At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of September, 2025.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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DANIELLE COLDING and FREDERIC TROADEC,

Plaintiffs,

-against-

1800 ALBERMARLE INC.,

Defendant.

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Index No.: 514070/2018

DECISION & ORDER

Mot. Seq. Nos. 4-5

The following e-filed papers read herein:	NYSCEF Doc Nos.
Mot. Seq. No. 4	
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Plaintiffs Danielle Colding and Frederic Troadec (collectively, "Plaintiffs") commenced this action seeking (i) a declaration that their apartment was unlawfully deregulated by their landlord Defendant 1800 Albermarle Inc. ("Defendant") and (ii) to recover damages for rent overcharge pursuant to Rent Stabilization Law § 26-516a. Plaintiffs entered into a lease, for an initial term commencing October 1, 2016 and ending September 30, 2018, for a monthly rate of $2,750 (the "lease").[1] Plaintiffs allege that Defendant registered the prior tenant, Carmen Betty,[2] as a rent stabilized

[1] Plaintiffs subsequently renewed their lease four times (*see* NYSCEF Doc No. 112).
[2] The name of the prior tenant varies between Carmen Betty, Betty Carmen, and Betty Carmola (*see* 9-10, *infra*).

tenant. Plaintiffs claim that Ms. Betty vacated the apartment on or about June 15, 2016 (the "vacancy date"). From the vacancy date until October 1, 2016, Plaintiffs assert that no plumbing job, electrical job or general construction job was filed with the NYC Department of Buildings. Plaintiffs aver that Defendant has not registered Plaintiffs as rent-stabilized tenants with the New York State Division of Homes and Community Renewal ("DHCR"). In their complaint, Plaintiffs assert three causes of action: (1) unlawful deregulation;[3] (2) declaration fixing legal regulated rent;[4] and (3) rent overcharge, treble damages and legal fees.[5] In its answer, Defendant asserts a counterclaim, alleging that Plaintiffs performed unauthorized alterations to the apartment, and seek a judgment declaring Plaintiffs in violation of their lease and directing Plaintiffs to restore the premises to the state that existed at the time it was rented and/or reimburse Defendant for any costs expended to make repairs, restorations or replacements.

In Motion Seq. No. 4, Defendant moves for an order pursuant to CPLR 4201 (c), striking the Plaintiffs' demands for a jury trial on the grounds that (i) Plaintiffs contractually waived the right to a trial by jury and (ii) there is no basis to invalidate the waiver. In support of their motion, Defendant cites to paragraph 17 of the lease, which states:

> Jury trial and counterclaims: Landlord and Tenant agree not to use their right to a Trial by Jury in any action or proceeding brought by either against the other, for any matter concerning this Lease or the Apartment. This does not include actions for personal injury or property damage. Tenant gives up any right to bring counterclaims or set-off in any other action or proceeding by Landlord against Tenant on any matter directly or indirectly related to this Lease or Apartment. (NYSCEF Doc No. 73).

Though the lease has expired, Defendant maintains that the parties are still bound by its terms. Defendant acknowledges that Plaintiffs first filed their Note of Issue in May 2020, and only moved to strike the jury demand in September 2022. By order dated December 22, 2022, Justice Donald Scott Kurtz denied the motion, finding that it was untimely. Defendant asserts that Justice Kurt's decision was not on the merits. In addition, Defendant states that Plaintiff's Note of Issue was vacated by order dated March 15, 2023, by Justice Pamela L. Fisher. Plaintiffs again filed their Note of Issue with a jury demand on December 1, 2023; thus, Defendant argues that the instant motion is timely.

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[3] Plaintiffs sought "declaratory and injunctive relief recognizing them as the Rent Stabilized tenants of the Apartment, and directing the Defendant to issue them a rent stabilized lease together with all forms, riders and notices required to be sent to rent stabilized tenants under DHCR regulations" (NYSCEF Doc No. 75, ¶ 39).
[4] Plaintiffs seek a "declaration fixing the legal regulated rent for the apartment at an amount to be proven at trial, but not exceeding $1,319.11 per month" (*id.* at ¶ 44).
[5] Plaintiffs request an award of damages for rent overcharge in an amount no less than $117,010.08, plus pre-judgment interest (*id.* at ¶¶ 48-49).

In opposition, Plaintiffs argue that Defendant's motion to strike should be denied based on the law of the case doctrine. Since Defendant's prior motion was denied, Plaintiffs argue that Defendant must demonstrate there was an absence of a full and fair opportunity to litigate the issue in the prior motion. Plaintiffs contend that Defendant does not deny that it had a full and fair opportunity to litigate the issues raised in the prior motion. In addition, Plaintiffs argue that the motion should be denied because the jury waiver clause in the lease is unenforceable, or in the alternative, the lease is void. Plaintiffs claim that Defendant fraudulently represented that the apartment was not subject to rent stabilization and fraudulently induced Plaintiffs to sign a non-rent stabilized lease. Thus, Plaintiffs assert that the Court should either decline to enforce the jury waiver clause or hold the lease as a whole void on the basis of fraudulent inducement. Moreover, since Defendant conceded in its answer that the apartment is subject to rent stabilization, Plaintiffs maintain that the primary character of their remaining claims is monetary, and any equitable relief sought is merely incidental to the computation of damages.

In reply, Defendant maintains that its prior motion to strike was denied as untimely and was never determined on the merits. Since the Note of Issue was vacated, Defendant asserts that the timeliness determination was rendered moot. With respect to Plaintiffs' claims of fraud in their opposition, Defendant argues that in their complaint, Plaintiffs never once mentioned fraud or sought any damages based upon fraud. In addition, Defendant argues that Plaintiffs' deliberate joinder of legal and equitable claims invalidates any arguments that the right to a jury was not waived.

The "law of the case" doctrine "applies only to adjudicated matters" (*Sta. Pump & Tank Maintenance & Constr., Inc. v Score Oil Corp.*, 112 AD2d 931, 932 [2d Dept 1985]). That is, "legal determinations that were necessarily resolved on the merits in a prior decision" *(Brownrigg v NY City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). Here, Justice Kurtz's order "did not determine the merits of the issues raised, and did not constitute the law of the case" (*Peerless Ins. Co. v Micro Fibertek, Inc.*, 67 AD3d 978, 979 [2d Dept 2009]).

While Plaintiffs raise arguments asserting fraud in their opposition, their complaint is devoid of any particularized allegations to support a claim of fraudulent inducement (*see Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1273 [2d Dept 2019]). Therefore, any argument that fraudulent inducement bars the enforcement of the jury waiver clause or voids the lease in its entirety is unavailing. Accordingly, the Court need not address whether Plaintiffs also waived their right to a jury trial by asserting both legal and equitable claims. Therefore, Defendant's motion seeking to strike the jury demand is granted.

In Motion Seq. No. 5, Defendant moves for an order, pursuant to CPLR 3212, granting them summary judgment dismissing Plaintiffs' first, second and third causes of action and finding Plaintiffs liable on Defendant's counterclaim. In this motion, Defendant postulates that Plaintiffs' claims are either moot or have no basis in fact, and that the "only real issue is the improvements performed by Defendant to justify a substantial rent increase" (NYSCEF Doc No. 89, ¶ 2).[6] According to Defendant, the prior tenant Betty Carmola a/k/a Betty Carmen occupied the apartment from October 25, 1979, through June 2016. Defendant asserts that since she vacated the apartment, it was permitted statutory increases due to the vacancy and longevity of the prior tenancy. First, Defendant argues that it was entitled to a 20% vacancy allowance. Second, since the apartment was not vacant for more than 36 years, Defendant contends that it was entitled to a longevity allowance of 21.6%. Thus, without taking into account renovations, Defendant asserts that the rent was increased by 41.6%. Carmen's last lease provided for a monthly rent of $977.12. Accordingly, Defendant submits that it is permitted a 41.6% increase, which meant that it could charge a rent of $1,383.60.

Since the apartment had not been repaired or upgraded since 1979, Defendant asserts that renovations were required entitling them to an individual apartment improvement ("IAI") increase. In his affidavit, Baruch Rosenfeld ("Baruch"), a member of JBM Estates NY LLC ("JBM Estates"),[7] states that he personally inspected Carmen's apartment after she vacated and noted that issues, such as the floors were sagging, the walls and ceilings were cracked, and the appliances were outdated. Baruch lists numerous vendors and contractors who worked on the renovations. Several invoices and checks were attached to Rosenfeld's affidavit, totaling $44,065. Defendant also submits an affidavit of Issac Rosenfeld ("Issac"), who is also a member of JBM Estates. In his affidavit, which is similar to Baruch's, Issac explains that Defendant paid $38,829.58 to four entities for supplies, including a door, cabinets and appliances. According to the amounts presented by the Rosenfelds, the renovation totaled $82,894.58. Isaac further asserts that this amount permitted an increase in rent in the amount of $1,381.58—1/60 of the total costs of renovations. In addition, the Rosenfelds asserts that Plaintiffs made substantial alterations to the apartment without Defendant's permission. In further support of its motion, Defendant submits the affidavit of the superintendent Edouard Maitre ("Maitre"), who states that he performed renovation work at the apartment, confirms that he was paid $21,050 for this work, and asserts that he never gave Plaintiffs permission to make changes to the apartment. These substantial

[6] In their opposition, Plaintiffs concede that the "the only factual issues left to be determined at trial herein relate to [Defendant]'s purported justifications for increasing the last legal regulated rent from $977.12 to $2,750" (NYSCEF Doc No. 128).

[7] According to Rosenfeld, JBM Estates NY LLC is a management company that manages the building on behalf of Defendant since 2009.

alterations, according to Defendant, makes it "impossible for someone to evaluate the scope of, and value of the work, as the renovations performed by Defendant have been altered or replaced" (NYSCEF Doc No. 89, ¶ 35).

With respect to Plaintiffs' first and second causes of action seeking a declaratory judgment, Defendant asserts that it must be dismissed as moot because there is no actual controversy between the parties. Defendant acknowledges that Plaintiffs are rent stabilized tenants, their apartment has been registered with DHCR as rent stabilized, and Plaintiffs have been provided with rent stabilized leases. In addition, since the "legal rent charged is in compliance with the relevant authority . . . and the Defendant is otherwise in compliance with the requirements of the Rent Stabilization Law and Code," Defendant argues that there is no justiciable dispute. Moreover, Defendant maintains that it provided proof of almost $83,000 in improvements. Though there was no limit on the cost of improvements prior to 2019, Defendant argues that since the apartment went 36 years without substantial improvement, significant renovations were needed, justifying the total amount expended.

In addition, Defendant argues that Plaintiffs have spoliated evidence and breached their lease by admittedly making extensive alterations to the apartment and removing and replacing much of the work performed during Defendant's renovations. Thus, Defendant asserts that Plaintiffs cannot seriously challenge the scope of renovation when they engaged in unauthorized modifications to the apartment in violation of the lease.

Moreover, Defendant argues that even if it did not provide a rent stabilization rider to Plaintiffs' lease, this has no effect on the rent charged. Defendant further maintains that the alleged failure to properly register an apartment with DHCR has no bearing on a determination of rent overcharge. In addition, Defendant asserts that an award of treble damages would be arbitrary and capricious since there can be no showing of willfulness where the majority of the renovation work is shown to be substantiated or when an owner reasonably believes that it has sufficient proof of improvements.

With respect to its counterclaim, Defendant cites to paragraph 8 of the lease, which states that

> Tenant must take good care of the Apartment and all equipment and fixtures in it. Landlord will repair the plumbing, heating and electrical systems. Tenant must, at Tenant's cost make all repairs and replacements whenever the need results from Tenant's act or neglect. If Tenant fails to make a needed repair or replacement, Landlord may do. Landlord's reasonable express will be added rent (NYSCEF Doc No. 98).

Defendant also asserts that paragraph 7 of the lease requires Plaintiffs to obtain Defendant's written consent to make any alterations to the apartment. Defendant contends that Plaintiffs' alterations include removing of a wall and adding a washing machines/dryer. According to Defendant, Plaintiffs only

obtained written consent on one occasion. Defendant further asserts that it has been damaged by Plaintiffs' breach of their lease. Thus, Defendant contends that it is entitled to summary judgment on their counterclaim.

In opposition, Plaintiffs assert that Defendant failed to meet its prima facie burden because it relies on inadmissible evidence. According to Plaintiffs, Defendant failed to lay a proper evidentiary foundation for the exhibits used to establish IAIs and included records prepared by Defendant, which do not qualify for the business record exception to the hearsay rule. Even if the Court were to find that Defendant met its initial burden, Plaintiffs submit that the affidavits of plaintiff Frederic Troadec ("Troadec") and their expert Christopher J. Leahy ("Leahy")[8] raise issues of fact as to (a) whether Defendant performed the IAI work it claims it did and (b) whether Plaintiffs caused damage to the apartment.

Plaintiffs concede that Defendant is entitled to a 20% vacancy increase and that Defendant would be entitled to the 21.6% longevity increase if the prior tenant, Carmen Betty, resided at the apartment since 1979. However, Plaintiffs point to Defendant's Exhibit C, the DHCR registration history, to argue that the apartment was registered to Betty Carmola from 1984 to 1991, with Carmen Betty appearing as tenant of record starting in 1992. According to Plaintiffs, Defendant asserts that Carmen Betty and Betty Carmola are the same person without personal knowledge and without providing any evidence. In addition, Plaintiffs assert that Defendant has not proffered a proper business records foundation for the purported 1979 lease signed by Betty Carmola.

Turning to the IAI increase, Plaintiffs rely on their expert Leahy's report to argue that there are issues of fact. In his report, Leahy states that he conducted an on-site inspection of Plaintiffs' apartment on December 2, 2019. Leahy reviewed Defendant's documentation of invoices and proof of payment and compared them to his own observations and photographs of the apartment. Leahy concluded that Defendant's work descriptions did not match the condition of the apartment and in fact, opined that the apartment was substantially unrenovated. Additionally, Plaintiffs contend that there are various issues warranting higher scrutiny of Defendant's alleged IAI claim: (i) the payment to the superintendent Maitre, (ii) Defendant's reliance on invoices it prepared on behalf of its contractors, (iii) the lack of contact information for certain contractors, and (iv) none of the work was permitted, inspected by the Department of Buildings, or supervised by licensed professionals. In sum, Plaintiffs

[8] Leahy is the Vice President and Chief Estimator for Major Renovation Management, Inc., a licensed New York City general contractor, and the Operations Manager for MRM Equity, LLC, a New York City landlord and multi-state investment property owner (NYSCEF Doc No. 126, ¶ 2).

argue that these circumstances implicate Defendant's credibility and warrant a fact-finder inquiry into the alleged work and payments at trial.

With respect to Plaintiffs' work to the apartment, Plaintiffs contend that Troadec's affidavit is sufficient to raise an issue of fact as to (i) Maitre's authority to approve alterations and (ii) the nature, scope and dollar value of any unapproved work performed. Though Defendant claims spoliation, in his affidavit, Troadec asserts that it is possible for the fact-finder to identify and distinguish Plaintiffs' work in the apartment from Defendant's work. In support, Troadec states that he took photographs of the work he performed and photographs of the condition of the apartment as of the date he moved in. Moreover, according to Troadec, Leahy's inspection occurred prior to most of Troadec's work in the apartment. Since he is an experienced general contractor, Troadec states that he ensured none of the work he performed caused damage, created unsafe conditions or diminished the quality or value of the apartment. Nonetheless, Troadec asserts that all the work he performed is reversible and could be restored to its prior condition at minimal cost. In addition, Troadec claims that the building's management office had a routine practice of referring tenant inquiries about repairs and replacements to the superintendent. Therefore, Troadec avers that this led them to reasonably believe that Maitre had authority to approve the minor, cosmetic alterations they performed.

In reply, Defendant maintains that it established entitlement to a 21.6% longevity increase by producing the 1979 lease and DHCR registration history. According to Defendant, the lease is in admissible form and since contracts are not hearsay documents, it does not need to be admitted as a business record. Defendant further argues that it established that Betty Carmola and Betty Carmen are the same person. However, even if they were not, Defendant asserts that the records it submitted establish that no vacancy increase was taken. In support, Defendant relies on the DHCR registrations reflecting that Betty Carmola was a tenant with a two-year lease starting October 24, 1989, and that "Carmen, Betty" was registered as the tenant for the two-year period commencing October 25, 1991. According to Defendant, the registration history reflects that a renewal lease was utilized. Therefore, Defendant argues that it is entitled to the longevity increase since no vacancy increase was taken.

Defendant further maintains that it proffered sufficient documentation demonstrating that renovations to the apartment occurred and were paid for in full. Defendant argues that the proof of improvements is supported by two affidavits. In addition, Defendant asserts that documents can be admitted as a business record by the owner even if the owner assisted in the drafting of them. Nonetheless, Defendant argues that even if there was no proper foundation for the improvement documentation as business records, it insists that they can be admitted as contracts between the owner and vendor.

With respect to Troadec's affidavit, Defendant avers that it only raises feigned issues of fact. Though Troadec claimed that Plaintiffs' alterations to the apartment were made primarily from 2020 to 2023, Defendant asserts that this is belied by his deposition testimony in which he admitted to removing a wall before they moved in. Defendant further notes that while in his affidavit, Troadec denied making certain changes, he admitted to making the changes at his deposition. Moreover, Defendant notes that (i) the lease did not allow for alterations without written permission, (ii) Maitre denied granting Plaintiffs permission, and (iii) Plaintiffs requested permission to make limited alterations directly with management in 2022. Thus, Defendant contests Plaintiffs' assertion that they were authorized to make alterations by Maitre.

Turning to Plaintiffs' expert Leahy, Defendant argues that his affidavit does not account for the passage of time or address Plaintiffs' admitted alterations. Additionally, Defendant claims that Plaintiffs never previously formally disclosed Leahy as an expert, his report, or the photographs incorporated in his report.

It is well-established that on a motion for summary judgment, the burden rests with the movant to demonstrate, through admissible evidence, that there are no triable issues of fact and that it is entitled to judgment as a matter of law (*see Englington Med., P.C. v Motor Vehicle Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011]). Once the movant has met its initial burden, summary judgment will only be granted if the opposing party fails to establish the existence of questions of fact (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal citation omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[I]n deciding the propriety of a motion for summary judgment, a court may search the record and grant summary judgment to the nonmoving party on any related claim (*Mid-Hudson Equip., Inc. v AllCity Ins. Co.*, 282 AD2d 723, 724 [2d Dept 2001] [internal quotation marks and citations omitted]; *see* CPLR 3212 [b]).

The Court will first address the longevity increase, which forms the basis for Plaintiff's second cause of action seeking a declaration fixing the legal regulated rent. It is undisputed that the apartment is subject to a vacancy increase. However, the parties dispute the year from which the increase can be taken. On the one hand, Defendant maintains that the prior tenant resided there since 1979. On the other hand, Plaintiffs contend that the prior tenant resided at the apartment from at least October 1991. In their opposition, Plaintiffs raise two purported issues: (1) the lack of proof of the connection between Betty Carmola and Carmen Betty and (2) the lack of a proper business records foundation for the admission of the 1979 lease.

"Contracts, or other documents having independent legal significance, are not hearsay" (*Serv. All., Inc. v Betesh*, 52 Misc 3d 131(A) [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]; *Bd. of Managers of Club at Turtle Bay v McGown*, 226 AD3d 468, 469 [1st Dept 2024] [contracts "are not hearsay and [do] not require a business record foundation to be offered"]; *see also Malloy v V.W. Credit Leasing, Ltd.*, 21 Misc 3d 1110[A], 2008 NY Slip Op 52035[U], *3 [Sup Ct, Bronx County 2008]). All that is required for a lease to be admissible is proper authentication (*see Young v Crescent Coffee, Inc.*, 222 AD3d 704 [2d Dept 2023]; *All Borough Group Med. Supply, Inc. v GEICO Ins. Co.*, 43 Misc 3d 27, 28 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]). Per the Second Department,

> Authenticity may be established by, inter alia, submitting the document with a certificate of acknowledgment, introducing the testimony of a witness who was present at the time and saw the person make or sign the instrument, a handwriting comparison, self-authentication of official publications or certified copies of public documents, deposition testimony, or other circumstantial evidence (*Young*, 222 AD3d at 705 [internal quotation marks and citations omitted]; *see also Knight v NY & Presbyt. Hosp.*, 42 NY3d 699, 704 [2024]).

In Issac's affidavit, he states that annexed to his affidavit are "true and accurate copies [of] all leases for Ms. Carmola/Carmen, in the owner's possession, including the original 1979 lease" (NYSCEF Doc No. 91, ¶ 8). JBM Estates began managing the building in or about 2009 (*id.* at ¶ 4), which is about thirty years after the lease was signed. The Court notes that no affidavit was provided from Defendant. Accordingly, the Court finds that Issac's affidavit alone in insufficient to establish the authenticity of the leases.

However, Defendant also submitted records from DHCR corroborating most of the leases attached to Issac's affidavit. According to these records,[9] the tenant of the subject apartment is listed as "Betty Carmola" from registration years 1984 to 1991, "Carmen Betty" from 1992 to 1994, "Betty Carmen" from 1995 to 1998, and then back to "Carmen Betty" from 1999 until 2016 (*see* NYSCEF Doc No. 96). DHCR's records reflect multiple renewal leases prior to Plaintiffs' tenancy and no vacancy is noted until their initial lease. Thus, at the very least, Defendant has established that the prior tenant resided at the apartment since 1984.[10]

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[9] Defendant submitted two sets of DHCR's apartment registration information, which were provided pursuant to requests dated December 7, 2018, and January 11, 2024 (NYSCEF Doc No. 96). The only set of information that is certified is the one associated with the January 11, 2024, request date (*see id.* at 5-10). Nonetheless, Plaintiffs have not disputed the authenticity of the documents. In fact, they use it to challenge the length of time of Carmen Betty's tenancy. Accordingly, the Court will consider DHCR's records.

[10] Though Defendant submitted a fully executed 1979 lease, Defendant submitted an unsigned renewal lease for the term 1981-1983. The next available record showing residency is the DHCR record reflecting an initial registration year of 1984.

Defendant has also demonstrated that the variations of the name within the several documents are associated with the same person. For instance, Defendant proffered two renewal leases addressed to "Betty Carmula" that were signed by "Carmen Betty" in 1989 and 1991, respectively. While this Court does not hold itself out to be a handwriting expert, it notes that later renewal leases addressed to "Carmen Betty" contain substantially similar signatures of "Carmen Betty" as the 1989 and 1991 renewal leases.[11] In opposition, Plaintiffs merely raise an allegation that they are different individuals without any substantiating evidence.[12]

After reviewing the record, the Court finds that Defendant is entitled to a longevity increase calculated from 1984, not 1979 or 1991. Accordingly, at the time of Plaintiffs' initial lease in 2016, the legal regulated rent should have been $1,360.15 ($977.12 [prior tenant's legal regulated rent] + $195.42 [20% vacancy increase] + $187.61 [32 years x 6% longevity increase]). Thus, Defendant's motion for summary judgment dismissing the second cause of action is denied. This Court exercises its discretion in granting Plaintiffs summary judgment on their second cause of action to the extent that the legal regulated rent is $1,360.15 (*see* CPLR 3212 [b] ["If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."]).

The Court will next address the IAI increase, which is encompassed in Plaintiff's third cause of action asserting rent overcharge. As the Second Department stated,

> Essentially, in evaluating the legitimacy of an IAI increase, the court is required to determine (1) whether the owner made the improvements to the apartment during the relevant time period, (2) whether those improvements constitute legitimate individual apartment improvements within the meaning of the regulations, (3) the total cost of the improvements, (4) one fortieth of that cost, and (5) the sum of one fortieth of the costs plus the monthly rent level after any other increases to which the owner may be entitled (*Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36, 42 [2d Dept 2006]).

However, where as here, a building contains more than 35 units and improvements are effectuated prior to 2019, a property owner is entitled to 1/60th of the total cost (Rent Stabilization Code [9 NYCRR] § 2522.4 [a] [2] [vii]). The other analysis remains the same.

It is the property owner's "burden of proving the cost of the renovations made to the apartment to justify the rent it charged" to its tenant (*Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 683 [1st Dept 2011]). A property owner meets its burden by submitting documentary support, including "all

[11] Plaintiffs did not dispute the authenticity or admissibility of the leases other than the initial 1979 lease.
[12] In fact, at her deposition, Ms. Colding testified that "the people before us [in the subject apartment] were there 40 years" (Colding tr at 20, line 25; at 21, line 2). She further testified that she knew this information from her neighbors (*id.* at 21, lines 8-19).

relevant invoices, bills, cancelled checks and/or other material" (*985 Fifth Ave. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574-575 [1st Dept 1991], *lv denied* 78 NY2d 861 [1991]). According to DHCR's Operational Bulletin 2016-1 [the "Operational Bulletin"],

> Claimed individual apartment improvements are required to be supported by adequate and specific documentation, which should include: 1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment; 2. Invoice receipt marked paid in full contemporaneous with the completion of the work; 3. Signed contract agreement; and 4. Contractor's affidavit indicating that the installation was completed and paid in full (DHCR, Office of Rent Admin, Operational Bulletin 2016-1 [May 6, 2016]).

Where tenants "present[] expert evidence that the alleged IAI work in [the] apartment [] was either not performed or non-qualifying, then the burden of proof on this issue" shifts to the property owner" (*Reichenbach v Jacin Invs. Corp., N.V.*, 2023 NY Slip Op 33309[U], *6 [Sup Ct, NY County 2023]).

Here, Defendant asserts that it expended $82,894.58 in renovations, justifying a rent increase of $1,381.58. In support of its motion, Defendant submits, inter alia, invoices and proofs of payment indicating work was performed at the subject apartment. Before the Court can consider the substance of Defendant's arguments, a determination must first be made as to whether this documentation is admissible (*see Bank of NY Mellon v Gordon*, 171 AD3d 197, 205 [2d Dept 2019] ["[T]he business record exception to the hearsay rule applies to a writing or record"] [internal quotation marks omitted]).

Pursuant to CPLR 4518 (a),

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter (CPLR 4518 [a]).

An employee seeking "to lay a foundation for a business record produced and maintained by [his or] her own employer, [] [is] only required to set forth [his or] her familiarity with [his or] her employer's record-keeping practices and procedures" (*Bank of NY Mellon*, 171 AD3d at 207). Here, Defendant argues that it provided "two separate affidavits [of Issac and Baruch Rosenfeld] that painstakingly provide detail in support of it[s] records" (NYSCEF Doc No. 134, ¶ 14). Upon review of these affidavits, however, the Court fails to see the necessary detail sufficient to lay a proper foundation for the admission of these documents. In his affidavit, Issac states that he "handle[s] management issues like . . . negotiating contracts with vendors" (NYSCEF Doc No. 91, ¶ 5). However, the affidavit is devoid of any indication Issac had personal knowledge of the hiring of and payment to

the subject vendors (*see e.g.* Issac aff ¶¶ 18-23). Moreover, Issac does not allege that he is familiar with Defendant's record-keeping practices and procedures (*see GMAC Mtge., LLC v Yorke*, 175 AD3d 1498, 1499 [2d Dept 2019]). Therefore, Defendant's motion for summary judgment dismissing the third cause of action is denied. Even if the Defendant had presented admissible evidence, upon consideration of Plaintiffs' opposition, the Court would find issues of fact as to whether all claimed improvements were made to the apartment.

Lastly, the Court will address Defendant's request for summary judgment on its counterclaim asserting breach of the lease. It is uncontested that Plaintiffs made certain alterations to the apartment. It is further uncontested that Plaintiffs did not comply with paragraph 7 of the lease because they did not obtain written approval for each alteration. However, Defendant has also failed to comply with the lease. Specifically, paragraph 16 (A) of the lease provides as follows:

> Landlord must give Tenant written notice of default stating the type of default. The following are defaults and must be cured by Tenant within the time stated: . . . (5) Failure to comply with any other term or Rule in this Lease, 10 days . . . If the default can not [*sic*] be cured in the time stated, Tenant must begin to cure within that time and continue diligently until cured (NYSCEF Doc No. 98, ¶ 16).

Here, Defendant has not presented any evidence indicating that a notice of default was served on Plaintiffs, providing them an opportunity to cure. Therefore, Defendant's motion seeking summary judgment on its counterclaim is denied.

Accordingly, it is hereby

ORDERED, that Defendant's motion to strike Plaintiffs' demand for a jury trial (Mot. Seq. No. 4) is granted; and it is further

ORDERED, that the portion of Defendant's motion for summary judgment (Mot. Seq. No. 5) seeking dismissal of Plaintiffs' first cause of action for declaratory and injunctive relief recognizing them as the rent stabilized tenants of the apartment is granted to the extent it is now moot; and it is further

ORDERED, that the portion of Defendant's motion for summary judgment dismissing Plaintiffs' second cause of action, which seeks a declaration fixing the legal regulated rent, is denied; and it is further

ORDERED, that Plaintiffs are granted summary judgment on their second cause of action to the extent that the amount of the legal regulated rent is $1,360.15; and it is further

ORDERED, that the portion of Defendant's motion seeking summary judgment dismissing Plaintiffs' third cause of action for rent overcharge is denied since there are issues of fact; and it is further

ORDERED, that the portion of Defendant's motion for summary judgment on its counterclaim is denied.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice