SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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S.M. THOMAS, BRADLEY LEVIN, KEVIN WENDT, MAXEMILLIAN CORKUM, ERIC JONES, K.G. MCGUIRE

Plaintiffs,

- v -

560-566 HUDSON LLC,

Defendant.

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INDEX NO. 158854/2019

MOTION DATE 02/10/2021

MOTION SEQ. NO. 004

INTERIM DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 165

were read on this motion to/for JUDGMENT - SUMMARY.

In this residential landlord/tenant class action for rent overcharge, plaintiffs move for summary judgment on the complaint and to dismiss defendant's affirmative defenses and counterclaim (motion sequence number 004).

BACKGROUND

Defendant 560-566 Hudson LLC (landlord) is the fee owner of a residential apartment complex consisting of four buildings which are respectively located at 560, 562, 564 and 566 Hudson Street in the County, City and State of New York [the buildings] (*see* NYSCEF document 50 [amended complaint], ¶ 1). Plaintiffs are a class composed of:

> "[a]ll tenants at 560 Hudson Street, 562 Hudson Street, 564 Hudson Street, and 566 Hudson Street, New York, New York . . . living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by the owner . . .."

(*see* NYSCEF document 30 [class certification order]); and/or of a subclass composed of:

> "[a]ll current tenants at the buildings, who currently reside in an apartment that was deregulated during the pendency of the building's participation in the J-51 Program" (*id*.).

Plaintiffs commenced this action on September 12, 2019 (s*ee* NYSCEF document 1). By so-ordered stipulation dated December 9, 2019, the above class was certified (i*d*., NYSCEF document 30). By so-ordered stipulation dated September 1, 2020 the parties were permitted to submit amended pleadings (*id*., NYSCEF document 48). Thereafter, plaintiffs filed an amended complaint on September 4, 2020 that sets forth causes of action for: 1) violation of Rent Stabilization Law [RSL] § 26-512 (on behalf of the class); 2) violation of RSL § 26-512 (on behalf of the subclass); 3) a declaratory judgment (on behalf of the subclass); and 4) legal fees and court costs (*id*., NYSCEF document 50). On October 5, 2020, landlord submitted an answer to the amended complaint that set forth 27 affirmative defenses and a counterclaim for legal fees and court costs (*id*., NYSCEF document 63). After limited discovery, plaintiffs filed the instant summary judgment motion (*id*., NYSCEF documents 80-129 [motion sequence number 004]). With the filing of landlord's opposition and plaintiffs' reply papers, this motion is now fully submitted (*id*., NYSCEF documents 139-146, 147-160). However, it is not capable of being fully resolved.

DISCUSSION

"It is well settled that '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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce

evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

This motion seeks summary judgment on the amended class action complaint (which involves claims by 26 plaintiff/tenants for rent overcharge and related relief) as well as summary judgment dismissing landlord's 27 affirmative defenses and one counterclaim. Unfortunately, the limited documentation the parties have submitted in connection with this motion precludes a final determinations with respect to any of those claims. As a result, this decision is restricted to certain preliminary findings, and plaintiffs' summary judgment applications are held in abeyance pending the receipt of the further submissions that are directed below.

The Amended Complaint

As noted above, plaintiffs' amended complaint sets forth four causes of action. The first and second each allege a "violation of Rent Stabilization Law [RSL] § 26-512" ["Stabilization Provisions"] (*see* NYSCEF document 50 [amended complaint], ¶¶ 125-139). However, the first cause of action specifically asserts that landlord "charged Plaintiffs and the Class rents in excess of the legal regulated rent for their apartments" (*id.*, ¶ 128). This plainly states a claim for rent overcharge, which is governed by RSL § 26-516 ["Enforcement and procedures"], rather than by RSL § 26-512. The amended complaint cited the incorrect statute in connection with plaintiffs' first cause of action. Consequently, the claim will be reviewed under the correct section of the RSL as an allegation of rent overcharge(s) in violation of RSL § 26-516, *not* RSL § 26-512.

Plaintiffs' second cause of action does not mention rent overcharge, but rather seeks determinations and declarations as to the rent regulated status of their apartments and their legal rents (*see* NYSCEF document 50 [amended complaint], ¶ 137). This is the same relief that plaintiffs request in their third cause of action (*id.*, ¶ 145). RSL § 26-512, which the second

cause of action cites, does not specifically provide for declaratory relief, but instead simply sets forth the general rules for calculating the rents of rent stabilized apartments. On the other hand, New York law has long recognized that declaratory judgment claims permit a reviewing court to determine the respective rights of all affected parties to a lease (*see 615 Co. v Mikeska*, 75 NY2d 987, 988 [1990]; *citing Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 [1926]). Here, both the second and third causes of action in the amended complaint seek several declarations with respect to each plaintiff/tenant's individual leasehold. Each such declaration will necessarily involve consideration of both the rules set forth in RSL § 26-512 and the terms of each individual plaintiff's lease. It is therefore apparent that plaintiffs' second and third causes of action are both identical and duplicative (*see e.g., Mahmood v Riverside 1795 Assoc. L.L.C.*, 69 Misc 3d 723 [Sup Ct NY County 2020]). Accordingly, both claims will be treated as a single cause of action.

Plaintiffs' fourth cause of action seeks awards of attorney's fees and court costs. *See* NYSCEF document 50 (amended complaint), ¶¶ 146-150. The court observes that there are statutory bases for granting both of these items of relief. RSL § 26-516 (a) (4); CPLR 8101.

As was mentioned, landlord's answer sets forth 27 affirmative defenses, and one counterclaim for attorney's fees and court costs.

The first portion of plaintiffs' motion requests summary judgment on the four causes of action in the amended complaint.

1. **Plaintiffs' First Cause of Action (Rent Overcharge)**

Plaintiffs commenced this action on September 12, 2019, after the June 14, 2019 effective date of the Housing Stability & Tenant Protection Act of 2019 [HSTPA] (*see* NYSCEF document 1). Nevertheless, the pre-HSTPA version of RSL § 26-516 governs plaintiffs' rent

overcharge claims. As counsel acknowledged in their September 1, 2020 stipulation, the Court of Appeals' holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332, 363 [2020]) prohibits applying the HSTPA's amended rent overcharge provision retroactively to overcharges alleged to have occurred *before* the statute's enactment (*id*., NYSCEF document 48). The amended complaint asserts that landlord fraudulently deregulated the buildings' apartments and collected rent overcharges from plaintiffs via illegal market rate leases (*id*., NYSCEF document 50, ¶¶ 101-105). Because the alleged overcharges were imposed before the HSTPA's effective date, counsel agreed that plaintiffs' first cause of action should be governed by the pre-HSTPA version of RSL § 26-516 [including statute's the four-year limitations/"lookback" period] (*id*., NYSCEF document 48). By so-ordering, the September 1, 2020, stipulation, the court accepted counsels' agreement with respect to the controlling statute (*id*., NYSCEF document 48). However, further review of that stipulation compels that it be modified.

The September 1, 2020, stipulation provides that "the parties agree that the class period should begin on June 14, 2015 [four years prior to the HSTPA's effective date]" (*see* NYSCEF document 48). However, plaintiffs commenced this action on September 12, 2019, three months after the HSTPA's June 14, 2019, effective date (*id.,* NYSCEF document 1). The pre-HSTPA version of RSL § 26-516 provides, in part, as follows: "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years *before the complaint is filed*" (RSL § 26-516 [a] [2], eff. June 15, 2015 [emphasis added]). The claims period that the parties agreed to in the September 1, 2020, stipulation incorrectly calculated the rent overcharge claims period from four years prior to the effective date of the HSTPA i.e., June 14, 2019, rather than "four years before

the complaint [was] filed" i.e., September 12, 2019. Therefore, the pre-HSTPA version of RSL § 26-516 (a) (2) mandates that the overcharge period for plaintiffs' claims should be measured from a four-year "base date" of September 12, 2015. A so-ordered stipulation may only be set aside where "fraud, collusion, mistake or accident is established" (*Matter of Gaitor v Morrissey*, 47 AD3d 975, 976 [3d Dept 2008]; quoting *Matter of Rose BB*, 300 AD2d 868, 869 [3d Dept 2002]; and citing *Curcio v Watervliet City School Dist.*, 21 AD3d 666, 667 [3d Dept 2005]; *Stefanovich v Boisvert*, 271 AD2d 727, 728 [3d Dept 2000]). The parties "mistake" of law here is evident from a cursory review of the plain language of the pre-HSTPA version of RSL § 26-516. Accordingly, the September 1, 2020 stipulation will be modified *sua sponte* to provide that the "class period" in this action shall span from the September 12, 2015 "base date" through the September 12, 2019 filing date.

Plaintiffs have chosen to proceed as a class in this action. As a result, they are deemed to have waived the right to seek treble damages that RSL § 26-516 (a) presumptively awards in connection with rent overcharge claims (*see e.g.*, *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]; *Casey v Whitehouse Estates, Inc.*, 197 AD3d 401, 406 [1st Dept 2021]). Therefore, the issue of treble damages will not be considered in connection with plaintiffs' first cause of action.

The pre-HSTPA version of RSL § 26-516 provided, in pertinent part, as follows:

> a. Subject to the conditions and limitations of this subdivision, *any owner of housing accommodations who*, upon complaint of a tenant, or of the [DHCR], *is found by the [DHCR], after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge*. In no event shall such treble damage penalty be assessed against an owner based solely on said owner's failure to file a timely or proper initial or annual rent registration statement. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the [DHCR] shall establish the penalty as the amount of the overcharge plus interest. (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, *the*

legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. (ii) As to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date four years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than four years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments. Where the rent charged on the date four years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by the [DHCR].

Where the rent charged on the date four years prior to the date of initial registration of the housing accommodation cannot be established, such rent shall be established by the [DHCR] provided that where a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

(1) The order of the [DHCR] shall apportion the owner's liability between or among two or more tenants found to have been overcharged by such owner during their particular tenancy of a unit.

(2) Except as provided under clauses (i) and (ii) of this paragraph, a complaint under this subdivision shall be filed with the [DHCR] 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 an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed*. (i) No penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed or upon an overcharge which occurred prior to April first, nineteen hundred eighty-four. (ii) Any complaint based upon overcharges occurring prior to the date of filing of the initial rent registration as provided in section 26-517 of this chapter shall be filed within ninety days of the mailing of notice to the tenant of such registration. *This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision*.

(3) Any affected tenant shall be notified of and given an opportunity to join in any complaint filed by an officer or employee of the [DHCR].

(4) *An owner found to have overcharged may be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the*

> *overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules*.
>
> (5) The order of the [DHCR] awarding penalties may, upon the expiration of the period in which the owner may institute a proceeding pursuant to article seventy-eight of the civil practice law and rules, be filed and enforced by a tenant in the same manner as a judgment or not in excess of twenty percent thereof per month may be offset against any rent thereafter due the owner.
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> b. In addition to issuing the specific orders provided for by other provisions of this law, the [DHCR] shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate.

(RSL § 26-516 [a], [b] [emphasis added]).

RSL § 26-516 is a statutorily created cause of action, not the codification of a common-law claim. The statute designates awards of, *inter alia*, court costs, attorney's fees, judgments for money damages, treble damages and related declaratory and/or injunctive relief ("other orders as may be deemed appropriate") as items of damages that are to be assessed only after a landlord's liability for "rent overcharge" has been established (RSL § 26-516 [a]). Here, however, plaintiffs have unnecessarily raised separate claims for some of those items of damages in their second, third and fourth causes of action. Nevertheless, RSL § 26-516 requires a reviewing court to determine a landlord's liability for rent overcharge(s) before considering the measure(s) of appropriate damages. Accordingly, so much of plaintiffs' motion as requests summary judgment on their second, third and fourth causes of action is held in abeyance pending a determination on the issue of defendants' liability (if any) in connection with plaintiffs' first cause of action.

The pre-HSTPA version of RSL § 26-516 (a) defines a "rent overcharge" as a rental charge which is "above the rent authorized for a housing accommodation," which is, in turn, defined as "the rent indicated in the annual [DHCR] registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases

and adjustments." The statutory scheme thus requires the fact-finder to identify three figures when considering a rent overcharge claim: 1) an apartment's "legal regulated rent" (i.e., the rental amount listed on the unit's most recent DHCR registration statement plus lawful increases and adjustments); 2) the amount that the landlord actually charged the tenant; and 3) the amount that the tenant actually paid to the landlord. The second and third figures may be easily determined by reference to documentary evidence; i.e., leases and payment records. Here, however, the parties have not presented complete records of any plaintiff's leasing history or payment history during the entire September 12, 2015 - September 12, 2019 overcharge claim period. As a result, a determination as to any plaintiff's "actual rent charges" or "actual rent payments" during the class claims period cannot be made. Accordingly, counsel are directed to submit supplemental documentary proof of each plaintiff's "actual rent charges" and "actual rent payments" during the claims period.

The other factor for determining a rent overcharge, an apartment's "legal regulated rent," requires a more complex calculation. As noted, the pre-HSTPA version of RSL § 26-516 provides for a unit's "legal regulated rent" to be ascertained by simple reference to the amount that is recorded on the New York State Division of Housing and Community Renewal (DHCR) registration statement that was in effect four years before a rent overcharge claim was filed. However, an apartment's "legal regulated rent" is *not* the amount listed on the DHCR registration statement if a plaintiff establishes that a landlord has engaged in "a fraudulent scheme to deregulate" the unit (*see e.g.*, *Conason v Megan Holding, LLC*, 25 NY3d 1 [2015]; *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]; *Thornton v Baron*, 5 NY3d 175 [2005]). Where a landlord has engaged in a "fraudulent scheme to deregulate," the "default method" set forth in Rent Stabilization Code

(RSC) § 2522.6 (b) (9 NYCRR § 2522.6 [b]) must be used to determine an apartment's "legal regulated rent" (*id*.). The Court of Appeals' 2009 holding in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), raised the question of whether a landlord's improper deregulation of rent stabilized units while a building was enrolled in the "J-51" real estate tax abatement program, by itself, constituted a "fraudulent scheme to deregulate" those units (*see also Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84 [2019]). The Court's 2020 decision in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* answered that question in the negative. With respect to such "*Roberts*" rent overcharge claims, the Court confirmed the rule that "under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 361).

The Appellate Division, First Department, subsequently considered the issue of "fraud" in a number of recent decisions. In *Montera v KMR Amsterdam LLC* (193 AD3d 102 [1st Dept 2021]) the First Department observed that:

> *Regina* does not grant an owner carte blanche in post-*Roberts/Gersten* cases to willfully disregard the law, by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme is uncovered.

(193 AD3d at 107). The court held that, when this behavior is demonstrated, "the apartment history beyond the four-year lookback period may be reviewed *to determine whether fraud occurred*" (193 AD3d at 109 [emphasis added]). The rule enunciated in *Montera* is thus that a landlord's failure to promptly comply with the DHCR's apartment registration

requirement[1]constitutes a "willful disregard of the law" that authorizes a court reviewing a *Roberts* overcharge case to examine an apartment's rent history beyond the four-year "lookback" period for the sole purpose of determining *whether there was fraud involved* in the unit's deregulation.

Montera left open the question of when a landlord's willful disregard of its registration obligation might also constitute evidence of a "fraudulent scheme to deregulate" (193 AD3d at 108-109). *Casey v Whitehouse Estates, Inc.*, which was decided several months after *Montera*, identified a "fraudulent scheme to deregulate" where a landlord filed amended DHCR registrations listing incorrect "legal regulated rents" (which the landlord promulgated unilaterally) after a rent overcharge complaint had been filed in an attempt to conceal/obscure the subject apartment's true rental history (*Casey v Whitehouse Estates, Inc.*, 197 AD3d 401, 404 [1st Dept 2021]). Similarly, in *Hess v EDR Assets LLC* (200 AD3d 491 [1st Dept 2021]), which was decided four months after *Casey*, the First Department found that:

> Plaintiffs assert that defendants, while enjoying J–51 tax benefits, failed to re-register the units until years after *Roberts* was decided and applied retroactively, waited over a year to re-register units after being notified by DHCR that they had to do so, took steps to comply only after their scheme was uncovered, and continued to inform tenants that the units were not subject to regulation even after DHCR notified them otherwise. Contrary to defendants' contention, *plaintiffs have alleged more than a mere delay in re-registering units, and their allegations, if proven, may support application of the default formula*.

(200 AD3d at 492 [internal citations omitted, emphasis added]). In *Ampim v 160 East 48th Street Owner II LLC* (_ AD3d_, 2022 NY Slip Op 05263 [1st Dept Sept 17, 2022]), decided this year, the First Department reiterated *Montera*'s holding that "owners in [*Roberts* overcharge]

[1] That requirement was confirmed by the Court of Appeals in *Roberts* and subsequently held to be retroactive by the First Department in *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]).

cases could hardly deny their knowledge of the receipt of tax benefits under [the "J-51"] program while deceitfully claiming that the apartments were not subject to rent stabilization" (2022 NY Slip Op 05263, *1). The rule that arises from these recent First Department decisions is that a landlord's willful disregard of its registration obligation will constitute evidence of a "fraudulent scheme to deregulate" where it is accompanied by some other form of demonstrably deceitful behavior by the landlord. Proof of the existence of such a scheme in turn justifies use of the "default formula" to determine an improperly deregulated apartment's "legal regulated rent" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 355-356). The bulk of plaintiffs' motion is devoted to the argument that landlord has engaged in a "fraudulent scheme to deregulate" the buildings, and that their respective apartments' rents should be set via the "default formula." For the reasons that follow, plaintiffs are correct.

This case involves some *Roberts* deregulations since both parties aver that the buildings were enrolled in the "J-51" real estate tax abatement program through June of 2016, and plaintiffs allege that landlord deregulated their apartments before that date (*see* NYSCEF document 50 [amended complaint], ¶ 2, 9, 19; document 63 [answer], ¶ 2). In 2009, *Roberts* held that apartments in buildings enrolled in the "J-51" program were rent stabilized by operation of law for the duration of a building's enrollment, that landlords were precluded from using the RSC's "high rent" or "luxury" apartment deregulation procedures during a building's enrollment period, and that any deregulations purportedly made during such enrollment period were improper as a matter of law (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d at 286-287). In 2011, the First Department determined that the *Roberts* holding applies retroactively (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 198 [1st Dept 2011]). Here, the buildings' four DHCR

"Registration Rent Roll Reports" (rent rolls) that plaintiffs submitted show that landlord allegedly deregulated their respective units at various points between 1998 and 2020 (*see* notice of motion [motion sequence number 004], Sachar affirmation, exhibits D, E, F, G).[2] Any unit that was purportedly deregulated while the buildings were enrolled in the "J-51" program is deemed a "*Roberts* deregulation" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 384). It is thus apparent from the rent rolls that landlord deregulated some apartments before *Roberts* was decided and more of them after *Roberts* was decided but while the buildings were still enrolled in the "J-52" program (*id.*). Any such deregulation is a *per se Roberts* deregulation, and these appear to account for the bulk of plaintiffs' units. This does not end the inquiry, however.

Although the parties admit that the buildings were enrolled in the "J-51" program, they have not presented tax records that show the buildings' actual period(s) of enrollment, rendering the assertion that the enrollment ended in 2016 unreliable. Indeed, the rent roll for 560 Hudson Street records the notation "J-51 expired" in August 2018 for five of the building's apartments, and the same notation for two other units in September 2020 (*see* notice of motion [motion sequence number 004], exhibit D).[3] The "J-51" program's governing law and regulations provide for an enrollment period of 14 years (Real Property Tax Law [RPTL] § 489; New York City Administrative Code [NYC Admin Code] § 11-243). Given the three dates for the expiration of the buildings' "J-51" enrollment that are suggested, it is thus possible that they

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[2] Also, the leases and/or renewal leases that were in effect on the September 12, 2015 "base date" are all market-rate leases with provisions stating that the subject apartment(s) were not rent-regulated (*see* notice of motion [motion sequence number 004], Sachar affirmation, exhibits H-RR). This indicates that landlord had deregulated all of plaintiffs' apartments prior to the "base date."

[3] The rent rolls for the other three buildings do not contain any similar notations regarding "J-51" expiration (*see* notice of motion [motion sequence number 004], exhibits E, F, G).

were enrolled between 2002-2016, 2004-2018 or 2006-2020. It is also possible that they were enrolled for some other period of time; however, the determination cannot be made without reviewing the buildings' tax records mentioned above. Consequently, a determination cannot be made which if any of the plaintiffs' apartments may have been deregulated after the buildings' "J-51" enrollment had expired and were therefore not "*Roberts* deregulations."[4] Accordingly, the parties are directed to submit copies of all four buildings' "J-51" tax records along with the other supplemental materials described herein.

This case also involves a "fraudulent scheme to deregulate" the buildings. The documentary evidence at hand establishes landlord's "willful disregard" of its obligation to "promptly" comply with the DHCR rent registration requirement outlined in *Roberts* and its progeny (*Montera v KMR Amsterdam LLC*, 193 AD3d at 107). The buildings' respective DHCR rent rolls show that landlord deregulated the buildings' units at various points between 1998 and 2020 and, with the exception of an amended registration for 560 Hudson Street filed in 2018, never re-registered any apartments as rent stabilized after *Roberts* was decided in 2009 (*see* notice of motion [motion sequence number 004], exhibits D, E, F, G). This is notable given that landlord avers that the buildings were enrolled in the "J-51" program until 2016 [although the exact date that the buildings actually exited the "J-51" program has yet to be determined] (*see* NYSCEF document 63 [answer], ¶ 2). Landlord's protracted failure to act makes it impossible to find that landlord "promptly complied" with its obligation to file DHCR registration statements for the plaintiffs' apartments.

[4] The HSTPA permanently repealed the RSC's deregulation provisions effective June 14, 2019 (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 350).

The documentary evidence also discloses additional deceitful acts by landlord apart from its persistent refusal to file DHCR registrations. The DHCR rent roll for 560 Hudson Street records that landlord deregulated all eight of the building's units except apartment 7 at various times between 1998 and 2015 (*see* notice of motion [motion sequence number 004], exhibit D). The rent roll then shows that landlord filed an amended DHCR registration on January 30, 2018 which retroactively re-registered all of the building's units as rent stabilized in 2016 and 2017 with the following legal regulated rents: 1) apartment 1 with a legal regulated rent of $5,482.76/month (and a preferential rent of $3,495.00/month) in 2016 and a legal regulated rent of $3,896.34/month (and a preferential rent of $3,495.00/month) in 2017; 2) apartment 2 with a legal regulated rent of $4,110.54/month (and a preferential rent of $2,850.00/month) in 2016 and a legal regulated rent of $5,613.00/month (and a preferential rent of $5,250.00/month) in 2017; 3) apartment 3 with a legal regulated rent of $3,790.57/month (and a preferential rent of $3,450.00/month) in 2016 and a legal regulated rent of $3,790.57/month (and a preferential rent of $3,650.00/month) in 2017; 4) apartment 4 with a legal regulated rent of $4,237.11/month (and a preferential rent of $3,450.00/month) in 2016 and a legal regulated rent of $4,140.00/month (and a preferential rent of $3,895.00/month) in 2017; 5) apartment 5 with a legal regulated rent of $4,654.69/month (and a preferential rent of $3,695.00/month) in 2016 and a legal regulated rent of $4,654.69/month (and a preferential rent of $3,795.00/month) in 2017; 6) apartment 6 with a legal regulated rent of $6,950.89/month (and no preferential rent) in 2016 and a legal regulated rent of $7,048.14/month (and a preferential rent of $4,295.00/month) in 2017; 7) apartment 7 with legal regulated rents of $3,995.00/month (and no preferential rent) in both 2016 and 2017; and 8) apartment 8 with legal regulated rents of $3,395.00/month in 2016 and $3,595.00/month in 2017 (and no preferential rents) (*id.*). The rent roll further shows that

landlord filed a second amended DHCR registration on August 31, 2018 which again listed apartments 1, 2, 3, 5 and 6 as "permanently exempt" from rent stabilization with the notation "J-51 expired" (*id*.). Further, the rent roll shows that landlord listed apartments 4 and 8 as "permanently exempt" from rent stabilization in 2020 with the same notation ("J-51 expired") as of September 30, 2020 (*id*.). Thereafter, the rent roll only lists apartment 7 as currently rent stabilized with a legal regulated rent of $4,895.93/month (*id*.). However, there is no notation in the rent roll to account for the precipitous rise in apartment 7's legal regulated rent from $942.17/month in 2015 to $3,995.00/month in 2016 [as was recorded on the January 30, 2018 amended DHCR registration filing] (*id*.). The leases or renewal leases for apartments 1, 2, 3, 4 and 5 that were in effect in 2016 all included monthly rental amounts equal to the "preferential rents" for those units that landlord had recorded on the January 30, 2018 amended DHCR registration to the building's rent roll and *not* the amounts that landlord had listed as the units' "legal regulated rents" (*id*., exhibits D, H-R). Further the leases for apartments 1, 2 and 5 had the "preferential rent" sections of their respective riders crossed out, while the renewal leases for apartments simply contained no mention of "preferential rent" at all (*id*., exhibits H-R). It thus appears that landlord filed the January 30, 2018 amended DHCR registration with the intention of recording the apartments' leased rents as "preferential rents" while also legitimizing much higher monthly amounts as the units' actual "legal regulated rents." It further appears that landlord unilaterally generated those higher "legal regulated rents," since there is no documentation in the DHCR filings or the units' respective lease histories to justify them. In *Casey v Whitehouse Estates, Inc.*, the First Department held that these types of deceptive filings, when coupled with a landlord's subsequent willful refusal to file corrected DHCR registrations, constitute evidence of a "fraudulent scheme to deregulate" a building (197 AD3d at 404-405).

Accordingly, pending proof of 560 Hudson Street's period of enrollment in the "J-51" program, landlord has engaged in a "fraudulent scheme to deregulate" that building.

The same finding is made with respect to the other three buildings as well. Although landlord did not file any deceptive amended DHCR registrations with respect to those buildings, their respective DHCR rent rolls record many instances when landlord listed a unit as "permanently exempt" from rent registration with the notation "vacant," while plaintiffs have presented leases and/or renewal leases that were clearly in effect at the time that an alleged vacancy was claimed to have occurred (*see* notice of motion [motion sequence number 004], Sachar affirmation, exhibits E-G, S-RR). Accordingly, landlord's "fraudulent scheme to deregulate" touched all four buildings, although it may have taken a different form in each building.[5]

Casey v Whitehouse Estates, Inc. also reiterated that an apartment's "legal regulated rent" should be determined via the "default formula" when it is established that a landlord engaged in a "fraudulent scheme to deregulate" it (197 AD3d at 403-404). Under the RSC, the default formula is applied by substituting "the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment" (RSC § 2522.6 [b] [3] [i]). Because landlord has engaged in a "fraudulent scheme to deregulate" the four subject buildings, use of the "default formula" to set the legal regulated rents of plaintiffs' respective apartments is appropriate. Accordingly, plaintiffs are directed to identify "comparable

[5] Landlord is free to challenge this conclusion in its supplemental submissions, should it choose to do so.

apartments" to their units whose rents were in effect on the September 12, 2015 "base date" to be used for reference when applying the "default formula" herein.[6]

In conclusion, that branch of plaintiffs' motion seeking summary judgment on their first cause of action is held in abeyance pending their submission of supplemental materials including, at minimum: 1) tax records that establish the building' exact period(s) of enrollment in the "J-51" real estate tax abatement program; 2) leasing and payment records for each plaintiffs' apartment for the overcharge claims period of September 12, 2015 through September 12, 2019 that establish the "actual rents charged" and the "actual rents paid" by each plaintiff for each apartment for the amount of time that each plaintiff occupied his/her apartment during the claims period; 3) a list of "comparable apartments" and their rents in effect on September 12, 2015 for use in applying the "default formula"; and 4) calculations of the amounts of rent overcharge(s) that each plaintiff sustained during the claims period using the aforementioned figures, with said calculations *not* to include estimations of treble damages. Counsel are directed to contact the Part 47 clerk at SFC-Part47-Clerk@nycourts.gov within 30 days after service of a copy of this decision with notice of entry to receive a conference date during which a submission schedule for the supplemental materials will be set.

2. <u>Plaintiffs' Second, Third and Fourth Causes of Action</u>

As noted earlier, money judgments, declaratory relief and awards of costs and fees are all items of statutory damages authorized in RSL § 26-516 that may be granted after a landlord is shown to be liable for imposing a rent overcharge on a tenant. As also noted, a final determination of landlord's liability for rent overcharge cannot be made owing to the inadequacy

[6] Landlord is also free to challenge plaintiffs' proposed "comparable apartment" rents, should it choose to do so.

of the documentary evidence submitted. Accordingly, for the reasons discussed above, that portion of plaintiffs' motion that seeks summary judgment on the second, third and fourth causes is held in abeyance pending a determination of the extent of landlord's liability (if any) for plaintiffs' first cause of action.

3. Landlord's Affirmative Defenses

The next portion of plaintiffs' motion seeks summary judgment to dismiss landlord's 27 affirmative defenses. Plaintiffs' dismissal arguments group those affirmative defenses into several categories rather than challenging each defense individually, and landlord's opposition arguments also adopts the same categories. Each category will in turn be addressed.

As an initial matter, plaintiffs observe that landlord did not raise any opposition arguments to challenge their request for summary judgment to dismiss landlord's 12th ("the rents . . . are not in excess of the of the legal regulated rents"), 13th ("[p]laintiffs fail to allege that the rent[s] . . . are not the legal rent[s]"), 14th ("[p]laintiffs failed to allege that the rents . . . exceeded the legal regulated rent[s]"), 16th ("[p]laintiffs fail to meet the numerosity requirement" for class certification) or 17th ("the amended complaint fails to name any plaintiffs who currently reside and/or had ever resided at 562 Hudson Street and/or 564 Hudson Street") affirmative defenses or landlord's counterclaim (*see* NYSCEF document 63 [answer], ¶¶ 197-205, 210-220; plaintiffs' reply mem at 3). Plaintiffs argue that landlord's failure to assert opposition is a sufficient ground to dismiss these affirmative defenses and the counterclaim (*id*., plaintiffs' reply mem at 3). Plaintiffs' request is granted in part. Landlord's 13th, 14th, 16th and 17th affirmative defenses each allege that plaintiffs failed to make specific allegations in the amended complaint which the complaint *does* in fact contain (*see* NYSCEF document 50). Because they are belied by the text of the pleading, those affirmative defenses are meritless. Accordingly, so much of plaintiff'

motion as requests summary judgment dismissing landlord's 13th, 14th, 16th and 17th affirmative defenses is granted.

However, landlord's 12th affirmative defense asserts the correctness of the "legal regulated rents" it collected from each plaintiff - a matter that has yet to be determined in this action (*see* NYSCEF document 63 [answer], ¶¶ 197-200). Further, the fact that landlord failed to raise opposition arguments in support of its counterclaim for attorney's fees and court costs is of no moment since it has already been determined that it would be inappropriate to consider awards of costs and fees at this stage of the litigation. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 12th affirmative defense and counterclaim is held in abeyance.

Plaintiffs designate the first category of affirmative defenses they seek to dismiss as landlord's "base date defenses," comprised of the 2nd ("the HSTPA's expansion of the limitations provisions . . . from four (4) to six (6) years is inapplicable to this case"), 3rd ("[t]o the extent plaintiffs' claims . . . seek recovery for a period of time prior to the Class Period . . . they must be dismissed") and 5th ("the HSPTA's six (6) year statute of limitations and/or longer look back period are unconstitutional in that they are a violation of Defendant's due process rights under the Fourteenth Amendment . . . and the Fifth Amendment'") affirmative defenses (*see* NYSCEF document 63 [answer], ¶¶ 154-163, 171-172). Plaintiffs aver that they "are at a loss to understand" these affirmative defenses, since the issues they raise seem to have been obviated by the provisions of the September 1, 2020 stipulation and/or the amended complaint (*see* plaintiffs' mem of law at 5). Landlord responds that it is "free to preserve [its] argument(s) in [its] pleading" (*see* defendant's mem of law in opposition at 19 [pages not numbered]). Plaintiffs reply, without citation, that "the CPLR does not condone such tactics, particularly in the absence

of the requisite factual specificity" (*see* plaintiffs' reply mem at 3). These arguments miss their mark, but nevertheless these affirmative defenses will be dismissed. In the beginning of this decision the court determined that the "base date" for plaintiffs' rent overcharge claims is September 12, 2015, and that their claims recovery period runs from September 12, 2015 through September 12, 2019 (the date this action was commenced). To the extent that the instant affirmative defenses seek to challenge those determinations, they are rejected for the reasons discussed earlier. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 2nd, 3rd and 5th affirmative defenses is granted.

Plaintiffs next request dismissal of landlord's 4th affirmative defense ("plaintiffs have failed to sufficiently allege fraud to permit the court to go beyond the four-year [limitations] period"), which they categorize (by itself) as a "fraud/discovery defense" (*see* NYSCEF document 63 [answer], ¶¶ 164-170; plaintiffs' mem of law at 5-6). Plaintiffs argue that they "have alleged fraud sufficient to surmount the base date" (*id*.). Landlord's opposition and plaintiffs' reply papers devolve into a dispute over the adequacy of each side's case law and/or documentary evidence (*see* defendant's mem of law in opposition at 19 [pages not numbered]; plaintiffs' reply mem at 3). However, this matter is easily disposed of. The 4th affirmative defense asserts that the amended complaint lacks allegations of fraud, but the amended complaint *does* in fact set forth allegations of fraud (*see* NYSCEF document 50). Because the defense is belied by the language in the complaint, it is without merit. Moreover, an attack on the sufficiency of pleadings is only appropriate in a CPLR 3211 motion to dismiss, whereas the instant motion sequence seeks summary judgment pursuant to CPLR 3212 and is directed to the sufficiency of the evidence. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 4th affirmative defense is granted.

Plaintiffs next request dismissal of landlord's 6th affirmative defense ("this court should determine that the legal rent on the base date for the any apartments subject to the Class and/or Sub-Class be calculated by looking to the last registered rent together with all applicable increases"), which they categorize (by itself) as a "reconstruction defense" (*see* NYSCEF document 63 [answer], ¶¶ 173-174; plaintiffs' mem of law at 6). Plaintiffs argue that "[e]ssentially, defendant seeks to have the Court employ the 'reconstruction method,'" but that "in *Regina*, the Court of Appeals struck down the reconstruction method" (*see* plaintiffs' mem of law at 6). However, this argument is incorrect. The 6th affirmative defense closely tracks the statutory language of the pre-HSTPA version of RSL § 26-516, which provides that:

> . . . the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments.

(RSL § 26-516 [a]). The Court of Appeals holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* described the now-prohibited "reconstruction method" of calculating an apartment's legal regulated rent as:

> . . . identifying the last legal regulated rent before improper deregulation - even though the apartment was deregulated more than four years prior to imposition of the claim - and applying all permissible rent increases between the date of that regulated rent and the base date.

(35 NY3d at 358). The 6th affirmative defense asserts that the court should use the former method to calculate the legal regulated rents of the plaintiffs' apartments, and *not* the latter. Plaintiffs' argument appears to be based on a mischaracterization of the 6th affirmative defense, and it is rejected. This does not end the inquiry, however. As previously determined the "default formula" is the correct method to determine the "legal regulated rent" of each plaintiff's apartment. As a result, landlord's assertion that the method set forth in RSL § 26-516 should be

used instead is rejected. Accordingly, so much of plaintiffs' motion as seeks summary judgment to dismiss landlord's 6th affirmative defense is granted.

The next category of affirmative defenses that plaintiffs seek to dismiss is composed of the 7th ("plaintiffs have alleged no facts or grounds pursuant to RSL § 26-516 [h] upon which the Court should consider any factors or rent history prior to the Four-Year Period or the Class Period"), 8th ("it is not reasonably necessary to consider the rental histories for any of the subject apartments beyond the four (4) year period immediately prior to commencement of this action"), 9th ("plaintiffs have not alleged the illegality in any rent registration prior to their tenancy"), 10th ("the rents registered for Plaintiffs' respective apartments prior to their individual tenancies was lawful") and 23rd ("defendant maintains that neither it nor its predecessor(s) engaged in any fraudulent scheme to avoid rent regulations") defenses, which plaintiffs collectively refer to as the "four-year, overcharge, and 'default formula not established' defenses" (*see* plaintiffs' mem of law at 6-7). Plaintiffs argue that they "have not only alleged fraud sufficient to examine surmount [sic] the base date, but have established fraud, as that term is used in rent-overcharge cases" (*id*.). Landlord responds that it "is entitled to preserve its argument" (*see* defendant's mem of law in opposition at 20 [pages not numbered]). Plaintiffs are correct. The 7th and 9th affirmative defenses each assert that "plaintiffs have not alleged" certain fraudulent acts in the amended complaint, whereas the amended complaint *does* in fact contain those allegations (*see* NYSCEF document 63 [answer], ¶¶ 175-177, 181-186). Accordingly, because the 7th and 9th affirmative defenses are belied by the complaint, so much of plaintiffs' motion as seeks summary judgment dismissing those defenses is granted. The 8th, 10th and 23rd affirmative defenses all allege that plaintiffs have failed to present sufficient evidence to establish fraud for the purposes of a rent overcharge claim (*id*., ¶¶ 178-180, 187-192). However, as has already been determined

plaintiffs *did* establish such fraud and this determination constitutes a rejection of the merits of landlord's 8th, 10th and 23rd affirmative defenses. Accordingly, so much of plaintiffs' motion as requests summary judgment to dismiss landlord's 8th, ,10th , and 23rd affirmative defenses is granted.

Plaintiffs next argue that "defendant's class-related affirmative defenses are improper" (*see* plaintiffs' mem of law at 7). This argument refers to a category composed of landlord's 11th ("no common questions of law or fact, as required by CPLR § 901 [a] [2]"), 18th ("the proposed Class fails to meet the commonality and/or typicality requirements of CPLR § 901"), 19th ("the proposed Class fails to meet the superiority requirement of CPLR §901") and 20th ("[m]aintaining the controversies alleged by the Class as separate actions is neither impracticable nor inefficient") affirmative defenses (*see* NYSCEF document 63 [answer], ¶¶ 193-196, 221-234). Plaintiffs argue that landlord "already stipulated that class certification is appropriate (NYSCEF No. 30) . . . [and] cannot now be heard to raise class related arguments" (*see* plaintiffs' mem of law at 7). Landlord responds that it "is free to preserve its allegations in the event the Court determines that this action is inappropriate for class treatment" (*see* defendant's mem of law in opposition at 20-21). This argument is disingenuous because the court so-ordered the parties class certification stipulation on December 9, 2019 (*see* NYSCEF document 30). Landlord's time to appeal or otherwise challenge that order has long since expired. The issue of the sufficiency of plaintiffs' class allegations was resolved by the December 9, 2019 stipulation and landlord is now barred from raising any challenges to plaintiffs' class definitions by the doctrine of "law of the case" (*see e.g., Jacobs v Macy's E., Inc.,* 17 AD3d 318 [2d Dept 2005]). Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 11th, 18th, 19th and 20th affirmative defenses is granted.

Plaintiffs next argue that landlord's "default formula class action defenses are inapplicable" (*see* plaintiff's mem of law at 8). This argument is directed at a category composed of landlord's 15th ("plaintiffs fail to allege that there are no reliable rent records pertaining to their apartments and/or the rent charged . . . [and] therefore, the default formula is inapplicable"), 21st ("the default formula is punitive and cannot be sought in a class action") and 22nd ("a class action may only be maintained in the event that punitive damages are waived") affirmative defenses (*see* NYSCEF document 63 [answer], ¶¶ 206-209, 235-242). Plaintiffs argue that these defenses all fail as a matter of law (*see* plaintiff's mem of law at 8). They cite the First Department's decision in *Simpson v 16-26 E. 105, LLC* (176 AD3d 418 [1st Dept 2019]) which held that (a) the absence of reliable rent records is only one of three acceptable means of demonstrating the existence of fraud for rent overcharge purposes, and (b) the "default formula" is *not* a penalty within the meaning of CPLR 901 [b] (176 AD3d at 419). Landlord's response that "plaintiffs have not provided any decisions by the Court of Appeals on the subject" is unavailing since First Department holdings are binding on this court unless and until they are reversed, modified or otherwise abrogated by the Court of Appeals. Research discloses that the *Simpson* holding is still good law and, as a result, landlord it bound by it. That holding affords sufficient grounds to grant plaintiffs' request for summary judgment to dismiss landlord's 15th and 20th affirmative defenses. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 15th and 20th affirmative defenses is granted.

Landlord's 22nd affirmative defense is dismissed as well because it misstates the law. As observed earlier, case law holds that treble damages are unavailable in connection with rent overcharge claims that tenants choose to pursue via class action (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d at 398; *Casey v Whitehouse Estates, Inc.*, 197 AD3d at 406). The mere fact of

proceeding as a class renders treble damages unavailable as a matter of law. There are no additional specific waiver procedures to be complied with. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's landlord's 22nd affirmative defense is granted.

Plaintiffs next argue that "defendant's residency related affirmative defenses are devoid of merit" (*see* plaintiffs' mem of law at 11). Counsel incorrectly designates landlord's 23rd ("defendant maintains that neither it nor its predecessor(s) engaged in any fraudulent scheme to avoid rent regulations.") and 24th ("plaintiffs Thomas, Levin, Wendt, Corkum and Jones vacated their apartments prior to the commencement of this action," and therefore "have waived any right they may have had to serve as proposed class representatives") affirmative defenses in this category, although it is evident that only the latter is a "residency related affirmative defense." (*see* NYSCEF document 63 [answer], ¶¶ 243-251). Landlord's 23rd affirmative defense was dismissed in an earlier portion of this decision. Plaintiffs argue that the 24th affirmative defense should be dismissed because all of the named plaintiffs resided in their units during the rent overcharge claims period, even if they vacated those units before this action was commenced (*see* plaintiffs' mem of law at 11). Landlord did not raise any opposition argument to support the 24th affirmative defense. Also, the December 9, 2019 class certification order/stipulation recognized plaintiffs' "class" composed of "[a]ll tenants [of the buildings] . . . living, *or who had lived*, in apartments that were deregulated during the period when J-51 tax benefits were being received by the owner . . .." (*see* NYSCEF document 30 [emphasis added]). The leases plaintiffs submitted establish that the named plaintiffs all did, in fact, reside in the buildings during a portion of the September 12, 2015 - September 12, 2019 rent overcharge claims period (*see* notice of motion [motion sequence number 004], exhibits I, K, MM, NN, RR). Therefore, the

named plaintiffs are all proper members of the "class," and the fact that they vacated their units prior to this action's commencement is of no moment. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 24th affirmative defense is granted.

Plaintiffs next argue that landlord's 25th affirmative defense ("to the extent that Plaintiffs seek to support their putative claims by demanding the production of unredacted copies of records with regard to buildings in which no named plaintiff resided or resides, such demands must be denied") should be dismissed because it "is absurd" (*see* NYSCEF document 63 [answer], ¶¶ 252-254;plaintiffs' mem of law at 11). That defense cites an order issued in the case *Stafford v A&E Real Estate Holdings, LLC* (2020 NY Slip Op 33090[U] [Sup Ct, NY County 2020]) which disposed of several pre-note of issue motions to compel. That order is inapposite to the current litigation, which has progressed to the summary judgment phase. Also, the defense appears to be based on the incorrect premise that no "plaintiffs . . . currently reside and/or have ever resided at 562 Hudson Street and/or 564 Hudson Street" (*see* NYSCEF document 63 [answer], ¶ 253). This assertion is belied by the leases annexed to the motion which establish that plaintiff/tenants resided in all four of landlord's buildings during some portion of the rent overcharge claims period (*see* notice of motion [motion sequence number 004], exhibits H-RR). Further, landlord raised no opposition arguments to support the 25th affirmative defense. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's 25th affirmative defense is granted.

Plaintiffs request dismissal of landlord's 26th affirmative defense ("on or about June 4, 2015, plaintiff McGuire for good and valuable consideration, executed a written release, under the terms of which Defendant was discharged and released from any and all liability in connection with her tenancy, including, but not limited to, the claims asserted by plaintiff

McGuire in the amended complaint.") which they refer to as the "waiver defense" (*see* NYSCEF document 63 [answer], ¶¶ 255-257; plaintiffs' mem of law at 12). Plaintiffs argue that this defense, too, is based on an incorrect premise, since the waiver that McGuire signed on June 1, 2015 expressly only granted landlord a release "for all matters to date relating to [her] occupancy of Apartment 2 at 566 Hudson Street . . . *through the date of execution of this agreement*" [emphasis added] (*see* notice of motion [motion sequence number 004], exhibit SS). Plaintiffs note that the rent overcharge claims period began after June 1, 2015 (*see* plaintiff's mem of law at 12). Landlord raised no opposition argument to support the 26th affirmative defense. Accordingly, because the waiver speaks for itself and flatly belies the allegations in landlord's 26th affirmative defense, so much of plaintiffs' motion as seeks summary judgment dismissing the 26th affirmative defense is granted.

Plaintiffs direct their final dismissal arguments against landlord's 1st ("the [amended] complaint fails to state a cause of action for rent overcharge and/or declaratory judgment") and 27th ("defendant . . . reserves the right to assert and rely on such . . . applicable defenses as may become available by law, or pursuant to statute, or appear during the pendency of this action") affirmative defenses (*see* NYSCEF document 63 [answer], ¶¶ 152-153, 258-260; plaintiffs' mem of law at 12-13). With respect to the former, plaintiffs assert that "[b]ecause defendant's [other] affirmative defenses are meritless, factually deficient, and devoid of evidentiary support, of any kind, all of Defendant's affirmative defenses . . . should now be stricken" (*id*., plaintiffs' mem of law at 13). However, while the majority of landlord's affirmative defenses have been dismissed as meritless, a determination as to some is being held in abeyance and are still being litigated. The earlier portion of this decision expressly declined to rule on the issue of landlord's liability for either rent overcharge or declaratory relief pending the submission of additional evidence.

The court now also expressly declines to make any findings with respect to landlord's argument that it is not liable for the claims plaintiffs assert. Accordingly, so much of plaintiffs' motion as seeks summary judgment to dismiss landlord's 1st affirmative defense is held in abeyance.

Landlord's final affirmative defense, the 27th is a different matter. The First Department has long recognized the rule that:

> [A] party cannot employ a catch-all provision in an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party. Moreover, neither plaintiff nor the court ought to be required to sift through a boilerplate list of defenses, or 'be compelled to wade through a mass of verbiage and superfluous matter,' to divine which defenses might apply to the case.

(Scholastic Inc. v Pace Plumbing Corp., 129 AD3d 75, 79 [1st Dept 2015] [internal citations omitted]). Landlord did not raise any opposition argument to support its 27th affirmative defense, which is "an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party." Accordingly, so much of plaintiffs' motion as seeks summary judgment to dismiss landlord's 27th affirmative defense is granted.

4. Landlord's Counterclaim (Legal Fees and Court Costs)

The final portion of plaintiffs' motion seeks summary judgment dismissing landlord's counterclaim for legal fees and court costs (*see* NYSCEF document 63, ¶¶ 261-262). Since a determination to what extent (if any) cannot yet be made as to landlord's liability to plaintiffs for rent overcharge(s) and/or declaratory relief, it is premature to consider whether landlord is entitled to an award of fees and costs at this juncture. Accordingly, so much of plaintiffs' motion as seeks summary judgment dismissing landlord's counterclaim is held in abeyance.

CONCLUSION

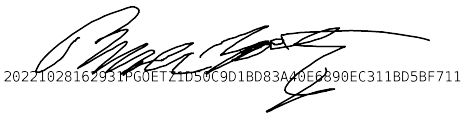
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of the plaintiff class (motion sequence number 004) is held in abeyance with respect to plaintiffs' first cause of action for rent overcharge pending counsels' submissions of the supplemental materials identified in the body of this decision; and it is further

ORDERED that counsel are directed to contact the Part 47 clerk at SFC-Part47-Clerk@nycourts.gov within thirty (30) days after service of a copy of this decision with notice of entry to receive a conference date during which a submission schedule for the above-mentioned supplemental materials will be set; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the plaintiff class (motion sequence number 004) is held in abeyance with respect to plaintiffs' second, third and fourth causes of action and to the counterclaim of defendant 560-566 Hudson LLC; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the plaintiff class (motion sequence number 004) is held in abeyance with respect to defendant's 1st and 12th affirmative defenses and to defendant's counterclaim, but is granted with respect to defendant's remaining affirmative defenses, and defendant's 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th and 27th affirmative defenses are dismissed.



10/28/2022
DATE

PAUL A. GOETZ, 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**