SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER **PART** 08

Justice

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JORGE A NAJERA-ORDONEZ, E LOPEZ,

Plaintiffs,

- v -

260 PARTNERS L.P., BEACH LANE MANAGEMENT, INC.,

Defendants.

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INDEX NO. 160546/2017

MOTION DATE 12/11/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410

were read on this motion to/for SUMMARY JUDGMENT.

INTRODUCTION

This is a class action alleging rent overcharges resulting from the improper deregulation of 37 rent-stabilized apartments while the owner received benefits pursuant to the J-51 tax abatement program. By decision and order dated August 11, 2022, the court, as relevant here, granted plaintiffs' motion for summary judgment as to liability, finding that defendants engaged in a fraudulent scheme to deregulate the subject apartments, and that damages for each of the apartments should therefore be calculated using the Division of Housing and Community Renewal's ("DHCR") default formula (MOT SEQ 003). By decision and order dated June 22, 2023, the First Department modified the court's order to deny plaintiffs' motion for summary judgment as to liability and remanded the matter for further proceedings consistent with its holdings.

Plaintiffs now move a second time for summary judgment as to liability (MOT SEQ 004), relying on a recent change in the law regarding the fraud exception to the four-year statute of limitations and rental history "lookback" period for overcharge claims. Defendants oppose the motion. The motion is denied.

BACKGROUND

Plaintiffs are Jorge A. Najera-Ordonez and E. Lopez, individually, and on behalf of all others similarly situated, tenants and former tenants at the building located at 260 Convent Avenue in Manhattan (the "building" or "260 Convent"). Defendants are 260 Partners, L.P., the building's owner, and Beach Lane Management, the property management company for the building. The building, at all relevant times, participated in the J-51 tax abatement program authorized by Real Property Tax Law § 489 (RPTL 489), as a condition of which the building's apartments were required to be maintained as rent-regulated units subject to the Rent Stabilization Law (RSL) and the Rent Stabilization Code (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 280 [2009]).

DHCR's rent rolls demonstrate that, following *Roberts*, *supra*, which held that rent-regulated apartments could not be removed from rent stabilization while the building received J-51 benefits, defendants continued deregulating units in the building—they had deregulated twenty-nine (29) units pre-*Roberts*. Specifically, eight additional units were removed from the rent-stabilization rolls after *Roberts* was decided. Further, Mitchell Rothken, a manager at Beach Lane and the managing agent of the building, testified in another J-51 action that he and Beach Lane knew of the *Roberts* decision in 2009. It is also undisputed that defendants did not promptly re-register units after the First Department's decision in *Gersten v 56 7th Ave. LLC*, (88 AD2d 189 [1st Dept. 2011]), which held that *Roberts* applied retroactively and thus required that apartments deregulated pre-*Roberts* be promptly returned to the rent-stabilization rolls (*id.* at 198; *see Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498, 498-99 [1st Dept. 2018]). Indeed, the DHCR rent rolls demonstrate that defendants did not re-register apartments for rent-stabilization until June 2016, several months after DHCR published a guide (the "DHCR FAQ") advising landlords receiving J-51 benefits to re-register their deregulated units. Notably, though, Beach Lane had issued refunds and registered rent-stabilized units in another nearby building it managed on behalf of a different owner approximately a year earlier, in or about May 2015, after tenants there served a complaint alleging the owner's and Beach Lane's failure to comply with the J-51 program. Finally, the DHCR rent rolls and the leases for the subject apartments[1] show

[1] The leases for the subject apartments were filed as exhibits to plaintiffs' prior motion for summary judgement (*see* NYSCEF Doc. Nos. 152-346) and are cross-referenced in the parties' current motion papers.

that when, in June 2016, defendants re-registered the thirty-seven (37) subject apartments at 260 Convent, they re-registered approximately a third of those units at rents higher than the actual rent paid by the tenant, in violation of guidance provided by the DHCR FAQ.

Plaintiffs commenced the instant action in November 2017. In September 2021, plaintiffs moved for summary judgment on the complaint and to dismiss defendants' affirmative defenses (MOT SEQ 003). Defendants cross-moved for summary judgment seeking an order denying plaintiffs' request for application of the default formula and instead scheduling a hearing to determine plaintiffs' overcharge damages in accordance with the four-year lookback rule.

By decision and order dated August 11, 2022, the court granted plaintiffs' motion for summary judgment as to liability, dismissed defendants' affirmative defenses, and denied defendants' cross-motion. The court found that defendants had engaged in a fraudulent scheme to deregulate the subject apartments, and that the default formula should therefore be used to calculate plaintiffs' overcharge damages.[2]

On June 22, 2023, the First Department modified this court's order to deny plaintiffs' motion for summary judgment as to liability, affirmed the dismissal of defendants' affirmative defenses, and remanded the matter for further proceedings consistent with its holdings (*Nájera-Ordóñez v 260 Partners, L.P.*, 217 AD3d 580 [1st Dept. 2023]). The First Department held, in pertinent part, that the fraud exception, and thus the default formula, is inapplicable to the twenty-nine (29) apartments deregulated before *Roberts*, and that, as to those apartments, rent overcharges should be calculated upon remand using the actual rent paid on the base date of November 29, 2013 (*id.* at 581).[3] As to the eight apartments deregulated after *Roberts*, the Court

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[2] Where a court finds that the base date rent is the product of a fraudulent scheme to deregulate an apartment, the default formula provides several options for amounts to use to set a base date rent, including, but not limited to, the lowest rent for a comparable rent-stabilized apartment "in the building in effect on the date the complaining tenant first occupied the apartment" RSC § 2522.6(b)(2)-(3).

[3] Prior to the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L 2019, ch 36), former CPLR 213-a and RSL § 26-516 (a) (2) "provided for a strict 'lookback' period, permitting recovery of rent overcharges for only the four years prior to the filing of a tenant's complaint" (*Aras v B-U Realty Corp.*, 221 AD3d 5, 8 [1st Dept 2023]). This case predates the enactment of the HSTPA; thus, absent a finding of fraud, plaintiffs' overcharge claims are subject to the four-year lookback rule (*Matter of Regina Metro.*, 35 NY3d 332).

held that plaintiffs had shown sufficient indicia of fraud to warrant a review of each apartment's rent history beyond the four-year lookback period, but that "[p]laintiffs must still ultimately prove all of the elements of a fraudulent scheme to deregulate"—i.e., all the elements of common-law fraud (*id.*, citing *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 356 n.7 [2020]).

On March 1, 2024, the Legislature enacted chapter 95 of the Laws of 2024 (the "Chapter Amendments"), which amended Section 2 of Part B of Chapter 760 of the Laws of 2023 (the "2023 Act"). One of the aims of the 2023 Act, as stated by the Legislature, was "to define clearly the scope of the fraud exception to the pre-HSTPA four-year rule for calculating rents." Under the Chapter Amendments, a plaintiff must "establish that the defendant knowingly engaged in a fraudulent scheme to deregulate an apartment unit under the totality of the circumstances" (*Gomes v Vermyck, LLC*, -- AD3d -- , 2025 NY Slip Op 00849, *7 [2d Dept. 2025]). Thus, pursuant to the Chapter Amendments, plaintiffs "do not need to prove all of the elements of common-law fraud so long as the totality of the circumstances nonetheless indicate that a fraudulent scheme to deregulate an apartment unit was committed" (*id.* at *8). The Chapter Amendments further provide that "the determination as to whether the defendant engaged in a fraudulent scheme to deregulate an apartment unit must be done with respect to *each* apartment unit that is the subject of" an action (*id.* at *7).

On March 4, 2024, plaintiffs moved the Appellate Division for leave to renew, arguing that the Court should vacate its prior order modifying this court's summary judgment decision and, applying the Chapter Amendments' totality of the circumstances standard for the fraud exception, affirm this court's decision granting summary judgment to plaintiffs. By order dated May 14, 2024, the Appellate Division denied plaintiffs' motion to renew.

On August 24, 2024, plaintiffs filed the instant motion for summary judgment asking this court to again determine, this time based on application of the Chapter Amendments, that defendants engaged in a fraudulent scheme to deregulate the subject apartments, including both the apartments deregulated pre-*Roberts* and those deregulated post-*Roberts*, such that the default formula should be applied to calculate all of plaintiffs' overcharge damages.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). The function of the summary judgment procedure is "issue-finding," not "issue-determination" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012] [internal quotation marks and citation omitted]).

1. *Successive Motion for Summary Judgment*

"[I]t is axiomatic that successive summary judgment motions are disfavored" (*Priester v Phanor*, 228 AD3d 593, 594 [1st Dept. 2024]), and "should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept. 2010]; *see Varsity Tr., Inc. v Bd. of Educ. of City of New York*, 300 AD2d 38, 39 [1st Dept. 2002]). Here, in addition to the First Department's decision modifying this court's prior summary judgment order, the Legislature has since enacted the Chapter Amendments, which rolled back the standard applied by the First Department in this very case requiring plaintiffs to satisfy all the elements of common-law fraud to establish an owner's fraudulent scheme to deregulate (*see Gomes*, -- AD3d -- , 2025 NY Slip Op 00849, *7). The Appellate Division's remittal of this matter for further proceedings consistent with its holdings and a change/clarification to the governing statutory authority are sufficient bases for this court to consider plaintiffs' second motion for summary judgment.

2. *Apartments Deregulated Before Roberts*

Plaintiffs argue that, applying the totality of the circumstances standard set forth in the Chapter Amendments, the court should find that defendants knowingly engaged in a fraudulent scheme to deregulate all the subject apartments, including those deregulated before *Roberts*. Plaintiffs maintain that, in its prior decision, the court effectively performed the fraud analysis now required by the Chapter Amendments, and that, notwithstanding the First Department's order modifying that decision, the court should do "what it has already done" and reach the same conclusions on the present motion. Plaintiff's invitation for the court to disregard the First Department's directives must be rejected.

The law of the case doctrine "is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided" (*People v Evans*, 94 NY2d 499, 503 [2000] [internal quotation marks omitted]). Though the doctrine merely "directs a court's discretion" and "is not a limit to [a court's] power" in respect of its own prior decisions in the same case (*id.* [internal quotation marks omitted]), the doctrine *does* bind trial courts and subsequent appellate courts of coordinate jurisdiction "to follow the mandate of an appellate court, absent new evidence or change in the law" (*In re Part 60 RMBS Put - Back Litig.*, 195 AD3d 40, 48 [1st Dept. 2021] [citations omitted]). Plaintiffs expressly relied upon the Chapter Amendments in moving the Appellate Division to renew and reverse its prior order. The Court declined to do so and left its prior order undisturbed. Where the Appellate Division has refused to reverse its own order, this court will not reopen what has already been decided (*see id.*).

Further, plaintiffs' argument that a reconsideration of the circumstances surrounding defendants' deregulation of apartment pre-*Roberts* would yield a different result under the Chapter Amendments is unavailing. With respect to these apartments, the Appellate Division relied on the well-established principle that "the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims" (*Nájera-Ordóñez* , 217 AD3d at 581, citing *Matter of Regina Metro.*, 35 NY3d at 356). The Second Department, in a recent case involving application of the Chapter Amendments, restated the basis for this principle, explaining that:

> [P]rior to *Roberts*, it is likely that many owners deregulated apartment units in good-faith reliance on the DHCR's guidelines, which had misinterpreted the applicable law. Although that does not

> preclude the possibility that even prior to *Roberts* some owners deregulated apartment units while receiving J–51 benefits as part of a fraudulent scheme, standing alone, the deregulation of apartment units prior to *Roberts* is insufficient to establish a fraudulent scheme to deregulate an apartment unit.

(*Gomes*, 2025 NY Slip Op 00849, at *8; *see Casey v Whitehouse Ests., Inc.*, 39 NY3d 1104, 1107 [2023]; *Matter of Regina Metro.*, 35 NY3d at 356; *Montera v KMR Amsterdam LLC*, 193 AD3d 102, 105 [1st Dept. 2021]; *Park v New York State Div. of Hous. & Cmty. Renewal*, 150 AD3d 105, 115 [1st Dept. 2017]).

The Chapter Amendments do not implicate this principle, as they still expressly require plaintiffs to establish that defendants "*knowingly* engaged" in a fraudulent scheme to deregulate an apartment (L 2024, ch 95, § 4 [emphasis added]). Defendants insist that, with respect to the apartments deregulated pre-*Roberts*, they relied on DHCR's mistaken interpretation of the law, and thus did not knowingly engage in a fraudulent scheme to deregulate. "Mere ignorance of the law--or even good-faith confusion about the law--cannot be sufficient to equate with knowingly engaging in a fraudulent scheme" (*Gomes*, 2025 NY Slip Op 00849, at *11). Thus, as plaintiffs submit no evidence demonstrating knowing fraud with respect to the deregulation of these units, they fail to carry their prima facie burden, even under the standard annunciated by the Chapter Amendments.

Nor do the Chapter Amendments alter the basis for the First Department's determination that recourse to the default formula is not warranted by the alleged improper re-registration of certain of these units in 2016 at rents higher than those actually paid by the tenants. The First Department held that, "where, as here, 'it is possible to determine the rent actually charged on the base date . . . that amount should be used' together with the permissible legal increases within the lookback period" (*Nájera-Ordóñez* , 217 AD3d at 581, quoting *Casey*, 39 NY3d at 1107). The First Department relied on the Court of Appeals decision in *Casey v Whitehouse Ests., Inc.*, which held that use of the default formula was unwarranted where plaintiffs failed to offer evidence that defendants' re-registering of apartments after the four-year lookback period "somehow affected the reliability of the actual rent plaintiffs paid on the base date" (39 NY3d at 1107). Here, too, plaintiffs present no evidence indicating that defendants' re-registration of the

subject apartments in 2016, allegedly at improper rents, somehow affected the reliability of the rent calculated on the base date of November 29, 2013.

Therefore, plaintiffs' motion is denied to the extent it seeks summary judgment as to liability for fraud and application of the default formula with respect to the apartments deregulated before *Roberts*.

3. *Apartments Deregulated After Roberts*

Plaintiffs are correct that the Chapter Amendments have abrogated so much of the First Department's order as required plaintiffs, on remand, to prove every element of common-law fraud with respect to the eight apartments deregulated after *Roberts*. Nevertheless, even applying the standard required by the Chapter Amendments, plaintiffs' motion must be denied with respect to these apartments. As stated by the First Department, the post-*Roberts* deregulation of these apartments and the failure to promptly re-register them following *Gersten* provides sufficient indicia of fraud to warrant a review of each apartment's rent history. Plaintiffs have not, however, carried their prima facie burden of demonstrating as a matter of law that defendants *knowingly* engaged in a fraudulent scheme to deregulate.

Plaintiffs point to Rothken's deposition testimony in another J-51 case wherein Rothken admitted that he was aware of the *Roberts* decision in 2009 (NYSCEF Doc. No. 377 at 38:19-21). However, the fact that defendants continued to deregulate some apartments after they knew about *Roberts* does not necessarily establish a fraudulent scheme to deregulate. "After *Roberts* there was understandable confusion regarding how the decision should be implemented, including whether *Roberts* should be given retroactive effect, and, if so, how that should be accomplished" (*Matter of Regina Metro.*, 35 NY3d at 357; *see Aras v B-U Realty Corp.*, 221 AD3d 5, 15 [1st Dept. 2023] ["In a time riddled with questions concerning this topic, it cannot be held that a post-*Roberts* deregulation establishes fraud."]). Indeed, Rothken further testified at the same deposition that "we were all trying to figure out how to adjust in the aftermath of *Roberts*," that *Roberts* "reached a conclusion and it basically told all of us who were relying upon an exact opposite position that the DHCR told us was the law and then nobody knew what to do because the *Roberts* decision was silent," and that Beach Lane was waiting "for transitional rules, which I guess took a long time until they came out, and then we were following the

progeny of the decisions, which didn't shed an awful lot of light until those transitional rules came out" (NYSCEF Doc. No. 377 at 38:16-18, 39:9-19). In short, plaintiffs' submission of Rothken's deposition testimony fails to eliminate triable issues of fact as to whether the continued deregulation of apartments after the defendants learned of *Roberts* was the result of confusion, and thus does not establish as a matter of law that defendants knowingly engaged in a fraudulent scheme to deregulate under the totality of the circumstances (*see Gomes,* 2025 NY Slip Op 00849, at *9-10). To the extent this testimony raises an inference that defendants knew about *Roberts* and its implications prior to the 2016 DHCR FAQ but deregulated the eight apartments anyway, it "raise[s] credibility issues that are inappropriate to decide on a motion for summary judgment" (*id.* at *9; *see Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]).

Similarly, defendants' belated re-registration of the subject apartments does not necessarily establish a fraudulent scheme to deregulate, especially given that defendants re-registered the subject apartments shortly after publication of the DHCR FAQ and prior to the commencement of this litigation (*see Gomes,* 2025 NY Slip Op 00849, at *9-10). Plaintiffs' submissions demonstrating that Beach Lane re-registered units at a different property in 2015 could support a finding of fraud but does not require such a determination. In particular, plaintiffs' evidence does not eliminate triable issues of fact as to whether Beach Lane's prior re-registration of units at this other building was due to its knowledge that such re-registration was legally required, or whether it stemmed from some other motivation—defendants contend this prior re-registration was simply a strategic response to the filing of a tenants' overcharge complaint in an attempt to avoid treble damages (*see Choice Assocs. LLC v New York State Div. of Hous. & Cmty. Renewal*, 62 Misc. 3d 852, 856-57 [NY Sup. Ct. 2018]).

Further, plaintiffs' evidence showing that two of the eight apartments deregulated post-*Roberts* were re-registered at improper rents, in contravention of the guidance offered by the DHCR FAQ, does not necessarily establish fraud (*see Gomes,* 2025 NY Slip Op 00849, at *10). As discussed with respect to the apartments deregulated prior to *Roberts*, there is no indication that the re-registration of units in 2016 at an improper rent somehow tainted the reliability of the rent on the base date. Nonetheless, to the extent plaintiffs contend that defendants' re-registration of some apartments at an improper rent in disregard of the DHCR's guidelines is a "circumstance" indicating that defendants were engaged in a fraudulent scheme to deregulate,

"the circumstances of the re-registration, including the defendant[s'] reasons for disregarding the DHCR's guidelines, merely raise triable issues of fact" (*id.*).

For the foregoing reasons, plaintiffs have also not met their burden of establishing their entitlement to summary judgment as a matter of law with respect to the apartments deregulated after *Roberts*.

The court has considered plaintiffs' remaining contentions and finds them unavailing.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/15/2025
DATE

LYNN R. KOTLER, J.S.C.

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