, STUART FRAASS, FRANCES RIVERA, DANIELLE GURR, HOWARD GURR, CHRISTINE MAHONEY, KEVIN MAHONEY, ALEXANDER DAVIDSON, KAREN DAVIDSON, JANEL RABBANI, JANET RABBANI, BRYAN PRYWES, MITCH PRYWES, MARISA VIETS, ROBERT VIETS, LISA KANG, ANDERS RICH, SASHA NANUS, DAVID SMITH, BARBARA LEE, DENNIS THREAD, KAY THREAD, TALIA KLEIN, DAVID OFFIT, HANNAH DERESIEWICZ, SIOBHAN O'DRISCOLL, PATRICK O'DRISCOLL

Plaintiff,

- v -

D-DAY REALTY LP, MARK SCHARFMAN,

Defendant.

----------X

INDEX NO. 651450/2015

MOTION DATE 02/04/2022

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 196, 197, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

ORDERED that the plaintiffs' motion pursuant to CPLR 2221 (motion sequence number 006) for leave to reargue a portion of their prior motion for summary judgment is denied with respect to plaintiffs David Cooper-Smith, Siobhan O'Driscoll and Patrick O'Driscoll, but is granted with respect to plaintiff Michael Berl; and it is further

ORDERED that, upon reargument, the court modifies its prior order, dated June 29, 2021 (motion sequence number 003), to the extent of holding in abeyance so much of plaintiff's motion as seeks summary judgment on the portion of the third cause of action for rent

overcharge that pertains to plaintiff Michael Berl pending further submissions by counsel as directed herein; and it is further

ORDERED that the balance of plaintiffs' previous motion pursuant to CPLR 3212, and of the responsive cross motion of defendants D-Day Realty LP and Mark Scharfman (together, motion sequence number 003), remain held in abeyance pending further submissions by counsel as directed herein; and it is further;

ORDERED that counsel for plaintiffs shall serve a copy of this order along with notice of entry on counsel for defendants within ten (10) days; and it is further

ORDERED that counsel are thereafter directed to appear for a Microsoft Teams Conference on June 10, 2022 at 10:00 am; and it is further

ORDERED that plaintiffs' counsel is directed to submit the supplemental materials described herein within thirty (30) days following the Teams Conference, and defendants' counsel is directed to file a response within thirty (30) days after receipt of said supplemental submissions.

In this residential landlord/tenant action, plaintiffs move for leave to reargue (motion sequence number 006) a portion of their earlier motion for summary judgment (motion sequence number 003). The court's prior decision partially disposed of that motion. This decision partially modifies that decision.

BACKGROUND

Defendants D-Day Realty LP (D-Day or landlord) is the record owner a residential apartment building located at 250 West 99th Street (a/k/a 248-256 West 99th Street) in the County, City and State of New York (the building). *See* NYSCEF document 122 (verified complaint), ¶ 4. Co-defendant Mark Scharfman (Scharfman) is an officer of D-Day. *Id.*, ¶ 5. Plaintiffs are current and former tenants of various apartment units in the building. *Id.*, ¶ 7. Plaintiffs commenced this action because they believe that their apartments were subject to the Rent Stabilization Law (RSL), but that landlord collected illicit rent overcharges from them by imposing improper market rate rents instead. *Id.*, ¶ 11.

Plaintiffs commenced this action on April 22, 2015 by filing a summons and complaint that set forth causes of action for: 1) a declaratory judgment that their apartments are subject to the Rent Stabilization Law (RSL); 2) a declaratory judgment that their leases are all invalid, along with an injunction requiring landlord to offer them proper rent-stabilized leases; 3) rent overcharge; 4) an injunction pursuant to General Business Law § 349 (h); and 5) attorney's fees and court costs. *See* NYSCEF document 122 (verified complaint). Landlord filed an answer with affirmative defenses on July 9, 2015. *See* NYSCEF document 123 (verified answer).

On August 4, 2017, plaintiffs moved for summary judgment on the complaint, and defendants thereafter cross-moved to dismiss the complaint on August 25, 2017 (together, motion sequence number 003). On November 16, 2017, plaintiffs also moved for leave to amend

the complaint to add new plaintiffs and to consolidate other new plaintiffs' separate actions with this one (motion sequence number 005). Defendants did not oppose that motion.

On June 29, 2021, the court issued a decision that: 1) denied plaintiff's motion to amend (motion sequence number 005) as moot since the relief sought therein had already been granted in an interim order; 2) granted defendants' cross motion (motion sequence number 003) solely to the extent of dismissing a portion of plaintiffs' first cause of action as moot; and 3) held the balance of the summary judgment motions (motion sequence number 003) in abeyance pending counsel's submission of certain additional material within 30 days. *See* NYSCEF document 191. Counsel did not make those submissions. Instead, on September 7, 2021, plaintiffs filed the instant motion for leave to renew/reargue a portion of its summary judgment motion. With the service of opposition and reply papers, that matter is now fully submitted (motion sequence number 006). However, counsel's failure to submit the additional materials which they were directed to produce in the June 29, 2021 decision precludes the court from rendering its planned final decision on their summary judgment motions (motion sequence number 003).

DISCUSSION

For the sake of clarity, this decision will discuss the two instant motions in reverse order.

I. Plaintiffs' Motion to Reargue (motion sequence number 006)

CPLR 2221 ("Motion affecting prior order") provides, in part, as follows:

> "(d) A motion for leave to reargue:
> "1. shall be identified specifically as such;
> "2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
> "3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. . .."

Settled appellate precedent holds that leave to reargue pursuant to CPLR 2221 may only be granted upon a showing "'that the court overlooked or misapprehended the facts or the law or for

some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). The Appellate Division, First Department, cautions that "a motion for leave to reargue 'is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.'" *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept 2011); quoting *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999). Here, plaintiffs' motion recites that it is a request to "renew and/or reargue," however, counsel's affirmation more specifically identifies it as a request for leave to reargue a portion of the earlier summary judgment motion. *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶¶ 11-14. Plaintiffs submitted their current motion on September 7, 2021, which was within the 30-day period after notice of entry of the court's prior decision was filed on August 9, 2021. *See* NYSCEF documents 193, 196. As a result, the court concludes that the motion meets the statute's "identification" and "timeliness" requirements. It will therefore now consider plaintiffs' arguments that it "overlooked or misapprehended" certain matters regarding three of the building's apartments in the June 29, 2021 decision.

Michael Berl (Apartment 1D)

Plaintiffs assert that the court inadvertently omitted analysis of the rent history of apartment 1D from its June 29, 2021 decision. *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶¶ 15-24. Defendants concede that "[p]laintiffs' counsel appears to be correct in her assertion." *See* Coppe affirmation in opposition (motion sequence number 006), ¶ 3. After review, the court agrees. This case's convoluted procedural history included an episode after the parties' summary judgment motions had been filed in which plaintiffs' original counsel

was relieved, but plaintiffs' current counsel was not immediately retained by all of the named plaintiffs. *See* NYSCEF document 106 (motion sequence number 004). Michael Berl (Berl) was one such plaintiff. On April 19, 2018, the court entered an interim order permitting Berl and several other plaintiffs to belatedly rejoin plaintiffs' summary judgment motion after they had finalized their representation agreements with plaintiffs' current counsel. *See* NYSCEF document 140. However, at a conference with chambers staff regarding counsels' submissions in connection with their summary judgment motions, Berl's name was apparently inadvertently not included on the list of "moving plaintiffs." *See* NYSCEF document 193 at 6. As a result, the June 29, 2021 decision did not discuss Berl or apartment 1D despite the court's having acknowledged him as a proper plaintiff. *Id.* The court finds that this miscommunication constitutes the "overlooking" or "misapprehending" of a "matter of fact" within the meaning of CPLR 221 (d) (2). Since plaintiffs have thus satisfied all three statutory criteria with respect to Berl, the court grants their motion for leave to reargue so much of their summary judgment motion as pertains to him. The court will address that matter in the latter half of this decision.

David Cooper-Smith (Apartment 6B)

Plaintiffs argue that "the Court overlooked numerous instances of Defendants' fraudulent behavior within apartment 6-B's history, and therefore, the base date rent is inherently unreliable and the default method must be applied" to David Cooper-Smith's (Cooper-Smith) rent overcharge claim. *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶¶ 25-30. Defendants respond that the June 29, 2021 decision correctly found that the 2001 deregulation of apartment 6B was a non-fraudulent, pre-*Roberts* deregulation, and that there was consequently no justification to set the unit's rent via the default method. *See* Coppe affirmation in opposition (motion sequence number 006), ¶¶ 4-10. Plaintiffs' reply papers simply repeat

their original argument. *See* Rozen reply affirmation, ¶¶ 6-10. After review, the court finds that defendants are correct.

The June 29, 2021 decision found that defendants' prolonged refusal to comply with their obligation to file DHCR registration statements for the building's apartments,[1] and their sudden filing of inaccurate amended DHCR registrations in 2015, constituted fraud which justified disregarding the four-year "lookback" provision in the pre-HSTPA version of RSL § 26-516 in effect when this action was commenced. *See* NYSCEF document 193 at 15, citing *Montera v KMR Amsterdam LLC*, 193 AD3d 102 (1st Dept 2021). The June 29, 2021 decision then found that a review of apartment 6B's extended rental history did not disclose any evidence of fraud connected with the unit's 2001 deregulation, and concluded that that deregulation should therefore be treated as a pre-*Roberts* deregulation for the purposes of determining the unit's legal regulated rent. *Id.* at 28-29. Plaintiffs' motion now asserts that the court improperly overlooked evidence of three instances of fraud; however, their arguments fail as a matter of law.

First, plaintiffs assert that defendants' failure to attach a "deregulation rider" to Cooper-Smith's initial lease "was a clear effort to conceal the deregulation, improperly depriving [him] of the ability to interpose a timely challenge to it." *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶ 26. However, the Appellate Division, First Department, has specifically held that a landlord's failure to provide such a rider "although a violation of law,[2] [is] not fraudulent." *Sandlow v 305 Riverside Corp.*, 201 AD3d 418, 419 (1st Dept 2022), citing

[1] As enunciated in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) and *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]), and applicable by virtue of the building's enrollment in the "J-51" real estate tax abatement program between 1987 and 2017.
[2] Such notices are required by Rent Stabilization Code (RSC) § 2520.11 (u) and RSL § 26-504.

Fuentes v Kwik Realty LLC, 186 AD3d 435, 438 (1st Dept 2020). Therefore, the court rejects this argument.

Plaintiffs next complain that "Defendants did not adhere to RSC's and RSL's requirement to register Apartment 6B for 2001 as 'Permanently Exempt' from regulation due to 'High Rent Vacancy,'" but instead "simply stopped registering the apartment altogether for 15 years." *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶ 28. However, it has been observed that the RSC did not require landlords to file "exit registrations" for deregulated apartments until 2014. *See e.g.*, *350 Cent. Park W. Assoc., LLC v Udo*, 72 Misc 3d 1221(A), 2021 NY Slip Op 50812(U) (Civ Ct, NY County 2021); *see also Matter of Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569, 570 (1st Dept 2020) ("the fact that the owner filed an erroneous exit registration on the ground of high-rent vacancy, does not compel a finding of fraud"). Because that requirement was not in place when defendants purportedly deregulated apartment 6B in 2001, plaintiffs may not assert that defendants acted fraudulently by not complying with it. Thus, the court rejects this argument as well.

Finally, plaintiffs argue that defendants' failure to document the 1991 individual apartment improvement (IAI) expenditures that purportedly justified the precipitous increase in apartment 6B's legal regulated rent that year indicates that the unit's subsequent deregulation was fraudulent. *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶ 27. Defendants assert that plaintiffs bear the burden of proof in this instance, and also note that plaintiffs failed to "timely challenge" the subject IAIs. *See* Coppe affirmation in opposition (motion sequence number 006), ¶ 7. The court observes that the pre-HSTPA version of RSL § 26–516 (g) only required landlords to maintain IAI records for a period of four years. *See e.g.*, *Matter of Haskin v New York State Div. of Hous. & Community Renewal*, 203 AD3d 603 (1st

Dept 2022). Because plaintiffs seek to challenge the veracity of IAI work that was performed two decades ago, it is clearly incumbent on them to support their argument with documentary evidence. They have not done so. Therefore, the court rejects their final argument and concludes that the June 29, 2021 decision did not overlook or misapprehend any evidence of fraud. Accordingly, the court denies plaintiffs' reargument motion with respect to Cooper-Smith.

Siobhan and Patrick O'Driscoll (Apartment 9A)

Plaintiffs also argue that the June 29, 2021 decision overlooked or misapprehended evidence of fraud connected with defendants' 1992 deregulation of apartment 9A. *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶¶ 31-39. They specifically assert that:

> "The Defendants' have: 1) failed to provide leases for tenants prior to the commencement of the O'Driscolls' tenancy; 2) failed to provide documentation to show that a warehouse flood that allegedly destroyed their business records even occurred; 3) failed to belatedly register the alleged prior tenants of the subject apartment. If these facts do not support a finding of fraud, nothing does."

Id., ¶ 37. Defendants respond that the June 29, 2021 decision correctly found no fraud connected with apartment 9A's deregulation since the evidence demonstrated that 1) the unit exited rent control in 1990; 2) the first rent stabilized tenant to occupy it in 1992 executed a lease with a rent above the $2,000.00 per month deregulation threshold; and 3) that tenant did not file a timely "fair market rent appeal" (FMRA) to challenge his unregulated rent. *See* Coppe affirmation in opposition (motion sequence number 006), ¶ 11. Again, plaintiffs' reply papers merely repeat their original arguments. *See* Rozen reply affirmation (motion sequence number 006), ¶¶ 11-15. Again, the court finds for defendants.

As was the case with Cooper-Smith's unit, the June 29, 2021 decision disregarded the four-year lookback rule with respect to apartment 9A in view of defendants' fraud in connection

with their DHCR registration practices. *See* NYSCEF document 193 at 15, citing *Montera v KMR Amsterdam LLC*, 193 AD3d at 102. As was also the case with apartment 6B, the June 29, 2021 decision determined that the O'Driscoll's unit had been the subject of a non-fraudulent pre-*Roberts* deregulation because: 1) it occurred in 1992 (and *Roberts* and *Gersten* were not decided until 2009 and 2011, respectively); 2) at that time, the RSC permitted the practice of rent stabilized tenants entering formerly rent controlled units to agree to "first rents" that were above the deregulation threshold, and reserved such tenants the right to challenge such rents via a FMRA; and 3) no FMRA was ever filed regarding apartment 9A. *Id.* The decision specifically noted that the unit's deregulation was improper, but *not* fraudulent. As a result, the Court of Appeals holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]) does not sanction use of the default formula to set apartment 9A's legal regulated rent, and instead requires that that figure be set in accordance with the pre-HSTPA version of RSL § 56-516; i.e., by reference to the DHCR registration on file four years prior to the commencement of the rent overcharge action (in the O'Driscoll's case, $4,500.00 per month). *Id.* All of the evidence of fraud that plaintiffs cite in their current motion involves irregularities in apartment 9A's rent history *after* the unit's non-fraudulent (albeit improper) deregulation in 1992. Because that was a pre-*Roberts* deregulation, the court cannot consider that evidence. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 356-358. Therefore, it cannot support an allegation that the court improperly overlooked or misapprehended a matter of fact or law, and plaintiffs have consequently failed to establish that the O'Driscolls are entitled to relief under CPLR 2221. Accordingly, the court denies plaintiffs' motion as regards their overcharge claim.

The Default Formula

Plaintiffs' motion concludes by asserting that "consideration of the [defendants'] fraudulent acts, . . . would have required the Court to apply the default method to determine the legal rents for each of the units." *See* notice of motion (motion sequence number 006), Rozen affirmation, ¶¶ 40-51. Defendants do not address this assertion in their opposition, and plaintiffs' counsel merely repeats it in her reply. *See* Coppe affirmation in opposition (motion sequence number 006); Rozen reply affirmation, ¶ 16. That is perhaps due to the fact that the June 29, 2021 decision *did* rule that the default formula is the correct method by which to select a base date "legal regulated rent" for each of the five apartments determined therein to have been fraudulently deregulated (specifically, apartments 2D, 3A, 3B, 3D and 6E). *See* NYSCEF document 193 at 44-45. Plaintiff's instant motion does not seek leave to reargue that point with respect to those units. However, since plaintiffs have established that apartment 1D was also fraudulently deregulated, the court grants plaintiffs leave to reassert the "default formula" argument on behalf of Berl in their summary judgment motion. This will be discussed below.

II. Plaintiffs' Motion and Defendants' Cross Motion for Summary Judgment (motion sequence number 003)

Having granted plaintiffs' reargument motion in part and denied it in part, the court turns its attention to plaintiffs' prior motion for summary judgment on their third cause of action for rent overcharge (motion sequence number 003). The June 29, 2021 decision recited that a party seeking summary judgment 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 moving party does so, 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). The court's decision included findings as to whether each moving plaintiff was entitled to summary judgment on the separate issues of liability and damages on their respective rent overcharge claims. This decision resumes that task.

Michael Berl (Apartment 1D)

Berl first took possession of apartment 1D on June 27, 2011 pursuant to a one-year deregulated lease that ran from July 1, 2011 until June 30, 2012 with a monthly rent of $3,300.00. *See* notice of cross motion, (motion sequence number 003), Rothken affirmation, exhibit K. Defendants also produced copies of three one-year deregulated renewal leases that Berl subsequently executed which respectively ran from: 1) July 1, 2012 until June 30, 2013 with a monthly rent of $3,450.00; 2) July 1, 2013 until June 30, 2014 with a monthly rent of $3,525.00; and 3) July 1, 2014 until June 30, 2015 with a monthly rent of $3,625.00. *Id.*, exhibit K. Because the rent overcharge claims period ran from April 20, 2011 through April 20, 2015, the foregoing documentary evidence indicates that Berl sustained $159,550.00 in "actual rent charges"[3] during the portion of the claims period when he occupied apartment 1D. The partial payment history that defendants produced indicates that Berl also made "actual rent payments" in the same total amount ($159,550.00). *Id.*, exhibit K.

With respect to apartment 1D's "legal regulated rent," the building-wide DHCR roll recites that: 1) defendants filed contemporaneous annual registration statements listing apartment

[3] The $159,550.00 in total charges is composed of: 1) 12 months (July 2011-June 2012) x $3,300.00 per month ($39,600.00); 2) 12 months (July 2012-June 2013) x $3,450.00 per month ($41,400.00); 3) 12 months (July 2013-June 2014) x $3,525.00 per month ($42,300.00); and 4) 10 months (July 2014-April 2015) x 3,625.00 per month ($36,250.00?).

1D as rent stabilized from 1984 until 1997; 2) defendants filed an amended registration statement on July 6, 2015 that retroactively listed apartment 1D as rent stabilized from 1998 through 2001; 3) defendants listed apartment 1D as "permanently exempt" from rent stabilization in 2002 (with no reason recorded); 4) defendants' July 6, 2015 amended DHCR filing retroactively re-registered apartment 1D as rent stabilized again from 2003 through 2015; and 5) defendants' contemporaneous DHCR registrations in 2016 and 2017 also listed apartment 1D as rent stabilized. *Id.*, exhibit H. The rent roll records the unit's "legal regulated rent" as being the same as the amounts set forth on Berl's four leases (with variations of approximately $30.00 during the second and third lease terms). However, defendants inserted those amounts retroactively on their July 2, 2015 amended DHCR re-registration, which casts doubt on their accuracy. That 2015 filing also retroactively amended apartment 1D's legal regulated rents from 1998 through 2001, the year before the unit was listed as "permanently exempt" from rent stabilization. The rent roll states that the unit's 1997 legal regulated rent was $633.88 per month, and that its 1998 legal regulated rent was $1,297.42 per month. *Id.*, exhibit H. The rent roll does not list a reason for this increase of over 100%. Defendants appear to have unilaterally imposed on their July 6, 2015 amended DHCR registration filing. The unit's rent was thereafter increased incrementally each year until 2001, when the legal regulated rent was recorded at $1,651.56 per month. *Id.* However, the rent roll states the tenant of record that year, one Joshua Haywood, actually paid a much higher monthly rent of $2,850.00. *Id.* As noted, apartment 1D was listed as "permanently exempt" from rent stabilization in 2002 with no legal regulated rent recorded on the rent roll. *Id.* However, in 2003, the amended DHCR filing retroactively re-registered apartment 1D as being rent stabilized, again with a legal regulated rent of $1,961.87 per month.

Id. The rent roll did not record a reason for the $300.00 increase either.[4] Nor is there a reason for defendants to have left the 2002 registration unamended, given that the building was enrolled in the "J-51" program that year and subject to rent stabilization as a matter of law. Similarly unexplained are the calculations of the increases to apartment 1D's legal regulated rent which were recorded subsequent to 2002. Those figures seem to have been raised by increments of several hundred dollars every other year, and to have reached a high point of $3,350.00 per month in 2009, only to have been (inexplicably) reduced to $3,000.00 per month in 2010. *Id.* The court also observes that the rent roll states that, between 2003 and 2008, apartment 1D's tenants routinely made actual rent payments of up to $1,000.00 per month above the unit's recorded legal regulated rent. Mitchell Rothken, an officer of D-Day's registered managing agent (non-party Beach Lane Management, Inc.), alleges that apartment 1D's various legal regulated rent increases were justified by, *inter alia*: 1) a $20,000.00 IAI expenditure in 1997; 2) an 18% vacancy allowance and 7.8% longevity allowance that same year; 3) a pro-rated, building-wide "major capital improvement" (MCI) increase in 2006; and 4) subsequent RGBO and vacancy increases. *See* notice of cross motion (motion sequence number 003), Rothken affirmation, ¶ 11. However, Rothken's assertions are not credible. He admits that the 1997 expenditure of $20,000.00 in IAI costs was an estimate and provided no documentation to support it. *Id.* The 2006 MCI order approved an increase of $20.00 per room to each of the building's rent stabilized apartments; however, the DHCR rent roll records that apartment 1D's legal regulated rent that year was the same as that recorded in the previous year ($,2378.27 per

[4] The court observes that $300.00 greatly exceeds the 2% increase to apartment 1D's $1,297.42 monthly rent that was permitted by the Rent Guidelines Board Order (RGBO) that was in effect in 2002. The permissible amount under that order would have been an increase of approximately $26.00.

month) with *no* MCI increase added. *Id.*, exhibits H, L. The RSC does not permit a landlord to impose both a longevity increase and a vacancy increase on a rent stabilized apartment's rent at the same time. RSC § 2522.8. Finally, apartment 1D's rent increases after 2003 do not appear to correspond with the percentage increases permitted by the RGBO orders in effect when defendants imposed them. The court concludes that apartment 1D's rent registration history is unreliable as a result of defendants' fraudulent attempts to conceal and/or alter the unit's actual legal regulated rent. Accordingly, the "default formula" must be used to establish that figure on the April 20, 2011 base date by reference to the rent of a "comparable apartment." RSC § 2522.6 (b) (3) (i); *see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 355-356.

Because apartment 1D's last reliable legal regulated rent appears to have been the $633.88 monthly amount recorded in 1997, and because it would have been mathematically impossible to increase that rent to the $3,300.00 that Berl paid in 2011 solely by adding authorized RGBO and/or vacancy percentage increases over a 14-year period, it is highly probable that apartment 1D's "legal regulated rent" was substantially lower that Berl's "actual rent charges" and "actual rent payments." This would necessarily result in a finding that defendants collected a rent overcharge from him in violation of the pre-HSTPA version of RSL § 26-516. However, until defendants identify a comparable apartment's rent for use in the default formula, the court cannot make a final finding with respect to defendants' liability to Berl for a rent overcharge. Nor can it calculate what amount of money damages (if any) Berl sustained during the claims period as a result of such an overcharge. Plaintiffs' moving papers did not identify a comparable apartment's rent. Accordingly, the court concludes that it must hold

plaintiffs' motion for summary judgment on so much of their third cause of action as pertains to Berl in abeyance pending counsel's submission of the supplemental material discussed *infra*.

David Cooper-Smith (Apartment 6B)

Because the court denied plaintiffs' reargument motion with respect to Cooper-Smith, it adheres to its previous ruling holding plaintiffs' motion for summary judgment on his rent overcharge claim in abeyance pending further submissions by counsel.

Siobhan and Patrick O'Driscoll (Apartment 9A)

Because the court denied plaintiffs' reargument motion with respect to the O'Driscolls, it adheres to its previous ruling holding plaintiffs' motion for summary judgment on their rent overcharge claim in abeyance pending further submissions by counsel.

Supplemental Submissions

The June 29, 2021 Decision and Order ("the June 2021 Order") expressly directed counsel to submit certain supplemental material that is necessary for the court to complete the calculations required to determine whether or not plaintiffs are entitled to summary judgment on their individual rent overcharge claims within thirty (30) days following service by defendants of the June 2021 Order with notice of entry. *See* NYSCEF document 193 at 49-50. The court also directed counsels to appear at a Microsoft Teams Conference on August 10, 2021 to discuss the submissions. *Id.*

Defendants' counsel did not file the June 2021 Order with notice of entry until August 9, 2021. NYSCEF doc No. 193. By Letter to the Court filed the same day, counsel apologized for his delay in filing the notice of entry, and respectfully requested an extension to prepare the supplemental submissions through September 6, 2021. NYSCEF doc No. 194. Counsel also requested an adjournment of the August 10, 2021 conference due to a scheduling conflict, and

also on the ground that holding the conference *after* the supplemental submissions were received "will surely result in a more fruitful conference". *Id.* Counsel also emailed the Court on August 9, 2021 to advise that plaintiffs did not oppose the adjournment request.

By email dated August 9, 2021, the Court held:

> "Defendant's counsel's request for an adjournment of tomorrow's Teams conference is granted. The Court finds an adjournment is reasonable given that the purpose of the Teams conference was to discuss the further submissions directed in this Court's June 30 order, and counsel has requested more time to prepare the submissions. The conference is thus adjourned to October 12, 2021, at 10:00 am."

By email dated August 10, 2021, the Court moved the adjourned conference to October 13, 2021 due to an internal scheduling conflict.

On September 8, 2021, plaintiffs filed the instant motion seeking leave to reargue part of the June 2021 Order.

By email dated October 6, 2021, the Court advised the parties as follows:

> "…the Court is canceling the conference in this matter scheduled for next Wednesday, October 13 at 10 am.
>
> The purpose of the October 13 conference was to discuss the further submissions directed in the [June 2021 Order]. The conference, originally scheduled in August, was adjourned to give counsel more time to prepare the submissions. However, no submission schedule was set, and no submissions have been received from counsel.
>
> Furthermore, the conference cannot proceed at this juncture given that on September 8, Plaintiffs' counsel moved to reargue the [June 2021 Order] (NYSCEF doc No. 196). Accordingly, additional submissions under the [June 2021 Order] must be held in abeyance pending the Court's decision on Plaintiffs' application for reargument."

In light of the decision herein, the further submissions that were held in abeyance shall now be complied with as follows.

The court directs counsels to appear at a Microsoft Teams Conference on June 10, 2022, at 10:00am, at which plaintiffs' counsel must identify which of the individual plaintiffs are

participating in the instant summary judgment request, which are not, and whether or not the claims of the latter group are therefore to be deemed abandoned. Plaintiffs' counsel shall also advise as to whether plaintiffs intend to withdraw any of the causes of action in the original complaint. Following the conclusion of the conference, plaintiffs' counsel is directed to make a supplemental submission within 30 days[5] that includes the following information:

> 1) for every moving plaintiff, a calculation of their "actual rent charges" drawn from the leases that were in effect for their respective apartments during the April 2011-April 2015 rent overcharge claims period (including a specific recitation of each lease's term and monthly rental charge);
> 2) for every moving plaintiff, a calculation of their "actual rent payments" during the April 2011-April 2015 rent overcharge claims period drawn from each individual plaintiff's rent payment history (along with proof of such payments, if any);
> 3) for those moving plaintiffs whose apartments were found *not* to have been fraudulently deregulated, identify each apartment's "legal regulated rent" by reference to the "base date rent" that was in effect for each subject unit in April 2011 (with that latter figure to be drawn from the DHCR registration statement in effect for each unit in April 2011), and calculate each unit's total "legal regulated rent" charges over the course of the April 2011-April 2015 rent overcharge claims period;
> 4) for that same group of plaintiffs, a calculation of the total rent overcharge each plaintiff sustained (if any) which is to be arrived at by comparing their respective total "actual rent payments" with their total "legal regulated rent" payments over the course of the April 2011-April 2015 rent overcharge claims period;
> 5) for those members of that same group of plaintiffs who did sustain a rent overcharge, a calculation of treble damages for each such overcharge that is restricted to the final two years of the rent overcharge claims period (i.e., from April 2013-April 2015);
> 6) for those moving plaintiffs whose apartments *were* found to have been fraudulently deregulated, identify each apartment's "legal regulated rent" by reference to the rent of a "comparable apartment" that was in effect in April 2011, and calculate each unit's total "legal regulated rent" charges over the course of the April 2011-April 2015 rent overcharge claims period;
> 7) for that same group of plaintiffs, a calculation of the total rent overcharge each plaintiff sustained (if any) which is to be arrived at by comparing their respective total "actual rent payments" with their total "legal regulated rent" payments over the course of the April 2011-April 2015 rent overcharge claims period; and
> 8) for those members of that same group of plaintiffs who did sustain a rent overcharge, a calculation of treble damages for each such overcharge that is restricted to the final two years of the rent overcharge claims period (i.e., from April 2013-April 2015).

[5] Counsels may advise at the June 10, 2022 Conference whether they request more time to prepare the supplemental submissions. However, the Court will only allow up to 45 days, given that the supplemental submissions were originally directed nearly a year ago in the June 2021 Order.

Defendants' counsel is directed to serve a response to the foregoing supplemental submission within 30 days after receiving a copy of it. The failure of either counsel to comply with the foregoing submission requirements shall authorize opposing counsel to submit a motion to dismiss the complaint and/or strike the answer as a result of such non-compliance.

The court adheres to its prior ruling holding the balance of plaintiffs' summary judgment motion (and defendants' cross motion) in abeyance pending its resolution of plaintiffs' rent overcharge claims, inasmuch as plaintiffs' other causes of action are all dependent on said overcharge claims. Should plaintiffs' counsel wish to withdraw any of the other causes of action in the complaint, it should notify the court of the intention to do so at the upcoming video conference.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the plaintiffs' motion pursuant to CPLR 2221 (motion sequence number 006) for leave to reargue a portion of their prior motion for summary judgment is denied with respect to plaintiffs David Cooper-Smith, Siobhan O'Driscoll and Patrick O'Driscoll, but is granted with respect to plaintiff Michael Berl; and it is further

ORDERED that, upon reargument, the court modifies its prior order, dated June 29, 2021 (motion sequence number 003), to the extent of holding in abeyance so much of plaintiff's motion as seeks summary judgment on the portion of the third cause of action for rent overcharge that pertains to plaintiff Michael Berl pending further submissions by counsel as directed herein; and it is further

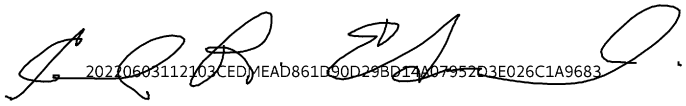
ORDERED that the balance of plaintiffs' previous motion pursuant to CPLR 3212, and of the responsive cross motion of defendants D-Day Realty LP and Mark Scharfman (together,

motion sequence number 003), remain held in abeyance pending further submissions by counsel as directed herein; and it is further;

ORDERED that counsel for plaintiffs shall serve a copy of this order along with notice of entry on counsel for defendants within ten (10) days; and it is further

ORDERED that counsel are thereafter directed to appear for a Microsoft Teams Conference on June 10, 2022 at 10:00 am; and it is further

ORDERED that plaintiffs' counsel is directed to submit the supplemental materials described herein within thirty (30) days following the Teams Conference, and defendants' counsel is directed to file a response within thirty (30) days after receipt of said supplemental submissions.



6/3/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE