To be Argued by:
RONALD S. LANGUEDOC
(Time Requested: 15 Minutes)

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

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 a/k/a 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.

Index No. 111723/11

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-RESPONDENTS

HIMMELSTEIN MCCONNELL GRIBBEN & JOSEPH LLP
15 Maiden Lane, 17th Floor
New York, New York 10038
Tel.: (212) 349-3000
Fax: (212) 587-0744
rlanguedoc@hmgjlaw.com

– and –

EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
Fax: (212) 763-5001
mbrinckerhoff@ecbawm.com

Attorneys for Plaintiffs-Respondents

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.

Third-Party Index No. 595472/17

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Tenants' complaint, amended complaint, and motion for summary judgment sufficiently allege that the Owner engaged in a fraudulent scheme, such that the Supreme Court properly found that the Owner did engage in a fraudulent scheme?

Answer:

The Owner did not raise this issue in either the Supreme Court or the Appellate Division, and is therefore barred by this Court's preservation rule from raising this issue here for the first time. In any event, the Tenants' complaint, amended complaint, and motion for summary judgment did sufficiently allege that the Owner engaged in a fraudulent scheme, and the lack of adequate rental history records provided an independent basis for the Court to impose the default formula.

2. Do the requirements of CPLR 3016(b) with respect to particularity of pleadings in certain actions apply to this action for rent overcharges?

Answer:

The Owner did not raise this issue in either Supreme Court or the Appellate Division, and is therefore barred by this Court's preservation rule from raising this issue here for the first time. In any event, the requirements of CPLR 3016(b) do not apply to this action; furthermore, even if these requirements do apply, they were met here.

3. Pursuant to this Court's established precedent providing for an exception to the four-year rule in the case of a fraudulent scheme, is it appropriate for the Supreme Court to consider conduct engaged in by the Owner after the four-year base date as part of that fraudulent scheme?

Answer:

The owner did not raise this issue in either Supreme Court or the Appellate Division, and is therefore precluded by this Court's preservation rule from raising this issue here for the first time. In any event, it is entirely appropriate for Supreme Court to consider conduct engaged in after the four-year base date as part of a fraudulent scheme.

4. Can the four-year lookback period be breached where, as part of a fraudulent scheme, the Owner, after the base date, files retroactive registrations listing the apartments as rent stabilized, with outrageously inflated rental amounts that are false and are not backed up by documentation?

Answer:

The Owner did not raise this issue in either Supreme Court or the Appellate Division, and is therefore precluded by this Court's preservation rule from raising this issue here for the first time. In any event, the four-year rule can be breached where the Owner, as part of a fraudulent scheme, files retroactive registrations after

the base date, listing the apartments as rent stabilized but with inflated rental amounts that are false and not backed up by documentation.

5. Does the Owner have a defense to the Tenants' claims as to a fraudulent scheme, where the Owner, in 2011-2012, performs outrageous recalculations of the tenants' rents, files false retroactive registrations listing outrageously high amounts of rent, and demands that tenants who wish to remain in possession sign renewal leases agreeing to pay grossly inflated amounts of rent, based upon the fact that these actions were done prior to this Court's 2020 decision in *Matter of Regina Metro. Co. LLC. v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332 (2020) ("*Regina*")?

Answer:

This issue could not have been raised in Supreme Court because the motion and cross-motion were filed, and Supreme Court's decision and order was issued, prior to this Court's decision in *Regina*. The Owner did not raise this issue in its first appeal before the Appellate Division, which was perfected after this Court's ruling in *Regina*, and the Owner is now raising this issue for the first time before this Court. The Owner is precluded by this Court's preservation rule from raising this issue for the first time on this appeal. In any event, the fact that the Owner undertook these outrageous actions prior to this Court's decision in *Regina* is not a defense to the Tenants' claims that the Owner engaged in a fraudulent scheme.

6. Can the Owner, who, in opposition to the Tenants' motion for summary judgment on their claim of rent overcharge, never produced leases and other rental history records to show the amount charged on the base date, as to any of the 78 apartments affected by the action, rely upon a mere suggestion in the record that base date leases were turned over on discovery for 55 of these apartments?

Answer:

The Owner did not raise this issue either in Supreme Court or at the Appellate Division and is therefore precluded by this Court's preservation rule from raising this issue for the first time on this appeal. In any event, the record does not "establish," as the Owner now claims, that base date leases for 55 of the 78 apartments were turned over on pre-trial discovery, and the possible suggestion in the record that these leases were turned over does not constitute a basis for denying the Tenants' motion for summary judgment, particularly where, as here, Supreme Court properly found that none of the 78 apartments were properly deregulated.

PRELIMINARY STATEMENT

In this class action for rent overcharges and declaratory and injunctive relief, Plaintiffs-Respondents Kathryn Casey *et al.* ("the Tenants") oppose the appeal of Defendants-Appellants Whitehouse Estates, Inc. *et al.* ("the Owner") and they respectfully request that the order of the Appellate Division in this case entered August 5, 2021 be affirmed in all respects.

Supreme Court correctly determined, and the Appellate Division correctly affirmed, that Defendants failed to present documentary evidence to support their claim that the 78 subject apartments were legally and validly deregulated, and failed to establish that the rents set forth in the various apartments' leases are legal.

Moreover, Supreme Court also correctly determined, and the Appellate Division correctly affirmed, that Defendants' back-filing of hundreds of rent registration statements for the 78 apartments in 2012 was part of a fraudulent scheme by which they were attempting to obviate an official determination that the apartments were rent stabilized, and to impose their own outrageous rent recalculations as the presumptively legal rents for the duration of the statutory four-year lookback period.

Finally, Supreme Court correctly determined, and the Appellate Division correctly affirmed, that Defendants' outrageous recalculations and *en masse* filing of retroactive registrations was a fraudulent attempt to avoid the consequences of

Defendants' previous illicit deregulation of the 78 apartments, and to use the Rent Stabilization Law to prevent Plaintiffs from challenging the rents that Defendants unilaterally recalculated.

As such, this case is very different from the four cases heard by this Court in 2020 and decided collectively under the name *Regina*. Unlike the *Regina* cases, the Owner herein not only failed to produce base date leases; the Owner engaged in a fraudulent scheme.

On this appeal, Defendants largely abandon the arguments and claims that they made before Supreme Court and the Appellate Division, and they rely primarily upon arguments they are making for the first time to this Court. Defendants are precluded by this Court's preservation rule from raising these arguments before this Court for the first time, especially where they had a full and fair opportunity to raise these claims previously, and therefore these arguments should be rejected for that reason alone.

However, even if this Court were to grant an exception to the preservation rule, and consider Defendants new arguments, which it should not do, this Court should reject all of those new arguments.

Contrary to one of Defendants' new arguments, Plaintiffs' claims with respect to the application of the default formula based upon the inadequacy of the rental history record and the existence of a fraudulent scheme were all adequately pleaded

in the complaint and raised on their motion for summary judgment. Defendants had a full and fair opportunity to contest these claims and to submit evidence refuting those claims.

Also, contrary to the second of Defendants' new arguments, Supreme Court properly considered, as part of the fraudulent scheme, Defendants' outrageous actions in 2011 and 2012, including Defendants' unilateral recalculations of the rents to amounts far higher than what was ever charged or paid, their unilateral decision to register those amounts retroactively with DHCR, and their attempts to require tenants to sign lease renewals agreeing to pay these outrageously inflated rents. Supreme Court's determination in this regard was properly affirmed by the Appellate Division.

Furthermore, contrary to the third of Defendants' new arguments, the so-called lack of clarity of the means by which to recalculate the rents and the overcharges until this Court's decision in 2020 in *Regina* did not justify Defendants' actions. No amount of lack of clarity would have justified Defendants' actions in this case. So far as Plaintiffs and their counsel are aware, no other landlord in New York City, in a post-*Roberts* situation, attempted to use the situation to massively increase the tenants' rents, and to register base date rental amounts with the DHCR at rates much higher than what were ever charged. Furthermore, as Defendants did not perfect their first appeal of Supreme Court's 2017 decision and order until 2021,

after *Regina* was decided, Defendants could have made this argument to the Appellate Division but chose not to do so, thereby precluding them from raising it in this Court.

Also, contrary to another of Defendants' claims made for the first time on this appeal, the record does not "establish" at all that Defendants provided, upon pre-trial discovery, the base date leases for 55 of the 78 affected apartments. In the over six years since Plaintiffs filed their motion for summary judgment, Defendants have never presented the base date leases for any of the 78 apartments to any Court. Defendants have, until now, always relied upon, and defended, their unilateral recalculations they performed in 2011-2012.

Defendants have always utilized the Court system to the best of their ability to delay any final reckoning in this case, which was commenced on October 14, 2011, by which the rents of the 78 affected apartments would be properly recalculated; renewal leases setting forth the correct rental amounts would be offered; the proper amounts would be registered, and refunds, together with interest, would be paid to the hundreds of tenants who have occupied the affected apartments in the relevant period from October 14, 2007 to present.

Accordingly, and based upon the arguments set forth below, it is respectfully requested that Defendants' appeal be rejected and that the decision and order of the Appellate Division be affirmed in its entirety.

STATEMENT OF FACTS

A. The Building, the Owners, and the Tenants

At the time this action was commenced, all named Plaintiffs were tenants of the subject building located at 350 East 52nd Street, New York, New York (R. 10, 139-140). Defendant Whitehouse Estates Inc. was the landlord and owner pursuant to a ground lease dated June 28, 1956, which had been extended (R. 140). Eastgate Whitehouse LLC, a related entity, which was added as a Defendant after this action was commenced (R. 13, 1350), became the owner pursuant to an Assignment and Assumption of Ground Lease dated September 9, 2014 (R. 88-94, 95-96).

The initial rent roll with the New York State Division of Housing and Community Renewal ("DHCR") listed 139 apartments registered as rent stabilized in 1984 (R. 11, 59-60, 339-340). Defendants received J-51 tax benefits from 1991 until 2014 (R. 11, 106-131). From 1993 to 2011, Defendants purported to deregulate many apartments pursuant to high-rent vacancy deregulation or, in a few cases, high-rent/high-income deregulation (R. 145-146).[1] The named Plaintiffs became tenants of their respective apartments between 2002 and 2011 pursuant to market non-stabilized leases (R. 11, 139-140).[2]

---

[1] *See* former Rent Stabilization Law ("RSL") [N.Y.C. Admin. Code] §§26-504.1, 26-504.2, which were repealed pursuant to the Housing Stability and Tenant Protection Act (L. 2019 ch 36, Part D §5). The process was sometimes known as "luxury deregulation" or "luxury decontrol." *See e.g., Kuzmich v. 50 Murray Street Acquisition LLC*, 34 N.Y.3d 84, 89 (2019).

[2] As of June 15, 2011, a total of 61 apartments in the building were registered as rent stabilized, out of 139 that had been registered as rent stabilized in 1984 (R. 439-442). The annual registration

In 2009 this Court ruled in *Roberts v. Tishman Speyer Props. L.P.*, 13 N.Y.3d 270 (2009) ("*Roberts*"), that the deregulation of apartments in buildings where landlords received J-51 tax benefits was unlawful.[3] In *Gersten v. 56 7th Ave. LLC,* 88 A.D.3d 189 (1st Dept. 2011), *appeal withdrawn*, 18 N.Y.3d 954 (2012), the Appellate Division ruled that *Roberts* must be accorded retroactive effect and that it applies to the entire time period that the building was enrolled in the J-51 program (see R. 20).[4]

In light of these rulings, Defendants took action in a transparent attempt to preempt any lowering of the rent roll or the payment of any refunds to the tenants.

By letters dated September 28, 2011, Defendant William W. Koeppel advised the Tenants that "many units that were switched into market rates will now need to be converted back into stabilization rates." According to Mr. Koeppel, this "conversion" would often entail "higher rent numbers in the stabilization program, due to legal increases we may take."[5] In what can only be described as a falsely

---

forms reflect the owner's representation as to the regulatory status of an apartment as of April 1st of that year. Thus, according to the records, a total of 78 apartments (139 minus 61) that were registered as rent stabilized in 1984 were no longer registered as rent stabilized in 2011 (see also R. 22, referencing "the building's 78 improperly deregulated apartments"). Defendants purported to deregulate additional apartments after April 1, 2011, by issuing market non-stabilized leases to some tenants who moved in between April and September/October 2011.

[3] Defendants continued to illegally deregulate apartments for two years after *Roberts* (see e.g. R. 27 referring to deregulations continuing until 2011).

[4] *See also* discussion of retroactive applicability of *Roberts* in *Regina* at 350.

[5] Defendants have never cited to any authority for the outrageous proposition that a recalculation of the tenants' rents after *Roberts* could result in resetting the base date rent to an increased amount, or that a landlord could demand massive increases in the rents to be charged upon renewal of the

magnanimous fashion, Mr. Koeppel's letter went on to state that the Owner "will honor the lower rent amounts …even if the newly recalculated rent stabilization rate is higher …for the balance of your present term" (R. 133).

B. Litigation in Supreme Court

Plaintiffs commenced this action on October 14, 2011 (R. 134-171). The complaint made a series of allegations that were clearly intended to preserve Plaintiffs' right to pursue claims that the rents should be computed pursuant to the default formula, either due to the inadequacy of the rental history record or fraud. Clearly, and as in nearly all cases of this type, at the point this action was commenced, there was little evidence available to Plaintiffs as to the rental histories of their apartments.

For example, the complaint alleged as follows:

> "[¶]29…In a case 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 or the owner's violations of the law, the base date rent is calculated on the basis of what is known as the default formula"
>
> "…[¶]36…Upon 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 and their predecessors in interest" (R. 144-146).

tenants' leases, a position that was never taken by any other landlord in New York City so far as Plaintiffs and their counsel are aware.

The complaint went on to specifically allege the facts relating to the notice disseminated to the Tenants by Defendants dated September 28, 2011, and further alleged that Defendants "have begun issuing tenants new leases with J-51 riders, as well as taking other actions as described by the notice. Tenants are being required to respond immediately by signing the new leases and riders" (R. 147).[6]

Following the filing of the complaint, Defendants pushed forward with their outrageous recalculations of the rents. By letters to the Tenants dated October 20, 2011, Stephen K. Trynosky, a consultant hired by Defendants, annexed copies of amended DHCR registration records for each individual apartment unit and set forth a purported calculation of each apartment's "maximum legal regulated rent" (R. 11, 156). According to Mr. Trynosky's letters, if the amount actually paid was less than the legal regulated rent, it would be considered a preferential rent (R. 156).[7] The

[6] The complaint also alleged that, on or about September 9, 2011, Defendant Whitehouse Estates, Inc. commenced an action against named Plaintiff Kirk Swanson, alleging that Mr. Swanson "provides tenants with false information that they will be protected from eviction if their leases expire….The commencement of this action demonstrates Defendants' refusal to acknowledge in any way that the tenants' apartments were covered by rent stabilization, and continued to maintain that said apartments were properly deregulated, as recently as three weeks ago."

[7] In his affidavit dated April 8, 2015, over three years later (R. 1196-1197), Mr. Trynosky stated that he "looked at records going back to 2006 and in some cases even further back when picking a starting point to recalculate the rents going forward." He claimed that he "personally went through the apartment records and created a work sheet for each individual apartment….We decided to use the rent amount from the last time each apartment was registered as the starting rent. I then calculated the rents forward using the records and documents that the Landlord had on file and those obtained from DHCR." These worksheets, records and documents were never turned over to Plaintiffs' attorneys on pre-trial discovery despite repeated requests, nor were they annexed as exhibits in Defendants' papers in opposition to Plaintiffs' motion for summary judgment (See R. 215-217).

record does not reflect that any refunds of past overcharges were issued, only that rents were recalculated and, in most cases, increased (see R. 1196-1200).

On December 16, 2011, Defendants filed their answer to the complaint, in which they contended *inter alia* that their actions were in reliance upon applicable statutes and regulations; were taken in good faith; and that they relied in good faith upon "pronouncements and conduct of DHCR and the New York City Department of Housing Preservation and Development in determining whether apartments could be regulated" (R. 168-169). Defendants did not plead any defense relating to the particularity of pleading requirements of CPLR 3016(b).

By letters dated January 12, 2012, signed by attorneys for both sides, the Tenants were reminded that Defendants had filed registrations in October 2011, which in many cases listed the amounts the Tenants were paying as preferential rents; the letters went on to state that Plaintiffs' attorneys objected to these communications with the Tenants, and informed them that the Trynosky letters "are hereby withdrawn" and "should be ignored" (R. 11, 173).

Notwithstanding the above, on or about March 8, 2012, Defendants filed hundreds of "revised rent registrations for the years 2007 through 2011" (R. 864). Copies of those registration forms were placed in the record (see R. 864-1135). These registration forms encompass 70 apartments, and in nearly every case they purport to list a "legal" amount that is much higher than the rent actually charged,

which is listed as a "preferential" rent. For example, the 2011 registration form for Apartment 2B lists a "legal" rent amount of $3,555.01 per month and a "preferential" rental amount of $1,800.00 per month (R. 873).[8]

The record also shows that throughout the year 2012, Defendants issued rent stabilized lease renewal offers to many of the tenants who had moved in, in prior years, pursuant to market leases; most of these renewals listed outrageously high amounts of rent and were not agreed to by the tenants (R. 486-863).[9]

By notice of motion dated April 12, 2012, Plaintiffs moved to certify this action as a class action, with the proposed class to be defined as follows:

> "All current, former, and future tenants of 350 E. 52nd Street whose apartments have been, are currently being, or will be, deregulated by, or subjected to attempts to be deregulated by, Defendants, their predecessors in interest, or their successors in interest, pursuant to Luxury Decontrol, while Defendants are or have been in receipt of J-51 tax abatement benefits" (R 177-178, 187).

---

[8] There has never been any authority for any landlord who entered into a "market," "non-stabilized" lease with a tenant for a rent stabilized apartment to later characterize that rental amount as a "preferential" rent, then file a retroactive registration form listing a much higher "legal" rent, and then require that tenant to agree to pay that much higher rental amount in a renewal lease as a condition for remaining in the apartment. Another way of explaining what occurred is that Defendants purported to reset the rents on the base date of October 14, 2007 by inflating those amounts dramatically, and listing those amounts on registration forms filed with the DHCR, thereby creating a written record that could be used to justify whatever rent Defendants decided to charge. Defendants never produced to any court any of the base date leases for any of the affected apartments.

[9] It is not shown on this record how many of the Tenants, if any, signed renewal leases in 2012 and agreed to pay these inflated rents, or how many of the Tenants, believing these renewal lease offers to be legitimate, chose to move out rather than pay the much higher rent. In their opposition papers filed in February 2016, Defendants claimed that 29 of the Tenants (out of 78) refused to sign the renewals (R. 486-863), which suggests that a great many of the Tenants either did sign the renewals and paid the higher rent, or moved out.

Plaintiffs' motion for class certification was granted by order entered on August 6, 2012 (R. 183-197).[10]

Thereafter, on January 3, 2013, Plaintiffs' counsel made a formal discovery demand for production of documents related to the class of tenants in this action (R. 199-205). A preliminary conference order was entered on July 5, 2013 (R. 209-210).

In April 2014, Defendant Whitehouse Estates, Inc. issued notices of termination of tenancy to named Plaintiffs Kirk Swanson and Betty Furr, on the ground that they refused to sign lease renewals in 2012 whereby they would have agreed to outrageous increases in their rents (see R. 472). Mr. Swanson's rent would have increased from $4,200.00 per month to $7,281.80 per month (R. 654-659), and Ms. Furr's rent would have increased from $2,200.00 per month to $2,768.05 per month (R. 630-635).

On May 21, 2014, the Court entered an order enjoining Defendants from commencing holdover proceedings based upon these outrageous notices (R. 481-482), and further directed Defendants to demand no more rent than the amount listed

[10] The decision and order granting class certification is reported as *Casey v. Whitehouse Estates, Inc.*, 36 Misc.3d 1225(A) (Sup. Ct. NY Co. 2012). Plaintiffs waived the right to pursue treble damages as a condition of class certification (R. 149, 188).

in the tenants' last leases unless they bring a motion to set a higher rate of use and occupancy (R. 482-483, see also R. 29).[11]

A status conference order was entered on May 23, 2014, again directing Defendants to comply with Plaintiffs' discovery demands (R. 212-213).

On September 9, 2014, the ground lease for the building was assigned by Whitehouse Estates, Inc. to Eastgate Whitehouse LLC, for no consideration. The Tenants were advised in letters that the transfer took place "due to an internal structural change made by the ownership" (R. 88-96).

On February 12, 2015, with only a limited amount of discovery documents having been supplied, Plaintiffs' counsel issued a detailed deficiency letter (R. 215-244). By letter dated March 23, 2015, Plaintiffs' counsel noted "…It has now been over two years since that [document] demand was served" (R. 254). Thereafter, however, no further documents were forthcoming (see R. 64-65).

C. Plaintiffs' Motion for Summary Judgment, and Defendants' Opposition

On December 9, 2015, Plaintiffs filed their motion, which is the subject of this appeal, seeking *inter alia* an order striking Defendants' affirmative defenses, and

[11] The May 21, 2014 order directing the Tenants to continue to pay rent at the rate of their last expired lease and barring the Owner from increasing that amount without leave of Court remained in effect until April 15, 2021, when Supreme Court modified that order to the extent of reducing the payment amount, effective February 5, 2021, to the default formula computation for each affected apartment. Defendants' motion for a stay of the April 15, 2021 order pending appeal was denied by the Appellate Division on August 5, 2021 (R. 1378), and Defendants' second motion seeking *inter alia* a stay of the April 15, 2021 order was denied by the Appellate Division on October 7, 2021 (R. 1368-1369).

seeking summary judgment on the causes of action on their complaint, as well as discovery sanctions, and finding that Plaintiffs' legal rents are to be calculated pursuant to the default formula (R. 39-40).[12]

Plaintiffs submitted a detailed analysis of the rental history records for the affected apartments that had been provided to date, showing that records for only 60 apartments had been provided, and that none of these were sufficient to determine the legal rents (See R. 63-65, 246-247, 256-278), as well as a list of 23 additional apartments where it appeared that an unlawful deregulation had occurred but no rental history records were provided whatsoever (R. 249).

Plaintiffs argued that the default formula must be applied due to Defendants' failure to provide adequate records on pre-trial discovery to establish the legal rent amounts (R. 1338-1345), noting that the default formula is to be applied not only in

---

[12] The default formula is codified at Rent Stabilization Code ("RSC") (9 N.Y.C.R.R.) §2522.6(b)(2) and (3), which provides as follows:
"(2) Where either (i) the rent charged on the base date cannot be determined, or (ii) a full rental history from the based 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) has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3)."
"(3) These amounts are: (i) the lowest rent registered pursuant to section 2528.3 of this Code 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 Code; 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." *See also, Regina, supra* at note 11.

a case of fraud but in a case where a landlord does not provide complete and reliable rental records sufficient to establish the legal rent (R. 1344-1345). Plaintiffs cited, in their motion papers, the decisions of this Court with respect to the applicability of the default formula in cases of fraud (R. 1343-1344). Plaintiffs argued that in a post-*Roberts* case, a landlord had an obligation to submit rental history records upon discovery showing that the rent was lawfully increased to an amount over $2,000.00 per month, which was the threshold for high rent vacancy deregulation until 2011 (R. 1345).[13]

Plaintiffs also argued that, had the full rental history records of the affected apartments been made available, the legal rents would be calculated by what was sometimes referred to as the "reconstruction method" or the "bridging-the-gap" method (R. 302-322, 1339-1340). This methodology, adopted by the DHCR and by some courts for a period of time,[14] was ultimately rejected by this Court in *Regina*. Defendants' brief, at 13-17 and 54-56, devotes some verbiage to this Court's rejection of the reconstruction method, though it is largely irrelevant to this case inasmuch as Defendants herein never provided adequate rental history records to

---

[13] Supreme Court directed Plaintiffs to withdraw their initial Memorandum of Law for being too lengthy, and directed them to replace it with a revised Memorandum of Law (R. 1350). Both Memorandums are included in the record (R. 48-87, 1313-1349), but the references here are to the revised Memorandum.

[14] *See, e.g., Taylor v. 72A Realty Assoc. LP,* 151 A.D.3d 95 (1st Dept. 2017), *modified sub nom Regina.* The Appellate Division's decision in *Taylor* was dated May 25, 2017 after Supreme Court's decision and order in this case.

justify the deregulation of the affected apartments, engaged in a fraudulent scheme, and failed to produce any base date leases.[15]

Shortly after the service of Plaintiffs' motion, counsel for the parties entered into a stipulation dated December 22, 2015 whereby it was agreed that Defendants would submit additional documents responsive to Plaintiffs' demand dated January 3, 2013, which Plaintiffs could accept without prejudice to any claims they were making in the pending motion (R. 455-456). The parties entered into a second stipulation dated "February 11, 2015" [sic should be 2016] again agreeing that Defendants would submit additional documents without prejudice (R. 457-458). Thus, between December 22, 2015 and February 26, 2016, Defendants did submit additional documents, and the motion was adjourned pending their submission of those documents, and Plaintiffs' review.

By entering into these stipulations, the parties charted their course, such that both parties where aware that any issues stemming from the production of the

[15] Defendants' arguments with respect to the reconstruction method conflate the standard to be applied for the calculating of the legal rents with the standard to be applied for assessing the Tenants' right to obtain rental history documents upon pre-trial discovery. In a rent overcharge action, the Tenants' right to discovery is assessed based upon the rule allowing for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of burden of proof" (CPLR 3101[a]). Thus, in a rent overcharge action, pre-trial discovery may well entail production of documents prior to the base date. In any event, Defendants never objected to the production of documents prior to the base date, and thus they charted their course in this litigation. Plaintiffs' review of the discovery documents revealed that the apartments were not lawfully deregulated in the period 1995-2011, even based upon the mistaken interpretation of the law at the time.

additional documents would be raised in the context of the motion practice, and would be addressed by the Court. Although Defendants probably hoped that supplemental documents would cure any discovery deficiencies and enable the Court to calculate the legal regulated rent, such was not the case.

Shortly after submitting the supplemental documents, on February 26, 2016, Defendants served a notice of cross-motion seeking relief with respect to interim use and occupancy payments, papers in support thereof, and papers in opposition to Plaintiffs' motion (R. 459-1220). Defendants' papers in opposition to Plaintiffs' motion did not contain any detailed refutation of the analysis of the records in Plaintiffs' motion, nor did they contain any description or summary of the records produced in the interim, nor did they contain any apartment-by-apartment analysis of the records, nor did they contain copies of the leases in effect on the base date of October 14, 2007 (R. 22-23).[16]

Defendants' papers argued in conclusory fashion that the additional records were adequate to determine the legal rents of the tenant class members (see R. 1216-1217). Defendants also argued, in conclusory fashion, that there was not sufficient

[16] Defendants' attorneys noted in their Memorandum of Law that they discovered boxes of documents relating to the subject apartments; that the production project began on or about December 1, 2015; that the process of scanning, reviewing and organizing the additional documents took several weeks; that a DVD containing documents was delivered to Plaintiffs' attorneys on January 15, 2016; and that another DVD with additional documents was turned over on February 22, 2016 (R. 1216-1217).

evidence to support the application of the fraud exception to the four-year rule,[17] arguing that the deregulation was done with good faith reliance upon the DHCR's interpretations of the law (R. 1217-1218)

In what Supreme Court correctly described as a "document dump" (R. 22), Defendants included, with their opposition papers, hundreds of pages of documents consisting of copies of what were purported to be the last market leases signed by numerous of the Tenants, as well as unsigned rent stabilized renewal lease forms dating from 2012 and unsigned rent stabilized leases (R. 486-863). These documents covered only 29 apartments, and did not include any summary, analysis, or explanation as to how the amounts listed on the leases were calculated (R. 23).[18]

Defendants' opposition papers also included copies of the hundreds of "revised registrations" that were filed in 2012 (R. 864-1135). Again, these records

[17] The former four-year rule used to be codified at RSL §26-516(a) and CPLR 213-a, and it provided that "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before" initiation of the claim. The four-year rule, along with the exceptions thereto based upon inadequacy of rental history records and fraud, is applicable here because this action was commenced prior to the repeal of the four-year rule. RSC §2526.1(a)(3)(i), issued pursuant to the prior law, provides that "the legal rent for the 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." RSC §2526.1(a)(3)(ii) provides that where the rent on the base date cannot be established, the rent shall be determined pursuant to RSC §2522.6, where the default formula is codified.

[18] 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. The documents provided by Defendants only concerned those of the Tenants who refused to sign.

included no summary, explanation, analysis, justification, or backup documentation (R. 22-23).

Defendants' opposition papers also included a rent roll for the building covering the month of September 2015 (R. 1180-1188), again without any analysis or explanation as to how the rental amounts charged were arrived at.

Defendants opposition papers also included a calculation chart purporting to show amounts of rent that the Tenants should have agreed to pay upon renewal, based upon Defendants' outrageous recalculations of the rents (R. 1189-1191), again without any explanation of the calculations.

Defendants submitted an affidavit of Defendant William W. Koeppel, which made no mention of the methodology of the calculation of the legal regulated rents or the amounts of the overcharges, focusing instead on only two of the current Tenants out of 78 affected apartments who were in arrears (R. 1192-1195).

Finally, Defendants submitted an affidavit of Mr. Trynosky, inexplicably dated April 8, 2015, ten months earlier, and eight months before Plaintiffs' motion was filed (R. 1196-1200). As explained above, this affidavit did not offer any specific analysis of the rental history records. Obviously the affidavit could not have provided any refutation of Plaintiffs' analysis, as it was prepared long before Plaintiffs' motion papers were served. The affidavit merely describes, in a general way, the process that allegedly was followed in resetting the base date rents and

demanding that the Tenants sign rent stabilized lease renewal forms with huge rent increases.[19]

Plaintiffs' counsel, after reviewing the additional documents provide by Defendants, submitted their reply papers on May 4, 2016 (R. 1225-1269). The reply papers included a detailed apartment-by-apartment analysis of the additional documents (R. 1228-1241). As per this detailed analysis, in each case, the rental history record of the affected apartments was incomplete. As explained by the analysis, the defects included long gaps in the rental history records for most of the apartments (R. 1259-1260); also the analysis explained that it was impossible to determine if the rents of many of the affected apartments had been lawfully increased to over $2,000.00 per month, and in a large number of cases the rental history records from the base date to the present were not included. In many cases records of individual apartment improvements ("IAI's") were not provided (R. 1260). No records at all were submitted as to eight of the affected apartments (R. 1257-1263). Plaintiffs again argued that the default formula had to be applied, based upon the inadequacy of the rental history record as well as fraud (R. 1263-1265).

[19] In their opposition papers, Defendants also submitted copies of New York City Rent Guidelines Board orders for the years 2005-2015 (R. 1136-1179), and a DHCR notice dated January 8, 2014 describing the process for filing amended registrations that was adopted at that time (R. 1202). The reasons for these submissions were unclear (see R. 1219).

On May 31, 2016, Defendants served papers which were denominated as reply papers in further support of their motion, but were actually, in large part, sur-reply papers in further opposition to Plaintiffs' motion (R. 1274-1295). These papers were accepted without objection. Defendants argued that Plaintiffs were precluded from arguing the existence of a fraudulent scheme because the 2012 decision and order of the Supreme Court was "the law of the case"; that absent fraud it was improper to examine the rental history more than four years prior to commencement of the action; and that all records within the lookback period have been produced; and that their failure to produce records was not willful and contumacious (R. 1288-1292).

Again, Defendants' primary argument in opposition to Plaintiffs' motion for summary judgment was that, taken together, the 29 leases of tenants last expired and the renewal leases proffered but unsigned, the revised registration forms, the Rent Guideline Board orders, the chart of tenant status showing the tenants who did not sign the proffered renewals and the amounts of rent they should have paid pursuant those renewals, the 2014 DHCR notice, and the affidavit of Defendants' consultant, constituted sufficient evidence "to calculate the use and occupancy for the Plaintiff Class Members" (R. 1286).

On June 28, 2016, Plaintiffs interposed their amended complaint naming Eastgate Whitehouse LLC as an additional defendant (R. 1296-1312).

D. Decision and Order of Supreme Court

By decision and order dated March 23, 2017, Supreme Court granted Plaintiffs' motion and determined that all the Tenants' rents were to be calculated pursuant to the default formula (R. 21-27).[20] Supreme Court specifically found that "[D]efendants' evidence is too incomplete to permit an accurate calculation of either the base rent, or the current legal rent, for any of the 78 apartments that plaintiffs assert were improperly deregulated" (R. 23). Supreme Court went on to determine that "[D]efendants also have failed to establish that the rents set forth in the various apartments' leases are legal, as well" (R. 27).

Supreme Court specifically made the following findings:

> "The court notes that, while the 78 alleged acts of improper apartment deregulation took place over time between 1995 and 2011, it was on March 8, 2012, that defendants filed back-dated rent registration statements with the DHCR for 2007-2011. By back-dating the apartment registrations for five years (six, if one includes 2012, the year in which the amended registrations were filed), defendants were seeking to (1) obviate an official determination that the building's apartments were and are rent stabilized; and (2) impose their own rent calculations, as the presumptively legal rent, for the duration of the statutory four-year look-back period that would normally apply in the overcharge action that plaintiffs had recently commenced. The court finds this en masse filing a fraudulent attempt to (1) avoid the consequences of defendants' previous illicit deregulation of the 78 subject

[20] Supreme Court's well-analyzed, comprehensive, detailed, 30-page, single-spaced, decision and order is published as *Casey v. Whitehouse Estates, Inc.*, 2017 N.Y. Misc. LEXIS 13633, 2017 NY Slip Op 33319(U), 2017 WL 1161744.

> apartments herein; and (2) to use the RSL[21] to prevent plaintiffs from challenging the rents that defendants had unilaterally calculated for those apartments. In other words, it satisfies the 'fraud' showing specified in *Grimm*:[22] i.e. a 'combination of …factors [that] should have led …to investigat[ing] the legality of the base date rent, rather than blindly using the rent charged on the base date four years prior to the rent overcharge claim.' 15 N.Y.3d at 366. Following *Grimm*, the court finds that, because the rent history in this action is unreliable, the default formula should be used to determine the base date rent and to calculate the rent for each of the 78 subject apartments herein" (R. 27).

Defendants then moved to reargue, thereby availing themselves of yet another opportunity to demonstrate that the default formula should not be applied in this case. Defendants' motion to reargue was denied by a Supreme Court decision and order dated July 14, 2017. *Casey v. Whitehouse Estates, Inc.*, n.o.r., Index No. 111723/11 (Sup. Ct. NY Co.), NYSCEF Doc. 289.

E. Defendants' Appeal to the Appellate Division

Thereafter Defendants took nearly four years to perfect their appeal to the Appellate Division. During most of that time, Defendants had the benefit of Supreme Court's order directing the Tenants to continue paying rent at the rate of their last market lease pending the default formula calculation before the Special

[21] "RSL" stands for "Rent Stabilization Law" (N.Y.C. Admin. Code §§26-501 et seq.).
[22] The full citation of this case is *Matter of Grimm v. New York State Div. of Hous. & Community Renewal*, 15 N.Y.3d 158 (2010).

Referee (see R. 27-31, 1377).[23] The year before Defendants perfected that appeal, this Court issued its decision in *Regina*.

On their appeal to the Appellate Division, Defendants made the following arguments: (1) Supreme Court's finding that the Owner committed fraud is contrary to law; (2) in finding fraud, Supreme Court violated the law of the case doctrine by "overruling" the 2012 order which "held" that the Owner was acting in good faith; (3) Supreme Court erred by holding that the default formula should be applied; (4) Supreme Court erred in determining that the Owner's discovery production was insufficient; and (5) the Tenants failed to meet their burden on summary judgment (Compendium at C-17 to C-19).

Defendants did not argue to the Appellate Division that Plaintiffs did not make any adequate claim of fraud in their motion for summary judgment; they did not argue that Plaintiffs failed to meet the pleading requirements of CPLR 3016(b); they did not argue that a finding of fraud could not be based upon conduct that occurred after the base date; they did not argue that until *Regina* was decided there was a lack of clarity as to the methodology to recalculate the rents; and they did not argue that

[23] That order was modified by Supreme Court on April 15, 2021 to the extent of reducing the interim payments to the default formula amount. Defendants' motions seeking a stay of that modification order pending appeal were denied (R. 1378, 1368-1369). Thus, Defendants had the benefit, following Supreme Court's March 23, 2017 decision, of collecting nearly four additional years of market-rate rent.

the record "established" that 55 base date leases out of the 78 affected apartments were turned over in pre-trial discovery.

By a 3-1 decision and order dated August 5, 2021, the Appellate Division affirmed Supreme Court (R. 1370-1385).[24] As correctly noted by that Court:

> "By March 2012, following the commencement of this action, defendants had purported to recalculate the legal regulated rent for the apartments and filed rent registrations with DHCR reflecting defendants' rent calculations for approximately 72 apartments for the years 2007 through 2011" (R. 1372).

The Appellate Division decision went on to distinguish this case from *Regina*, as follows:

> "…[T]he facts of this case differ significantly from …other typical post-*Roberts* cases….Here, …after commencement of the action, defendants, without court approval, unilaterally registered rents from the base date forward that were not the rents actually paid, and instead registered rents far higher, without explanation. While these intentional misstatements of fact, which were intended to artificially increase the legal regulated rent, constitute fraud under *Grimm*, RSC 2522.6(b)(2) also calls for application of the default formula where '(2) the rent charged on the base date cannot be determined; or (ii) a full rental history from the base date is not provided.' Both of these scenarios apply here, and differ from situations in which the base date rent is known….Here, the base date rent cannot be established because defendants filed to provide leases showing what the actual rent charged on the base date was, or whether the actual rent was known; rather, without explanation, they registered

[24] The Appellate Division's decision and order is published as *Casey v. Whitehouse Estates, Inc.*, 197 A.D.3d 401 (1st Dept. 2021).

> rents much higher than the actual rent. In such cases, under RSC 2522.6(b)(2), the default formula applies" (R. 1373-1374).

The Appellate Division decision went on to note the following:

> "Although defendants maintain that they provided evidence showing the legal regulated rent on the base date on which the motion court should have relied, the DHCR rent history for the apartments within the four-year lookback period shows that the rents beginning in 2007, four years before the complaint was filed, were registered in 2012, based on defendants' unilateral calculations and not the actual rent charged. Plaintiffs also assert that the Trynosky letter demonstrates that in some cases, defendants converted plaintiffs' actual rents to 'preferential rents' in order to justify registering significantly higher rents with DHCR. That evidence, combined with defendants' failure to produce leases for the class within the lookback period, showing the actual rent paid, does not adequately establish the base date rent by a preponderance of the evidence under RSC 2526.1(3)(i)" (R. 1375).

Addressing the opinion of the one dissenting Justice, the Appellate Division majority went on to note the following:

> "Contrary to the assertions by our dissenting colleague, defendants' actions were more than simply imperfect registrations, and as a whole the evidence was sufficient to satisfy plaintiffs' burden on summary judgment. Defendants failed to produce leases for the class reflecting the actual rent charged on the base date, October 14, 2007 (RSC 2520.6[f]), seeking instead to rely on their retroactive rent registrations for the relevant apartments in 2012, after this action was commenced, based on their own unilateral calculations of what the base date rent ought to have been….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. Defendants' actions gave rise to a colorable claim of fraud [citations omitted]. Based on defendants' conduct, and in light of the absence of evidence in the record as to the actual rent charged on the base date by which to calculate legal regulated rents under RSC 2526.1(a)(3)(i), plaintiffs' overcharges, if any, must be determined according to the default formula set forth in RSC 2522.6(b) [further citation omitted]" (R. 1375-1376).

The dissenting Justice incorrectly opined that Defendants' filing of revised registrations in 2011-2012 evinced an effort to comply with the law once *Gersten* made clear that *Roberts* had retroactive effect (R. 1383). As the majority noted, these registrations were "more than simply imperfect" (R. 1375). And, as Supreme Court determined, these registrations constituted part of "a fraudulent attempt to (1) avoid the consequences of defendants' previous illicit deregulation of the 78 subject apartments herein; and (2) to use the RSL to prevent plaintiffs from challenging the rents that defendants had unilaterally calculated for those apartments" (R. 27). As the courts have recognized, a fraudulent scheme in violation of the Rent Stabilization Law may come in various forms; in some cases it may manifest itself in the absence of a registration history; in other cases such as the present case it consists of the mass filing of false registrations listing patently incorrect amounts of rent, hardly a good faith attempt to come into compliance with the law in light of the holdings of *Roberts* and *Gersten*.

The dissenting Justice also noted, incorrectly, that "the majority's perceived injustice in defendants' registration of an incorrectly high rent is redressed by the requirement that the base rent is what the tenant was actually paying" (R. 1384). These argument presumes that the base date leases for the affected apartments are contained in the record, which as explained above is not the case. Also, this argument ignores the fact that Defendants never established how the rents of the 78 affected apartments were increased to an amount over $2,000.00 per month in the period from 1995 to 2011 (see e.g. R. 27).

The dissenting Justice incorrectly noted that the Supreme Court "order[ed] reconstruction of each apartment's rent history" (R. 1385), something neither Supreme Court nor the Appellate Division majority did.

Following the issuance of the Appellate Division's decision and order, that Court granted Defendants' motion for leave to appeal to this Court (R. 1368-1369), certifying the following question:

> "Was the order of this Court, which affirmed the order of the Supreme Court, properly made?
>
> This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion."

To the extent that Defendants' motion sought a stay, it was denied (R. 1368-1369).

This appeal followed.

POINT I

DEFENDANTS ARE PRECLUDED, PURSUANT TO THE PRESERVATION RULE, FROM RAISING THE MULTIPLE ARGUMENTS THEY HAVE MADE FOR THE FIRST TIME ON THIS APPEAL

As explained above, Defendants have made multiple arguments to this Court which they made neither to Supreme Court nor to the Appellate Division. These arguments should not be considered by this Court pursuant to the preservation rule. These arguments have not been preserved for review and are not properly before this Court.

The preservation rule is straightforward: An appellant must have raised the issue in the court of first instance in order to preserve the issue for appellate review. *Freedom Mortgage v. Engel*, 37 N.Y.3d 1, 37 (2021) (Wilson, concurring), citing Karger, Powers of the New York Court of Appeals, §17:1 (2020 ed.); *Clement v. Durban*, 32 N.Y.3d 337 n. 1 (2018); *Matter of NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 181 (2016); *see also*, The New York Court of Appeals Civil Jurisdiction and Practice Outline (Sept. 2020 ed.), at 22-23.

In *Regina, supra* at 362-363, this Court restated the principal that "we generally do not review issues raised for the first time on appeal," making a narrow exception in that case to consider the applicability of legislation enacted while those appeals were pending. *Id.*, citing *Matter of Gleason v. Michael Vee, Ltd.*, 96 N.Y.2d

117 (2001). That exception does not apply here, as Defendants do not raise any issues on this appeal relating to any new legislation or other change in the law, but they merely raise issues which should have been raised in Supreme Court had they intended to preserve them for appeal.

This Court rarely reviews questions raised for the first time upon appeal. Moreover, unlike the Appellate Division, this Court lacks jurisdiction to review unpreserved issues in the interest of justice. *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355, 359 (2003).

The requirement of preservation is not simply a meaningless, technical barrier to review. *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 829 (2008), citing *Bingham, supra.* It is designed to promote the proper administration of justice, as well as to avoid unfairness to the other party. *Bingham, supra*.

Here, for example, had Defendants argued in Supreme Court that Plaintiffs' 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, and/or Plaintiffs could have sought to withdraw their motion without prejudice to refiling it. Instead, Defendants opposed Plaintiffs' fraud claims on the merits and the law, both in the opposition papers and in their sur-reply papers.

Similarly, had Defendants argued in Supreme Court, or even raised as an affirmative defense in their answer, that the complaint did not satisfy the pleading requirements of CPLR 3016(b), Plaintiffs could have sought to amend their complaint pursuant to CPLR 3025(b), or to replead pursuant to CPLR 3211(e), or to request that the pleadings be amended to confirm to the proof pursuant to CPLR 3025(c).

Had Defendants argued in Supreme Court that an allegation of a fraudulent scheme could not be based upon conduct occurring after the base date, Plaintiffs could have sought to supplement their papers with additional information as to conduct that occurred prior to the base date.

Had Defendants argued in Supreme Court that the record "established" that base date leases for 55 of the 78 affected apartments had been produced upon pre-trial discovery, Plaintiffs could have demanded that Defendants demonstrate that such leases had in fact been produced, insisted that Defendants annex copies of those alleged 55 base date leases as exhibits, and afforded Plaintiffs an opportunity to analyze and rebut this alleged evidence. In any event, Defendants had every opportunity to produce copies of these alleged 55 base date leases in Supreme Court, had they chosen to do so.

Had Defendants argued in the Appellate Division that they engaged in their recalculations based upon a lack of clarity in the law prior to this Court's decision

in *Regina*, Plaintiffs could have fully argued that point in the Appellate Division, thereby allowing for the proper administration of justice.

Now, several years after this motion practice began, Defendants raise these arguments for the first time upon their appeal to this Court. These arguments have all been improperly raised to this Court for the first time and should not be considered.

Accordingly, it is respectfully submitted that Defendants arguments that have been raised for the first time on this appeal should not be considered, and they should all be rejected.

POINT II

DEFENDANTS' ARGUMENTS ON THIS APPEAL WITH RESPECT TO PLAINTIFFS' ALLEGED FAILURE TO PLEAD OR ARGUE FRAUD IN SUPREME COURT ARE UNAVAILING AND SHOULD BE REJECTED

A. Plaintiffs Did Argue Before Supreme Court that Defendants Engaged in Fraud

Assuming *arguendo* that this Court does not apply the preservation rule with respect to Defendants' arguments as to the pleading and arguing of fraud claims in Supreme Court, and considers Defendants' new arguments, this Court must nevertheless reject them.

A review of the record in this case reveals that Plaintiffs raised the issue of fraud at every relevant stage of this action; and that Defendants never raised any objection to the raising of the issue of fraud, and in fact repeatedly responded to

Plaintiffs' allegations of fraud by submitting two sets of responsive papers in Supreme Court, both of which argued that they did not engage in fraud; then moving to reargue in Supreme Court, arguing that they did not engage in fraud; then raising the issue of fraud in their initial brief to the Appellate Division.

As a review of the record will show, the allegation made in Defendants brief at page 29, that Plaintiffs "improperly alleged fraud for the first time on appeal" is simply incorrect.

As explained above, Plaintiffs' complaint filed on October 14, 2011 alleged, at paragraphs 29-30, that the default formula would be applied in cases where the rental history records did not exist, were not provided, were inherently unreliable, or were created by fraud or by the owner's violations of law; and that, upon information and belief, the legal regulated rents of the 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 and their predecessors in interest (R. 144-145). The complaint went on to make a series of allegations with respect to Defendants' notices dated September 28, 2011, including the claim that many of the Tenants' rents would be treated as "preferential," and that Defendants had already begin issuing new leases, requiring the Tenants to respond immediately (R. 147).

In Plaintiffs' papers in support of their motion for summary judgment, submitted on December 9, 2015, Plaintiffs argued that the default formula must be applied due to Defendants' failure to provide adequate records to establish the legal rent amounts (R. 75-83, 1338-1345), noting that the default formula is to be applied not only in a case of fraud but in a case where a landlord does not provide complete and reliable rental records sufficient to establish the legal rent (R. 80-83, 1344-1345). Plaintiffs cited, in their motion papers, the decisions of this Court with respect to the applicability of the default formula in cases of fraud (R. 1343-1344).

Defendants' first set of papers in opposition to Plaintiffs' motion addressed the issue of fraud. In Plaintiffs' reply papers, Plaintiffs' claims of fraud were reiterated and expanded upon, based upon Plaintiffs' review of the supplemental discovery materials turned over in the interim. Defendants' sur-reply papers, in further opposition to Plaintiffs' motion, also addressed the issue of fraud.

Upon receipt of Supreme Court's decision and order granting Plaintiffs' motion, partly upon the ground of fraud, Defendants moved to reargue, thereby availing themselves once again of the opportunity to refute Plaintiffs' claims of fraud.

In their initial brief to the Appellate Division, Defendants devoted over 17 pages to their position that they did not engage in fraud (Compendium at C-4). This

belies Defendants' claim to this Court that Plaintiffs raised the issue of fraud for the first time in their brief in opposition to Defendants' appeal at the Appellate Division.

Accordingly, Defendants' argument that Plaintiffs did not raise the issue of fraud until they filed their opposition brief with the Appellate Division is completely unavailing and should be rejected.

B. Defendants Charted Their Course in the Litigation By Offering to Supplement Their Discovery Production After Plaintiffs' Motion was Filed.

As their initial response to Plaintiffs' motion, Defendants opted to enter into two stipulations whereby the parties agreed that Defendants would supplement their document production on pre-trial discovery, without prejudice to Plaintiffs' claims on their pending motion.

By entering into these two stipulations, Defendants "charted their course" by reaping the benefits of being allowed to supplement their document production in exchange for Plaintiffs being allowed to maintain their position on their motion for summary judgment. Defendants were in no way misled to their prejudice, and they have fully defended themselves at every stage of this action. *See, e.g.*, *Battaglia v. MDC Concourse Center, LLC,* 175 A.D.3d 1026, 1027 (4th Dept. 2019).

In other words, it was Defendants' choice to seek to avoid the consequences of possible discovery sanctions pursuant to CPLR 3126 by entering into those stipulations with Plaintiffs, whereby Defendants could supplement their discovery

and in exchange Plaintiffs were permitted to maintain all the arguments at their disposal on their motion.

"The parties to a civil dispute are free to chart their own litigation course." *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214 (2014); *Mill Rock Plaza v. Lively*, 224 A.D.2d 301 (1st Dept. 1996). "The management of litigation calls upon counsel to exercise a highly judgmental function as they 'chart their procedural course through the courts.'" *Salesian Society, Inc. v. Village of Ellenville*, 51 N.Y.2d 521, 525 (1977), citing *Stevenson v. News Syndicate Co.*, 302 N.Y 81, 87 (1950).

Having submitted supplemental material on pre-trial discovery, Defendants then elected to submit opposition papers to Supreme Court which did not address that supplemental material in any detail; rather Defendants elected to make the focus of their opposition papers to be the recalculations done in 2011-2012, the revised retroactive registration forms, the renewal leases for outrageous amounts which many of the Tenants had, understandably, refused to sign, and the amounts of money Defendants felt they were deprived of as a result of the Tenants' refusal to sign these outrageous renewals. Defendants did not even submit copies of base date leases for the 78 affected apartments.

For their part, Plaintiffs, after receiving and reviewing Defendants' supplemental documents, as was their right under those stipulations, did not

withdraw any of their claims on their pending motion, but rather, they reiterated, and expanded upon, their arguments relating to fraud.

Defendants submitted sur-reply papers, in further opposition to Plaintiffs' motion, without objection, again responding to Plaintiffs' arguments with respect to fraud.

In summary, Defendants charted their course in the litigation by offering to supplement their document production while Plaintiffs' motion was pending, and then having supplemented the document production, choosing to focus their opposition on the supposed correctness of their recalculations and revised registrations of the rent in 2011-2012, and on the supposed applicability of the "law of the case" doctrine to the 2012 ruling granting class certification (see R. 25-26).

Defendants were in no way deprived of their opportunity to refute Plaintiffs' claims that the default formula should be applied, on the ground of the lack of rental history records as well as fraud; and in fact Defendants did respond to these claims at every stage of the case; they only made the choice to focus on the supposed correctness of the 2011-2012 calculations. Accordingly, Defendants' arguments with respect to Plaintiffs' failure to bring up fraud until the case reached the Appellate Division are unavailing and should be entirely rejected.

C. It is Defendants, not Plaintiffs, Who Raise Issues for the First Time on Appeal

It is ironic that Defendants argue that Plaintiffs' arguments with respect to fraud were improperly raised for the first time on Defendants' appeal to the Appellate Division (Defendants' brief at 33-34), when in fact it is Defendants who improperly have made multiple arguments for the first time on their appeal to this Court with respect to Plaintiffs' claims. Moreover, it was Defendants who appealed to the Appellate Division, not Plaintiffs, and even a cursory review of Defendants' initial brief filed with the Appellate Division reveals that Defendants were fully prepared to, and did, address the issue of fraud (Compendium at C-4) and were thus not in any way surprised, misled, or prejudiced by Plaintiffs' supposed raising of fraud for the first time on Defendants' appeal to the Appellate Division.

D. Supreme Court Would Have Been Entitled to Find Fraud Even if Plaintiffs Had not Raised it in the Complaint

Defendants' claim that Plaintiffs did not raise fraud in their complaint is incorrect. In any event, "[i]t is well settled that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice." *Torrioni v. Unisul, Inc.*, 214 A.D.2d 314, 315 (1st Dept. 1995); *see also*, *Boyle v. Marsh & McLennan Companies, Inc.*, 50 A.D.3d 1587, 1588 (4th Dept. 2008), rejecting the defendants' arguments that they were misled to their prejudice by the plaintiff's motion for summary judgment based upon a breach of contract theory which was not asserted in the complaint.

E. The Pleading Requirements of CPLR 3016(b), Though Inapplicable Here, Were Nevertheless Satisfied

Notwithstanding the fact that Defendants did not raise any issue concerning the applicability of CPLR 3016(b)[25] in their answer, their answer to the amended complaint, in their papers in opposition to Plaintiffs' motion for summary judgment, or in their appeal to the Appellate Division, they raise that issue before this Court.

As explained above, the complaint adequately set forth the elements of Plaintiffs' claims with respect to Defendants' fraudulent scheme and the resulting breach of the four-year rule. Assuming arguendo that CPLR 3016(b) applies to this action, which, Plaintiffs assert, it does not, the complaint satisfied CPLR 3016(b) because "the facts were sufficient to permit a reasonable inference of the conduct." *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 492 (2008). The requirement under CPLR 3016(b), i.e. that the circumstances constituting the wrong be stated in detail, "should not be confused with unassailable proof." *Id.* In evaluating a motion to dismiss based upon CPLR 3016(b), which Defendants never made in this case, the Court would review the complaint "in the light most favorable to the nonmoving party …according that party the benefit of every possible favorable inference," and "only determine whether the facts as alleged are cognizable within the claim to section 3016(b)'s satisfaction." *Id.* at 493.

[25] CPLR 3016(b) states, in relevant part, "Where a cause of action …is based upon fraud …the circumstances constituting the wrong shall be stated in detail."

F. CPLR 3016(b) Does Not Apply to this Action.

This Court in *Regina* did not hold that the requirements of CPLR 3016(b), relating only to a common-law fraud claim, would apply to a cause of action for rent overcharges under the Rent Stabilization Law, where the tenants were seeking the application of an exception to the statutory four-year rule on the basis of the existence of a fraudulent scheme.

For these purposes, it is important to distinguish Plaintiffs' claims herein, which are based upon the Rent Stabilization Law, from a common-law fraud claim. As explained by this Court in *Regina*, a tenant seeking application of the default formula based upon a claim that the owner engaged in a fraudulent scheme has the burden of proving that an exception must be made to the standard four-year rule. *Regina, supra* at 355 ("review of the rental history outside the four-year lookback period [is] permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate"). Plaintiffs herein did not assert a cause of action for common-law fraud; they asserted statutory claims of rent overcharges, and asserted that exceptions to the four-year rule applied to their claims.

In this Court's decision in *Regina*, at footnote 7, this Court made the following restatement of the black-letter law with respect to the elements of fraud: "Fraud consists of 'evidence of a representation of material fact, falsity, reliance and

injury.'" *Id.*, citing *Vermeer Owners, Inc. v. Guterman*, 78 N.Y. 1114, 1116 (1991). 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.

This Court in *Regina* did not modify the parameters of the fraud exception to the four-year rule; this Court merely restated and reaffirmed the existence of that exception. *See Regina* at 355 ("[t]he rule that emergences from our precedent…").

To the extent that two cases cited in Defendants' brief, at 33, *Gridley v. Turnbury Village, LLC*, 196 A.D.3d 95 (2d Dept. 2021), *leave to appeal denied,* 2021 NY Slip Op 75990, and *699 Venture Corp. v. Zuniga*, 69 Misc.3d 863, 869 (Civ. Ct. Bronx Co. 2020), may hold that the pleading requirement of CPLR 3016(b) applies to a tenant's action for rent overcharges, it is respectfully argued that those cases should not be followed.

In any event, it is significant to note that in both *Gridley* and *699 Venture Corp.*, the Courts cited to CPLR 3016(b), and stated that the pleading requirements were not met, but they did not stop there; they proceeded to review and analyze the tenants' evidence in detail, and made decisions based upon the evidence presented

on summary judgment that the tenants did establish that there had been fraud. As such, the comments of those courts with respect to the applicability of CPLR 3016(b) were mere dicta, and in any event are not binding upon this Court.

Accordingly, it is respectfully argued that CPLR 3016(b) does not apply to this action.

G. Even if CPLR 3016(b) Applies to this Action, Plaintiffs Would Have the Right to Plead Over, or Seek Leave to Amend Their Complaint

CPLR 3025(c) gives the Court broad authority to permit pleadings to be amended before or after judgment to conform them to the evidence. Such a request to amend "is determined in accordance with the general consideration applicable to such motion, including the statute's direction that leave shall be freely given upon such terms as may be just." *Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014).

Also, assuming hypothetically that this Court would be inclined to find that CPLR 3016(b) applied to this case and that the complaint herein did not satisfy CPLR 3016(b), the result would be that Plaintiffs would seek leave to replead or to serve an amended complaint (CPLR 3211[e], CPLR 3025[b]). This would be a highly unreasonable course for this long-pending case, particularly considering Defendants' delays of over three years in complying with pre-trial discovery demands, and Defendants' subsequent delay of nearly four years in perfecting their appeal to the Appellate Division.

POINT III

DEFENDANTS' ARGUMENT THAT, AS A MATTER OF LAW, THERE WAS NO BASIS TO APPLY THE DEFAULT FORMULA, BASED UPON BOTH PRE-BASE DATE AND POST-BASE DATE CONDUCT, IS UNAVAILING AND SHOULD BE ENTIRELY REJECTED

A. *Regina* Rejected the Reconstruction Method; It Did Not Mandate the Application of the Four-Year Rule in Every Case

The issue before the Court in *Regin*a was whether the reconstruction method, also known as the bridge-the-gap method, could be applied under the Rent Stabilization Law to set the legal regulated rent on the base date at an amount lower than what was charged in a post-*Roberts* case where the deregulation of the apartment had occurred prior to the base date; there was no fraud; and the entire rental history record was available from the date of the deregulation until the present.

In this case, Supreme Court found that the rental history records did not establish that the rents of the 78 affected apartments were ever lawfully increased to over $2,000.00 per month; Defendants submitted none of the base date leases for those apartments; and Defendants engaged in a scheme intended to inflate the base date rents to amounts exceeding what was charged.

Defendants are incorrect when they claim that *Regina* held that "a fraudulent scheme to destabilize" is the sole exception to the four-year rule (Defendants' brief at 35-36). There are circumstances other than a fraudulent scheme to destabilize where the default formula would be applicable. Where, as here, Defendants did not

produce records showing that the rents were lawfully increased to over $2,000.00 per month, did not produce the base date leases, and did not produce the rental history records from the base date to the present, the legal regulated rents are to be calculated pursuant to the default formula. In such a case, the law requires application of the default formula because the base date rent cannot otherwise be established. Rent Stabilization Code ("RSC") (9 N.Y.C.R.R.) §2526.1(a)(3)(ii); *Matter of Partnership 92 LP v. New York State Division of Hous. & Comm. Renewal*, 11 N.Y.3d 859 (2008), *affirming* 46 A.D.3d 425 (1st Dept. 2007).[26]

B. Supreme Court Correctly Found That There Was a Pre-Base Date Scheme to Destabilize

Upon its detailed review of the submissions made by the parties, Supreme Court correctly determined that Defendants failed to present documentary evidence to support their claim that the 78 apartments were legally and validly deregulated (R. 22, 26-27). As a result of this and other factors, Supreme Court correctly held that the default formula must be applied (R. 27).

The Appellate Division did not specifically review this particular finding of Supreme Court, and only stated in passing that that while Defendants "may" have

[26] This Court has long recognized that an owner cannot avoid possible application of the default formula when, having engaged in a fraudulent scheme and treated an apartment as deregulated for a period of time, the owner re-registers the apartment at an inflated rental amount. In *Matter of Grimm v. DHCR*, 15 N.Y.3d 358, 363 (2010), the owner, upon receipt of the tenant's complaint alleging fraud, retroactively registered the apartment and gave the tenant revised leases stating that the apartment was rent stabilized. These belated actions, however, were not enough to prevent the possible finding of fraud and application of the default formula.

been following the law in deregulating apartments during the period before *Roberts* was decided, "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).[27]

In cases such as *Nolte v. Bridgestone Assoc.*, 167 A.D.3d 498, 499 (1st Dept. 2018), a finding of a fraudulent scheme post-*Roberts* was upheld, in part because the owner failed to present evidence to show that there were sufficient individual apartment improvements to lawfully increase the rent to over $2,000.00 per month.

Also, as a point of clarification, the pre-*Regina* decision of the court in *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 402-403 (1st Dept. 2012) while not accepting the amount charged on the base date as the legal rent, due to the owner's failure to include documentary proof of individual apartment improvements in the record, merely held that, in light of the illegal deregulation of the apartment, and in the absence of that documentary proof in the record, the matter should be remanded for a "further review of any available record of rental history necessary to set the proper base date rent." The Court in *Lucas* did not espouse any particular

[27] Without any legal justification whatsoever, Defendants continued to deregulate apartments for nearly two years after *Roberts* (*see e.g.* R. 27, noting that the 78 acts of improper deregulation took place between 1995 and 2011).

methodology for calculating the legal rent as to that tenant (*see* R. 1373 *and see, Regina* at 357).

It is of course true that the DHCR and other courts later cited *Lucas, supra,* as support for the proposition that the reconstruction or bridge-the-gap method should be applied where the entire rental history record from deregulation to date was available and there was no fraud, a proposition which was ultimately rejected. *See, Regina* at 357. However, that development in the law has no application here where the rental history records are not available and there is fraud.

C. Supreme Court and the Appellate Division Correctly Determined that Defendants' 2012 Registration Filings and Issuance of Renewal Leases Listing Inflated Rates Warranted Application of the Default Formula

As the Appellate Division majority correctly noted in this case, the court held in *Montera v. KMR Amsterdam LLC*, 193 A.D.3d 102, 107 (1st Dept. 2021), *Regina* did not grant an owner carte blanche in post-*Roberts* cases to willfully disregard the law by, for example, failing to re-register illegally deregulated apartments and "taking steps to comply with the law only after its scheme is uncovered" (R. 1374). Here, Defendants did begin re-registering apartments in 2011-2012, but at grossly inflated rates. This distinction, between non-registration for many years in *Montera*, as opposed to re-registration at patently excessive and unlawful rates in this case, is of no consequence, as both are forms of a fraudulent scheme. *See also*, *Hess v. EDR Assets LLC*, 200 A.D.3d 491, 492 (1st Dept. 2021), holding that an owner's actions

taken after *Roberts* to conceal tenants' legal regulated rents may constitute a fraudulent scheme.

Similarly, in *435 Central Park Tenants Assoc. v. Park Front Apts. LLC*, 183 A.D.3d 509, 510-511 (1st Dept. 2021), the Court correctly denied the owner's motion for summary judgment and determined that, if it were proven that the owner engaged in a fraudulent scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent would have to be computed based upon the default formula.

In other words, 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 the application of the default formula. The case before this Court presents just such a scheme.

At no time in the over 10-year history of this case have Defendants attempted to come forward with base date leases and subsequent rental histories for the 78 apartments, or with recalculations of the rents based upon those records, or with revised registrations, or renewal leases or offers of refunds to the hundreds of affected tenants who have occupied the affected apartments during the relevant time period, October 14, 2007 to date.

Defendants attempt to place their conduct into a neat category, in a transparent effort, via hyper-technical readings of the regulations, to escape the full force of the

law. Supreme Court and the Appellate Division correctly found that Defendants' failure to submit base date leases for the 78 affected apartments, combined with the false re-registration of the apartments listing inflated rents, the making of lease renewal offers at illegal rates, and the failure to produce documents showing that Defendants were "following the law" at the time in deregulating the 78 apartments between 1995 and 2011, were all part and parcel of a fraudulent scheme and required the application of the default formula. Defendants present no legitimate basis for the reversal of those findings, and they should be in all respects affirmed.

POINT IV

DEFENDANTS' ARGUMENTS WITH RESPECT TO DOCUMENT PRODUCTION WERE NOT PRESERVED FOR APPEAL, AND IN ANY EVENT THEY ARE ENTIRELY UNAVAILING.

A. Defendants Were Required to Comply with Plaintiffs' Discovery Demands

Defendants argue that, as a matter of law, they could not have been compelled to submit rental history records prior to the October 14, 2007 base date (Defendants' brief at 55). Like many of Defendants' arguments to this Court, that argument is made for the first time upon this appeal, and thus is barred by the preservation rule. However, even if this Court were to consider this argument, which it should not, it should be entirely rejected, for a number of reasons.

Plaintiffs' demand for documents was served on January 3, 2013. Defendants did not object at that time on the ground that it included a demand for records dating

prior to the base date. Subsequently, two orders were entered directing Defendants to comply with this document demand, and Defendants did not object to these orders or seek any relief from them. As such, these orders were binding upon Defendants.

In a rent overcharge action, it is permissible for a tenant to demand, upon pre-trial discovery, production of rental history records dating from prior to the base date. On pre-trial discovery a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of burden of proof" (CPLR 3101[a]).

Defendants present this argument as if there is an absolute bar under the Rent Stabilization Law upon the courts requiring an owner to produce pre-trial discovery documents dating from prior to the applicable base date. There is no such bar.

Upon being served with Plaintiffs' motion in December 2015, it was Defendants' decision to contact Plaintiffs' counsel and request an opportunity to supplement their discovery production. They could have chosen to raise, at that time, arguments regarding the applicability of pre-base date records but they did not. Their entire argument to Supreme Court was premised upon the claim that their document production and their review of the rental history was correct, not that the demand for pre-base date documents was improper.

Accordingly, based upon all these facts and circumstances, Defendants were properly directed to produce rent records dating prior to the October 14, 2007 base date, and their arguments to the contrary should all be rejected.

B. Supreme Court Did Not Review Defendants' Document Production Under an "Illegal Standard."

Defendants argue that all of Plaintiffs' discovery demands were "tainted by an unlawful methodology" (Defendants' brief at 56). This is incorrect. While it is true that Plaintiffs argued, in their motion for summary judgment submitted in December 2015, that the reconstruction or bridge-the-gap method should be applied in the event that Defendants submitted the complete rental history records of the affected apartments, and did not engage in fraud, that turned out not to be the case. In fact, Defendants' document production was so egregiously deficient that the default formula had to be applied, not only because it could not be determined whether Defendants deregulated apartments in compliance with the law at the time it was done, but also because Defendants did not provide base date leases or other records sufficient to establish the legal rent, and because Defendants presented revised recalculations setting forth outrageous, grossly inflated, amounts of rent, and Defendants consistently relied upon those recalculations.

C. The Record Does Not "Establish" That Defendants Provided Base Date Leases.

In opposition to Plaintiffs' motion for summary judgment, Defendants did not submit any base date leases for any of the affected apartments, or any complete set of records for any apartment dating from the base date to present. Thus, the record does not "establish" that Defendants provided any base date leases. To the contrary, Defendants consistently relied upon, and defended, the outrageous recalculations they performed in 2011-2012.

The listing of apartments on pages 57-58 of Defendants' brief raises merely the suggestion that some base date leases were turned over upon pre-trial discovery, as supplemented by Defendants in January-February 2016 after Plaintiffs' motion was filed. A suggestion of something is not enough to "establish" that these records were provided. In any event, they are certainly not part of the record.

It is beyond the purview of this Court, upon this appeal, to review documents *dehors* the record for the purpose of ascertaining what if anything can be established with respect to the base date rents. Also, Defendants did not raise this issue in Supreme Court or at the Appellate Division, and thus it is not preserved for appellate review before this Court.

Defendants' arguments with respect to the existence of base date leases outside the record must therefore be rejected in their entirety.

POINT V

DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO ALLEGED GOOD FAITH AND RELIANCE UPON AGENCY INTERPRETATIONS OF THE LAW WERE PROPERLY DISMISSED.

The determination of the Supreme Court, affirmed by the Appellate Division, to strike Defendants' affirmative defenses related to alleged good faith and alleged reliance upon agency interpretations of the law, was entirely correct and should be upheld. As already explained in this brief, Defendants failed to establish that they relied upon government interpretations in deregulating the 78 affected apartments; they did not refute in any meaningful way Plaintiffs' careful analysis of the pre-trial discovery documents in that regard. Similarly, in pushing forward with their outrageous recalculations of the rents of the affected apartments, Defendants failed to establish in any way that they acted in good faith. The dismissal of these affirmative defenses was therefore correct and should be affirmed.

POINT VI

PLAINTIFFS' POSITION WITH RESPECT TO DEFENDANTS' SECOND AND THIRD AFFIRMATIVE DEFENSES REMAINS UNCHANGED

Plaintiffs stand by the position they took before the Appellate Division with respect to Defendants Koeppel & Koeppel, Inc. and Duell 5 Management LLC d/b/a Duell Management Systems (C-76).

CONCLUSION

It is respectfully requested that the decision and order of the Appellate Division be, in all respects, affirmed.

Dated: New York, New York
February 28, 2022

HIMMELSTEIN McCONNELL
GRIBBEN & JOSEPH LLP
Attorneys for Plaintiffs

By: Ronald S. Languedoc
Ronald S. Languedoc
William Gribben
15 Maiden Lane, 17th Floor
New York, New York 10038
(212) 349-3000

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using [Microsoft Office Professional Plus 2016].

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 13,910 words.

Dated: February 28, 2022

HIMMELSTEIN MCCONNELL
GRIBBEN & JOSEPH LLP
15 Maiden Lane, 17th Floor
New York, New York 10038
Tel.: (212) 349-3000
Fax: (212) 587-0744
rlanguedoc@hmgjlaw.com

– and –

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
Fax: (212) 763-5001
mbrinckerhoff@ecbawm.com
Attorneys for Plaintiffs-Respondents

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 28, 2022

deponent served the within: **BRIEF FOR PLAINTIFFS-RESPONDENTS**
upon:

ROSENBERG & ESTIS, P.C.
Attorneys for Defendants-Appellants
and Third-Party Plaintiffs-Appellants
733 Third Avenue, 14th Floor
New York, New York 10017
(212) 867-6000
westis@rosenbergestis.com
hkingsley@rosenbergestis.com

BELKIN • BURDEN • GOLDMAN, LLP
Attorneys for Third-Party Defendants-Respondents
270 Madison Avenue
New York, New York 10016
(212) 867-4466
skirkpatrick@romerdebbas.com

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 28, 2022

Mariana Braylovskiy

T. Heath

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

Job#311300

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AMENDED AFFIDAVIT OF PERSONAL SERVICE

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 1, 2022

deponent served the within: **BRIEF FOR PLAINTIFFS-RESPONDENTS**

upon:

Belkin Burden Goldman LLP
Matthew S. Brett Esq.
60 East 42nd Street, 16th Floor
New York NY 10165
(212) 867-4466
Attorneys for Third-Party Defendants-Respondents

the attorney(s) in this action by delivering **3** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me on March 1, 2022

Mariana Braylovskiy

T. Heath

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

Job#311300