SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

---X

SABENA T LEAKE, BRIAN GONZALES, ASHLEY GONZALES, ANGELO MARIANO

Plaintiffs,

- v -

55 COOPER ASSOCIATES, L.P., BEACH LANE MANAGEMENT, INC.,

Defendants.

---X

INDEX NO. 160549/2017

MOTION DATE 07/01/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278

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

In this class action for violations of the J-51 program, plaintiffs Sabena T. Leake (Leake), Brian Gonzales, Ashley Gonzales, and Angelo Mariano (collectively, plaintiffs) now move pursuant to CPLR 3211 and 3013 to dismiss the affirmative defenses of defendants 55 Cooper Associates LP (owner) and Beach Lane Management, Inc. (manager) (collectively, defendants), and for summary judgment on the complaint. Defendants cross move for summary judgment, to amend the Division of Housing and Community Renewal (DHCR) apartment registrations for 2013 – 2017, and for a hearing with a special referee to determine the current rents for the apartments and plaintiffs' overcharge damages. The motions are opposed. For the following reasons, plaintiff's motion is granted in part, and defendant's cross-motion is denied.

BACKGROUND

The owner purchased the building located at 55 Cooper Street, New York, New York (the Building), on July 29, 1993. The manager is the managing agent for the building and has been since owner's purchase of the Building. Plaintiffs are current and former tenants of the Building, not including tenants who vacated any such apartments prior to November 29, 2013. The class is defined as:

> "all tenants at 55 Cooper Street living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by the owner of 55 Cooper Street, except that the class shall not include (i) any tenants who vacated before December 21, 2013, or (ii) any tenants whose occupancy in any such apartment commenced after such J51 tax benefits to the building ended"

(NYSCEF Doc. no. 256, third amended compl, ¶ 79).

The subclass is composed of: "all current tenants at 55 Cooper Street, who currently reside in an unlawfully deregulated apartment" (third amended compl, ¶ 81).

The parties agree that the Building was in receipt of J-51 benefits through June 30, 2015 (third amended compl, ¶ 25 defs' statement of material facts, ¶ 3). Defendants state that J-51 benefits were not in effect from July 1, 2015 through June 30, 2018, but were in effect on July 1, 2018 and continued at least through August 25, 2021, the date of defendants opposition papers (*id.* ¶¶ 4 and 5). Plaintiffs contend that the J-51 benefits for the Building may have continued after June 30, 2015 (plas' response to defs' statement of material facts, ¶¶ 3, 4 and 5). The tax bills submitted to the court are dated, June 2013, June 2014, June 2015, June 2016, June 2017, June 2018, June 2019, and June 2021. The bills for years 2013-2014, 2014-2015, 2018-2019, 2019-2020 and 2021 indicate the Owner's receipt of J-51 benefits. However, the bills for 2015-2016, 2016-2017 and 2017-2018 do not indicate the Owner's receipt of J-51 benefits.

Under the J-51 program, landlords are required to provide their tenants with rent-stabilized leases as a condition of receiving tax benefits. Specifically, landlords participating in the J-51 Program are required to: (1) register all apartments in the J-51 Program with the Division of Housing and Community Renewal (DHCR); (2) provide the tenants with rent-stabilized leases; and (3) take only rental increases allowed by New York's rent regulations (*see* Administrative Code § 11-243).

Plaintiffs commenced this action alleging that during that period when defendants were receiving J-51 benefits for the Building, defendants deregulated the apartments and overcharged tenants as part of a fraudulent scheme. Plaintiffs seek, among other things, damages based upon the default formula, which is applied in cases of established fraud. They further seek recalculation of their rents. The class was certified pursuant to Marin's October 30, 2020 Order (Marin, J.).

Defendants argue that all material facts in this action are undisputed and specifically that the parties agree that, except for the basement unit, plaintiffs' apartments were improperly deregulated during the period in which Owner received J-51 benefits. Thus, according to defendants, the sole issue in this action is whether, as a matter of law, plaintiffs have established that there was a fraudulent scheme to deregulate warranting application of the default formula (defendants' memo in opp and in support of cross motion at 4, NYSCEF Docket No. 261).

The claims set forth in the third amended complaint are: (1) violation of Rent Stabilization Law (RSL) 26-512 (on behalf of the class), in that "Defendants charged Plaintiffs and the Class rents in excess of the legal regulated rent for their apartments (third amended complaint, ¶ 98); (2) violation of RSL 26-512 on behalf of the subclass), for which plaintiffs seek a declaratory judgment as to the regulatory status of their apartments and the legal regulated rents; and (3) declaratory relief (on behalf of the subclass) that defendants conduct was willful in failing to provide the subclass with rent-stabilized leases and the correctly calculated rents under the rent stabilization regulations. Defendants interposed an answer that contains twenty-five affirmative defenses and a counterclaim for attorneys and court costs.

Plaintiffs argue that they can establish fraud on the grounds that for nearly eight years prior to November 2017, of the approximately 45 apartments in the Building, Owner did not register with the DHCR plaintiff's approximately 26 apartments[1] and, instead, listed them as exempt from rent stabilization (third amended complaint, ¶ 10). They state that 17 of those 26 apartments were deregulated prior the Court of Appeals decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), in which the Court of Appeals held that owners may not deregulate apartments while receiving J-51 benefits. For example, the rent history for apartment 3C on file with DHCR states that the apartment was exempt from rent stabilization on July 31, 2007 as a result of high rent vacancy. It further states that registration was not required for this apartment, as a result of the exemption, from 2008 through 2016 (third amended complaint, ¶ 11).

There is no dispute that defendants did not promptly attempt to register the 26 apartments as issue here that were deregulated before or after *Roberts*. According to defendants' submission, defendants re-registered the subject apartments right after commencement of this action in 2017, in accordance with what it believed to be current DHCR regulations. Defendants state that as the owner and manager of the Building, they used a methodology to re-register the apartments, which they believed was approved by the DHCR. Defendants used the last registered rent for each apartment, and then applied any rent increases that were appropriate under the applicable law. They re-registered the legal rents in 2017 based on that calculation. If a lease rent was less than the recalculated legal rent, the lease rent was registered as a preferential rent (Rothken aff, ¶ 3, NYSCEF Docket No. 255).

Plaintiffs allege that the default formula should be applied because defendants willfully failed to comply with the requirements of the RSL, as they: (1) did not provide tenants at 55 Cooper Street with rent-stabilized leases, (2) did not properly register the apartments with DHCR, increased rents beyond the limits set forth by the RGB, and (3) improperly declared the apartments to be deregulated due to 'High Rent Vacancy.'

Defendants argue that plaintiffs cannot establish a fraudulent scheme and that the four-year rule should be applied. The four-year rule established each overcharge action's base date, which is the date that is four years prior to the commencement of the action and from which the tenant is permitted to seek overcharge damages. Here, the base date is November 29, 2013, since this date is four years prior to the commencement of this action, on November 29, 2017.

Defendants cross-move for summary judgment arguing that, because plaintiffs are unable to establish fraud, they are entitled to the application of the four-year rule to determine any rent overcharges and those amounts. Plaintiffs move for summary judgment on the ground that the default formula should be applied to determine damages since defendants engaged in a fraudulent scheme to deregulate the subject apartments.

DISCUSSION

1. Plaintiffs' Motion for Summary Judgment

[1] Plaintiffs also contend that the tenants of the basement apartment are proper parties to this action. Defendants argue that this should be rejected, however, because they state that the basement apartment was never treated as deregulated.

The central issue on this motion is whether plaintiffs have established sufficient evidence, as a matter of law, that beyond any dispute of fact, defendants engaged in a fraudulent scheme to deregulate the subject apartments while receiving J-51 benefits, and overcharging the tenants, which would permit the application of the default formula. This punitive remedy resets the base date rent to the lowest rent of a similarly situated units in the building. On this motion, plaintiffs also ask the court to extend the four-year lookback period to permit an examination of those earlier records in order to establish fraud. Defendants argue that plaintiffs fail to establish that the owner engaged in a fraudulent scheme to deregulate, and therefore, the court must strictly apply the four-year rule and uphold the rent actually being charged on the base date, the date four years prior to the filing of this action. This is so, argue defendants, even where the rent was inflated or greater than what the landlord was entitled to, had it properly treated the subject apartments as rent stabilized.

The first cause of action

In the first cause of action, plaintiffs seek damages for rent charged in excess of the legal regulated rent pursuant to RSL § 26-512. However, it is RSL § 26-516 that governs the determination of rent overcharge. RSL § 26-512 does not specifically provide for declaratory relief, but instead it sets forth the general rules for calculating the rents of rent stabilized apartments.

Plaintiffs commenced this action on November 29, 2017, prior to the June 14, 2019 effective date of the Housing Stability & Tenant Protection Act of 2019 (HSTPA). Thus, it is the pre-HSTPA version of RSL § 26-516 that governs plaintiffs' rent overcharge claims. This is consistent with the holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332, 363 [2020]), in which the court held that the HSTPA's amended rent overcharge provision cannot be retroactively applied to overcharges that were alleged to have occurred before its enactment.

RSL § 26-516 is a statutorily created cause of action, not the codification of a common-law claim. According to the statute, after it is established that a landlord is liable for rent overcharge, the statute identifies awards of, among other things, court costs, attorney's fees, judgments for money damages, treble damages,[2] and related declaratory and/or injunctive relief (RSL § 26-516 [a]).

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 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" (RSL § 26-516 [a]). This language in the statute, therefore, would require 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

[2] Because plaintiffs have proceeded as a class in this action, they are not entitled to treble damages under the statute (*see, e.g., Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]). Thus, the court will not consider the issue of treble damages with respect to plaintiffs' claims.

statement plus the 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 of these factors may be determined by reference to documentary evidence that includes leases and payment records.

The first factor for determining a rent overcharge, an apartment's "legal regulated rent" requires a calculation. 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 in the DHCR registration statement that was in effect four years before a rent overcharge claim was filed, and not prior to four years: "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 Sec. 26-516 [a] [2]). The four-year rule establishes each overcharge action's "base date," which is the date that is four years prior to the commencement of the action and from which the tenant is permitted to seek overcharge damages (i.e., the "recovery period") (*Regina*, 35 NY3d at 348 and 352-53).

This four-year "statute of limitations" (known as the four-year lookback rule) governs in rent overcharge actions, unless there is proof that the landlord engaged in fraud (*Grimm v State Div. of Housing and Community Renewal Office of Rent Admin.*, 15 NY3d 358, 365 [2010]). The Court of Appeals has held that when there are allegations that the standard base date rent is tainted by fraudulent conduct on the part of the landlord, "the parties may look back further than four years to calculate the lawful rent" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 15 [2015]["'such base date rent may not be used as a basis for calculating subsequent regulated rent if fraud is indeed present'"][internal citation omitted]).

Again, in cases without proof of fraud, in addition to limiting a tenant's damages to those incurred during the recovery period, the four-year rule also precludes a tenant from challenging or modifying the actual rent charged on the base date (*see id.* at 354). As the Court of Appeals in *Regina* explained, "the base date rent [is] the rent actually charged on the base date — i.e., four years prior to the overcharge complaint — even if no registration statement had been filed reflecting that rent." (*id.* at 354 ["(t)he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments"], citing RSC § 2526.1[a]).

Where a plaintiff alleging a rent overcharge establishes that the landlord engaged in a fraudulent scheme to deregulate the unit, then an apartment's "legal regulated rent" is likely not the amount the landlord listed on the DHCR registration statement (*see Regina*, 35 NY3d at 355). In such cases, the parties offer proof of the actual legal regulated rent as well as the amount of the deviation, the overcharge (*see id.*). The default formula is used in such cases to calculate compensatory overcharge damages where no other method is available (*see id.* at 354). Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable.

"The default formula for establishing the base date rent is applied where (1) the base date rent cannot be determined, (2) a full rent history is not provided, or (3) the owner has engaged in

fraudulent practices" (*Simpson v 16-26 E. 105, LLC*, 176 AD3d 418, 418-419 [1st Dept 2019] citing 9 NYCRR 2522.6 [b] [3]; 2526.1 [g]).

Thus, where it had been established by the tenant that a landlord has engaged in a fraudulent scheme to deregulate the unit, the court applies the "default formula," as set forth in RSC Sec. 2522.6 (b) (9 NYCRR Sec. 2522.6 [b]), to determine an apartment's "legal regulated rent." Evidence of practices by the landlord such as any misrepresentations by the owner in the rental history of the subject apartment would support the application of the default formula (*Regina*, 35 NY3d at 355).

This formula sets the base date rent as "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*id.* at 354-355).

Here, plaintiffs' overcharge claim is set in the context of defendants' receipt of J-51 benefits. In other words, plaintiffs allege that while receiving J-51 tax benefits, defendants unlawfully deregulated plaintiffs' apartments and overcharged the rent. New York courts have been addressing this type of J-51 litigation in New York since the landmark decision of *Roberts v Tishman Speyer Props, L.P.*, (13 NY3d 270 [2009]), in which the Court of Appeals established that luxury deregulation was unavailable in J-51 buildings. The *Roberts* decision overturned DHCR guidance that had permitted building owners to deregulate rent stabilized apartments during receipt of J-51 benefits. In its later decision in *Regina*, the Court explained this aspect of the *Roberts* decision: "[b]uildings electing to receive J-51 benefits become subject to the rent stabilization scheme (RSL [Administrative Code of City of NY] § 11-243 [b], [i] [1]; [t])" (*Regina*, 35 NY3d at 350). However, at the time of *Roberts*, removing apartments from rent stabilization while receiving J-51 benefits was not a fraudulent act, since the Court was correcting a DHCR regulation permitting such deregulation: "in these [post-]*Roberts* cases, the owners removed apartments from stabilization consistent with agency guidance" (*Regina*, 35 NY3d at 356). The deregulation of these apartments, according to *Regina*, was not based on fraud but on a misinterpretation of the law "that DHCR itself adopted and included in its regulations" (*id.*, 35 NY3d at 356).

Before *Roberts,* the deregulation of 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" (*Regina*, 35 NY3d at 356), and therefore, this act of deregulation, in and of itself, cannot establish fraud.

In 2011, in *Gersten v 56 7th Ave. LLC*, (88 AD2d 189 [1st Dept 2011]), the Appellate Division, First Department, held that *Roberts* applied retroactively, and required prompt re-registration of all apartments that had been luxury deregulated in buildings receiving J-51 benefits. In early 2016, the DHCR issued a "J51 FAQ," which reminded landlords to re-register their units, utilizing a provided formula to set the rent. The FAQ guidance provided that, "[t]he legal regulated rent to be registered cannot exceed the actual rent being paid by the tenant" (Sachar affirmation, ex 5).

In the years that followed *Roberts* and *Gersten*, New York courts have found that a landlord's failure to re-register apartments, while receiving J-51 benefits, could form the basis for a finding of a fraudulent scheme to deregulate and overcharge tenants (*see e.g., Montera v KMR Amsterdam*, 193 AD3d 102, 107 [1st Dept 2021]). The parties may use records that pre-date the four-year lookback period to establish fraud, but not to calculate the overcharge. To calculate the overcharge amount, the parties may not go beyond the four-year lookback period, because if fraud is established, the court applies the default formula to set the base date rent (*see Regina*, 32 NY3d at 355).

The Court in *Regina* also reiterates the difficulty of establishing fraud in cases where the landlord deregulated apartments while receiving J-51 tax relief prior to *Roberts* (Regina, 35 NY3d at 356-357). In its decision in *Regina*, the Court of Appeals explained that any proof of fraud must require proof of willfulness (*id.*). "Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury'" (*id.* at 356, fn 7 [citations omitted]). "In this context," the Court explains, "willfulness means 'consciously and knowingly charg[ing] . . . improper rent'" (*Regina*, 35 NY3d at 356, fn 7, citing *Lavanant v State Div. of Hous. & Community Renewal*, 148 AD2d 185, 190 [1st Dept 1989]; and *Old Republic Life Ins. Co. v Thacher*, 12 NY2d 48, 56 [1962] [interpreting "willful" in a regulatory context to mean "intentional and deliberate"]). "Assumptions regarding the regulatory status of an apartment may amount to 'willful ignorance, which constitutes willful conduct, particularly since defendants are sophisticated property managers and owners'" (*Montera*, 193 AD3d at 107 citing (*Grady v Hessert Realty L.P.*, 178 AD3d 401, 405 [1st Dept 2019]).

Here, according to the third amended complaint, and the parties' undisputed facts, defendants were receiving J-51 benefits for the Building until June 2015. According to plaintiffs, defendants waited until November 2017 to register the units, which was not only after the commencement of this lawsuit, but also approximately twenty-three months after receipt of the J-51 FAQ, and nearly six (6) years after *Gersten*.

On this point, plaintiffs further argue that "in the years following the *Roberts* decision, defendants kept deregulating units, and failed to re-register promptly after *Gersten*" (memo in support at 21). Plaintiffs continue: "[a]fter DHCR reminded them that registration was required, in January 2016, defendants waited until November 2017 before re-registering. When they did so, they utilized preferential rents and higher legal regulated rents in contravention of DHCR's express directive that the legal regulated rent could not be higher than what the tenant was paying" (plaintiffs' memo in support at 2).

The J-51 FAQ requires that "[i]f the rent resulting from these calculations is less than the rent being charged to the current tenant, the rent being charged should be adjusted to the calculated rent and registered" (Sachar affirmation, ex 5, 10 [c]). In other words, the legal regulated rent to be registered cannot exceed the actual rent being paid by the tenant, and so, a landlord could not re-register using preferential rents. According to plaintiffs, defendants registered, for example, plaintiff Sabena T. Leake's (Leake) unit with a legal regulated rent of $3,410.36, and a preferential rent of $1,375.00. By registering this higher legal regulated rent, according to plaintiffs, defendants were able to calculate Rent Guidelines Board (RGB) increases off that higher rent number, despite charging the tenant a lower preferential rent. On this point,

plaintiffs argue: "In sum, Defendants' re-registration methodology allowed them to feign compliance with the rent regulations while subjecting their tenants to the risk of free-market rent increases" (plaintiffs' memo in support at 4).

Defendants argue in opposition that apartments deregulated before *Roberts* cannot form the basis for a claim of fraud. Defendants cite *Regina* for this proposition and argue that even an "illegally inflated" or "unreliable" base date rent does not warrant the use of the default formula. (defendants' memo in opp at 11 citing *Regina*, 35 NY3d at 358-60). Defendants argue the Court's reasoning in *Regina,* which is that in every overcharge case there is evidence of inflated rent, and, therefore, if inflated rent was enough grounds for use of the default formula, the four-year lookback would never be applied. Defendants further posit that the establishment of repose for landlords, who need not keep records prior to the four-year lookback period, precludes the consideration of overcharges prior to the four-year recovery period (*see Regina*, 35 NY3d at 360). Thus, any overcharge resulting from improper, but not fraudulent, luxury deregulation does not warrant the default formula, but only the application of the standard lookback provisions (*see id.*).

Defendants further argue that apartments that were deregulated after *Roberts* also do not establish fraud. Defendants cite the confusion of landlords after *Roberts*, and a DHCR determination to argue that "the Agency did not promulgate post-*Roberts* policies, prohibiting such deregulation and instructing owners on how to register apartments, until years after the issuance of *Roberts*, and years after the [December 27, 2012] base date of this case" and, therefore, there can be no finding of fraud here. According to defendants, most of the post-*Roberts* deregulations here occurred shortly after the Roberts decision. Defendants offer these examples:

> "apartment 2A (currently occupied by plaintiff Sabina Leake) was registered as vacant on August 26, 2009, prior to Roberts, and thereafter registered as deregulated due to "high rent vacancy" on July 2, 2010 (*see* ex 6 to plaintiffs' motion). Similarly, apartments 5D, 6D and 6G were also registered as deregulated due to "high rent vacancy" on July 2, 2010 (*id.*) These facts, on their face, do not demonstrate that Defendants engaged in fraud"

(defendants' memo in opp at 12).

Defendants additionally argue that failure to re-register the apartments for years after *Roberts* is not enough to support a claim for fraud, since the Court of Appeals in *Regina* acknowledged that the four-year lookback period is the measure of damages, regardless of defendants' failure to register the apartments at issue.

The Court of Appeals and First Department have set forth what constitutes the hallmarks of a landlord's fraudulent conduct. "[A]n increase in 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 to require DHCR to inquire further (*Conason*, 25 NY3d at 16). In *Montera*, the First Department held that there was enough evidence of a fraudulent scheme to permit the court to review the rental history beyond the four-year lookback period to determine whether fraud

occurred (*id.*, 193 AD3d at 107), but did not reach the question of the applicability of the default formula. *Montera* concerned an apartment that was deregulated after the Court of Appeals issued its guidance in *Roberts* and after the decision in *Gersten.* In *Montera*, the owner allegedly had engaged in a scheme over many years to illegally deregulate the tenant's apartment and many other apartments in the building. In 2003, the *Montera* defendant's predecessor applied for J-51 tax benefits for the building. This was one year prior to defendant's acquiring the building. In about June 2013, the J-51 tax benefits expired and defendant was required to re-register the apartments with DHCR, provide the building tenants with rent-stabilized leases, and seek rent increases in accordance with rent regulations (*see Montera*, 193 AD3d at 107-108).

The *Montera* Court found that the plaintiff had "sufficiently alleged" a fraudulent scheme to deregulate on the facts that: (1) the defendant deregulated the apartment after *Roberts* and did not re-register with DHCR, despite receiving J-51 tax benefits after *Gersten* applied *Roberts* retroactively; (2) the defendant did not promptly re-register, but waited until 2018 to re-register the apartment, which was one year after the complaint, alleging that defendant unlawfully deregulated the building's apartments, was filed; (3) during the four-year period preceding commencement of the lawsuit, plaintiff was still not given a rent-stabilized lease. Thus, the defendant re-registered the apartment more than a decade after *Roberts* was decided and eight years after *Gersten*. Here, likewise, there is no question that defendants' actions cannot be deemed to be prompt compliance, as "plaintiff has alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building" (*id.* at 108-109).

The *Montera* Court further ruled that landlords cannot simply wait to be sued for wrongful deregulation and consequential rent overcharges to register the apartments. Specifically, the First Department stated that the decision in *Regina* does not grant an owner "carte blanche in post-*Roberts/Gersten* cases to willfully disregard the law" (193 AD3d at 107). Owners may not enjoy tax benefits and simultaneously misrepresent the regulatory status of the apartments they illegally deregulated, and then take steps to comply with the law "only after its scheme is uncovered" (*id.*).

The First Department held that, because plaintiff sufficiently alleged a fraudulent scheme, "the apartment history beyond the four-year lookback period may be reviewed to determine whether fraud occurred" (*id.*, 193 AD3d at 109). In other words, the court did not find that plaintiff submitted enough evidence of a scheme to apply the default formula but was permitting the plaintiff to examine an extended rent history, beyond just the four years, to find evidence of deceit, such as rent spikes or unexplained rent history that, in addition to the illegal failure to register, would constitute a fraudulent scheme (*id.; see also Stafford v A&E Real Estate Holdings LLC* 188 AD3d 583 [1st Dept 2020] ["Here, as to the contested 62 of 68 plaintiffs at issue, the complaint sufficiently alleges 'indicia of fraud' to warrant consideration of the rental history beyond the four-year statutory period"]; *see also Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434 [1st Dept 2018] [registration failures and rent spikes demonstrated a sufficient indicia of fraud to support looking back prior to the four-year period]). Likewise, the Second Department has stated that "rent spikes or unexplained increases in rent could be evidence of fraud" (*Gridley v Turnbury Village, LLC*, 196 AD3d 95, 102 [2d Dept 2021].

In *435 Cent. Park W. Tenant Assn v Park Front Apartments LLC* (183 AD3d 509 [1st Dept 2020]), the Court in affirming the lower court's denial of defendants' motion for summary judgment clarified what constitutes a fraudulent scheme to support the application of the default formula. The Court offered the facts of plaintiffs' fraud claims as follows:

> "Plaintiffs, however, claim that the HUD rent in effect on the last day of federal oversight, April 11, 2011, was an illegal rent and thus could not be used as the initial legal regulated rent (base rent) to determine whether defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment"

The First Department found that plaintiffs submitted sufficient evidence to raise an issue of fact as to whether the defendant "tampered with a recertification process provided for under the Use Agreement," and pressured and misled tenants for the purpose of improperly raising rents at "Market" rates far higher than the Use Agreement rates (*see 435 Cent. Park W. Tenant Assn.*, 183 AD3d at 510).

Based upon these facts the *435 Cent. Park W.* Court clarified that the fraud exception to the four-year look back period applies both to schemes to deregulate apartments and schemes to overcharge tenants (*id.* at 510). It is key that the Court concluded that where the tenant has offered enough fact-based evidence that the landlord failed to promptly register, the court would permit an examination of landlord's records that pre-date the four-year look-back period (*id.*). This examination is done to determine whether the landlord illegally raised the pre-registration rents, which would taint the reliability of the rent on the base date and require the use of the default formula to determine a proper lawful rent on the base date. The Court denied defendants' motion for summary judgment and rejected the defendant landlord's argument that the "exception to the four-year look back period applies only to a fraudulent-scheme-to-deregulate case" (*435 Cent. Park W. Tenant Assn.*, 183 AD3d at 510).

The Court held that if it is proven that defendant tainted the reliability of the based date rent by engaging in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the default formula must be applied. In such a case, the plaintiffs' recovery would be limited to those overcharges occurring during the four-year period immediately preceding plaintiffs' rent challenge (*see 435 Cent. Park W. Tenant Assn.*, 183 AD3d at 510-511).

Likewise, in *Nolte v Bridgestone Assoc., LLC*, 167 AD3d 498 [1st Dept 2018]), the First Department affirmed the finding by the lower court of treble damages based upon a fraudulent scheme to deregulate where the record showed that defendant had been dishonest about apartment improvements and "defendant [landlord] failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of [*Roberts*] was clear" (*Nolte*, 167 AD3d 498, 498-499 [1st Dept 2018]). On the issue of fraud, the Court specifically noted that the landlord did not create an issue of fact where the tenant alleged that there was no evidence of these improvements and that the landlord was not truthful about the existence of repairs or improvements. The Court stated that the defendant failed to raise any

questions of fact as to whether the rent was improperly increased between 1999 and 2000 based on these false claims of repairs (*see id.* at 499).

Similarly, in *Kreisler v B-U Realty Corp.* (164 AD3d 1117 [1st Dept 2018]), the First Department affirmed the lower court's granting of plaintiffs' summary judgment motion and application of default formula where it was determined that the landlord engaged in a fraudulent scheme to deregulate the apartments. According to the decision, the record supported a finding of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease. The Court further found that defendants only addressed the issue when their conduct, "which violated [*Roberts*] came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014" (*id.* at 1117).

The *Kreisler* Court reiterated the rule that "where, as here, a landlord has engaged in fraud in initially setting the rent or removing an apartment from rent regulation, the court may examine the rental history for an apartment and, moreover, may do so beyond the [four-year] statutory period" (*id.* at 1117 [internal citation omitted]). Furthermore, the First Department in its decision in *Kreisler* rejected defendants' arguments that they relied on the regulatory framework pre-Roberts and therefore did not act willfully, since "the wrongdoing here occurred in 2010, after *Roberts* was decided" (*id.* at 1118), and likewise rejected "defendants' arguments regarding the legality of the initial rent," which rang "hollow" to the Court. The Court further found that the rent was a product of defendant's fraudulent scheme and "the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate" (*id.*).

In *Casey v Whitehouse Estates, Inc.*, 197 AD3d 401 [1st Dept 2021], the First Department affirmed the lower court's grant of summary judgment for plaintiff. The court found that the defendant engaged in fraud as the plaintiffs established that "the DHCR rent history for the apartments within the four-year lookback period shows that the rents beginning in 2007, four years before the complaint was filed, were registered in 2012, based on defendants' unilateral calculations and not the actual rent charged" (*id.* at 404). The Court further found that plaintiff had established that for some of the apartments, defendants converted plaintiffs' actual rents to "preferential rents" in order to justify registering significantly higher rents with DHCR" (*id.* at 405). This evidence, as well as defendants' failure to produce leases for the class within the lookback period, showing the actual rent paid, raised questions about the base date rent, which "was not established by a preponderance of the evidence under RSC § 2526.1 (a) (3) (i)" (*id.*).

Ultimately, the lack of any basis for their calculations, "gave rise to a colorable claim of fraud" (*id.*). The Court identified a "fraudulent scheme to deregulate" since the landlord filed amended DHCR registrations listing these incorrect "legal regulated rents" after plaintiff filed a rent overcharge complaint in an attempt to conceal/obscure the subject apartment's true rental history (*Casey v Whitehouse Estates, Inc.*, 197 AD3d at 404).

Similarly, in *Hess v EDR Assets LLC* (200 AD3d 491 [1st Dept 2021]), which was decided four months after *Casey*, the First Department addressed plaintiffs' motion to be certified as a class and found that the landlord, while receiving J-51 benefits, failed to re-register

the units until years after *Roberts*, and waited over a year to re-register after DHCR instructed them to do so. The landlord continued to inform the tenant that the units were not subject to regulation. Moreover, these steps to comply were only undertaken after the scheme was uncovered (*Hess*, 200 AD3d at 492). The *Hess* Court found: "[c]ontrary 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" (*id.*, at 492 [internal citations omitted]).

In *Ampim v 160 East 48th Street Owner II LLC* (208 AD3d 1085 [1st Dept 2022]), the First Department affirmed the trial court's denial of plaintiff's summary judgment motion. The Court found that "an increase in rent and failure to register the apartment with the [DHCR], standing alone, are insufficient to establish a colorable claim of a fraudulent scheme to deregulate the apartment" (*id.* at 2087). The Court held that "this case differs from recent decisions relating to the failure to register apartments in buildings for which the owner is receiving J-51 benefits, in which the owners affirmatively misrepresented the rent-stabilized status of the apartment and the legal regulated rent" (*id.*).

Thus, New York courts will apply the default formula only where an examination of the record reveals, without factual dispute, that the landlord willfully tainted the rent on the base date such that the "legal registered rent" is not reliable. In such cases, the legal rent should be based on a 'default formula,' "otherwise reserved for cases where there are no reliable rent records," which sets the base date rent as "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*Regina*, 35 NY3d at 354-355 [internal quotation marks and citation omitted]).

Based upon these decisions, the court concludes that the crux of the inquiry herein, is not exclusively whether the landlord deregulates the apartment before or after *Roberts*, but it is the landlord's failure, after *Roberts*, to promptly register the apartments that have been wrongly deregulated, along with additional fraudulent conduct, such as unexplainable rent increases or repair charges that demonstrate intentional misrepresentation on the part of the landlord. To establish that defendants herein engaged in a fraudulent scheme to deregulate, plaintiffs submit most of the twenty-six apartments' leases for a period including 2013 to 2017, along with riders and lease extensions.[3]

Plaintiffs also rely on the Building's DHCR rent roll for the period 1990 to 2019, as well as the Building's June 2013 and 2021 tax bills and the 2016 J-51 FAQ provided by New York State Homes and Community Renewal (HCR). Defendants have submitted the tax bills from June 2014, June 2015, June 2016, June 2017, June 2018, June 2019 and June 2021. The June 2013, June 2014, June 2018, June 2019 and June 2021 tax bills all indicate receipt of J-51 benefits for the Building. Plaintiffs additionally submit in support of their motion, a copy of the

[3] The following 2013-2017 documents are missing for 10 of the subject apartments: (1) for apartment 2F, there are no leases annexed for 2014 or 2015; (2) for apartment 2G, there is no lease annexed for 2016; (3) for apartment 3B, there is no lease annexed for 2013; (4) for apartment 4H, there are no leases annexed for 2014 and 2015; (5) for apartment 5D, there is no lease annexed for 2014; (6) for apartment 6A, there is no lease annexed for 2013; (7) for apartment 6C, there are no leases annexed for 2016 and 2017; (8) for apartment 6D, there is no lease annexed for 2013; (9) for apartment 6E, there are no leases annexed for 2014, 2015 or 2016; (10) for apartment 6F, there are no leases annexed for 2013, 2015 or 2016.

permitted New York City Rent Guidelines Board (NYCRGB) increases for October 2000 through September 2021.

By submitting the leases, plaintiffs seek to demonstrate that during the period that defendants allegedly received J-51 benefits, the defendants were offering free market leases and free market lease renewals to their tenants, thereby misleading tenants about the legal status of the apartments and their rights thereto. They also seek to demonstrate the use of illegal rents and preferential rents by the defendants, as well as defendants' scheme to increase the rents in excess of the allowed RGB increases. Finally, by offering the DHCR rent roll, plaintiffs seek to establish that defendants wrongly "permanently exempted" several apartments in the Building from the rent regulations during the period when the Building was receiving the benefits of the J-51 program, and that defendants wrongly and intentionally failed to re-register the apartments in the Building until November 2017, raised rents in excess of the legal RGB limitations and misrepresented the rents they were charging the tenants to the DHCR.

Sample of Plaintiffs' Proof for First Cause of Action

The plaintiffs offer the tenant and rent history of the 26 apartments at issue in this action to establish defendants' fraudulent conduct. In order to provide a summary of the type of facts that plaintiffs use to seek the application of the default formula, the court reiterates the data from six of those apartments as follows:

A. Apartment 1A

Apartment 1A was listed as "permanently exempt" in the DHCR rent rolls in 2009. Emily Rau signed a one-year free-market renewal on August 7, 2013, indicating a monthly rent of $1,360.00 (Sachar affirmation, exhibit 8). On September 30, 2014, Amanda J. and William E. Rikard signed a free-market lease, indicating a monthly rent of $2,750 (Sachar affirmation, ex 9). This lease contained a deregulation rider, advising that the apartment was deregulated and "is not subject to any form, manner, or provision of rent regulation whatsoever" (*id.*, ex 10). The lease also contained preferential lease rider, indicating a preferential rent of $1,400.00. On August 17, 2015, the Rikards signed a free-market renewal, indicating a monthly rent of $1,450 (*id.*, ex 11).

Plaintiffs allege that this rent increase from $1,400 to $1,450 was in excess of the permitted increase for rent stabilized apartments from 2014 to 2015. According to the NYCRGB guidelines, the increase for that year was 1% on a one-year lease (*id.*, ex 7). A 1% increase on $1,400 would be $14.

On September 1, 2016, the Rikards signed a free-market renewal, indicating a monthly rent of $1,525.00 (*id.*, ex 12). Again, plaintiffs allege that this increase was in excess of the legal guidelines. According to the NYCRGB, the increase for that year was 0% on a one-year lease (*id.*, exhibit 7). On August 15, 2017, the Rikards received a free-market renewal, with a monthly rent of $1,635.00, (*id.*, exhibit 13), but vacated. Defendants registered this unit in November 2017, indicating a legal regulated rent of $2,850.00 and a preferential rent of $1,325.00 (id., exhibit 6). On November 20, 2017, Marie-Paule Ayoh occupied the unit pursuant to a rent stabilized lease, with a legal regulated rent of $3,135.00 and a preferential rent of $1,500.00 (id., exhibit 14).

B. Apartment 2A

Apartment 2A was listed as "permanently exempt" in 2010 in the DHCR rent rolls. On July 9, 2013, Sabena Leake signed a free-market lease, which indicated a monthly rent of $2,650.00 and contained a preferential lease rider indicating preferential rent of $1,350.00 as well as a deregulation rider (*id.*, exs 36 and 37). On June 17, 2014, Leake signed a free-market renewal indicating a payable monthly rent of $1,400.00 (*id.* ex 38). On June 29, 2015, Leake signed a free-market renewal lease, indicating a payable monthly rent at $1,450 (*id.*, ex 39).

Plaintiffs allege that the 2015 rent increase from $1,400 to $1,450 was in excess of the permitted increase. According to the NYCRGB guidelines, the increase for that year was 1% on a one-year lease (*id.*, ex 7). A 1% increase on $1,400 would be $14.

On June 25, 2016, Leake signed a free-market renewal lease, indicating a payable monthly rent of $1,525.00 (*id.*, ex 40). Plaintiffs allege that this $75 increase was in excess of the NYCRGB guidelines, as the permitted increase for 2016 was 0% for a one-yar lease. On June 29, 2017, Leake signed a free-market renewal indicating a payable monthly rent of $1,586.00 (*id.*, ex 41), again, allegedly in excess of the legally permitted amount, which was 0% for a one-year lease for 2017. Defendants registered Apartment 2A in November 2017 with a legal rent regulated rent of $2,900 and a preferential rent of $1,375.00 (*id.*, ex 6 at 48). On April 2018, defendants provided Leake with a rent-stabilized lease, indicating a legal regulated rent of $3,065.53 and a preferential rent of $1,700.00 (*id.*, ex 42).

C. Apartment 3F

Apartment 3F was listed as "permanently exempt" in 2007 in the DHCR rent rolls. In October 2011, Inti Martinez signed a free-market lease indicating a monthly rent of $2,550 and containing a preferential lease rider indicating a monthly rent of $1,975.00, and a deregulated status rider (id., exhibits 83 and 84). On or about September 11, 2012, Martinez signed a free-market renewal indicating a payable monthly rent of $2,035.00 (*id.*, ex 85).

On September 11, 2013, Martinez signed a free-market renewal indicating a monthly rent of $2,135.00 (id., exhibit 86). Plaintiffs allege that this increase was excessive. The NYCRGB guidelines indicate a permitted 2% increase on a one-year lease for 2012 to 2013. A 2% increase on $2,035.00 is $40.70, not $100. On September 25, 2014, Martinez signed a free-market monthly lease indicating a monthly rent of $2,210.00 (*id.*, ex 87). Plaintiffs allege that this increase was in excess of the legally permitted amount. According to the NYCRGB guidelines, the increase for 2013-2014 was 4%. A 4% increase on $2,075.70 is $83.00. On September 17, 2015, Martinez signed a free-market renewal lease indicating a monthly rent of $2,285.00 (*id.*, ex 88). Plaintiffs allege this amount was in excess of the legally permitted increase, as the increase for that yar was 1%. A 1% increase on $2,158.70 is $21.59, making the legal rent $2,180.29.

On November 2016, Martinez signed a free-market renewal lease indicating a monthly rent of $2,345.00 (id., exhibit 89). Defendants registered Apartment 3F in November 2017. This unit is listed as "rent stabilized-vacant," and there is no legal regulated rent or preferential rent listed on the DHCR rent roll for 2017 for this unit (*id.*, ex 6 at 48).

In March 2017, Meredith O'Toole, Tanner Cain and Darlyne Forister occupied Apartment 3F pursuant to a rent-stabilized lease, indicating a legal regulated rent of $3,480.00 and preferential rent of $2,450.00 (*id.*, ex 90).

D. Apartment 4B

Apartment 4B was listed as "permanently exempt" in 2007 in the DHCR rent rolls. On June 22, 2013, Louise Jeffries signed a free-market renewal (*id.*, ex 99), which contains a payable rent of $1,640.00. On June 16, 2014, tenant Anna Makatche signed a free-market lease (Sachar affirmation, exhibit 100), which indicated a monthly rent of $2,675.00, and contained a deregulation rider and a preferential lease rider indicating a rent of $1,650.00. On June 21, 2015, Anna Makatche signed a free-market renewal (*id.*, ex 102), which indicates a payable rent of $1700.00.

Plaintiffs allege that this increase was in excess of the legally permitted amount as the increase set forth by the NYCRGB guidelines was 1% for 2014-2015. A 1% increase on $1,650.00 is $33, not $50.

On August 10, 2016, Andrew, Tanya and Douglas Truehart signed a free-market lease (*id.*, exhibit 103), which indicated a monthly rent of $2,887.50, and contained a deregulation rider and a preferential lease rider indicating a rent of $1850.00. On June 24, 2017, the Trueharts signed a free-market renewal, indicating a monthly rent of $1,870.00 (*id.*, ex 105). Defendants registered the unit in November 2017 with a legal regulated rent of $2,887.50 and a preferential rent of $1,037.50.

In May 2018, defendants offered the Truehart's a one-year rent-stabilized lease containing a legal regulated rent of $3,056.79 and a preferential rent of $1,988.60 (*id.*, ex 106).

E. Apartment 5A

Apartment 5A was listed as "permanently exempt" in 2009 in the DHCR rent rolls (*id.*, ex 6 at 48). On July 22, 2011, Quentin Bellinger signed a free-market lease, indicating a monthly rent of $2,625.00, and containing a deregulation rider (*id.*, ex 119), and a preferential lease rider indicating the monthly rent as $1,275.00. On June 10, 2013, Bellinger signed a free-market renewal lease, indicating a monthly rent of $1,350.00 (*id.*, ex 121). In June 2014, Bellinger signed a free-market renewal, indicating a monthly rent of $1,415.00 (*id.*, ex 122), and on May 5, 2015, Bellinger signed an additional renewal lease, indicating the monthly rent of $1,475.00 (*id.*, ex 123).

Plaintiffs allege that the rent increase for 2014 was in excess of the legally permitted amount under the NYCRGB guidelines, which was a 4% increase. A 4% increase on $1,350.00 is $54, and not $65.

On July 17, 2016, Crista Earl signed a free-market lease, indicating a monthly rent of $3,480, with a preferential lease rider indicating a rent of $1,650.00 (*id.*, ex 124), and a rider reflecting deregulated status. Earl signed a free-market renewal lease on July 12, 2017, indicating a rent of $1685.00 (*id.*, ex 126). Defendants registered this unit in November 2017

with the DHCR with a legal regulated rent of $3,480.00 and a preferential rent of $1,830.00 (*id.*, ex 6 at 48). On September 6, 2018, Earl signed a one-year rent-stabilized lease with a monthly rent of $3,688.21, and a preferential rent of $1769.53 (*id.*, ex 127).

F. Apartment 6D

Apartment 6D was listed as "permanently exempt" in 2010 in the DHCR rent rolls. On July 15, 2009, Angelo Mariano signed a free-market lease, indicating a monthly rent of $2,053.33, containing a preferential lease rider reflecting a rent of $1,300.00 and a deregulated status rider. On May 14, 2014, Angelo Mariano and Ueno Yuko Mariano signed a free-market renewal indicating a monthly rent of $1,535.00 (*id.*, ex166). On May 29, 2015, the Marianos signed a free-market renewal reflecting a monthly rent of $1,570.00 (*id.*, ex 167).

Plaintiffs allege that the rent increase in 2015 was in excess of the legally permitted amount. According to the NYCRGB guidelines, the permitted increase for that year was 1%. A 1% increase on $1,535.00 is $15.35, and not $35.00.

On June 3, 2016, the Marianos signed a free-market renewal indicating a monthly rent of $1,640.00 (*id.*, ex 168). On May 18, 2017, the Marianos signed a free-market renewal indicating a monthly rent of $1,700.00 (*id.*, ex169).

Defendants registered the unit in November 2017 with the DHCR, with a legal regulated rent of $2,800.00 and a preferential rent of $1,160.00 (*id.*, ex 6 at 49). On May 9, 2018, defendants provided the Marianos with a two-year rent-stabilized lease, indicating a legal regulated rent of $3,002.90, and a preferential rent rider, indicating a preferential rent of $1,865.00 (*id.*, ex 170).

Continued Discussion of First Cause of Action

Plaintiffs further argue, even if Beach Lane, Mark Scharfman, the Chief Executor Officer of Beach Lane and Rothken were unaware of *Gersten*, they knew by mid-2015 that the J-51 Program required immediate re-registration, because they did so in July 2015 at 250 West 99th Street, where they tendered refunds to tenants and registered the units with the DHCR as rent stabilized. Yet, Beach Lane, Mark Scharfman, the Chief Executor Officer of Beach Lane, and Rothken waited until after the filing of this action, in November 2017, to register units at the Building. Nonetheless, "[i]t is axiomatic that ignorance of the law is not a defense for the failure to comply with unambiguous legal obligations" (*Montera*, 193 AD3d at 107 [internal citations omitted]).

The court further notes that in *Najera-Ordonez v 260 Partners L.P. et al*, (Sup Ct NY County, Index No. 160546/2017), the court found that Mitchell Rothken, a manager of Beach Lane, the managing agent for the building, testified in another J-51 action, that he, and Beach Lane, knew of the Roberts decision in 2009. The court further concluded that in 2015, Beach Lane issued refunds and registered rent-stabilized units in a nearby building but took no action at the building at issue in the case before the court (*id.* at 2).

As outlined above, to establish a fraudulent scheme, plaintiff needs to establish the defendant landlord's willful failure to register the units while receiving J-51 benefits, contemporaneous with receipt of those benefits, plus additional willful conduct to misrepresent the regulation status of the apartments and unlawfully increase the rents. Here, plaintiffs allege that defendants deregulated the subject apartments prior to, and after, *Roberts* in contravention of the law, since defendants were receiving J-51 benefits. However, in establishing defendants' participation in the J-51 program, the parties have submitted the property tax bills for 55 Cooper Street for: June 2013 through June 2019, and June 2021. Although the bills indicate defendants' participation in the program in 2013, 2014, 2018, 2019 and 2021, the tax bills for June 2015, June 2016 and June 2017 do not indicate participation in the J51 program. Several time periods are missing, such as the bills from June 2009 through May 2013, and July 2019 through May 2020. With these missing bills, the submitted records indicate that defendants' participation in the program was interrupted through the years 2014 to 2021, and not continuous.

The J-51 program's governing law and regulations provide for an enrollment period of 14 years (Real Property Tax Law (RPTL) Sec. 489 (1) (a) (6); New York City Administrative Code (NYC Admin Code) Sec. 11-243 (a) (8) (b)). Thus, once enrolled, the landlord is both entitled to the benefits, and the requirements, of the program for 14 years. Further, a landlord cannot unilaterally rescind its participation in the J-51 program: "There is no provision in the J-51 program for unilateral withdrawal from the program or for repaying the tax benefits in exchange for rescission from the program nunc pro tunc" (*Dugan v London Terrace Gardens, L.P.*, [1st Dept 2020], citing *Matter of London Terrace Gardens, L.P. v City of New York*, 101 AD3d 27, 31-32 [1st Dept 2021]).

The base date rent is the rent actually charged on the date four years prior to the initiation of the claim (*Sandlow v 305 Riverside Corp.*, 201 AD3d 418, 420 [1st Dept 2022]). This incomplete record of defendants' participation in the J51 program is insufficient to establish as a matter of law that defendants' failure to lawfully register or re-register the plaintiffs' apartments was part a fraudulent scheme, and it also raises questions about landlord's lawful participation in the program. The court, therefore, cannot find on this submission that the defendants acted in contravention of the J-51 requirements as a matter of law. In order to do so, the court would need the parties to submit a complete J51 enrollment history to establish when defendants first enrolled in the program and for how long defendants were continuously enrolled in the J-51 program in order to establish the exact period of enrollment in the J-51 real estate tax abatement program.

Additionally, as described above, in order to establish a fraudulent scheme that would support the application of the default formula, a plaintiff must establish more than a failure to lawfully register or re-register. The rule that arises from the recent 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 (*see Hess v EDR Assets LLC*, 200 AD3d 491, 492 [1st Dept 2021]).

Here, plaintiffs seek to establish that defendants deceived the tenants by deregulating apartments after *Roberts*, providing free-market leases, charging unregulated rents, which allegedly exceeded the legal limitations under the RSB, failing to promptly re-register after

Roberts or *Gersten*, and, in contravention of DHCR regulations, registering a higher rent than the preferential rent which was charged to the tenants. In connection with this conduct, plaintiffs seek application of the default formula.

As stated above, to make a determination on summary judgment of whether the defendants engaged in a fraudulent scheme, the court must find uncontested evidence of chronic failure to register the apartments, plus willful misrepresentations in the rent history, including failure to provide leases consistent with rent regulation and registration of legally valid rents, rent increases in excess of NYCRGB protocol and possible misuse of preferential rents to conceal improperly inflated registered rents (*Hess*, 200 AD3d at 492). To this end, plaintiffs submitted most of the leases for the subject apartments for the period from 2013 to 2017. Moreover, plaintiffs offer, for example, leases for apartment 2A, which establish that the tenant was provided with free market leases, and deregulation riders, for 2013 through 2017. Furthermore, the rents indicated on the leases were raised in excess of the NYCRGB guidelines. Additionally, defendants retroactively registered the subject apartments in 2017 utilizing legal regulated rents and lower preferential rents, that do not correspond to the rents, and preferential rents, indicated on the leases. It is unclear based on this documentation whether defendants utilized these preferential rents in contravention of DHCR guidelines. These unexplained rent increases might result, ultimately, in an unreliable "lawful rent" registered with the DHCR on November 2017. This unreliable rent base rent, along with proof of willfulness, would legally support an application of the default formula.

Yet, in order for the court to determine that the defendants were engaged in such a scheme, plaintiffs would have had to submit, for example, complete leasing and payment records for each plaintiff's apartment for the overcharge claims for the period of November 17, 2013 through November 17, 2017, as well as the missing J-51 documents. This is necessary since the unexplained, or patterns of unlawful, increases may be evidence of fraud. These records, for example, would have established 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. The base date rent is the rent *actually* charged on the date four years prior to the initiation of the claim (*Sandlow v 305 Riverside Corp.*, 201 AD3d 418, 420 [1st Dept 2022] [emphasis added]). As the court is unable to rule as a matter of law that defendants engaged in a fraudulent scheme but based upon plaintiffs' evidence of a fraudulent scheme to deregulate, the court grants only plaintiffs' application to examine the subject apartment histories beyond the four-year lookback to determine whether fraud occurred and denies the remainder of the motion on the first cause of action.

With respect to the discovery in this action, the NYSCEF docket reflects that a preliminary conference took place on April 11, 2019. At a compliance conference on October 11, 2019, the court ordered limited discovery and stayed remaining discovery until resolution of plaintiffs' motion to amend the complaint (motion sequence 002). There were no other discovery orders filed on NYSCEF. Thus, the court directs the parties to appear for a conference before this court to address the status of discovery and to determine how far back before the lookback period the parties may examine records.

The second and third causes of action

In their second cause of action, plaintiffs and members of the sub-class seek, pursuant to RSL 26-512, a reformation of their leases to (1) provide that their units were and are, in fact, subject to rent stabilization; and (2) to represent accurately the amount of rent Defendants are legally entitled to charge Plaintiffs and members of the Sub-Class.

The first part of this cause of action was rendered moot in November 2017 when the defendants' registered the 26 apartments at issue in this action as rent stabilized apartments, and provided rent stabilized leases to the tenants. However, the accuracy of the rent charged by the defendants remains an outstanding question in this lawsuit, not subject to summary judgment, as the parties must submit documentation relevant to this question.

In their third cause of action, plaintiffs seek a declaratory judgment that contains five decrees that: (1) plaintiffs' apartments, and those of the sub-class are subject to the RSL and RSC and that deregulation was invalid as a matter of law; (2) the plaintiffs and members of the subclass are entitled to rent stabilized leases; (3) there must be a determination concerning the amount of the legal regulated rent for the subject apartments; (4) all leases offered by defendants are not lawful unless offered on a lease form approved by DHCR; (5) rent increases are not permitted until rent stabilized leases are negotiated and accepted by plaintiffs and members of the sub-class (*see* Rodriguez aff, ex A at 17).

Again, the first part of this cause of action has been rendered moot by defendants' registering the 26 apartments with the DHCR and providing rent stabilized leases to the tenants therein in November 2017. With respect to the questions concerning lawful rent, based upon the documents submitted by the parties, the court is unable to ascertain the amounts of legal regulated rents for the subject apartments. On this issue, therefore, the court cannot rule as a matter of law and denies plaintiffs' motion for summary judgment with respect to these two causes of action.

2. <u>Defendants' Motion for Summary Judgment</u>

On their cross-motion for summary judgment, defendants argue that the facts in this action are not in dispute and that the sole issue in this action is "whether Plaintiffs have established that there was a fraudulent scheme to deregulate warranting application of the default formula" (defendants' memo of law in opposition and in support of cross motion at 4). In support of this motion, defendants state: "As set forth below, Plaintiffs have not demonstrated their entitlement to the default formula and Defendants are entitled to have the more equitable four-year rule applied" (*id.*).

The court denies defendants' motion for summary judgment as there remain questions of fact concerning the existence of defendants' fraudulent scheme. The court additionally denies defendants' motion for an order permitting defendants to amend their DHCR filings. Under the law, there is no need for such a court order, landlords are required to properly file their building's data with the DHCR (*see* RSL 26-215[a]).

3. <u>Plaintiffs' Motion to Dismiss Defendants' Affirmative Defenses</u>

Defendants allege 25 affirmative defenses. Plaintiffs move to dismiss them all, pursuant to CPLR 3211 and CPLR 3013 on the ground that they have no merit. Defendant's offer very little by way of opposition to this section of plaintiffs' motion. They do not offer arguments specific to each affirmative defense, but simply state that based on their arguments concerning *Regina* and the four-year rule, twelve of their affirmative defenses are valid: the fourth, fifth, seventh, eighth, thirteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second affirmative defenses. Defendants do not oppose plaintiffs' motion with regard to the 13 remaining affirmative defenses. The court addresses the affirmative defenses as follows:

a. First Affirmative Defense

In the first affirmative defense, defendants assert that plaintiffs' complaint "fails to state a cause of action." The First Department has found that the pleading of this defense "is surplusage, as it may be asserted at any time even if not pleaded," and, therefore, has held that "[t]he assertion of that defense in an answer should not be subject to a motion to strike or provide a basis to test the sufficiency of the complaint" (*Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352-353 [1st Dept 1977]). Accordingly, the branch of plaintiffs' motion to dismiss the first affirmative defense is denied.

b. Second and Third Affirmative Defenses

In the second affirmative defense, defendants assert that Beach Lane, the managing agent, had no privity of contract with plaintiffs and, therefore, is an improper party. In the third affirmative defense, defendants assert that plaintiffs are unable assert any claim against Beach Lane, other than in its capacity as the Owner's disclosed agent for the Building.

Plaintiffs argue that Beach Lane "did not merely act as an innocuous manager", it actively participated in the fraud, including deceiving Plaintiffs about their rent-stabilized status, by providing market rate leases that falsely disclosed that the subject apartments were deregulated.

Plaintiffs argue that "where an agent makes false representation with a fraudulent design and damage results from them, the agent is liable, even though the agent might not have profited, or had an interest in such deception" (memo in support at 6, citing *Laska v Harris*, 215 NY 554, 556-557 [1915]).

The Third Affirmative Defense should not be dismissed because Plaintiffs have failed to demonstrate that there is any basis to impute liability upon Manager for any damages they may be entitled to as against Owner. The Court finds that because it requires additional documentation to determine whether Owner engaged in a fraudulent scheme to deregulate rents and overcharge tenants, the court will not dismiss these two affirmative defenses. Accordingly, the branches of plaintiffs' motion to dismiss the second and third affirmative defenses are denied.

c. Fourth Affirmative Defense

In the fourth affirmative defense, defendants assert that plaintiffs have failed to allege fraud with particularity.

Plaintiffs argue that fraud in the rent-stabilization context operates differently than common law fraud. Plaintiffs cite the Court of Appeals decision in *Conason v Megan Holding, LLC*, (25 NY3d 1 [2015]), wherein the court stated that: "tenants do not just make a generalized claim of fraud. They instead advance a colorable claim of fraud within the meaning of *Grimm*, - i.e. tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by Megan to remove tenants' apartment from the protections of rent stabilization" (*id.* at 16).

Plaintiffs allege that Owner participated in the J-51 Program, that Owner was required to provide them with rent-stabilized leases, to re-register apartments with DHCR after Roberts, to continue to adhere to the RSL during the life of the J-51 enrollment, to continue to calculate and increase rents according to the RSL and that Owner failed to do adhere to any of these requirements. Indeed, the First Department held that those kinds of acts may serve as the "hallmarks of a fraudulent scheme to deregulate[.]" (*Montera v KMR Amsterdam*, 193AD3d at 108). In *Regina*, the Court of Appeals noted that fraud, even in the context of unlawful deregulation and rent overcharge, consists of "evidence [of] a representation of material fact, falsity, scienter, reliance and injury" (*id.*, 35 NY3d at 355). Courts have routinely found that the conduct Plaintiffs have identified here (for example failures to register, and to provide rent-stabilized leases) may establish fraud. (*Kreisler*, 164 AD3d at 1117-1118 [finding fraud, because landlord impermissibly deregulated unit, and failed to notify tenants regarding their rent-stabilized status]).

The court finds that plaintiffs' have alleged fraud with sufficient particularity, and the court grants the branch of plaintiff's motion concerning the dismissal of this affirmative defense.

d. Fifth Affirmative Defense

Defendants assert that because there is an adequate remedy at law, plaintiffs may not seek equitable relief.

Plaintiffs argue that this defense fails to address the fact that the tenants in possession seek equitable relief, in the form of a rent-stabilized lease in an amount calculated pursuant to the default formula. Pursuant to applicable precedent, plaintiffs who establish that the landlord engaged in a fraudulent scheme are entitled to equitable relief (*see Regina*). No adequate "remedy at law" exists that would bar such a claim. The court dismisses this affirmative defense.

e. Sixth Affirmative Defense

In the sixth affirmative defense, defendants assert that if plaintiffs have obtained, or will obtain, recovery in any other case or in an administrative hearing, plaintiffs are barred from seeking recovery herein pursuant to the doctrines of res judicata and collateral estoppel.

Defendants have not supported this affirmative defense with any facts. Nor have plaintiffs alleged any pending or completed administrative hearings on the claims alleged herein. The court dismisses this defense.

f. Seventh Affirmative Defense

Defendants assert that plaintiffs' claims are barred because defendants have complied with all applicable regulations, including those of DHCR.

Defendants offer no proof at all to support this defense. Yet, as the court seeks additional information from the parties concerning whether defendants have complied with applicable laws and rules, the court will not dismiss this defense.

g. Eighth Affirmative Defense

Defendants assert that the deregulation of plaintiffs' apartment units was done in good-faith reliance on then-existing statutory, administrative and regulatory law, including the pronouncements and conduct of HCR (formerly DHCR).

As the court seeks additional information from the parties concerning whether defendants have complied with applicable laws and rules, the court will not dismiss this defense.

h. Ninth Affirmative Defense

Defendants assert that plaintiffs failed to exhaust their administrative remedies prior to commencing the instant action.

The Court dismisses this affirmative defense. In *Dugan v London Terrace Gardens L.P.*, the First Department held that the lower court "properly declined to cede primary jurisdiction of these actions to DHCR, since the actions raise legal issues, including class certification and applicable limitations periods, that should be addressed in the first instance by the courts" (*id.*, 101 AD3d 648, 649 [1st Dept 2012]).

i. Tenth Affirmative Defense

Defendants assert DHCR has primary jurisdiction over the claims asserted by plaintiffs in the complaint.

The Court dismisses this affirmative defense for the same reasons set forth above in the court's determination regarding the ninth affirmative defense.

j. Eleventh Affirmative Defense

Any award of retroactive damages or other relief would violate defendants' rights under the United States Constitution and the New York State Constitution.

Defendants offer no proof or explanation for this defense. As there is ample case law permitting the reimbursement by landlords of tenants who have been overcharged rent, the court

dismisses this affirmative defense. The court's retroactive application of *Roberts* does not violate defendant's rights under the Takings and Due Process Clauses of the United States and New York Constitutions (*see Matter of London Terrace Gardens, L.P. v City of New York*, 101 AD3d 27, 31-32 [1st Dept 2012]). The court dismisses this affirmative defense.

k. Twelfth Affirmative Defense

Upon information and belief, some or all of the plaintiffs' claims are barred because they are not occupying their apartments as their primary residences. As defendants offer no proof or substantiation for this defense, the court dismisses it as baseless.

l. Thirteenth Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

Defendants offer no explanation whatsoever as to which statute of limitations applies here. The court dismisses this affirmative defense since there is no statute of limitations as to plaintiffs as a tenant may challenge the deregulated status of an apartment at any time during the tenancy (*see Gersten v 56 7th Avenue LLC*, 88 AD3d 189). Further, according to the complaint, the plaintiffs seek damages for the period no more than four years preceding the filing of this action, which is a time frame supported by the applicable case law (*see Regina*, 35 NY3d at 355-356).

m. Fourteenth Affirmative Defense

Plaintiffs will be unjustly enriched if they are permitted to recover any sums from Defendants.

Defendants offer no explanation for this defense. The court dismisses this defense as it is an equitable defense and damages in this case are governed by the applicable statutes.

n. Fifteenth Affirmative Defense

The claims in the Complaint are barred in whole or in part on the grounds that any rents that may be payable pursuant to the RSL are more than the rents owed by Plaintiffs under the applicable leases and/or renewal leases.

Pending the additional documentation, the court will not dismiss this affirmative defense.

o. Sixteenth Affirmative Defense

Plaintiffs improperly seek, directly or indirectly, treble damages against Defendants. CPLR 901(b) expressly provides that "an action to recover a penalty," such as Plaintiffs' implied demand for an award of treble damages, "may not be maintained as a class action."

In support of their motion to dismiss this defense, plaintiffs refer to their brief seeking class certification, and the affidavits supporting that brief which state that in the event this class is certified, the plaintiffs will not seek treble damages. As the class was certified, the plaintiffs

state they are not seeking treble damages. Based upon this representation, the court dismisses this affirmative defense.

p. Seventeenth Affirmative Defense

The Complaint improperly contains allegations relating to the period prior to four years before its filing. In the event it is ultimately determined that Plaintiffs' tenancies are subject to the RSL and the RSC, Plaintiffs are barred from recovering damages, or relying upon any allegations in the Complaint, that pre-date the four years prior to the filing of the Complaint.

Plaintiffs are not seeking damages for a period that pre-dates four years prior to the commencement of this action. Additionally, applicable case law establishes that in New York, where a plaintiff is able to make a colorable claim of fraud, that plaintiff's apartment's rental history may be examined outside the four-year lookback period "for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (*Regina*, 35 NY3d at 355).

Accordingly, the court dismisses this affirmative defense.

q. Eighteenth Affirmative Defense

Plaintiffs' claims against defendants are precluded by the doctrines of waiver, payment, release, estoppel and/or unclean hands.

Defendants offer no support or explanation for this defense. The court, therefore, dismisses this defense as meritless.

r. Nineteenth Affirmative Defense

Plaintiffs' claims against Defendants are precluded by documentary evidence.

Defendants offer no documentation to support this defense. Additionally, the documentary evidence provided to the court raises questions of fact regarding defendants' allegedly fraudulent conduct. But, again, as the court awaits additional documentation from the parties, the court will not dismiss this affirmative defense.

s. Twentieth Affirmative Defense

Pursuant to RSC § 2528.4(a) and applicable case law, any failure to properly register an apartment does not result in a finding of rent overcharge, where the increases in the legal regulated rent were lawful except for the failure to file a timely registration.

Plaintiffs do not argue that the defendants' failure to properly register the apartments resulted in a rent overcharge, but that defendants' failure to register is further indicia of a scheme to wrongly deregulate the apartments and collect unlawful rents. As defendants' offer no further support for this affirmative defense, the court dismisses it as baseless.

t. Twenty-first Affirmative Defense

To the extent Defendants registered or have registered Plaintiffs' apartments with DHCR, Defendants are not barred from applying or collecting any lawful rent increases.

Pending the additional information, the court will not dismiss this affirmative defense.

u. Twenty-second Affirmative Defense

Plaintiffs are not entitled to recover interest, costs, disbursements or attorneys' fees incurred in bringing this action.

Plaintiffs seek attorneys' fees, not pursuant to their respective leases, but rather, pursuant to RSL § 26–516(a)(4), which provides for an award of attorneys' fees where a landlord is found to have overcharged. As this question is deferred until the court receives additional documentation, the court will not dismiss this defense at this time.

v. Twenty-third Affirmative Defense

Joinder of all plaintiffs having claims is not practicable.

Individual claims, questions of law and fact predominate over common claims and questions.

The claims of the purported representative parties are not typical of the proposed class.
A class action is not superior to other available methods of adjudication of the controversy and the parties' claims and defenses.

The court dismisses this affirmative defense as this issue was addressed then the plaintiffs' motion to certify the class was granted.

Counsel for the putative class is adequate to supervise and maintain this class action.

w. Twenty-fourth Affirmative Defense

Upon information and belief, certain Plaintiffs have moved out of the subject buildings. Thus, certain Plaintiffs are not tenants in the subject buildings.

By reason of the foregoing, Plaintiffs are not similarly situated with respect to any other tenants and/or persons currently occupying and/or residing in apartments located in the subject buildings.

The court dismisses this affirmative defense as this issue was addressed when the plaintiffs' motion to certify the class was granted.

x. Twenty-fifth Affirmative Defense

Defendants have not knowingly or intentionally waived any applicable affirmative defenses and reserve the right to assert and rely on such other applicable defenses as may become available by law, or pursuant to statute, or appear during the proceedings in this action.

Defendants reserve the right to amend its answer and/or affirmative defenses accordingly and assert any such defense.

The court dismisses this affirmative defense to the extent it does not comply with New York law (*see* CPLR 3018 [b]).

Accordingly, it is hereby

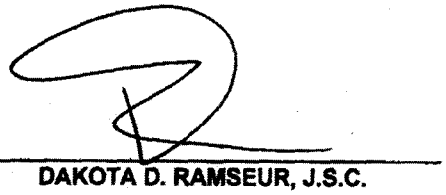
ORDERED that the plaintiffs' motion is granted only to the extent of permitting the parties to examine the records in this matter prior to the four-year lookback period to determine whether defendants engaged in a fraudulent scheme, and otherwise denied with respect to plaintiffs' first, second and third causes of action pertaining to rent overcharges and additional fees, pending the parties' submissions of the additional documents identified above; and it is further

ORDERED that the defendants' motion for summary judgment with respect to its counterclaim on the application of the four-year rule is denied; and it is further

ORDERED that the plaintiffs' motion to dismiss the affirmative defenses is granted only insofar as the fourth, fifth, sixth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, sixteenth, seventeenth, eighteenth, twentieth, twenty-third, twenty-fourth and twenty-fifth causes of action are dismissed; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



1/23/2023
DATE

DAKOTA D. RAMSEUR, 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