To be Argued by:
JEFFREY TURKEL
(Time Requested: 15 Minutes)

APL-2021-00169
Appellate Division–First Department Case No. 2020-03001
New York County Clerk's Index Nos. 111723/11 and 595472/17

Court of Appeals
of the
State of New York

KATHRYN CASEY, LAURIE CAGNASSOLA, GERALD COHEN, BETTY FURR, FRANCESCA GAGLIANO, CAROLYN KLEIN, JOSEPH MORGAN, RICHARD ROSE, JESSICA SAKS and KIRK SWANSON, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

– and –

PAMELA RENNA and VITTINA DEGREZIA aka VITTINA LUPPINO,

Intervenor-Plaintiffs,

– against –

WHITEHOUSE ESTATES, INC., KOEPPEL & KOEPPEL, INC., DUELL 5 MANAGEMENT LLC d/b/a DUELL MANAGEMENT SYSTEMS, WILLIAM W. KOEPPEL and EASTGATE WHITEHOUSE ESTATES, LLC,

Defendants-Appellants.

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS

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WHITEHOUSE ESTATES, INC., EASTGATE WHITEHOUSE LLC and WILLIAM W. KOEPPEL,

Third-Party Plaintiffs-Appellants,

– against –

ROBERTA L. KOEPPEL, ALEXANDER KOEPPEL as Executors and Trustees of the Trust created under Article Fourth of the Last Will of Robert A. Koeppel, KOEPPEL MANAGEMENT COMPANY LLC and ROBERTA L. KOEPPEL individually,

Third-Party Defendants-Respondents.

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PRELIMINARY STATEMENT

Owner,[1] K&K, Duell, and Koeppel submit this brief in reply to Tenants' February 28, 2022 brief ("Opp.").

POINT I

OWNER'S ARGUMENTS ARE PROPERLY BEFORE THIS COURT

Tenants assert that Owner did not previously raise certain of its arguments herein, such that they are not properly before the Court (Opp., pp. 1-4, 27-28). As Owner establishes below, Owner's arguments (1) were in fact raised below; or (2) are pure issues of law that are decisive of the appeal; or (3) both.

A. Arguments that Owner Expressly Preserved

Tenants claim that Owner did not argue in "Supreme Court or the Appellate Division" that Tenants did not sufficiently allege fraud in their "complaint, amended complaint, or motion for summary judgment" (Opp., p. 1; *see* Opp., p. 27 ["Defendants did not argue to the Appellate Division that Plaintiffs did not make any adequate claim of fraud in their motion for summary judgment"]). That is untrue. In opposition to Tenants' summary judgment motion, Owner argued in Supreme Court that there "have been no specific findings or allegations of fraud on the part of the Defendants" (R. 1217 [emphasis supplied]). Owner repeatedly asserted in the

[1] Unless otherwise indicated, all capitalized terms herein shall have the meaning set forth in the defendant-appellants' moving brief, dated January 13, 2022 ("Owner's Br.").

First Department that "Tenants' Motion never argued that Landlord engaged in fraud" (C-29; *see* C-48-49, 55, 131-32, 133-34, 137-40, 141).

Tenants next allege that Owner did not argue in the First Department that "until *Regina* was decided there was a lack of clarity as to the method to recalculate the rents" (Opp., p. 27; *see* Opp., pp. 3, 7-8). In fact, Owner raised this argument several times (*see* C-21, C-34 ["As for the rent amounts, Landlord made a good faith attempt to calculate the legal rents at a time when it was unclear to all what methodology would ultimately be deemed proper"], C-42, 131, 134, 142, 143-44).

Tenants also claim that Owner did not argue below that the record established that Owner, during the course of discovery, produced dozens of individual apartment leases in effect on the base date (Opp., pp. 4, 8, 27-28, 54). Owner in fact raised this argument (*see* C-27 ["…Landlord has produced more than 20,000 pages of documents…and after reviewing them, Tenants have admitted that Landlord has produced many 2007 leases setting forth the rent actually charged on the Base Date for Affected Apartments (R. 257-278, 1228-1241)"], C-152, 153; R. 1216-17; *see also* Point V, *infra*).

B. Pure Issues of Law that are Decisive of the Appeal and could not be Countered

Section 17:1 of Karger, Powers of the New York State Court of Appeals (Sept 2021 Update) recites the rule (the "*Telaro* rule") that "a newly raised point of law may be entertained on appeal where it is one which is decisive of the appeal and

which could not have been obviated by factual showings or legal countersteps if it had been raised below" (*id.* [internal quotations omitted], c*iting Telaro v Telaro*, 25 NY2d 433, 439 [1969]; *see Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]; *Matter of Richardson v Fiedler Roofing*, 67 NY2d 246, 250 [1986]).

The *Telaro* rule applies to arguments, as here, concerning "statutory interpretation" (*Matter of Richardson*, 67 NY2d at 250), and "legislative intent" (*American Sugar Ref. Co. of N.Y. v Waterfront Commn. of N.Y. Harbor*, 55 NY2d 11, 25 [1980]). No legal countersteps, or factual showings, are needed to rebut an argument based solely on the interpretation of a statute.

Four of Owner's primary arguments -- in addition to being decisive of the appeal on the issue of fraud -- raise purely legal issues concerning the meaning and intent of the pre-HSTPA version of RSL § 26-516(a), as interpreted by this Court in *Matter of Regina Metro Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020) ("*Regina*"): (1) the four-year look-back period cannot be breached based on fraud unless there has been a fraudulent scheme to destabilize an apartment (Owner's Br., pp. 35-36, 50-53); (2) fraud in rent overcharge actions is limited to conduct undertaken prior to the base date (Owner's Br., pp. 37-41); (3) there can be no fraud absent a tenant's showing of justifiable reliance on the purportedly fraudulent conduct (Owner's Br., pp. 49-50); and (4) the heightened

pleading requirements of CPLR 3016(b) apply in rent overcharge actions (Owner's Br., pp. 29-33). These pure issues of law are properly before the Court.

Tenants' preservation argument ignores the watershed effect of this Court's 2020 decision in *Regina*, which significantly post-dates (1) Tenants' 2011 complaint (R. 134-54); (2) Tenants' 2015 motion for summary judgment (R. 39-42); (3) Tenants' 2016 amended complaint (R. 1296-1312); and (4) Supreme Court's 2017 order granting summary judgment (R. 7-38). Tenants do not explain how Owner "should have…raised in Supreme Court" (Opp., p. 33) the purely legal issues Owner enumerated above, which concern *Regina* and the First Department's post-*Regina* gloss.

Tenants tacitly acknowledge the *Telaro* rule by reciting the factual showings and legal countersteps they allegedly would have taken had Owner raised these arguments earlier. Tenants assert, for example, that had they known that Owner would argue that there can be no post-base date fraud, they "could have sought to supplement their papers with additional information as to conduct that occurred before the base date" (Opp., p. 34). Tenants' argument is without merit. As the party moving for summary judgment, Tenants had the burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*,

68 NY2d 320, 324 [1986]). It was not Owner's job to suggest that Tenants might want to submit proof as to pre-base date fraud.

Moreover, when Tenants moved for summary judgment in 2015, fraud in rent overcharge cases was limited to *pre*-base date conduct, the inquiry being "whether a fraudulent scheme to destabilize tainted the reliability of the base date rent" (*Matter of Grimm v New York State Div. of Hous. & Community Renewal*, 15 NY3d 358, 367 [2010]). Post-base date conduct, of course, cannot affect the reliability of the rent a tenant paid on the base date years earlier (*see* Point III, *infra*). It was not until 2018 that the First Department undermined *Grimm* by holding that post-base date conduct can qualify as fraud (*see Kreisler v B-U Realty Corp.*, 164 AD3d 1117 [1st Dept 2018], *lv dismissed* 32 NY3d 1090 [2018]). If Tenants intended to argue fraud on their motion for summary judgment, their failure to submit proof of alleged pre-base date fraud is inexplicable.

Tenants also assert that "had Defendants argued in Supreme Court that Plaintiff's motion did not adequately explain that they were seeking application of the default formula on the ground of fraud, Plaintiffs could have sought to amend their motion papers" (Opp., p. 33). Tenants' default rent formula argument was solely based on purportedly missing rent records, not fraud (R. 1322-23, 1338-45; *see also* R. 57-58, 75-83, 87, 1263-65; *see* Point II[C], *infra*). A party opposing summary judgment cannot question the sufficiency of an argument that the movant

never raised. Fraud did not enter this case until Supreme Court *sua sponte* ruled in 2017 that Owner engaged in post-base date fraud (R. 26-27).

Tenants similarly assert that they could have amended their complaint had Owner raised an affirmative defense that the complaint did not satisfy the pleading requirements of CPLR 3016(b) (Opp., p. 34). Again, Owner cannot raise a defense as to the sufficiency of an allegation of fraud that was not made.

POINT II

TENANTS DID NOT PLEAD FRAUD IN THEIR COMPLAINT OR ASSERT FRAUD IN THEIR MOTION FOR SUMMARY JUDGMENT, AND IMPROPERLY ALLEGED FRAUD FOR THE FIRST TIME ON APPEAL

A. CPLR 3016(b) Applies to Pleadings in Rent Overcharge Actions

Tenants argue that the heightened pleading requirements in CPLR 3016(b) do not apply in a rent overcharge action (Opp., pp. 43-45). In fact, *Regina* holds otherwise.

This Court went out of its way in *Regina* to clarify that an allegation of fraud in a rent overcharge action is no different from an allegation of common law fraud:

> "Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury' (*Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]; *see e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569 [2018]; *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016])."

(35 NY3d at 356, n 7).

In *Gridley v Turnbury Vil., LLC*, 196 AD3d 95, 101 (2d Dept 2021), *lv denied* 2021 NY Slip Op 75990, __ NY3d __ (2021), a rent overcharge action, the Second Department interpreted the above-quoted language in *Regina* as requiring that "[t]he elements of fraud must be pleaded, and each element must be set forth in detail (*see* CPLR 3016[b]…)" (*id.*; *see also Henry 85 LLC v Roodman*, 2021 WL 4776230, *4 [Sup Ct, NY County 2021]; *699 Venture Corp. v Zuniga*, 69 Misc 3d 863, 869 [Civ Ct, Bronx County 2020]).

Forced to explain why *Regina* recited the elements of common law fraud, Tenants argue:

> "By restating the elements of fraud, the Court in *Regina* did not hold that a tenant seeking application of the fraudulent exception to the four-year rule was required to plead all those elements in the complaint in detail, as per CPLR 3016(b); the Court merely restated the law with respect to fraud and the burden a tenant would ultimately have to meet in order to persuade the Court that the four-year rule should be breached on the ground of fraud"

(Opp., p. 44).

Thus, according to Tenants, a plaintiff's ultimate burden of proof as to fraud in a rent overcharge action is the same as in an action for common law fraud, but a plaintiff alleging fraud in an overcharge action is somehow exempt from the pleading requirements of CPLR 3016(b). There is nothing in CPLR 3016(b), RSL § 26-516(a), or *Regina* to support Tenants' claim.

A defendant is a defendant. It cannot be that a defendant accused of common law fraud is entitled to a complaint asserting each element of fraud in detail, while a defendant-landlord in a rent overcharge action -- wherein a finding of fraud and imposition of the default rent formula can be economically devastating -- must mount a defense based on vague or conclusory allegations.

B. Tenants did not Satisfy the Pleading Requirements of CPLR 3016(b)

"Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Those elements are "a representation of material fact, falsity, scienter, reliance and injury" (*Regina*, 35 NY3d at 356, n 7).

Tenants' complaint (R. 134-54) and amended complaint (R. 1296-1312) do not satisfy CPLR 3016(b). Tenants assert that they alleged fraud in paragraphs 29 and 36 of their complaint (Opp., p. 11).[2] Paragraph 29 unremarkably states that the four-year look-back period can be breached "where the legal rent on the base date cannot be determined, either because records of the legal rent do not exist, were not provided, were inherently unreliable, or were created by fraud" (R. 144-45, 1303). That is a description of applicable law, not an allegation of fraud.

[2] These paragraphs, unchanged, are numbered as 30 and 37 in Tenants' Amended Complaint (R. 1303, 1305).

Paragraph 36 states that "[u]pon information and belief, the base date rents for the 72 improperly deregulated apartments cannot be determined because of the lack of reliable records of the legal rent, fraud, and/or intentional violations of law on the part of Defendants" (R. 146, 1305). This conclusory language, made on "information and belief" (in the conjunctive, no less), does not constitute an allegation of fraud, "in detail" or otherwise.

Tenants' mere mention of the word "fraud" only twice in their complaint, without any detailed, supporting facts, certainly does not satisfy CPLR 3016(b)'s requirement that the complaint set forth "the basic facts to establish the elements of" fraud (*Pludeman*, 10 NY3d at 492). For example, "justifiable reliance is a 'fundamental precept' of a fraud cause of action…as is 'resulting injury'" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 579 [2018]). Although Tenants now loudly complain that Owner's 2012 registrations and rent calculations constitute fraud, they did not allege in their complaint (or motion) that they justifiably relied on Owner's actions, or that such actions actually injured them.[3]

Citing *Pludeman*, Tenants assert that their complaint satisfies CPLR 3016(b) because it recites facts "'sufficient to permit reasonable inference of the conduct'" (Opp., p. 42). Tenants' complaint, however, did not allege fraud of any kind, and

[3] The effect of Tenants' failure to prove reliance or injury, as opposed to their failure to plead these elements, is discussed *infra* at Point IV.

thus permits no reasonable inference as to any fraudulent conduct. Notably, when Tenants amended their complaint in 2016 (R. 1296-1312), four years after Owner's 2012 calculations and registrations that Tenants now allege were fraudulent, Tenants did not add a single allegation of fraud or any facts as to any element of fraud.

C. Tenants Did Not Assert Fraud in their Motion for Summary Judgment

Tenants also failed to allege (much less prove) fraud in their motion for summary judgment (R. 48-87, 1313-1349). Tenants try to refute this by citing the following language in their June 28, 2016 memorandum of law in support of their summary judgment motion (Opp., p. 37):

> "[a]s clearly laid out in the RSC, the Default Formula is to be applied not only where a landlord committed fraud or engaged in a scheme to evade rent regulation, but also in any case where the rental history records sufficient to establish the base date are unreliable or unavailable"

(R. 1344).

In the very next paragraph, however, Tenants conclude:

> "Accordingly, because Defendants have failed to produce adequate and credible rental records sufficient to determine the legal base rent for Plaintiffs' apartments, the rents must be calculated pursuant to the Default Formula."

(R. 1345).

This language, and a review of Tenants' motion as a whole (R. 48-87, 1313-49), makes clear that on summary judgment, Tenants based their default rent formula

claim on Owner's alleged failure to submit rent records, not fraud (R. 1322-23, 1338-45; *see also* R. 57-58, 75-83, 87, 1263-65).

Tenants disingenuously claim that by citing three "fraud" cases in their motion (R. 1343-44), they effectively alleged fraud (Opp., pp. 18, 37). Tenants first quoted that portion of *Thornton v Baron*, 5 NY3d 175 (2005), stating that "we agree with Supreme Court and the Appellate Division majority that the default formula used by DHCR to set the rent where no reliable rent records are available was appropriate" (R. 1343 [emphasis supplied]). That goes to missing records, not fraud. Tenants next cited *Matter of Grimm* and *Conason v Megan Holding*, LLC, 25 NY3d 1 (2014), for the truism that the default rent formula is appropriate where there is fraud, but immediately added that "[h]owever, it has never been the case that the Default Formula would be applied only in a case of fraud; rather it is appropriate to apply the Default Formula where a landlord refuses, or is unable, to provide complete and reliable rental records sufficient to establish the legal rent" (R. 1344). Again, Tenants' claim is based on missing records.

Tenants' summary judgment motion did not once seek application of the default formula due to Owner's alleged fraud (R. 48-87, 1251-69, 1313-49). In opposition to the motion, and for the sake of completeness, Owner argued (R. 1217-18) that the four-year rule should not be breached because (1) there were no allegations or evidence of fraud; and (2) in an August 6, 2012 order herein, Justice

Singh ruled that "the facts alleged cannot support a finding that the Landlord fraudulently or purposefully evaded the rent stabilization law" (R. 191). Tenants' motion (and reply) never argued fraud on the merits (R. 48-87, 1251-69, 1313-49).

Tenants lastly argue that Supreme Court was entitled to *sua sponte* find fraud "'on an unpleaded cause of action if the proof supports such cause'" (Opp., p. 41). This rule has never been extended to an action alleging fraud, which must be pleaded "in detail" (CPLR 3016[b]). Nor did Tenants put forward such proof.

POINT III

THERE WAS NO FRAUD HEREIN AS A MATTER OF LAW

A. Pursuant to *Grimm* and *Regina*, Fraud in an Overcharge Action Must Occur before the Base Date

Supreme Court and the First Department ruled that Owner's 2012 registrations and calculation of rents constituted fraud (R. 26-27, 1373-74, 1376). Those actions occurred almost five years after the October 14, 2007 base date.

In *Regina*, this Court reiterated the standard rule in pre-HSTPA overcharge cases that "the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period" (35 NY3d at 356). The Court then restated the sole fraud-based exception to the four-year rule:

> "We elaborated on this fraud exception to the lookback rule in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, holding that where a tenant had made a 'colorable claim of fraud' by identifying 'substantial indicia,' i.e., 'evidence,' of 'a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization,' that apartment's 'rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date' (15 NY3d 358, 366-367 [2010]). Consistent with *Thornton*, we directed that, if review of the rental history revealed such a fraudulent scheme, the default formula should be used to calculate any resulting overcharge (*id.* at 367)"

(*id.* at 355 [emphasis supplied]).

The rationale for the exception is that the base date rent should not be used for subsequent calculations where the landlord's fraudulent conduct "tainted the reliability of the rent on the base date" (*id.*). Only actions that occur before the base date can affect the base date rent. Conversely, post-base date actions cannot possibly taint the reliability of rents that Tenants actually paid on the base date years before.

Nolte v Bridgestone Assoc. LLC, 167 AD3d 498 (1st Dept 2018), upon which Tenants rely, is inapposite. There, the base date was October 22, 2010 (*see* 2018 NY Slip Op 31869[U], 1 [Sup Ct, NY County], *affd* 167 AD3d 498 [1st Dept 2018]), but the First Department held that the landlord had engaged in "a fraudulent scheme to deregulate apartments" by failing to promptly register the subject units "as rent-stabilized in March 2012, when the applicability of *Roberts v Tishman Speyer*

Props., L.P. (13 NY3d 270 [2009]) was clear" (*Nolte*, 167 AD3d at 498-99). The First Department did not explain how the landlord's 2012 actions could affect the reliability of the rents actually charged and paid two years earlier. Because it is impossible to reconcile *Nolte* with *Regina's* requirement that "fraud" must taint the reliability of the base date rent, Courts have questioned *Nolte*'s continued viability after *Regina* (*see Montera v KMR Amsterdam LLC*, 193 AD3d 102, 116 [1st Dept 2021] [Gische, J., dissenting] ["I believe that *Regina*, with its robust requirements for finding fraud in *Roberts* overcharge cases has sub silentio overruled this authority"]; *Schrader v Lichter Real Estate No. One L.L.C.*, 2020 WL 4365389, *8 [Sup Ct, NY County 2020] [same]).

B. <u>Owner did not Commit Pre-Base Date Fraud</u>

Tenants assert that Supreme Court found, on the papers, that Owner fraudulently deregulated certain unnamed apartments some time before the October 14, 2007 base date (Opp., p. 47). Supreme Court's analysis was based on the discredited "reconstruction method" (R. 22). The First Department declined to affirm on this basis, and premised its finding of fraud solely on Owner's post-base date registrations and rent calculations:

> "Although defendants may have been following the law in deregulating apartments during the period before *Roberts* was decided (*see Regina*, 35 NY3d at 356), their 2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the Court's adjudication of the issues and to impose their own rent

> calculations rather than face a determination of the legal regulated rent within the lookback period"

(R. 1374; *see also* R. 1376).

POINT IV

EVEN IF POST-BASE DATE CONDUCT CAN CONSTITUTE FRAUD, THERE WAS NO FRAUD HEREIN

A. Tenants Fail to Prove Two Critical Elements of Fraud: Reliance and Injury

Tenants are at no loss for words when it comes to characterizing Owner's 2012 efforts to recalculate rents, register apartments as stabilized, and generally comply with *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), and *Gersten v 56 7th Avenue LLC*, 88 AD3d 189 (1st Dept 2011), *appeal withdrawn* 18 NY3d 954 (2012). According to Tenants, the rent registrations were "false," and the rent calculations were "outrageously high" (Opp., p. 3). Tenants also allege that Owner attempted to "require tenants to sign lease renewals agreeing to pay these outrageously inflated rents," as part of the scheme to "prevent Plaintiffs from challenging the rents that Defendants unilaterally recalculated" (Opp., pp. 6, 7).

Tenants, however, are oddly silent as to whether Tenants justifiably relied on Owner's actions, or were injured as a result of such reliance. As noted, "justifiable reliance is a 'fundamental precept' of a fraud cause of action…as is 'resulting injury'" (*Ambac Assur. Corp.*, 31 NY3d at 579). Because Tenants have never

proven justifiable reliance or resulting injury, their unpleaded fraud claim fails as a matter of law, not just as a matter of pleading.

1. DHCR Registrations and Rent Calculations

Tenants commenced this action on October 14, 2011 (R. 135). Six days later, Owner provided Tenants with copies of some of the most recent DHCR registrations (R. 155-56, 1198). On November 1, 2011, Owner completed the 2006 registrations for the subject apartments, and most of the 2007 registrations (R. 419-26, 1198).

Tenants, who were and are represented by expert landlord-tenant counsel, immediately objected to the registrations and rent calculations. By January 12, 2012 (just weeks after Tenants commenced this action), the respective attorneys for Owner and Tenants signed a joint letter advising Tenants that Owner's prior communications and documentation concerning registration and rent calculations "are hereby withdrawn" and "should be ignored" (R. 45, 173). The joint letter added that "[t]he attorneys for both sides agree that the calculation of past, current and future legal regulated rents at the building are the subject of pending litigation" (R. 173).

Thus, over 10 years ago, the parties agreed that Owner's registrations and rent calculations were not binding on Tenants, and that the Court would ultimately calculate Tenants' stabilized rents. One cannot rely on conduct that the parties have agreed should be ignored.

A plaintiff "cannot sustain a cause of action for fraud if defendant's misrepresentations did not form the basis of reliance" (*Securities Inv. Protective Corp. v BDO Seidman*, 95 NY2d 702, 709 [2001]). To prevail, the party alleging fraud must establish that they were "actually duped" by the alleged misrepresentation (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]). Nowhere in this record, or in Tenants' briefs to the First Department or this Court, do Tenants allege that they detrimentally relied on Owner's registrations and rent calculations. Notably, in *Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569 (1st Dept 2020), the First Department ruled that because the tenant therein did not rely on a purportedly fraudulent DHCR registration document, there was no fraud (*id.* at 570).

Moreover, to give rise to a fraud cause of action, reliance on the false representation must result in injury (*see Cunningham v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142-43 [2017]). Because Tenants failed to establish that they relied on Owner's registrations and rent calculations, there was necessarily no injury. That aside, Tenants never explain how the mere filing of registrations or the calculation of rents -- whether correct or erroneous -- injured them. Indeed, Tenants complain that the "legal" rents that Owner registered are "much higher than the rent actually charged" (Opp., p. 13). Precisely. Tenants were not charged the higher rents. Overcharges arise where the rents actually charged and paid exceed the lawful

rent, not where "registered" but unpaid rents do so. Tenants never asserted that Tenants paid the higher rents recited in the registrations, which is not surprising given that the attorneys for the parties jointly told Tenants that Owner's registrations and calculations "should be ignored" (R. 173).

2. Owner's Purported Attempt to Avoid a Judicial Determination

The First Department found that Owner committed fraud because its "2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period" (R. 1374). Owner has already explained why the First Department erred in this respect (*see* Owner's Br., pp. 42-49). As Owner establishes below, however, if this were part of a fraudulent scheme, it did not work, and did not injure Tenants.

Owner first communicated with Tenants about rent regulatory status, rent recalculations, and rent registrations on September 28, 2011 (R. 132-33). By October 14, 2011, Tenants retained expert landlord-tenant counsel and commenced this action (R. 134). Although reliance for purposes of fraud can take the form of inducing a party to refrain from acting (*see Ginsburg Dev. Cos., LLC v Carbone*, 134 AD3d 890, 892 [2d Dept 2015]), Owner's September 28, 2011 letter appears to have *prompted* the litigation that Owner allegedly sought to pre-empt or obstruct.

3. Lease Offers

Tenants also now allege that Owner committed fraud by attempting to "require tenants to sign lease renewals agreeing to pay…outrageously inflated rents" (Opp., p. 7). Tenants immediately undermine that claim by conceding that there is nothing in the record to establish that any tenant actually signed a proffered lease or paid the rent recited therein:

> "It is unknown from this record how many of the Tenants actually signed these rent-stabilized renewal leases proffered in 2012 with the outrageous rental increases, or how many moved out because they believed they otherwise would have been obligated to pay the massive increases"

(Opp., p. 21, n 18).

Absent proof that Tenants relied on, or were injured by, Owner's renewal offers, there is no fraud. Notably, the First Department did not find fraud with respect Owner's renewal offers (R. 1373-74, 1376).

B. Tenants Failed to Plead or Prove Scienter

Scienter is one of the five elements of fraud (*Regina*, 35 NY3d at 356, n 7). In Owner's Brief, Owner challenged Tenants to establish that they pleaded and proved that Owner's registrations and rent calculations were false, and that Owner knew this in 2011-2012 (pp. 47-49). Tenants tacitly concede the point by failing to rebut it.

C. There is no "Fraudulent Rent Overcharge Scheme" Exception to the Four-Year Look-Back Period

In *Matter of Grimm,* this Court established the sole fraud-based exception to the four-year look-back period:

> "Generally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,' and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date"

(15 NY3d at 367 [emphasis supplied]). In *Regina*, this Court restated the sole exception with approval (*see* 35 NY3d at 355).

Here, the First Department found that Owner had engaged in fraud by the manner in which Owner (1) registered the subject apartments as stabilized; and (2) recalculated stabilized rents (R. 1373-74, 1376). Clearly, there was no "fraudulent scheme to destabilize" these apartments. By finding that Owner committed fraud, the First Department implicitly held that the four-your look-back period can be breached without a fraudulent scheme to destabilize, and that a purported fraudulent rent overcharge scheme will suffice (*see e.g.*, *Montera v KMR Amsterdam LLC*, 193 AD3d at 107; *435 Cent. Park W. Tenant Assoc. v Park Front Apts. LLC*, 183 AD3d 509, 510-11 [1st Dept 2020]). These rulings are contrary to

(1) *Grimm* and *Regina*; and (2) the RSL, which sets forth independent statutory penalties for willful overcharges (*see* RSL § 26-516[a]).

Tenants respond by falsely claiming that Owner argues that *Regina* held that "'a fraudulent scheme to destabilize' is the sole exception to the four-year rule" (Opp., p. 46). In fact, Owner argues that, as *Grimm* and *Regina* make clear, it is the sole *fraud-based* exception (Owner's Br., pp. 6, 35-36, 38, 45, 51-52).

Tenants then claim that "there are various types of fraudulent schemes, not all of which end up with the apartments being unlawfully deregulated, which could, combined with the absence of accurate rental history records, result on [sic] the application of the default formula" (Opp., p. 50). There is nothing in *Grimm* or *Regina* to suggest that there is a fraud-based exception to the four-year look-back rule that does not concern a fraudulent scheme to destabilize. If such a scheme must be "combined with the absence of accurate rental history records" to warrant use of the default rent formula, such use would be justified on the basis of the missing records alone, without the need for a second, unauthorized, fraud-based exception (*see* RSC § 2522.6[b][2]).

D. <u>Owner did not Commit Fraud</u>

The First Department majority found that the method by which Owner recalculated rents and registered the apartments in 2012 was fraudulent (R. 1373-74, 1376). Owner respectfully submits that Justice Gische's assessment of Owner's

actions, set forth in her dissenting opinion, was more accurate: "Defendants' filing of the amended registrations evinces an effort to comply with the law once *Gersten* made it clear that *Roberts* had retroactive effect" (R. 1383).

In 2012, no one -- landlords, tenants, DHCR, or the Courts -- knew how to recalculate rents in a *Roberts*-type case. As Tenants' counsel correctly stated in a May 21, 2014 argument herein before Justice Singh:

> "As your Honor well knows, I mean, if anything is certain in the area of what methodology should be used in calculating rent in a J-51 scenario, the one certain thing is that it's uncertain"

(R. 469).

The proper methodology for calculating rents in a *Roberts*-type case would not be known until this Court's 2020 decision in *Regina*, which restated the standard rule and the sole fraud-based exception thereto. In so holding, this Court rejected the "reconstruction method" that the First Department endorsed in *72A Realty Assoc. v Lucas*, 101 AD3d 401 (1st Dept 2012), upon which Supreme Court erroneously relied herein (*Regina*, 35 NY3d at 357-58).

As of 2012, Owner had two choices as to how to proceed. Owner could have declined to register the apartments or recalculate their rents. The First Department, however, would have condemned such inaction as fraud (*see Montera*, 193 AD3d at 105-07; *Nolte*, 167 AD3d at 98; *Kreisler*, 164 AD3d at 1117).

Instead, Owner opted to calculate the rents as best it could, register the apartments as rent stabilized, and offer rent-stabilized renewal leases (R. 1193, 1196-98, 1215, 1219). By the time Owner began to do so in late 2011 and early 2012, Tenants had already commenced the instant action, thus ensuring that (1) their attorneys would closely monitor all of Owner's actions; and (2) the Court, after hearing from both sides, would ultimately calculate the rents. Indeed, the January 12, 2012 joint letter acknowledged these safeguards (R. 173).

The First Department specifically found fraud herein based on the following:

> "Here, the retroactive rent registrations that were filed by defendants reflected rents significantly higher than those actually charged, and some purported to classify the actual rent as a 'preferential rent' to justify registration of the higher amount. Further, there was no basis submitted for their calculation"

(R. 1376).

Owner respectfully submits that none of this is fraud. First, it was error to find fraud simply because registered legal rents were higher than those actually charged. Owner acted eight years before anyone knew what the proper recalculation methodology would be. Moreover, such retroactive registrations did not alter the rents Tenants actually paid, and thus cannot, of themselves, result in a rent overcharge. The registrations, even if erroneous, did not injure the Tenants.

Also erroneous is the First Department's finding of fraud based on Owner's characterization of some of the actual rents as "preferential." In addition to

registering the higher "legal rent" (as calculated by Owner during the post-*Roberts* confusion as to the proper methodology), Owner simultaneously registered the rents the Tenants *actually paid* on April 1st of each year (R. 419-42, 864-1135; *see* Owner's Br., p. 12, n 3). Such dual registration did not actually injure Tenants, and Tenants do not claim otherwise. As the January 12, 2012 joint letter stated, the Court would ultimately calculate the legal rents, under the watchful eye of Tenants' attorneys (R. 173). In fact, the joint letter specifically acknowledged that Mr. Trynosky had "in many cases calculate[d] a purported regulated rent above what was allegedly paid and declared any rent paid below that amount as a 'preferential rent,'" (R. 173), but advised Tenants to ignore this because the Court would ultimately calculate the rents.

The First Department and Tenants assert that Owner committed fraud because the amounts Owner registered as the "legal" rents were too high (Opp., pp. 49, 51; R. 1373-74, 1376). That finding is premature; no court has ever calculated the correct rents herein, and it remains to be seen whether the default rent formula should be applied to any particular apartment. However, even if Owner registered legal rents in 2012 that were revealed eight years later to be too high under the methodology announced in *Regina*, it still would not constitute fraud.

Lastly, Owner did not commit fraud by failing to provide Tenants with its rent calculations, although it is undisputed that Mr. Trynosky disclosed his methodology

(R. 1197-98). The parties agreed in 2012 that (1) Tenants should ignore Owner's calculations; and (2) the Court would ultimately calculate their rents (R. 173), at which time the Court's methodology and calculations would be laid bare. There was no actual injury, and thus no fraud.[4]

POINT V

TENANTS' OWN SUBMISSIONS, WHICH ARE IN THE RECORD, ESTABLISH THAT OWNER PRODUCED BASE DATE LEASES FOR 55 OF THE APARTMENTS

Despite evidence of record in the form of their own "painstakingly" prepared summaries (R. 256-78, 1228-41), Tenants assert that "the record does not 'establish' that [Owner] provided any base date leases" for the subject apartments (Opp., p. 54). Tenants' claim is outrageous.

Tenants moved on December 8, 2015 for an order "pursuant to CPLR 3126 and 3212(a)" (R. 39-42). They sought summary judgment because "Defendants [were] in default of their discovery obligations" with respect to providing rental histories of the affected apartments back to the last stabilized leases (R. 40, 42, 58, 78-80, 1322-23, 1338-45).

To prove that Owner was in default, Tenants could have, but did not, annex to their moving papers the documents Owner had actually produced. Instead,

[4] For the foregoing reasons and those set forth in Owner's moving brief, Owner's affirmative defenses asserting good faith should be reinstated (Owner's Br., p. 60).

Tenants created and submitted a 16-page "apartment-by-apartment summary of documents provided by defendants" (the "First Summary") (R. 46, 256-78), wherein Tenants listed every lease that Owner produced and the actual rent charged therein.

A review of the First Summary establishes that Owner, by Tenants' own admission, produced the leases in effect on the base date for 41 of the subject apartments (R. 257-67) (*see* Owner's Br., p. 57).

Following Tenants' service of the motion, Owner provided to Tenants an additional 17,000 pages of documents (R. 1216-17, 1257-58). On reply, Tenants could have submitted some or all of Owner's document production to establish their claim that Owner had not produced adequate additional rental records. Instead, Tenants submitted a summary (the "Second Summary") of "what documents are missing" (R. 1226, 1228-41). The Second Summary establishes that Owner produced the leases in effect on the base date for an additional 14 apartments, bringing the total to 55 (R. 1228-39) (*see* Owner's Br., pp. 57-58).

Outrageously, Tenants now claim that their own First and Second Summaries (the "Summaries") are without evidentiary value. They assert that their Summaries:

> "…raise[ ] merely the suggestion that some base date leases were turned over upon pre-trial discovery, as supplemented by Defendants in January-February 2016 after Plaintiff's motion was filed. A suggestion of something is not enough to 'establish' that these records were provided"

(Opp., p. 54).

Tenants' present belittling of their Summaries is in marked contrast to their statements below, wherein they asserted before Supreme Court that their Summaries were accurate and established what Owner did and did not submit in discovery. In Supreme Court, Tenants characterized the First Summary, without qualification, as "an apartment-by-apartment summary of all the documents provided by Defendants" (R. 46). Tenants asserted that the Second Summary "describes the records provided and lists the deficiencies with document production as to each apartment" (R. 1258). In the First Department, Tenants further defended their Summaries, stating:

> "On their motion for summary judgment, Plaintiffs' attorneys painstakingly reviewed the records submitted by Defendants on discovery, and provided a detailed and accurate analysis to the Supreme Court showing the deficiencies in Defendants' rental history records…
>
> * * *
>
> Plaintiffs' attorneys properly attached to their motion, as exhibits, summaries of the thousands of pages of rental history records provided by Defendants. This was proper, and these summaries were admissible"

(C-76, 103 [emphasis supplied]).

Tenants also defended their submission of the Summaries (in lieu of submitting the actual documents Owner produced) under the "voluminous writings" exception to the best evidence rule (C-103).

Tenants are reminded that they themselves created the Summaries and submitted them to Supreme Court in an effort to prove (1) Owner's discovery

disobedience; (2) Tenants' entitlement to summary judgment; and (3) why the Court should apply the default formula. If their Summaries are "accurate," as Tenants told the First Department (C-76), they conclusively establish that Owner produced base date leases for 55 units. If the Summaries are not accurate, and are unreliable "mere suggestions," then Tenants have perpetrated a fraud on the Court.

Tenants also assert that although Owner may have produced 55 of these leases, "Defendants never provided to any court any of the base date leases for many of the affected apartments" (Opp., p. 14, n 8 [emphasis supplied]). Tenants' claim that the leases are not in the record is misleading. As a proponent of a motion for discovery sanctions and summary judgment, Tenants had the burden of proving what Owner did or did not produce. Tenants elected to provide summaries, which *are* in the record and establish that Owner produced 55 base date leases.

Tenants urged the Court to rely on the Summaries, and the Court did so (R. 22). Having prevailed in Supreme Court and in the First Department based on these Summaries, Tenants are judicially estopped from now disavowing them (*see Greater N.Y. Mut. Ins. Co. v Utica First Ins. Co.*, 172 AD3d 588, 590 [1st Dept 2019]).

As Justice Gische wrote in her dissent, "[g]iven Supreme Court's sweeping determination that the entire rent history of the subject apartments had to be reconstructed," the matter should be remanded "to Supreme Court so that any

remaining discovery and other pretrial matters can be completed" (R. 1385). This will allow the rents to be computed on an apartment-by-apartment basis.[5]

[5] Tenants wrongly claim that 78 total apartments were deregulated during Owner's receipt of J-51 benefits (Opp., p. 9-10, n 2); the DHCR registrations establish that only 72 were deregulated (R. 339-446). Tenants' first mistake is claiming that there were 139 units registered in 1984; in fact, there were only 137 (R. 339-42). Tenants next incorrectly include units 15C and 15D in their "analysis" of deregulated units (R. 249), but such units do not exist (R. 342, 1213). Tenants also purport to include units 1A and 1B as deregulated units (R. 249), but such units were never deregulated; 1B was registered as temporarily exempt (TE) as employee occupied in 1993 and every year since 1998, and 1A was always registered as stabilized until 2008, when it was combined with unit 1B for employee use, such that both 1A and 1B have been registered as TE since 2012 (R. 339-446, 1213). This accounts for the six-unit differential.

Tenants are also wrong that Owner deregulated units after *Roberts* (Opp., p. 9-10, n. 3). As set forth in Owner's Br., 71 of the 72 subject units were deregulated prior to *Roberts*, and although Unit 2J was inadvertently not registered as stabilized in June 2011 after been registered from 1984-2010, it was registered as stabilized by March 2012 for the years 2011 and 2012 (Owner's Br., p. 8, n 1; R. 367-446).

CONCLUSION

The order of the First Department should be reversed insofar as it (1) granted Tenants' motion for summary judgment declaring that Tenants' rents should be calculated pursuant to the Rent Stabilization Code's default rent formula due to (a) Owner's fraud, and (b) Owner's alleged failure to submit documents necessary to establish base date rents; and (2) dismissed Owner's second, third, fourteenth, fifteenth, and seventeenth affirmative defenses; in addition, this Court should remand the matter to Supreme Court so that (a) any remaining discovery and other pretrial matters can be completed; and (b) rents can be calculated on an apartment-by-apartment basis.

Dated: New York, New York
March 15, 2022

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CERTIFICATE OF COMPLIANCE

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Sworn to before me on 15th day of March 2022

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