Greenwood v Maxtor Realty Corp.
2022 NY Slip Op 33800(U)
November 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 523924/2018
Judge: Debra Silber

At an IAS Part Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of November, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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DANIEL GREENWOOD AND CAROL SALEM,

Plaintiffs,

-against-

MAXTOR REALTY CORPORATION a/k/a MAXTOR REALTY CORP., MAXTOR REALTY, AND EMCEE MANAGEMENT CORP.,

Defendants.

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DECISION / ORDER

Index No.: 523924/2018
Mot. Seq. # 4 & 5

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations)	83-114; 115-152
Opposing Affidavits (Affirmations)	154-160, 185; 161-184
Reply Affidavits (Affirmations)	188-194; 186-187

In this action seeking declaratory and injunctive relief and damages stemming from rent overcharges, defendants Maxtor Realty Corporation a/k/a Maxtor Realty Corp. and Maxtor Realty (collectively, Maxtor) and defendant Emcee Management Corp. (EMC) (collectively, defendants) move (in motion sequence [mot. seq.] four) for an order, pursuant to CPLR 3212 (a), granting summary judgment in their favor and dismissing plaintiffs Daniel Greenwood and Carol Salem's complaint.

Plaintiffs separately move (in mot. seq. five) for an order granting summary judgment in their favor pursuant to CPLR 3212 (a), striking defendants' affirmative

defenses and dismissing defendants' counterclaim pursuant to CPLR 3212 (b) and CPLR 3211 (b).

BACKGROUND

Plaintiffs are tenants in a six-story apartment building, which has 44 units, located at 59 Livingston Street in Brooklyn (Building). The Building has been owned by Maxtor since 1944. EMC is the Building's management company. Plaintiffs first took possession of apartment 2B in the Building pursuant to an unregulated market rate lease with a term from July 15, 2006 to July 31, 2007 at a monthly rent of $3,900.00. Plaintiffs continued their tenancy through a series of unregulated lease renewals until August 1, 2016, when they were offered and accepted a two-year lease, with a monthly rent of $4,650.00, printed on a rent stabilization lease form but not accompanied by a rent stabilization rider.[1] Thereafter, to date, plaintiffs have been offered, and have accepted, rent stabilized leases. According to the New York State Division of Housing and Community Renewal (DHCR) rent registration history, prior to plaintiffs' tenancy, apartment 2B was registered as a rent stabilized apartment from 1984 through 1999. In 1999, it was registered as exempt from the Rent Stabilization Law of 1969 as amended (RSL) and the Rent Stabilization Code [9 NYCRR] (RSC), a codification of the RSL issued by the DHCR, based on the "high rent" deregulation threshold of $2,000 in effect at the time for apartments which became vacant.

[1] The Rider is mandatory, and the content is statutory.
https://hcr.ny.gov/system/files/documents/2022/09/ra-lr1-09-2019.pdf

In 2003, defendants began receiving J-51 tax abatement benefits for the Building, which remained in effect until 2014. However, defendants continued to treat several apartments in the Building, including plaintiffs' apartment, as unregulated market rent apartments. According to defendants, they did not learn, until 2016, that the entire Building became subject to the RSL and RSC upon receipt of the tax abatement benefits. Upon learning that plaintiffs' apartment was required to be rent stabilized, defendants offered plaintiffs the August 1, 2016 lease renewal on a rent stabilization lease form and timely registered their apartment as rent stabilized with DHCR for the year 2016. Later, in February 2019, defendants filed rent registrations for plaintiffs' apartment for the years 2008 through 2015 with DHCR.

Plaintiffs commenced this action on November 28, 2018, by the filing of a summons with notice and subsequently filed a complaint on December 20, 2018. The complaint was later amended on November 19, 2019, following a court order granting plaintiffs leave to do so, after the enactment of the Housing Stability and Tenant Protection Act of 2019 (HSTPA). In this Act, the New York State Legislature, *inter alia*, amended RSL § 26-516 and CPLR 213-a, which govern rent overcharge claims and the statute of limitations for bringing such claims, respectively, effective June 14, 2019 (L 2019, Ch 36, part F). In their complaint, plaintiffs assert three causes of action, in which they seek a 1) declaratory judgment and an injunction regarding their rent stabilized status, 2) an order setting the amount of their legal regulated rent (LRR), and 3) an award of reimbursement for their overcharge, with treble damages, and attorneys' fees.

By letter dated January 8, 2019, after this action was commenced, defendants sent plaintiffs a refund check in the amount of $5,595.77, which purportedly represented all overcharges from the period from August 2016 through January 2019, plus interest, in accordance with DHCR Policy Statement 89-2. In addition, the letter advised that "the owner shall only accept $4,500.00 as rent until such time as it is determined that all DHCR registration issues are resolved" (NYSCEF Doc No. 104). However, plaintiffs rejected and returned the check on the basis that the refunded amount did not reflect the full or the correct overcharge amount.

Defendants' Answer

After answering the original complaint on January 25, 2019 and the amended complaint on December 20, 2019, defendants filed a third amended answer on January 7, 2021, without leave of court, but plaintiffs did not object, and stipulated to permit it (Doc. 126). In the third amended answer, defendants asserted seven affirmative defenses, including that the complaint fails to state a cause of action; that the rent for the apartment had been registered with DHCR; and that they have overcome the presumption of willfulness by issuing a refund for all overcharges in accordance with DHCR Policy Statement 89-2. Defendants also interposed a counterclaim for attorneys' fees, based upon the parties' lease.

Defendants' Summary Judgment Motion

On March 4, 2022, defendants filed the instant motion seeking summary judgment in their favor on their counterclaim and dismissal of plaintiffs' complaint. In support of their motion, they submit the affidavit of Michael Cantor (Cantor), the president of Maxtor

Realty Corporation a/k/a Maxtor Realty Corp.[2] and of EMC; their attorney's affirmation; the deed for the Building; proof of the Building's current multiple dwelling registration with NYC HPD (MDR); the Building's J-51 tax benefits history; the DHCR registration history for apartment 2B for the period from 1984 through 2021; the leases for apartment 2B from September 1992 through July 31, 2022; the New York City Rent Guidelines Board (RGB) guidelines for rent increases for rent stabilized apartments from July 1, 1968 through September 20, 2022; and a copy of defendants' refund letter with check.

In his affidavit (Cantor Affidavit), Cantor recounts the various tenants of apartment 2B since 1984 and explains how the rent increased with each lease, leading to the eventual deregulation of the apartment in 1998. In explaining the rent increase in the April 1993 lease to David and Nancy Marks (Marks) from $1,194.27 per month charged to the prior tenant Andrew Berger (Berger) to $1,700.00 charged to the Marks', Cantor states that after Berger's vacatur, Maxtor was entitled to a 10% vacancy increase to $1,313.70 based on the Marks' two-year lease term as well as the addition of 1/40th of the cost of individual apartment improvements (IAIs) as a rent increase, totaling the $1,700.00 per month charged. Cantor attests that sufficient improvements were made to the apartment, to justify the rent increase, but he was unable to locate the contracts or invoices to document the IAIs. Notwithstanding, this, he notes that the Marks' 1993 lease specifically describes the

[2] According to Cantor, there is no entity named "Maxtor Realty" that is affiliated with the Building other than Maxtor Realty Corp. However, he said Maxtor Realty Corporation has been referred to as "Maxtor Realty."

IAIs completed, in that it states that Maxtor renovated the kitchen and two bathrooms and provided new electrical outlets and overhead fixtures.

Cantor continues to explain that, after their initial lease,

> "the Marks' renewed their tenancy for a two-year term commencing April 1, 1995 at a monthly rent of $1,768.00, followed by a one-year renewal commencing April 1, 1997 at a monthly rent of $1,856.40, and finally the tenancy was renewed for one more year for the term April 1, 1998 until March 31, 1999 at a monthly rent of $1,893.53. All increases taken during the Marks' tenancy were in compliance with the relevant Rent Guidelines Board Orders applicable at the time. Next, the apartment was rented to Cameron Fleming pursuant to a one-year lease commencing October 1, 1998 at monthly rent of $3,000.00. A free-market lease was provided as the owner was permitted a 18% vacancy increase which would have allowed the owner to charge in excess of the then existing deregulation threshold of $2,000.00. As such, the apartment was deregulated and registered as such in 1999."

Next, Cantor attests that when the Building obtained the J-51 tax abatement in 2003, he (and defendants) believed that the tax abatement did not preclude the continuation of high rent vacancy deregulation. He states that it was not until 2016 that he and defendants learned that all apartments in the Building had to be rent stabilized during receipt of the J-51 tax benefits, and that any tenants in occupancy during that period would remain rent stabilized until their vacatur unless a lease rider was provided which notified the tenant of the J-51 and the effect of its expiration.[3] Cantor further claims that he and defendants were

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[3] 28 RCNY 5-03(f)(1) and (3) provide, in pertinent part:

(f) *Rent regulatory requirements.*

(1) *Rent regulation generally mandatory.* In order to be eligible to receive tax benefits under the Act and for at least so long as a building is receiving the benefits of the Act, except for dwelling units which are exempt from such requirement pursuant to paragraph (2) below, all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to:

(i) the City Rent and Rehabilitation Law (§§ 26-401 et seq. of the Administrative Code); or

(ii) the Rent Stabilization Law of 1969 (§§ 26-501 et seq. of the Administrative Code); or

unaware of the impact of the Court of Appeals' decision in *Roberts v. Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) and the First Department Appellate Division's decision in *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [2011]) until 2016. However, he attests that, upon learning of the impact of these decisions in 2016, he registered plaintiffs' apartment as rent stabilized with DHCR and issued a rent stabilized renewal lease to plaintiffs.

By their attorney's affirmation, defendants argue that plaintiffs' first cause of action seeking declaratory and injunctive relief is moot, as plaintiffs' apartment has been treated as rent stabilized since 2016, more than two years prior to the commencement of this action. Additionally, defendants argue that plaintiffs' second cause of action for rent overcharge damages should be dismissed since they were unaware until 2016 that receipt of the J-51 tax abatement benefits prevented the continuation of high rent vacancy deregulation and, since upon learning of same, they promptly registered the subject apartment as rent stabilized with the DHCR and issued a rent stabilized lease. They further argue that any overcharge incurred since November 28, 2014, which they allege to be the relevant base date due to the absence of fraud, was mooted by their issuance of a refund to plaintiffs for

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(3) *Deregulation of units.*

(i) With respect to a dwelling unit in any building receiving benefits under the Act,

(A) such unit shall remain subject to rent regulation until the occurrence of the first vacancy after tax benefits are no longer being received for the building at which time the unit shall be deregulated, unless the unit is otherwise subject to rent regulation; or

(B) if each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefits has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of the tax benefits and stating the approximate date on which tax benefits are to expire, such dwelling unit shall be deregulated after tax benefits are no longer being received for the building, unless the unit is otherwise subject to rent regulation.

all overcharges collected, plus interest. Therefore, defendants argue that they have overcome the presumption of willfulness, which precludes the grant of treble damages to plaintiffs, as provided by DHCR Policy Statement 89-2. Based upon their arguments and submissions, defendants contend that they are entitled to summary judgment on their attorneys' fees counterclaim and dismissal of plaintiffs' complaint.

Plaintiffs' Opposition and Motion for Summary Judgment

Plaintiffs oppose defendants' motion and separately move (in mot. seq. five) for summary judgment in their favor on their complaint, to strike defendants' affirmative defenses and to dismiss defendants' counterclaim. In support of their arguments, plaintiffs' submissions include the affidavit of plaintiff Daniel Greenwood; their attorney's affirmation; their rent ledger for the period of April 1, 2012 through November 1, 2021; their apartment's DHCR rent registration history; their attorney's letter rejecting defendants' refund; defendants' response to their interrogatories; Cantor's deposition transcript; and a certified copy of Cantor's affidavit dated March 19, 2002 with the Building rent registrations submitted to the New York City Department of Housing Preservation and Development (HPD) [Doc 140].

In his affidavit, Greenwood states that neither he nor plaintiff Carol Salem were told by defendants that the Building was receiving J-51 tax abatement benefits when they moved in, and, thus, the apartment had to be subject to the RSL upon commencement of their tenancy in 2006, and during the Landlord's receipt of the tax benefits. He further states that, upon their rental of the apartment, it did not appear to have been recently renovated. He attests that they did not learn that they were entitled to be rent stabilized

until late 2017, through their own research and consultations with attorneys. Greenwood avers that with their first lease renewal in 2007 until their 2016 lease renewal, defendants used preprinted rent stabilization lease renewal forms, which bore a prominent stamp indicating that the apartment was "DECONTROLLED" and incorporated the terms of their initial unregulated lease. However, the 2016 lease renewal form did not have the "DECONTROLLED" stamp. Nevertheless, Greenwood states that he and Salem did not notice this omission at the time, and, thus, did not realize then that they had suddenly become rent stabilized tenants, particularly since they received no notification of a change in their regulatory status from defendants. He further asserts that a rent stabilization rider did not accompany the 2016 lease renewal and the RGB increase section depicted a "N/A." In addition to the 2016 lease renewal, Greenwood states that defendants also sent them an income certification form (ICF) in 2016. Upon reviewing the ICF, they saw that it solely applied to rent stabilized tenants and assumed that it had been sent to them in error, so they did not return it to defendants. Greenwood states that defendants never communicated to them that, as rent stabilized tenants, they were required to complete the ICF.

By their attorney's affirmation, plaintiffs argue that defendants engaged in a fraudulent scheme to deregulate their apartment by failing to provide proof of IAIs to substantiate the large rent increase in rent from 1993 to 1994; failing to notify plaintiffs of their regulatory status; failing to register plaintiffs' apartment and at least 16 other apartments in the Building as rent stabilized during receipt of the J-51 tax benefits; and registering plaintiffs' apartment with DHCR in 2019 retroactively for the years 2008 through 2015. Therefore, plaintiffs argue that the court should look beyond the four-year

limitations period and should apply the default formula to determine the LRR; award treble damages in their favor; and should freeze their rent at the LRR until defendants file proper DHCR rent registrations for their apartment. Plaintiffs further argue that they are entitled to a declaratory judgment confirming that they are rent stabilized tenants and an injunction directing defendants to continue to treat them as rent stabilized tenants.

Defendants' Opposition and Reply

In opposition to plaintiffs' motion and in further support of their motion, defendants argue that they were unaware that the J-51 tax abatement benefits subjected the Building to the RSL and RSC but, upon learning of same, they issued plaintiffs a rent stabilized lease and registered their apartment as rent stabilized; have continued to offer rent stabilized leases to plaintiffs since 2016; and tendered a refund to plaintiffs for all overcharges plus interest. As such, defendants content that plaintiffs' causes of action are rendered moot. Defendants further argue that plaintiffs have not raised a triable issue of fact to preclude the grant of summary judgment in defendants' favor, in that plaintiffs have not demonstrated all required elements of their fraud claim. Defendants contend that this action is a "post-*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009] action," since they were unaware of the effect of the J-51 tax abatement on the Building's regulatory status, and argue that the fraud exception [to the four-year statute of limitations for overcharge calculation] is generally inapplicable in *Roberts* cases, and, as a result, any errors or omissions that were the result of the aftermath of *Roberts* cannot implicate a fraud analysis, citing the Court of Appeals decision in *Matter of Regina Metro. Co., LLC v DHCR*, 35 NY3d 332 [2020].

Plaintiffs' Reply

In reply, plaintiffs maintain that defendants engaged in a fraudulent scheme to deregulate their apartment and conceal their rent stabilized status. Moreover, plaintiffs argue that this action is not akin to *Roberts* since, as sophisticated landlords and in light of *Roberts*, defendants knew or should have known that the Building was rent stabilized upon receipt of the J-51 tax abatement. As such, plaintiffs argue that the court should grant summary judgment in their favor.

DISCUSSION

Summary Judgment

It is well settled that summary judgment may only be granted when it is clear that no triable issues of fact exist (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; and *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The movant has the burden to make a prima facie showing of entitlement to summary judgment as a matter of law, by submitting admissible evidence demonstrating that there are no material facts that require a trial (*see Giuffrida v Citibank*, 100 NY2d 72 [2003]). Failure to make this showing requires denial of the motion, regardless of the opposing papers' adequacy (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 at 853). If a prima facie showing is made, the burden shifts to the opposing party to produce admissible evidence demonstrating the existence of a triable issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320 at 324).

Plaintiffs' Summary Judgment Motion

Since the determination of defendants' summary judgment motion is dependent upon the court's analysis of plaintiff's causes of action, the court will first consider plaintiff's summary judgment motion.

First Cause of Action – Declaratory and Injunctive Relief

In their first cause of action, plaintiffs seek a declaratory judgment determining that their tenancy is subject to the RSL and RSC and has been subject to same since it commenced. Plaintiffs further ask the court to set the amount of their LRR and to direct defendants to comply with the RSL and RSC with respect to their tenancy.

As it is undisputed that plaintiffs' tenancy is subject to the RSL and RSC, as defendants began to receive J-51 in 2003, prior to the start of their tenancy in 2006, and did not provide them with notice under 28 RCNY § 5-03 [f] [3], with their initial lease and all subsequent lease renewals, notifying them that their apartment would no longer be rent regulated upon the expiration of the J-51 benefits, that branch of plaintiffs' motion seeking summary judgment in their favor on their first cause of action is granted. The court finds that plaintiffs' tenancy has been subject to the RSL and RSC from the commencement of their tenancy in 2006, and shall continue to be subject to rent stabilization unless the applicable laws permit deregulation in the future, or until they vacate the apartment. Defendants are directed to comply with the provisions of the RSL and RSC with respect to plaintiffs' tenancy. Plaintiffs' LRR is set as directed below.

Second Cause of Action – Rent Overcharge

As it is undisputed that plaintiffs were overcharged, the branch of plaintiffs'

motion seeking summary judgment in their favor on their second cause of action is granted solely to the extent set forth herein.

The parties agree that the HSTPA does not apply to this action since the overcharges occurred before its passage in 2019 (see *Matter of Regina Metro. Co. v DHCR* 35 NY3d 332 [2020]). In *Regina*, the court held that HSTPA's rent overcharge calculation and treble damages provisions could not be applied retroactively; therefore, this rent overcharge claim must be resolved pursuant to the law in effect when the overcharges occurred. As such, the law pertaining to rent overcharge claims, pre-HSTPA, will be applied herein. Notably, the HSTPA did not disturb the precedent which provides that there is no statute of limitations barring the examination of an apartment's rent history to address a challenge to the apartment's regulatory status and the mode of its deregulation (*see Matter of Kostic v DHCR*, 188 AD3d 569 [1st Dept 2020]; *Gersten v 56 7th Ave., LLC*, 88 AD3d 189 at 199; *see also Matter of Regina Metro. Co. v DHCR*, 35 NY3d 332 at 351 n 4, where the court noted that there is a critical "distinction between an overcharge claim and a challenge to the deregulated status of an apartment").

Under pre-HSTPA law, the statute of limitations for the calculation of an overcharge and to determine the LRR was four years from the filing date of an overcharge complaint,[4] which is called the base date. Thus, examination of an apartment's rent history beyond the base date was precluded (*see Matter of Grimm v State of NY Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 364-365 [2010]). An exception to this rule is

[4] CPLR 213-a prior to its amendment by HSTPA.

specified in RSC § 2526.1 (a) (2) (iv), which states that "…the rental history of the housing accommodation pre-dating the base date may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the housing accommodation . . . rendered unreliable the rent on the base date."

"Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury'" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d 332 at 356 n 7, quoting *Vermeer Owners v Guterman,* 78 NY2d 1114, 1116 [1991]). "[A]n increase in the rent alone will not be sufficient to establish 'a colorable claim of fraud', and a mere allegation of fraud alone, without more, will not be sufficient . . . What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization" (*Matter of Grimm,* 15 NY3d 358 at 367).

Regardless of whether fraud is established, there is a presumption of willfulness upon an overcharge finding. As a result, the landlord becomes "liable to the tenant for a penalty equal to three times the amount of such overcharge" (treble damages), commencing from the two-year period preceding the overcharge claim filing, unless the landlord proves by a preponderance of the evidence that the overcharge was not willful (RSL § 26-516 (a); *see also* RSC § 2506.1 [a] [1]). If the landlord rebuts the presumption of willfulness, the overcharge penalty is the amount of the overcharge plus interest from the date of the first overcharge at the rate of interest payable on a judgment pursuant to CPLR 5001 and 5004 (*see* RSC § 2526.1 [a] [1]). Upon a finding of willfulness, interest is also payable, on all overcharge amounts outside of the period for which treble damages are applied. In addition,

a landlord may be assessed reasonable attorneys' fees and costs and, except where treble damages are awarded, interest from the first date of the overcharge under CPLR 5001 and 5004, pursuant to RSL § 26-516 (a) (4) and RSC § 2526.1 (d).

With regard to the LRR, absent fraud, the LRR is set at the amount of monthly rent on the base date plus any subsequent lawful increases and adjustments (*see* RSC § 2520.6 [e] and [f] [1] and RSC § 2526.1 [a] [3] [i]). However, if fraud is shown or when the full rent history from the base date is not provided, the default formula under RSC § 2526 (g) is utilized, by setting the LRR to the lowest rent charged for a rent stabilized apartment at the subject premises with the same number of rooms as the apartment at issue on the base date (*see Thornton v Barton*, 5 NY3d 175, 180 [2005]).

J-51 Tax Abatement and Fraud

Real Property Tax Law § 489 permits municipalities to grant tax abatements to landlords, who make certain improvements on their properties, and also permits municipalities to require that such tax benefits only be granted to rent regulated buildings (*see* Real Property Tax Law § 489 [7] [b]; *see also* Administrative Code of City of NY § 11-243, by which New York City grants such abatements, known as J-51 tax benefits). As such, upon receipt of a J-51 tax benefit, a New York City building becomes subject to the RSL (*see* Housing Preservation and Development Rules and Regulations of City of New York [28 RCNY] § 5-03 [f] [1]). Furthermore, any tenancy commenced during the receipt of the J-51 tax benefit, which is rent stabilized solely by virtue of the J-51 benefit, remains subject to the RSL after expiration of the J-51 benefit until the tenant vacates, unless the landlord provides a notice to the tenant with every lease and lease renewal advising that

the apartment will become deregulated upon expiration of the tax benefits (*see* 28 RCNY § 5-03 [f] [3]). These tax benefits are applied to the real estate taxes for the building for a minimum of twelve years, and can last for up to 20 years. Here, according to NYSCEF Doc 133, the landlord received an abatement for 14 years, with $7,913.60 per year deducted from the annual real estate taxes due for the Building.

Contrary to plaintiffs' contentions, for many years after *Roberts*, there was confusion in the case decisions and city and state regulations regarding J-51 tax benefits and its effect on rent stabilized apartments deregulated under the luxury (high rent or high income) deregulation laws.[5] Prior to *Roberts* (2009), DHCR, the administrative agency that oversees and promulgates rules for all New York City rent regulated apartments, interpreted the laws governing J-51 tax benefits to still allow luxury deregulation during the receipt of J-51 benefits. However, the Court of Appeals, in *Roberts*, determined that DHCR's guidance was incorrect (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 at 287).

The laws concerning buildings receiving J-51 tax benefits continued to be shaped by case law during the years following *Roberts*, most recently by the Second Department Appellate Division in *Gridley v Turnbury Village, LLC* (196 AD3d 95 [2d Dept 2021]). In

[5] HSTPA completely eliminated luxury deregulation (*see* RSL § 25-504.2 [a]), which had started in 1993 (*see* L 1993, Ch 253) and was triggered either when an apartment became vacant and the monthly LRR exceeded $2,000.00 ($2,500.00 after June 24, 2011; *see* L 2011, Ch 97) (high rent vacancy deregulation); when an apartment's monthly LRR exceeded $2,000.00 ($2,500.00 after June 24, 2011; *see* RSL § 26-504.1) (high rent deregulation); or when the tenant's annual household income exceeded $175,000.00 for two consecutive years (*see* RSL § 26-403.1) (high income deregulation).

Gersten v 56 7th Ave., LLC, 88 AD3d 189 at 192) the First Department noted that "[t]he ramifications of *Roberts*, however, remain uncertain; the case left unresolved a number of issues, including those explicitly noted by the Court: retroactivity, class classification, the statute of limitations and other defenses that may be applicable to particular tenants (*Roberts*, 13 NY3d at 287)." Nevertheless, the court in *Gersten* held that *Roberts* should be applied retroactively (*see Gersten v 56 7th Ave., LLC*, 88 AD3d 189 at 207).

In November 2014, the Court of Appeals decided *Borden v 400 E. 55th St. Assoc., L.P.* (24 NY3d 382 [2014]), which recognized the retroactive effect of the *Roberts* decision, ruling that a class action comprised of current and former tenants could recover overcharge damages resulting from the landlord's improper treatment of their apartments as free market while receiving J-51 tax benefits (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 at 389-390). Thereafter, as noted by the court in *Gridley*, "in January 2016, the DHCR, citing the *Borden* case, notified approximately 4,000 landlords of buildings which received J-51 tax abatement benefits that the New York courts had determined that 'any apartment [in a building] that was subject to Rent Stabilization at the date of the receipt of the J-51 benefits' must be registered as rent-stabilized" (*Gridley v Turnbury Village, LLC*, 196 AD3d 95 at 99-100). Subsequently, in 2020, the Court of Appeals, in *Regina*, held that a landlord's belief that an apartment was deregulated prior to clear guidance from the court or DHCR is not sufficient indica of fraud without additional proof of a fraudulent scheme to deregulate (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 at 356-356 n 8). Specifically, the court in *Regina*,

stated that

> "[i]n the wake of *Roberts*, courts and DHCR grappled with a surge of claims filed by tenants alleging overcharges arising from the improper deregulation of their apartments years (in some cases more than a decade) before—claims like those now before this Court. For example, the plaintiffs in *Raden*, who took occupancy of their apartment in 1995 at a market rent, commenced this action in 2010 seeking recovery of overcharges based on a reconstruction of the rent they should have been charged had the apartment never been deregulated. Likewise, in *Taylor*, similar relief was sought in an overcharge claim filed in 2014 brought by a tenant who took occupancy in 2000. In stark contrast to *Thornton*, *Grimm* and *Conason*, in which tenants came forward with evidence of fraud, in these *Roberts* cases, the owners removed apartments from stabilization consistent with agency guidance. Deregulation of the apartments during receipt of J-51 benefits was not based on a fraudulent misstatement of fact but on a misinterpretation of the law—significantly, one that DHCR itself adopted and included in its regulations. As we observed in *Borden v 400 E. 55th St. Assoc., L.P.*, a finding of willfulness 'is generally not applicable to cases arising in the aftermath of *Roberts'* (24 NY3d 382, 389, 998 NYS2d 729, 23 NE3d 997 [2014]). Because conduct cannot be fraudulent without being willful, it follows that the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims" *(Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 at 356).

See also, *Sandlow v 305 Riverside Corp.* (201 AD3d 418, 419 [1st Dept. 2022]), where the court held that a landlord's agent's reliance on his belief that receipt of J-51 benefits would not affect an apartment's regulatory status based upon a 1996 DHCR advisory opinion, although misplaced, did not demonstrate a "conscious and knowing" intent to deregulate the apartment.

This case is a "post-*Roberts* action," and defendants submitted evidence, by the Cantor Affidavit, that they were unaware of the effect of the J-51 benefits on the Building's regulatory status, but upon learning of same in 2016, promptly registered plaintiffs' apartment as rent stabilized and issued plaintiffs a rent stabilized lease, proof of which was

submitted with their papers. The fact that the 2016 lease was not accompanied by a rent stabilization rider, or that plaintiffs claim to be unaware that their 2016 lease was rent stabilized, are of no consequence under the circumstances of this action (*see Sandlow v 305 Riverside Corp.*, 201 AD3d 418 at 419, where the court held that the landlord's failure to provide notice of the last LRR, "although a violation of the law, was not fraudulent," especially if deregulation of the apartment was proper). Here, plaintiffs' allegations of defendants' improper deregulation in 1998 is unsubstantiated and, thus, does not support their fraud claim, particularly in light of the Cantor Affidavit and the Marks' signed 1993 lease, which indicates the IAIs performed. Although defendants admittedly failed to retain records of the IAIs, RSL § 26-516 [g] only required landlords to maintain IAI records for a period of four years prior to its amendment by the HSTPA in 2019 (*see Thornton v Baron*, 5 NY3d 175, 181 [2005], citing *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). Therefore, fraud cannot be found here, since the element of scienter, the willful or knowing intent to defraud, has not been demonstrated by plaintiffs.

Plaintiffs' remaining allegations of fraud do not produce a different result. As stated by the court in *Gridley*, the "late registration of [an] apartment as rent stabilized, only after notification by the DHCR of a change in the law several years in the making, does not indicate that [defendants were] engaged in a fraudulent scheme to deregulate the apartment", particularly since landlords are not required to file AARs[6] for deregulated

[6] Annual Apartment Registration

apartments (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d 332 at 354). Similarly, in *Sandlow*, the court held that the landlord's delay in filing or failure to file AARs as required by RSL § 26-517 (f) did not demonstrate fraudulent intent to deregulate (*see Sandlow v 305 Riverside Corp.,* 201 AD3d 418 at 419).

As no colorable claim of fraud has been established herein, the base date for calculating plaintiffs' overcharge damages and for determining the LRR is November 28, 2014 (base date), which is four years prior to the date of the commencement of plaintiffs' action.

Overcharge Calculation

Plaintiffs' DHCR rent registration history and lease renewals from the base date forward, as well as their rent ledger, which includes the rent charged and paid from the base date through November 2021,[7] reveals that plaintiffs' monthly rent on the base date was $4,500.00 (base date rent). More specifically, the submitted documents demonstrate the following:

DHCR Rent History: The DHCR rent registration history for plaintiffs' apartment, from the base date forward, indicates the following registrations:

For the year 2015, the apartment was registered as rent stabilized on February 11, 2019 with plaintiffs as tenants, a lease renewal term of August 1, 2014 through July 31, 2016 and a monthly rent of $4,500.00.

[7] Plaintiffs' rent history after November 2021 was not provided.

For the year 2016, the apartment was registered as rent stabilized on June 21, 2016 with plaintiffs as tenants, a lease term of August 1, 2014 through July 31, 2016 and a monthly rent of $4,500.00.

For the year 2017, the apartment was registered as rent stabilized on July 31, 2017 with plaintiffs as tenants, a lease renewal term of August 1, 2016 through July 31, 2018 and a monthly rent of $4,650.00.

For the year 2018, the apartment was registered as rent stabilized on July 23, 2018 with plaintiffs as tenants, a lease term of August 1, 2016 through July 31, 2018 and a monthly rent of $4,650.00.

Defendants also submitted proof of AAR filings for plaintiffs' apartment for the years 2019 through 2021, on which the registered LRR was $4,743.00 as of April 1, 2019, $4,500.00 as of April 1, 2020, and $4,612.50 as of April 1, 2021 (the prior registered LRR of $4,500.00 plus the allowable RGB 2.5% increase based upon plaintiff's lease renewal term of August 1, 2020 to July 31, 2022).

Lease Renewals: On the base date, plaintiffs were tenants in possession under a two-year unregulated lease with a term of August 1, 2014 through July 31, 2016 and a monthly rent of $4,500.00. After plaintiffs' 2014 lease renewal expired, they were offered and accepted a two-year rent stabilized lease renewal with a term of August 1, 2016 to July 31, 2018 and a monthly rent of $4,650.00, which was based on their prior monthly rent of $4,500.00 plus a $150.00 increase (approximately 3.33%), as plaintiffs' selected of a two-year renewal lease. According to the RGB chart, the proper increase for a two year renewal was 2.0%, $90 here. However, the rent for this renewal period should not have increased

and had to be frozen at $4,500, as the apartment was not properly registered until 2020. Therefore, plaintiffs were overcharged $150.00 per month during this lease term, totaling $3,600.00 in overcharges for the term.

Plaintiffs were then offered and accepted a two-year rent stabilized lease renewal with a term of August 1, 2018 to July 31, 2020 and a monthly rent of $4,743.00, which was based on their prior monthly rent of $4,650.00 plus a 2.0% RGB increase due to plaintiffs' selection of a two-year lease. Although the RGB guidelines allowed for a 2.0% increase on a two-year lease, the prior rent of $4,650.00, from which the increase was calculated, was improper, resulting in an overcharge of $243.00 per month. However, plaintiffs' rent ledger shows that they were only overcharged for ten months during this lease term, and they were later given a credit for five of the ten months, resulting in a total of $1,215.00 in overcharges for this lease term.

After expiration of their 2018 lease renewal, their lease was renewed with a two-year rent stabilized lease renewal with a term of August 1, 2020 to July 31, 2022 and a decreased monthly rent of $4,612.50, which is based on a monthly LRR of $4,500.00 plus a 2.5% increase based on the two-year lease. According to the RGB guidelines, the 2.5% increase was proper. Therefore, plaintiffs were not overcharged during this lease term. Plaintiffs subsequent lease renewal information was not provided.

Rent Ledger: Review of plaintiffs' rent ledger shows that it is substantially consistent with the lease renewals. Plaintiffs were billed and paid $4,500.00 from the base date through July 2016; $4,650.00 from August 2016 through July 2018; $4,743.00 from August 2018 through May 2019 but were credited $1,215.00 on May 1, 2019 for a "retro

rent decrease" from January 2019 to May 2019, effectively reducing their monthly rent to $4,500.00 for January 2019 to May 2019;[8] $4,500.00 from June 2019 through July 2020, with the exception of June 2019, when plaintiffs paid $3,285.00 after defendants' credit of $1,215.00 on May 1, 2019, leaving a zero balance at the end of June 2019; and $4,612.50 from August 2020 through November 2021. At the end of November 2021, plaintiffs had a zero balance due.

The rent ledger further reveals that, with the renewal rent increases in August 2016 and June 2018, plaintiffs paid additional monies to increase their security deposit to the amount of their new monthly rent, namely $150.00 on August 3, 2016 for the increase to $4,650.00, and $93.00 on June 1, 2018 for the increase to $4,743.00, totaling $243.00 in excess security deposits. Pursuant to RSL § 2525.4, a landlord cannot hold a security deposit in excess of one month's rent.

Based upon the foregoing, from the base date of November 28, 2014 through November 2021, plaintiffs were overcharged and paid $4,815.00 ($3,600.00 + $1,215.00) in improper rent increases and $243.00 in excess security deposits, totaling $5,058.00 in overcharges through November 2021.

Treble Damages and Interest under CPLR 5001 and 5004

As this action has been determined to be a "post-*Roberts* action," the presumption of willfulness must be deemed rebutted by defendants, since as previously stated "a finding

[8] By the Cantor Affidavit, defendants claim that, due to a clerical error, plaintiffs were billed $4,743.00, instead of $4,500.00, in 2018 and 2019 but were issued a credit in 2019 upon discovery of the error. Additionally, by the Cantor Affidavit, defendants claim that the $4,650.00 monthly rent stated in the 2016 lease renewal was also an error.

of willfulness 'is generally not applicable to cases arising in the aftermath of Roberts'" (*Matter of Regina Metro. Co. v DHCR*, 35 NY3d at 356, citing *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 389 [2014]; *see also Sandlow v 305 Riverside Corp.*,201 AD3d at 419; *Corcoran v Narrows Bayview Co., LLC*, 183 AD3d 511, 512 [1st Dept. 2020]). Therefore, plaintiffs' request for treble damages is denied.

However, plaintiffs are entitled to interest on the total overcharge amount of $5,058.00 through November 2021 at 9% per annum, pursuant to CPLR 5004, which shall be computed by the Clerk of the Court from August 1, 2016 (the date the first overcharge) to the date the judgment is entered.

Defendants argue that their refund of all overcharges plus interest in accordance with DHCR's "safe harbor" provision under DHCR Policy Statement 89-2[9] rebutted the presumption of willfulness (*see* DHCR Policy Statement 89-2; *see also Portofino Realty Corp. v DHCR*, 193 AD3d 773 [2d Dept. 2021]). The court agrees. While their interest calculation may not have been accurate, the tender was prior to the proper rent registration in 2020, and, in any event, was rejected. In light of this court's decision, the court need not reach the issue of whether the interest calculation was accurate and, thus, whether defendants complied with DHCR Policy Statement 89-2.

[9] DHCR Policy Statement 89-2 provides that a landlord can meet its burden of proof to establish the lack of willfulness for the purposes of avoiding treble damages if the "owner adjusts the rent on his or her own within the time afforded to furnish DHCR with an initial response when initially served with the overcharge complaint initiated by the tenant, and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant, a full refund by check or cash of all excess rent collected, plus interest." This "safety harbor" regulatory exception to RSL § 26-516 [a] and RSC § 2506.1 [a] [1], which relate to treble damages, were later abrogated by HSTPA (*see* RSL § 26-516 [a] and RSC § 2506.1 [a] [1], as amended by L 2019, Ch 36, part F, § 4).

Determination of the LRR and Plaintiffs' Request for a Rent Freeze

As the base date rent was $4,500.00, said amount is the initial LRR, regardless of whether it was the market rate rent (*see Matter of Regina Metro. Co. v DHCR*, 35 NY3d at 358-362). Thus, plaintiffs' current LRR is determined by the base date rent of $4,500.00 plus any subsequent lawful renewal increases.

Although the AARs filed with DHCR for plaintiffs' apartment for the years 2017-2019 improperly listed LRRs above the base date rent, defendants filed proper AARs in 2020 and 2021, registering the LRRs as $4,500.00 and $4,612.50, respectively. Therefore, plaintiffs' request for a rent freeze, pursuant to RSL § 26-517 [e] and RSC § 2528.4 [a], which provide that failure to properly and timely file AARs, on or after the base date, "shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of the base date rent, plus any lawful adjustments allowable prior to the failure to register," is denied.

As such, since defendants were allowed a 2.5% RGB increase at the start of plaintiffs' 2020 lease, given their selection of a two-year lease renewal, which lawfully increased their monthly rent from $4,500.00 to $4,612.50, plaintiffs' apartment's LRR is set at $4,612.50 for the renewal lease period August 1, 2020 to July 31, 2022, plus any lawful increases, if any, based upon renewals subsequent to their 2020 renewal lease and any adjustments provided for under the RSL and RSC.

Third Cause of Action – Attorneys' Fees

Given the court's grant of summary judgment to plaintiffs as stated herein, plaintiffs are entitled to recover reasonable attorneys' fees and costs pursuant to RSL § 26-

516 (a) (4) and RSC § 2526.1(d), plus interest at 9% per annum, pursuant to CPLR 5001 and 5004. This matter shall be referred to a Special Referee, who will hear and determine the reasonable amount of attorneys' fees and costs to be awarded to plaintiffs.

As such, that branch of plaintiffs' motion seeking summary judgment on their third cause of action is granted.

Defendants' Summary Judgment Motion

In light of the court's grant of summary judgment in plaintiff's favor, as stated herein, defendants' motion, seeking summary judgment in their favor on their attorneys' fees counterclaim and dismissal of plaintiffs' complaint, is denied.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion (mot. seq. four) is denied, in its entirety; and it is further

ORDERED that plaintiffs' motion (mot. seq. five) is granted to the extent that plaintiffs are granted summary judgment in their favor on their first cause of action pursuant to CPLR 3212 (a) and 3001;

Therefore, it is hereby Declared, Adjudged and Decreed that plaintiffs' tenancy has been subject to the RSL and the RSC from its commencement in 2006, and shall continue to be subject to the RSL and the RSC until their vacatur or a change in the law, and, as such, defendants are directed to comply with the provisions of the RSL and RSC with respect to plaintiffs' tenancy; plaintiffs' apartment's LRR is set at $4,612.50, for the period August 1, 2020 to July31, 2022, plus any lawful increases, if any, based upon renewals

subsequent to their 2020 renewal lease and any allowable adjustments provided for under the RSL and RSC; and it is further

ORDERED that plaintiffs are granted summary judgment on their second cause of action, solely to the extent that plaintiffs are awarded overcharge damages in the amount of $5,058.00 through November 2021, plus interest at 9% per annum, pursuant to CPLR 5004, which shall be computed by the Clerk of the Court from August 1, 2016 (the date of the first overcharge) to the date of the entry of judgment; any other relief requested in the second cause of action is denied; and it is further

ORDERED that plaintiffs are granted summary judgment on their third cause of action, solely to the extent that plaintiffs shall be awarded reasonable attorneys' fees and costs pursuant to RSL § 26-516 (a) (4) and RSC § 2526.1(d), plus interest at 9% per annum, pursuant to CPLR 5001 and 5004. This matter is referred to a Special Referee to hear and determine the reasonable amount of attorneys' fees and disbursements to be awarded to plaintiffs, and a Referee Referral Order is issued simultaneously herewith; and it is further

ORDERED that the plaintiffs' counsel shall provide the Special Referee with copies of its retainer and its billing and time records, together with a summary and a breakdown of the categories of legal services provided, and the hours attributed to each category of services; 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 Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 482), who is

directed to place this matter on the calendar of the Special Referee's Part (Part 82) for the earliest convenient date; and it is further

ORDERED that failure to comply with the immediately preceding paragraph will result in the dismissal of plaintiffs' third cause of action against defendants unless good cause is shown.

This constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C.