West v BCRE 90 W. St., LLC
2025 NY Slip Op 33536(U)
September 22, 2025
Supreme Court, New York County
Docket Number: Index No. 157031/2015
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

WILLIAM WEST, ELISA BEAGLEY, VERED BEHR, MATTHEW BRADSHAW, BRIDGET CASTER, FREDERICK A CUCCINIELLO, JOHN FURSTE, SARA FURSTE, JAMES HARRINGTON, MELISSA HARRINGTON, HIROKO MATSUMOTO, GREGORY MONTAGNA, CHRISTIAN NIELSEN, CHISARAM NKEMERE, CLAIRE SCHLISSEL, PRESTON B PRICE, ROBERTO DI CUIA, NICHOLAS ORAM, MATTHEW D ORGERA, MOHAMMED SHARAF, JARED TURCO, SARA VOIGT, REGGIE UDUHIRI, APRIL UDUHIRI, RENEE WILLIAMS, MARK WILLIAMS, KATY YANG, MAI LI, JULIE D'ANCONA, SUNITA DESHRANDE, ADRIENNE EKERN, LIUDMILA FILATOVA, SHEA HOUGLAND, JUAN C. MEALLA, MARIA MEALLA, JEANNE MOORE, GAVIN ROBERT SWEITZER, KETAN VAKIL, ELIZABETH VAKIL, DONNA VALENCIA, MICHELE ORLANDO, NANCY WALL, NORMAN YU, MARK ZAGUSKIN, LUKE O'DOWD, JENNIFER WU, PETRA KASS,

Plaintiffs,

- v -

BCRE 90 WEST STREET, LLC,LEE ROSEN,

Defendants.

---X

INDEX NO. 157031/2015

MOTION DATE 03/05/2021

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 397, 398, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 414

were read on this motion to/for RESTORE.

In this rent overcharge action, defendant-landlord, BCRE 90 West Street, LLC (hereinafter "defendant")[1] moves to restore this action, and upon restoration a determination that defendant's calculations accurately reflect the legal regulated rent, overcharges and interest owed

[1] The case was dismissed as against defendant, Lee Rosen by decision and order dated July 19, 2017 (NYSCEF Doc No 171).

by defendant to plaintiff-tenants. Plaintiff-tenants (hereinafter "plaintiffs") cross-move for a determination that their calculations accurately reflect the damages owed. Plaintiffs also request a money judgment for attorney's fees incurred litigating this action.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The building at issue is located at 90 West Street, New York, New York, 10006 (NYSCEF Doc No 339 ¶ 10). The building contains 410 residential units (*id.*). On June 29, 2006 defendant-landlord began receiving Real Property Tax Law ("RPTL") § 421-g tax benefits for the building (*id.*). Plaintiffs filed this action seeking a judgment that their apartments are subject to rent stabilization because they are located in a building that receives RPTL § 421-g tax benefits, and that receipt of these benefits requires that residences in these buildings to be subject to rent stabilization (*id.* at 11).

By decision and order dated July 19, 2017, plaintiff's cross-motion for partial summary judgment (MS #2) was granted, declaring that plaintiff's leases are "governed by rent stabilization" (NYSCEF Doc No 171). A Judicial Hearing Officer ("JHO") or Special Referee was ordered to be designated to determine the amount that each plaintiff had been overcharged and the JHO was directed to use the "default formula"[2] to determine the base rent, and overcharge (*id.*). The order also directed the JHO or Referee to make the determination on the amount of attorney's fees plaintiffs incurred in litigating the action.

Defendants appealed, and the First Department overturned the decision (NYSCEF Doc No 259). The Appellate Division then granted plaintiffs' leave to appeal to the Court of Appeals

[2] "(1) the amount that each plaintiff has been overcharged, said amounts to be calculated as follows: the lowest rent registered, pursuant to Rent Stabilization Code § 2528.3, for comparable apartments in the building located at 90 West Street in Manhattan, that were in effect on the date that said plaintiffs first occupied their apartments; or, if defendant did not register the rents of comparable apartments in said building, such amount to be based upon data compiled by the New York State Division of Housing and Community Renewal, using sampling methods for regulated housing accommodations" (NYSCEF Doc No 171).

(NYSCEF Doc Nos 247-248). The Court of Appeals reversed the First Department decision concluding that apartments located in buildings receiving RPTL § 421-g tax benefits are subject to rent stabilization, and accordingly granted summary judgment in plaintiffs' favor, remitting the case to this court for further proceedings (NYSCEF Doc No 260). The decision did not address how the base rent and damages should be calculated (*id.*).

By decision and order dated May 15, 2020, defendant's motion to renew its summary judgment motion was granted and upon renewal, the order referring the calculation of damages to a JHO or Special Referee based on the "default formula" was withdrawn (NYSCEF Doc No 292). Instead, pursuant to the May 15, 2020 order the determination of damages would be determined in accordance with the decision in *Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal*, 35 NY3d 332 [2020].

DISCUSSION

The parties dispute the method for calculating the overcharges for many of the apartments. There are four primary categories of apartments. For the first category consisting of Units 4G, 4J, 5D, 5J, 6E, 6T, 7N, 7U, 15H, 16T, 19N, 19V, 19Y, 23B the parties largely agree how to calculate the overcharges. These apartments had the same tenant for the entire four years preceding the litigation and the parties agree that the renewal increases must be calculated to determine how much, if any, the tenants were overcharged.

Base Date – Vacancy Increases

The primary dispute with the second category of apartments is whether when calculating the legal rent for each apartment, a landlord can use vacancy increases to increase the legal rent prior to the plaintiffs who live in those apartments moving in. Defendant argues that the ruling in *Regina* sets the legal rent in overcharge cases as the rent charged 4 years prior to the action, plus

all applicable increases. Defendant contends that among those applicable increases are "vacancy increases", which prior to 2019 when the Housing Stability and Tenant Protection Act ("HSTPA") was passed, allowed landlords to increase rents for rent stabilized apartments whose tenants vacated their apartments. The "vacancy increases" were generally significantly higher than the amount a landlord could increase the rent for apartments where tenants sought to renew their leases. Plaintiffs argue that the "vacancy increases" are unavailable to defendant because it waived the right to collect the higher rent by not reserving its right to charge the higher legal rent in subsequent years after the vacant apartments were re-rented.

Rent Stabilization Code ("RSC") § 2521.2 ("Preferential Rent Notice Provision") provides:

> (a) Where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, such rent shall be known as the "preferential rent." The amount of rent for such housing accommodation which may be charged upon vacancy thereof may, at the option of the owner, be based upon either such preferential rent or an amount not more than the previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law.
>
> (b) Such legal regulated rent as well as preferential rent shall be set forth in the vacancy lease or renewal lease pursuant to which the preferential rent is charged.
>
> (c) Where the amount of the legal regulated rent is set forth either in a vacancy lease or renewal lease where a preferential rent is charged, the owner shall be required to maintain, and submit where required to by DHCR, the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the base date preceding the filing of a complaint.

Prior to its amendment in 2019 by the HSTPA, Rent Stabilization Law ("RSL") § 26-511(c)(14) provided:

> [T]hat where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon renewal or upon vacancy thereof, may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law.

Also prior to the 2019 amendments, RSC § 2522.8 ("Vacancy Lease Provision") provides that:

> (a) The legal regulated rent for any vacancy lease entered into after June 15, 1997 shall be as hereinafter provided in this subdivision. The previous legal regulated rent for such housing accommodation shall be increased by the following:
> (1) if the vacancy lease is for a term of two years, 20 percent of the previous legal regulated rent; or
> (2) if the vacancy lease is for a term of one year, the increase shall be 20 percent of the previous legal regulated rent less an amount equal to the difference between:
> (i) the two year renewal lease guideline promulgated by the rent guidelines board applied to the previous legal regulated rent; and
> (ii) the one year renewal lease guideline promulgated by the rent guidelines board applied to the previous legal regulated rent.

While, the RSL limits the maximum amount of rent that a landlord may charge, landlords are free to contract with tenants to collect an amount lower than the maximum legal regulated rent (*Apar Realty Co. v New York State Div. of Hous. and Community Renewal*, 286 AD2d 274 [1st Dept 2001]). The rent that the tenant is charged is called the "preferential rent" and the maximum rent that a landlord can charge is known as the "legal rent" pursuant to the Preferential Rent Notice Provision (RSC § 2521.2). RSL § 26-511(c)(14) prior to its amendment by the HSTPA, allowed an owner to increase the "preferential rent" up to the "legal rent" upon renewal of the lease provided the "legal rent" had been "previously established". Additionally, in order to properly preserve the right to later raise the "preferential rent" up to the "legal rent," the

Preferential Rent Notice Provision (RSC § 2521.2) requires the landlord to include both rent amounts in the vacancy or renewal lease.

"[T]he legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, i.e., the base date rent, plus 'any subsequent lawful increases and adjustments'" (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal*, 35 NY3d 332, 353 [2020]). "Owners of rent-stabilized apartments are generally required to file annual rent registration statements with DHCR … [b]ut owners are [not] required to file such statements [if] the apartment [is] deregulated" (*id.* at 353-54). "Thus, where the apartment had been deregulated more than four years prior to the filing of an overcharge complaint, and the tenant failed to promptly challenge the deregulated status of the apartment, there might be no rent registration on file for the base date" (*id.* at 354). "[T]he base date rent was therefore 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.*).

RSC § 2526.1(3)(i) provides that "[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." Defendant argues that vacancy increases should be considered "subsequent lawful increases and adjustments" resulting in the legal rent for the plaintiffs who moved in less than 4 years prior to the commencement of the action to be significantly higher and thus often resulting in little to no overcharge. Plaintiffs argue that since defendant never established the maximum legal rent, it waived the right to have future increases be based upon this legal rent. Instead, plaintiffs contend that the base rent on which future

increases should be based is the rent the individual plaintiffs were charged when they first moved into the apartment.

"The base rent upon which future increases may be computed cannot be increased to reflect prior permissible increases which the owner failed to charge" (*Matter of N. Carolina Leasing Corp. v New York State Div. of Hous. and Community Renewal*, 156 AD2d 452, 454 [2d Dept 1989]). In *1437 Carroll, LLC v State Div. of Hous. and Community Renewal* the Court affirmed a DHCR decision finding that the landlord had waived a right to seek certain rent increases where the landlord failed to inform tenants of these increases in a timely fashion (*1437 Carroll, LLC v State Div. of Hous. and Community Renewal*, 150 AD3d 1224 [2d Dept 2017]).

In *NYC 107, LLC v New York State Div. of Hous. and Community Renewal*, 2013 NY Slip Op 32017[U] [SC NY Co 2013] a similar issue was addressed. There, after a landlord improperly deregulated an apartment, the court determined that the proper base date to determine an overcharge action was the rent reserved in the tenant's initial lease (*id*. at *3). The legal regulated rent for the unit prior to the improper deregulation, and preceding the tenant's initial lease was higher than the rent charged in that initial lease, but DHCR determined, and the court affirmed that by not giving the tenant notice of the higher legal rent the landlord "effectively waived any higher rent to which it may have been entitled" (*id*. at *2). Therefore, the court determined that the actual rent paid on the initial lease would become the proper base rent to determine the overcharge. Essentially, by not properly reserving the higher legal rent and giving notice to the tenant that the rent they were paying was in actuality a "preferential rent" the landlord lost its right to claim that the legal regulated rent was in actuality higher when faced with subsequent rent overcharge litigation.

The Preferential Rent Notice Provision (RSC § 2521.2) provides that when there is a legal regulated rent that is different from the preferential rent, or the rent the tenant actually pays, then both figures must be noted in the vacancy lease or the renewal lease. "The legal regulated rent was 'previously established' since it was listed on the renewal leases as well as landlord's annual registrations statements (*370 Manhattan Ave. Co., Inc. v Seitz*, 20 Misc 3d 9 [App Term 2008]). Waiver of higher legal regulated rent was also considered in *Hillside Park 168 LLC v Khan*, 59 Misc 3d 736, 744 [Civ Ct 2017], affd, 72 Misc 3d 130(A) [App Term 2021] where the court, quoting a previous DHCR decision stated:

> In the absence of a lease listing both the higher, registered rent and the lower rent being charged, the rent charged and paid on the base date was the lawful base rent upon which all increases must be computed and the owner is considered to have waived any right to collect the higher, registered rent.[3]

Defendant argues that it would be unjust to not allow them to take advantage of vacancy increases because if not for their mistaken belief that the apartments was deregulated they would have set forth in the vacancy lease both the legal regulated rent and the preferential rent. However, the First Department recently considered a similar argument in *81st Realty Corp. v New York State Div. of Hous. and Community Renewal*, 213 AD3d 610 [1st Dept 2023], where the DHCR found that a landlord had waived the right to increase rent based on a 2014 major capital improvement ("MCI") order permitting an increase for rent stabilized units. "Because [the landlord] treated the apartment as a free-market unit, the 2014 MCI order did not apply to it

[3] *See also* DHCR's fact sheet #40 "[T]he legal regulated rent upon which these increases are based must be written in the vacancy or renewal lease in which the preferential rent was first charged and in all subsequent renewal leases in order for the owner to charge the prior legal rent upon a vacancy" (DHCR Fact Sheet #40; fact-sheet-40-01-2024_0.pdf (ny.gov)).

[and] a rent increase pursuant to the 2014 MCI order was not a 'subsequent lawful increase' to be included in the legal regulated rent" (*id*. at 610).

In *81st Realty* as in this case, the landlord was treating the apartments in question as unregulated. A landlord must give notice to tenants of both the previously established legal regulated rent and the preferential rent by including these figures in the vacancy or renewal lease, pursuant to the Vacancy Lease Provision (RSC § 2522.8) and the Preferential Rent Notice Provision (RSC § 2521.2). Therefore, as in *81st Realty* because the landlord here treated the apartments as unregulated units and did not provide plaintiffs with notice of the legal regulated rent, it did not satisfy the requirements in order to increase the legal regulated rent upon the tenants' vacancies.

Establishing vacancy increases of the legal regulated rent pursuant to the Vacancy Lease Provision (RSC § 2522.8) required the landlord to give notice to the tenants of the higher legal regulated rent. Because it did not give notice to the tenants when it first signed their leases, these retroactive increases cannot be considered "subsequent lawful increases" to be included in the calculation of the legal regulated rent. In order for there to be a higher legal regulated rent, then the rent actually paid, the Preferential Rent Notice Provision (RSC § 2521.2) requires the landlord to give tenants notice that the rent they are paying is a "preferential rent." Absent the requirements of the Preferential Rent Notice Provision (RSC § 2521.2) being met, the legal regulated rent to assess overcharge damages must be set at the rent actually paid by the plaintiffs in their initial leases.

The calculation of base rent plus "subsequent lawful increases" will still include the annual increases for renewal leases that the Rent Guideline Board establishes each year. The distinction that makes these "lawful increases" while the vacancy increases are not is that the

tenant, is aware of that base rent. The subsequent increases can be considered lawful increases of the established base rent because the tenant is aware of the legal base rent that the subsequent increases are based on.

To calculate the overcharge for units that were vacant in the 4 years, prior to this action the landlord may set the rent at the previous tenant's legal rent plus the vacancy increase. However, if the rent *actually* charged to the new tenant is lower than that calculation and the tenant was not given notice that they were being charged a lower preferential rent, then the legal rent must reset to the amount the tenant was actually paying.

In contrast, when following a vacancy, the landlord charges higher than the previous tenant's rent plus the vacancy increase than the legal rent used to determine overcharge damages must be the previous tenants rent plus the available vacancy increase.

In sum, to determine the overcharge for a unit that was vacant within the four years prior to the start of litigation, a two-step process is needed. First, the vacancy increase is added to the previous legal rent for the prior tenant. Second, that figure is compared to the actual rent charged to the new tenant. If the actual rent charged is higher than the vacancy increased rent, then the overcharge is the difference between the rent charged and the legal rent for the prior tenant with the vacancy increase. However, if the actual rent charged is below the potential increase, the legal rent must reset to the actual rent paid if the defendant did not inform the tenant that there is a higher legal rent than the actual rent paid, as required by the Preferential Rent Notice Provision (RSC § 2521.2).

Below are sample calculations for two hypothetical units that were vacant within four years of the commencement of this action.

Unit 1 – Vacancy occurs after year 1. The Preferential Rent Notice Provision (RSC § 2521.2) was not complied with and Tenant 2 was not given notice of Higher Legal Rent. Actual Rent charged exceeded available increase. Legal Rent for Tenant 2 includes vacancy increase.

Year	Tenant	Actual Rent Charged	Legally Available Increase	Percent of Legally Available Increase	Legal Rent	Overcharge Amount
1	Tenant 1	$2,000.00			$2,000.00	0
2	Tenant 2	$2,500.00	Vacancy	10%	$2,200.00	$300.00
3	Tenant 2	$2,700.00	Renewal	2%	$2,244.00	$456.00
4	Tenant 2	$2,900	Renewal	2%	$2,288.88	$611.12

Unit 2 – Vacancy occurs after year 1. The Preferential Rent Notice Provision (RSC § 2521.2) was not complied with and Tenant 2 was not given notice of higher Legal Rent. Actual Rent charged was lower than available increase. Legal Rent for Tenant 2 resets to actual rent paid.

Year	Tenant	Actual Rent Charged	Legally Available Increase	Percent of Legally Available Increase	Legal Rent	Overcharge Amount
1	Tenant 1	$2,000.00			$2,000.00	0
2	Tenant 2	$2,100.00	Vacancy	10%	$2,100.00	0
3	Tenant 2	$2,200.00	Renewal	2%	$2,142.00	$58.00
4	Tenant 2	$2,250.00	Renewal	2%	$2,184.84	$65.16[4]

[4] As an additional example of a unit in compliance with the appropriate regulations: Vacancy occurs after year 1. The Preferential Rent Notice Provision (RSC § 2521.2) was complied with, and Tenant 2 was given notice of difference in legal rent and charged rent was lower than available increase. Legal Rent for Tenant 2 includes vacancy increase

Year	Tenant	Actual Rent Charged	Legally Available Increase	Percent of Legally Available Increase	Legal Rent	Overcharge Amount
1	Tenant 1	$2,000.00			$2,000.00	$0
2	Tenant 2	$2,100.00	Vacancy	10%	$2,200.00	$0
3	Tenant 2	$2,200.00	Renewal	2%	$2,242.00	$0
4	Tenant 2	$2,250.00	Renewal	2%	$2,288.88	$0

For Unit 2, the landlord did not preserve the higher potential legal rent of $2,200 in Year 2 because it did not give notice to the tenant that there was a difference between the rent charged and the reserved legal rent as required by the Preferential Rent Notice Provision (RSC § 2521.2). Therefore, the legal rent is based on the $2,100 rent the tenant actually paid. However, for Unit 1 since the rent charged exceeded the legally available increase, the legal rent to calculate the overcharge reflects the entire vacancy increase.

Accordingly, the second group of apartments which include units 4T, 5T, 5G, 6W, 9K, 10D, 10I, 12N, 14F, 17N, 19K, 21L, 21Z, 23A, and 23G shall have the rent overcharges calculated in accordance with the formulas above.

Failure to Provide Information as Basis of Deregulation

The third category of apartments in dispute consists of units 9U, 16J, 19M, and 20A. Plaintiff argues that these apartments should be subject to a rent freeze because unlike the other apartments, which were improperly deregulated based on landlord's erroneous belief that the apartments were subject to luxury deregulation, these units never reached the luxury deregulation and threshold, therefore the landlord had no basis for believing the units were subject to deregulation. Defendants argue that regardless of the reasoning for the erroneous deregulation, they are still entitled to all subsequent lawful increases and adjustments.

RSL § 26-517(e) provides that:

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section.

In accordance with this provision, plaintiffs argue that since defendant had no basis to deregulate the four apartments in question, and since it did not file the required annual registration, then the rent should freeze at the amount that was charged at the last registration. Plaintiffs also argue it would be impossible to assess any "subsequent lawful increases and adjustments", since according to RSL § 26-517(e) there can be no rent increases.

"[R]ent freezing is inapplicable in *Roberts* cases where the failure to timely register resulted directly from DHCR's endorsement of a misunderstanding of the law" (*Regina*, 35 NY3d at 358 n.9). "[R]ents should not be frozen if the failure to register was based on a justifiable belief that the apartment was not subject to rent regulation" (*EMA Realty, LLC v Leyva*, 64 Misc 3d 11, 14 [App Term 2019]). However, here the landlord has not asserted a misunderstanding of law that caused it to believe that these apartments were subject to deregulation. Unlike the other categories of apartments, these apartments had not crossed the rent threshold that would entitle the landlord to luxury deregulation for them.

Accordingly, RSL § 26-517(e) requires that a rent freeze be implemented from the date of the last registration and the overcharge calculations must be made from that figure.

Failure to provide base date rent data

The fourth and final category of apartments in dispute consist of units 6N and 22G. Plaintiffs argue that defendant has not provided records to establish the base date rent and therefore the "default formula" must be used. Defendant argues that the default formula would be inappropriate since plaintiff has not proven a "colorable claim of fraud."

RSC § 2522.6 provides that:

> a) Where the legal regulated rent or any fact necessary to the determination of the legal regulated rent, or the dwelling space, required services or equipment required to be provided with the housing accommodation is in dispute between the owner and the

tenant, or is in doubt, or is not known, the DHCR at any time upon written request of either party, or on its own initiative, may issue an order in accordance with the applicable provisions of this Code determining the facts, including the legal regulated rent, the dwelling space, required services, and equipment required to be provided with the housing accommodations.

(b)

(1) Such order shall determine such facts or establish the legal regulated rent in accordance with the provisions of this code. Where such order establishes the legal regulated rent, it shall contain a directive that all rent collected by the owner in excess of the legal regulated rent established under this section for such period as is provided in section 2526.1(a) of this Title, or the date of the commencement of the tenancy, if later, either be refunded to the tenant, or be enforced in the same manner as prescribed in section 2526.1(e) and (f) of this Title. Orders issued pursuant to this section shall be based upon the law and code provisions in effect on March 31, 1984, if the complaint was filed prior to April 1, 1984.

(2) Where either:

(i) the rent charged on the base date cannot be determined; or

(ii) a full rental history from the base date is not provided; or

(iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or

(iv) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision.

(3) These amounts are:

(i) the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or

(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; or

(iii) the last registered rent paid by the prior tenant (if within the four year period of review); or

(iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined

> by the DHCR, for regulated housing accommodations.

"In *fraud cases*, because the reliability of the base date rent has been tainted, [the Court of Appeals] sanctioned use of the default formula to set the base date rent" (*Casey v Whitehouse Estates, Inc.*, 39 NY3d 1104, 1106 [2023]). "For purposes of calculating overcharges, where it is possible to determine the rent 'actually charged on the base date' … that amount should be used and rent increases legally available to defendants pursuant to the RSL during the four-year period should be added" (*id.* at 1107). When "[i]t is unclear whether the records made available by either party provide enough information to determine the base date rent in accordance with *Regina* for any of the subject apartments," the default formula must be used (*id.*).

Here, for apartments 6N and 22G, defendant does not provide documents for the actual rent charged on the Base Rent Date of June 30, 2011. For Unit 6N, the earliest lease provided is from July 9, 2015, with a rent of $5,300 (NYSCEF Doc No 308). However, in the defendant's calculations it lists a rent paid and legal rent of $3,900 on July 1, 2011 (NYSCEF Doc No 299). For Unit 22G, the earliest lease provided is from August 30, 2013 with a rent of $4,000 (NYSCEF Doc No 331). In the defendant's calculations for this apartment it lists a rent paid and legal rent of $2,650 on July 1, 2011 (NYSCEF Doc No 299). In Defendant's Memorandum of Law in support of this motion it claims "[a] calculation of the legal rent, from the base date plus all applicable increases, can be completed based upon a search of the record and available rental history, and the legal regulated rent, as set forth in Exhibit B of Owner's motion is the correct rent for these two apartments" (NYSCEF Doc No 394). However, defendant has not provided any evidence of the rent charged on June 30, 2011.

Therefore, pursuant to RSC § 2522.6[b][2][i] "the rent charged on the base date cannot be determined". Accordingly, the formula set out in RSC § 2522.6[3] must be used.

Appropriate Recovery Period

Defendant argues that plaintiffs should be limited to recovery of overcharges that occurred within the 4 years prior to the start of litigation. Defendant contends that the rulings limiting the lookback period to four years prior to the start of litigation also prevent plaintiffs from recovering overcharges that occur after the start of litigation. Plaintiffs oppose arguing that defendants misinterpret the cited caselaw and that there is no limit on a "recovery period" after litigation has commenced.

In *Woodson v Convent 1 LLC*, the First Department held:

> Under the pre-HSTPA law, CPLR 213–a and Rent Stabilization Code (RSC) (9 NYCRR) § 2626.1(a)(2) provided for a strict "lookback" period of four years from when the original complaint was filed. That lookback period, however, did not preclude a court from awarding damages for rent overcharges that accrued after the action was commenced. Thus, we modify the order to clarify that plaintiffs' damages are to be calculated from the base date of November 29, 2013 through the conclusion of the action.

(216 AD3d 585, 586 [1st Dept 2023]).

Therefore, defendant's argument is rejected and plaintiffs will be able to collect overcharge damages through the conclusion of this action.

Pre-Judgment Interest

Defendant argues that plaintiffs should not be awarded interest after September 1, 2020 because defendant turned over all their records to plaintiffs on September 1, 2020 and that the delay in entering the judgment is the fault of the plaintiffs. Defendant avers that it is within the court's discretion to limit the amount of pre-judgment interest awarded to the plaintiffs. Plaintiffs

oppose arguing that they are entitled to pre-judgment interest as a matter of law and in rent overcharge cases the award of pre-judgment interest is mandatory and not discretionary.

CPLR § 5001 provides in relevant part:

> (a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract …
> (b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.
> (c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

N.Y. Code § 26-516[a][4], provides that "[a]n owner found to have overcharged shall be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules."

Limiting the amount of prejudgment interest is warranted where a plaintiff causes an inordinate delay in entering a judgment where the amount of the judgment has been determined (*Mendelson v Empire Assoc. Realty Co. Assn.*, 57 AD3d 413 [1st Dept 2008]). But here there was a dispute between the parties on how to calculate the amount of damages that were owed, causing a delay in entering of a final judgment.

"The plain language of CPLR 5001(a) "mandates the award of interest to verdict in breach of contract actions" (*J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117

[2012]). Pre-judgment interest "is not a penalty against defendant [but rather] the purpose of interest is to require a person who owes money to pay compensation for the advantage received from the use of that money over a period of time" (*Toledo v Iglesia Ni Christo*, 18 NY3d 363, 369 [2012]).

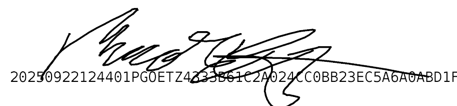
Therefore, plaintiff is owed pre-judgment interest in accordance with CPLR § 50001 and N.Y. Code § 26-516[a][4].

Accordingly, it is,

ORDERED that the portion of defendant-landlord, BCRE 90 West Street, LLC's motion to restore this action is granted; and it is further

ORDERED that the portion of defendant-landlord, BCRE 90 West Street, LLC's motion for a determination that its rent calculations are correct is granted to the extent that the amount of overcharge damages shall be calculated in accordance with the preceding formulas set forth in this decision and order; and it is further

ORDERED that the parties shall settle the judgment in accordance with this Decision and Order and the Uniform Rules for the New York State Trial Courts §202.48 with the notice of settlement made returnable in Pt 47, and the parties are directed to email a copy of the notice of settlement to the Pt 47 clerk at SFC-Part47-Clerk@nycourts.gov.



9/22/2025					
DATE			**PAUL A. GOETZ, J.S.C.**		
CHECK ONE:	☐ **CASE DISPOSED**		☒ **NON-FINAL DISPOSITION**		
	☐ **GRANTED**	☐ **DENIED**	☒ **GRANTED IN PART**	☐ **OTHER**	
APPLICATION:	☐ **SETTLE ORDER**		☐ **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**		☐ **FIDUCIARY APPOINTMENT**	☐ **REFERENCE**	