To be Argued by:
WARREN A. ESTIS
(Time Requested: 15 Minutes)

New York County Clerk's Index Nos. 111723/11 and 595472/17

New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2020-03001

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

Plaintiffs-Respondents,

– and –

PAMELA RENNA and VITTINA DEGREZIA aka VITTINA LUPPINO,

Intervenor-Plaintiffs,

Index No. 111723/11

– against –

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

Defendants-Appellants.

(For Continuation of Caption See Reverse Side of Cover)

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

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

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

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PRELIMINARY STATEMENT

Defendants-appellants, Whitehouse Estates, Inc. ("Estates"), Koeppel & Koeppel, Inc. ("K&K"), Duell 5 Management LLC d/b/a Duell Management Systems ("Duell"), William K. Koppel and Eastgate Whitehouse LLC ("Eastgate") (collectively and/or individually, "Landlord"), respectfully submit this brief in support of their appeal from the Order of the Supreme Court of the State of New York, County of New York (Lebovits, J.), dated March 23, 2017, and entered March 28, 2017 (the "Order") (R. 7-38)[1], insofar as Supreme Court, in this class action for rent overcharges, *inter alia*:

1. Granted the motion (the "Motion") of plaintiffs-respondents (collectively, "Tenants"), "pursuant to CPLR 3126 and 3212(a)," for summary judgment on their first cause of action for a declaratory judgment to the extent of:

    a. Declaring that (i) Tenants' apartments are subject to either Rent Stabilization or Rent Control, and (ii) Landlord is "required to offer [Tenants] renewal leases on forms approved by the DHCR at legal regulated rents as established by the Rent Stabilization Law, or to continue their existing tenancies pursuant to the Rent

[1] References to "R. __" are to the consecutively-paginated, two-volume Record on Appeal.

Control Law with legal maximum rent as established by the Rent Control Law" (R. 36);

b. Determining that "the default formula should be used to determine the base rent date and to calculate the rent for each of the 78 subject apartments herein" because, *inter alia*, Tenants had allegedly established the necessary quantum of fraud by Landlord (R. 27);

c. Determining that the discovery material produced by Landlord to Tenants, including "a large volume of discovery material" produced after the Motion was filed, was insufficient to determine the legal base date rent for any of the subject apartments using the "reconstruction" method, requiring rental records back to the last registered rent for each subject apartment (R. 22); and

d. Referring to a Special Referee to hear and report on the following issues:

   i. "calculating the base rent date for each plaintiff's apartment…utilizing the DHCR's 'default formula'" (R. 36-37);

ii. "calculating the maximum legal regulated rent for each plaintiff's apartment" (R. 37)

iii. "calculating the amount of use and occupancy ["U&O"] that was to be paid for each plaintiff's apartment…pursuant to the order issued in this action by the Hon. Singh, J., on May 21, 2014" (the "2014 U&O Order") (R. 37);[2] and

iv. Calculating the amount of U&O paid by each Tenant (R. 37); and

2. Dismissed Landlord's (a) second and third affirmative defenses that K&K and Duell, as managing agents, are not liable for Tenants' rent overcharge claims, and (b) fourteenth, fifteenth and seventeenth affirmative defenses that Landlord, in good faith, relied on the legal interpretation of the New York State Division of Housing and Community Renewal ("DHCR") in deregulating apartments during the receipt of J-51 tax benefits; and

3. Denied Landlord's cross-motion to enforce the 2014 U&O Order (the "Cross-Motion").

[2] Thereafter, this action was assigned to Justice Lebovits.

This is a *Roberts v Tishman Speyer Properties, LP* (13 NY3d 270 [2009]) ("*Roberts*") type J-51 rent overcharge class action.[3] Prior to the completion of discovery and without even mentioning, let alone establishing, that there were no issues of material fact, Tenants sought summary judgment because Landlord was allegedly in "in default of its discovery obligations" (R. 39-40). As established below, Supreme Court's confusing and convoluted 29-page Order granting Tenants' Motion and denying Landlord's Cross-Motion is replete with errors, including, *inter alia*, that it was in contravention of (1) established precedent, (2) prior decisions of Justice Singh in this action, and (3) other decisions by Justice Lebovits in other cases.

First, Supreme Court's finding that Landlord committed fraud is contrary to well-settled law. As held by the Court of Appeals, a landlord that (i) deregulated apartments during the receipt of J-51 benefits based upon DHCR's own misinterpretation of law, but (ii) then, as here, promptly took action to treat and register those apartments as rent-stabilized after this Court held in *Gersten v 56 7th Avenue LLC* (88 AD3d 189 [1st Dept 2011]) ("*Gersten*") that *Roberts* must be applied retroactively, has not committed fraud as a matter of law because the "[d]eregulation of the apartments during receipt of J-51 benefits was not based on a

[3] In *Roberts*, the Court of Appeals held that, notwithstanding longstanding industry and DHCR practice, owners were not allowed to "luxury" deregulate apartments based on high-rent during the owner's receipt of J-51 tax benefits. Thus, such deregulated apartments remained subject to rent-stabilization.

fraudulent misstatement of fact but on a misinterpretation of the law -- significantly, one that DHCR itself adopted" (*Matter of Regina Metro Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 356 [2020] ["*Regina*"]; *see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 113-115 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017] ["*Matter of Park*"]).

Second, in finding fraud, Supreme Court violated the law of the case doctrine by overruling a 2012 order entered in this action by the prior Justice assigned to this action, the Hon. Justice Singh, who held that Landlord "was acting in good faith reliance on DHCR's own interpretation of the law…[and] the facts alleged cannot support a finding that the [L]andlord fraudulently or purposefully evaded the Rent Stabilization Law…" (R. 191).

Third, because Landlord did not commit fraud as a matter of law, Supreme Court erred by holding that the base rent date for each Tenant's apartment should be calculated using DHCR's default formula. As the Court of Appeals held in *Regina,* in situations such as this, the base date rent is to be calculated as:

> the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period

(*Regina*, 35 NY3d at 356 [emphasis supplied]).

Fourth, Supreme Court erred in accepting "Plaintiffs' assessment" that the discovery material produced by Landlord was insufficient to determine the base date rent. Tenants incorrectly argued, and Supreme Court agreed, that Landlord was required to produce a complete rental history back to the last registered rent for each apartment in order to reconstruct the legal base date rent, which "reconstruction" methodology has been expressly rejected by the Court of Appeals in *Regina.*

Fifth, in any event, Tenants failed to meet their *prima facie* burden on summary judgment, as Tenants failed to provide any affidavit from any of the many Tenants or any admissible evidence that any Tenants were actually overcharged during the applicable time frame (from the October 11, 2007 base date). For example, Tenants failed to provide any proof to establish the amount of rent actually charged on the base date or that any tenant actually paid any rent. Without such proof, Tenants failed to prove that Landlord overcharged the rent as a matter of law.

Sixth, Supreme Court erred by dismissing Landlord's affirmative defenses at issue on this appeal because they have merit as a matter of law.

Seventh, Supreme Court erred by admittedly "superseding" a prior order from Justice Singh requiring Tenants to pay U&O *pendente lite*, again violating the law of the case doctrine.

Accordingly, it is respectfully submitted that the Order should be reversed, and the case should be remanded for completion of all pre-trial proceedings, such as

document discovery, depositions, *etc.*, and an eventual determination of the base date rents and any alleged overcharges in accordance with *Regina*.

STATEMENT OF QUESTIONS PRESENTED

1. Where a landlord, during its receipt of J-51 benefits, deregulated apartments consistent with DHCR's misinterpretation of the law, but then, promptly after this Court decided *Gersten*, (a) advised tenants that the previously deregulated apartments will be treated as rent stabilized, (b) advised tenants that an expert had been retained to recalculate the legal rents for each rent stabilized apartment, (c) gave tenants rent stabilized leases, and (d) registered with DHCR those previously deregulated apartments as rent stabilized, did Landlord engage in fraud?

Answer of the Court below: Supreme Court answered this question in the affirmative.

2. When a different Justice of Supreme Court, in the same action, previously held that: (a) Landlord did not engage in fraud "based upon *Roberts*…and its progeny," (b) Landlord "was acting in good faith reliance upon the DHCR's own interpretation of the law," and (c) "the facts alleged cannot support a finding that the landlord fraudulently or purposefully evaded the Rent Stabilization Law," can a different Justice subsequently assigned to the action defy the law of the case doctrine and hold that Landlord engaged in fraud?

Answer of the Court below: Supreme Court answered this question in the affirmative.

3. Where a landlord did not engage in fraud by deregulating a rent stabilized apartment, was the default formula the proper method to calculate the legal rent on the base date?

Answer of the Court below: Supreme Court answered this question in the affirmative.

4. In the context of a rent overcharge claim, absent a finding of fraud, is a landlord required to produce, and is a Court required to review, rental records of an apartment all the way back to the last registered rent-stabilized rent for that apartment in order to determine and "reconstruct" the legal rent on the base date?

Answer of the Court below: Supreme Court answered this question in the affirmative.

5. Where a motion for summary judgment is not supported by an affidavit from a person with knowledge and/or admissible evidence establishing a rent overcharge, is the moving party entitled to an award of summary judgment?

Answer of the Court below: Supreme Court answered this question in the affirmative.

6. Where an owner's managing agent is an agent for a disclosed principal, can such agent be held liable for rent overcharges?

Answer of the Court below: Supreme Court answered this question in the affirmative.

7. Can a Justice assigned to an action admittedly "supersede" an order from a prior Justice in the same action directing the payment of U&O at the last lease rate *pendente lite*?

Answer of the Court below: Supreme Court answered this question in the affirmative.

STATEMENT OF FACTS

A. The Building

When this action was commenced, Estates was the landlord of the building located at 350 East 52nd Street in Manhattan (the "Building"). Thereafter, Estates assigned its interests in the Building to the current landlord, Eastgate (R. 88-94).

The Building has more than 130 apartments (R. 101-105). The Building received benefits under New York City's J-51 Tax Abatement and Exemption Program from 1991 through and including 2014 (the "J-51 Period") (R. 44, 101-132). During the J-51 Period, prior to the *Roberts* decision in 2009, in good faith reliance on DHCR's own interpretation of the law, Landlord allegedly deregulated more than 70 rent stabilized apartments pursuant to "high-rent luxury deregulation" after the legal rent exceeded the statutory threshold then in effect (R. 337-454, 1192).

B. Promptly after the Issue of Retroactivity of *Roberts* was Decided by this Court in 2011, and Before this Action was Commenced, Landlord Treated the Apartments that were Deregulated During the J-51 Period as Rent Stabilized

On August 18, 2011, this Court decided *Gersten*. Only one month after *Gersten* was decided, on or about September 28, 2011, Landlord advised all of the tenants whose apartments in the Building were deregulated during the J-51 Period (the "Affected Apartments") that:

> your lease at 350 E. 52nd Street, NYC, needs to be redrawn with an adjusted monthly rent amount. This is due to a recent NY state Court of Appeals decision (the "Roberts

> Decision") returning many units into stabilization. Because your building…took advantage of the "J-51" tax abatement program, many units that were switched to market rates will now be converted back to stabilization rates.
>
> We are strictly adhering to the court decision, and we have hired an outside consultant to pour through the lease records to determine the exact rental amount that may be legally charged for each apartment.
>
> …Once finished, we will amend the registration statements with the City [sic] of New York and provide you with a new lease.
>
> If you have been overcharged, we will reimburse any overpayments and issue a new rent stabilized lease with a J-51 rider. If you signed a lease below the newly configured amount, we will honor the lower rent amounts now being paid…
>
> Thank you for your patience as we quickly and efficiently try to work through this process

(R. 132-133 [emphasis supplied]).

In connection therewith, Landlord retained Stephen K. Trynosky, an expert having more than 20 years of experience working with landlords in connection with J-51 abatement benefits and calculating the legal regulated rents for rent stabilized apartments (R. 1192-1193, 1196-1201). At the time, however, in 2011, the proper methodology to recalculate the legal rents after *Roberts* and *Gersten* was not settled by the courts. Accordingly, Mr. Trynosky, and Landlord, made a good faith effort

to recalculate "the legal regulated rents using DHCR guidelines for all of the apartments that were again subject to rent stabilization following the *Roberts v Tishman* decision and its progeny" (R. 1196).

By March 2012, Landlord had registered all of the Affected Apartments as rent-stabilized, including retroactively filing with DHCR amended rent registrations for the Affected Apartments for the years 2007 through 2011 to reflect the rent-stabilized status, and adjusted rents (R. 11, 27, 423-446, 864-995, 996-1135). Tenants of the Affected Apartments were sent a copy of the amended rent registration for their apartment, and Landlord offered them rent stabilized leases in 2011/2012 with the recalculated rents (R. 486-863, 864-995, 996-1135, 1197, 1199).

C. The Pleadings

Two weeks after Landlords' September 28, 2011 letter committing to treat and register the Affected Apartments as rent-stabilized and to recalculate the legal rents, on October 14, 2011, Tenants commenced this putative class action by filing their complaint (the "Complaint"),[4] alleging, *inter alia*:

- During the receipt of J-51 tax benefits, Landlord improperly deregulated rent regulated apartments after the rent reached a certain level pursuant to "luxury deregulation;"

[4] As a result, the base date for calculating rent overcharges is four years prior to that date -- October 14, 2007 (the "Base Date").

- "Upon information and belief, the base dates 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" Landlord;
- "Even after the Appellate Division issued its ruling in *Roberts* on March 5, 2009, [Landlord] continued the practice of treating the apartments at issue as luxury deregulated, notwithstanding [Landlord]'s receipt of J-51 benefits for the [B]uilding. Thus, by continuing to treat approximately 72 units in the Building as deregulated, Landlord has knowingly and intentionally acted in violation of controlling law;" and
- Landlord charged and collected rents in excess of the maximum rents permitted by law;

(R. 134-154).

Tenants asserted three causes of action. The first is for a judgment "declaring that their apartments are subject to rent stabilization or rent control and that [Landlord] [is] required to offer renewal leases on forms approved by the DHCR and required by the RSL at legal regulated rents" (R. 150). The first cause of action also seeks to enjoin Landlord from issuing a lease or lease renewal that does not comply with the law (R. 150-151). Tenants' second and third causes of action seek money damages for rent overcharges and attorneys' fees, respectively (R. 151-153).

In Landlord's December 13, 2011 Answer, Landlord denied the material allegations of the Complaint, and asserted affirmative defenses, including, without limitation, that Landlord acted in good faith by relying on the applicable pre-*Roberts* industry-wide interpretation of the law (fourteenth, fifteenth, and seventeenth affirmative defenses), and that K&K and Duell, as managing agents, were improperly named as defendants as they have no liability to Tenants for rent overcharges (second and third affirmative defenses) (R. 157-171).[5]

D. In 2012, Supreme Court Determined that Landlord Acted in Good Faith and did not Commit Fraud

By order entered on August 6, 2012 (the "2012 Order") (R. 182-197), Supreme Court (Singh, J.) granted Tenants' motion to certify this action as a class action, and the class was defined as:

> All current, former and future tenants of 350 East 52nd Street whose apartments have been, are currently being, or will be, deregulated by, or subject to attempt to be deregulated by, defendants, their predecessor 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. 187).[6]

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[5] Thereafter, by Stipulation, Tenants amended their Complaint solely to add Eastgate as a defendant in light of the assignment from Estates, and Landlord served an answer thereto, which was the same in substance as the first answer (R. 1296-1312, 1351-1362).

[6] To date, Landlord is not aware of Tenants or their counsel serving any notice to purported class members as required by CPLR 904, which notice would have had to inform them of their right

Significantly, Supreme Court also held that:

> [T]he landlord in the instant action was acting in good faith reliance upon the DHCR's own interpretation of the law. Accordingly, the facts alleged cannot support a finding that the landlord fraudulently or purposefully evaded the Rent Stabilization Law…

(R. 189, 191 [emphasis supplied]).

E. The 2014 U&O Order

On May 21, 2014, Supreme Court (Singh, J.) issued the 2014 U&O Order (R. 464-485). By the 2014 U&O Order (R. 464-485), Supreme Court directed the tenants in the Building "to pay use and occupancy in whatever their last expired lease was when this action was commenced, and that shall be paid prospectively until the completion of this case" (R. 483 [emphasis supplied]). Supreme Court went on to order that:

> In the event these amounts aren't paid, then the landlord has the right to go into housing court to commence a nonpayment proceeding against those tenants who are in arrears based on the rents in their last lease when this action was commenced.
>
> This decision constitutes the order of the Court

(R. 483-484).

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to opt-out of the class and the right to seek treble damages if they did so. Thus, almost nine years later, Landlord is still not certain as to who constitutes the actual the class members.

F. Landlord Seeks U&O in Civil Court

Since Tenants did not pay U&O as ordered by Supreme Court, Landlord, as directed by Supreme Court, commenced several summary nonpayment proceedings in Civil Court to enforce the 2014 U&O Order (R. 279-283, 1193-1194, 1210-1212, 1247-1250). Landlord had difficulty obtaining relief in Civil Court because, *inter alia*, this action was ongoing. Thus, Civil Court effectively told Landlord to go back to Supreme Court to obtain U&O (R. 279-283, 1193-1194, 1210-1212, 1247-1250).

G. Discovery: Tenants Never Moved to Compel the Production of Documents

On January 3, 2013, Tenants served their first document demand (R. 198-207). A preliminary conference was held on or about July 3, 2013 (R. 208-210). The Preliminary Conference Order, dated July 3, 2013, states:

> Discovery of all apartments removed from rent regulation while a J-51 tax benefit was in effect. Last regulated Tenant's lease, I.A.I. information and records and other entitlements to raise rent under RSC establishing legal regulated rent. Leases executed for apartment that was de-regulated

(R. 210).

By Status Conference Order dated May 21, 2014 (R. 211-213), the Court set a date by which a bill of particulars must be served, but did not set forth a date by which Landlord must produce additional documents (R. 213). Thereafter, Landlord continued to compile and produce documents to Tenants.

By letter dated February 12, 2015 (R. 214-244), Tenants' attorney acknowledged that Landlord had "provided records as to 60 apartments," but argued that "[a]s to the 60 apartments for which defendants have provided us with some records, none of those records are sufficient to determine what rents have been charged and collected from the first date the apartment was deemed deregulated through the present" (R. 216 [emphasis supplied]), as opposed to only determining the rent actually charged on the Base Date.

By responsive letter dated March 17, 2015, Landlord's counsel stated: "I have been diligently reviewing these documents and as you can appreciate this is no small task. We hope to have an updated document production to you as soon as is possible" (R. 252). In response, by a letter dated March 23, 2015, Tenants threatened to seek relief from the Court if additional documents were not produced (R. 253-255). Tenants, however, never made a motion to compel Landlord to produce documents. Indeed, Landlord has produced more than 20,000 pages of documents (R. 22, 455-457, 1216-1217, 1257-1258) and after reviewing them, Tenants have admitted that Landlord has produced many 2007 leases setting forth the rent actually charged on the Base Date for Affected Apartments (R. 257-278, 1228-1241).

Depositions have not yet been conducted.

H. Tenants' Motion

In December 2015, Tenants, improperly and absurdly conflating statutes for discovery sanctions and summary judgment, sought an order "pursuant to CPLR 3126 and 3212(a)" for:

> [S]ummary judgment on their first cause of action to the extent of granting a declaratory judgment with respect to the rent stabilized status of Plaintiffs' tenancies, and on their second cause of action to the extent of finding Defendants in default of their discovery obligations, finding that Plaintiffs' legal rents are to be calculated pursuant to the Default Formula, finding that Plaintiffs' rents should be frozen due to Defendants' failure to properly register their apartments, and calculating the amount of refund due to each Plaintiff and Plaintiff class member

(R. 41-42) [emphasis supplied]).[7]

Thus, instead of establishing that there were no material issues of fact, the thrust of Tenants' Motion was that the Court should calculate the Base Date rent using the default formula because Landlord was "in default of [its] discovery obligations" by failing to supply sufficient records going all the way back to the last registered rent-stabilized rents (in some cases into the 1990s) (R. 39-40, 75-83, 1338-1345). In fact, conspicuously absent from Tenants' Motion was any affidavit from any named plaintiff or other tenant having any knowledge of the facts to

[7] Tenants' Motion also sought to amend the Complaint, which was resolved by Stipulation as stated above (R. 1350).

establish the rent charged and paid on the Base Date (or thereafter). Rather, Tenants' Motion was supported only by the attorney affirmation of Ronald S. Languedoc, which focused on Landlord's purported discovery failures (R. 43-47, 335-336). Although Tenants' Motion had 32 exhibits, Tenants failed to provide any documents to establish any rent overcharge for any of the Affected Apartments, such as a lease, a rent bill or any proof of payment (R. 88-334).[8] Simply, Tenants' Motion failed to establish that there were no issues of fact as required to entitle them to summary judgment as a matter of law.

Moreover, Tenants' Motion never argued that Landlord engaged in fraud. While acknowledging that the default formula can be applied when there is fraud, Tenants argued that the default formula should be applied here, in the absence of fraud, because Landlord had not provided enough documents to establish the legal regulated rent amount for any of Plaintiffs' apartments under the now-rejected "bridge the gap" standard (R. 1339-1340), incorrectly arguing that:

> [I]n order to establish the legal regulated rents for Plaintiffs' apartments, it is necessary to review the entire rental histories of those apartments. However, the records produced

[8] The vast majority of the 32 exhibits are unrelated to Tenants' overcharge claims. Nine allegedly show Landlord's alleged non-compliance of its discovery obligations (R. 198-278; Exs. N-V), eight were allegedly applicable legal precedent (R. 279-283, 308-334; Exs. X, AA-FF), four related to the Building in general -- the assignment of the ground lease (R. 88-94; Ex. A), notice of attornment (R. 95-96; Ex. B), certificate of occupancy (R. 97-99; Ex. C) and J-51 benefits (R. 106-131; Ex. E), and three related to Landlord's acknowledgment, less than one month after *Gersten* was decided, that previously deregulated apartments were required to be registered as rent stabilized (R. 95-96, 132-133, 155-156; Exs. B, F and H).

> by Defendants are entirely inadequate to perform the necessary review and make the required calculations

(R. 75-83, 1338-1345). This standard was rejected in *Regina* (35 NY3d at 357-359).

In addition, after Tenants filed their Motion for summary judgment, Tenants stipulated twice that Landlord could produce additional documents (R. 455-458). Pursuant to such stipulations, Landlord timely produced an additional 17,000 pages of documents after the Motion was filed (R. 1216-1217, 1257-1258).

In opposition to Tenants' Motion, Landlord *inter alia:* (a) provided proof that Landlord had promptly and in good faith complied with *Roberts* and its progeny by re-registering previously deregulated apartments (R. 25-27, 486-863, 864-1135); (b) demonstrated that there were issues of fact as to Tenants' rent overcharge claims; (c) argued that Landlord had cured any alleged deficiency in their discovery production so as to permit the determination of the legal rents for the Affected Apartments (R. 1216-1218); (d) argued that the Tenants' legal rents should be determined using the "Four Year Rule" (R. 1217-1218) (which thereafter was confirmed as the correct methodology to calculate the legal rents by the Court of Appeals) and, thus, Tenants had no right to seek, and the Court need not review, records prior to the Base Date; (e) asserted that the five affirmative defenses noted above have merit and should not be dismissed (R. 1212-1214); and (f) argued that the requested judgment in the first cause of action declaring that the Affected

Apartments are subject to rent stabilization is moot because Landlord had already treated them as such (R. 1214-1216).

I. Landlord's Cross-Motion

Since Landlord was unsuccessful in Civil Court in attempting to enforce the 2014 U&O Order as directed therein, Landlord's Cross-Motion asked the Court to, *inter alia*, provide clarity since Tenants were not complying with the 2014 U&O Order (R. 459-460; 1211-1213). For example, two tenants who are named plaintiffs and were not paying rent or use and occupancy before the 2014 U&O Order continued to refuse to do so, and have for years failed to comply with the 2014 U&O Order (R. 1193-1194). When the Cross-Motion was made in 2016, they owed a total of almost $100,000 (R. 1193-1194, 1210, 1276-1277), which amount has obviously continued to substantially increase since then.[9]

[9] Given the substantial arrears, it is quite possible that these tenants and other tenants will not be able to establish any recovery for rent overcharge as a matter of law because the amount owed may be greater than the amount of any alleged overcharge.

THE ORDER BEING APPEALED

A. Tenants' First Cause of Action for a Declaratory Judgment

Supreme Court (Lebovits, J.) awarded summary judgment on Tenants' first cause of action for a declaratory judgment, not because Tenants had established that there were no material factual issues in dispute, but because, "[a]fter reviewing all the relevant discovery material,"[10] Supreme Court agreed with Tenants' "assessment" that the:

> large volume of discovery material in January and February 2016…is nonetheless insufficient evidence from which to calculate the legal base rent of the building's 78 improperly deregulated apartments

(R. 22 [emphasis supplied]).

Tenants' "assessment," with which the Court agreed, was performed under the incorrect standard, requiring a review of the entire rental history back to the last registered rent-stabilized rent to determine the Base Date rent (R. 75-79, 1257-1258, 1338-1342). Thus, Tenants' Motion only assessed whether Landlords' records were sufficient to "bridge the gap" from the last registered stabilized rent to the Base Date (R. 75-79, 1257-1258, 1338-1342). Supreme Court did not determine whether the records were sufficient to determine the actual rent charged on the Base Date.

[10] It is hard to believe that Supreme Court actually reviewed "all relevant discovery material," particularly because the 17,000 pages of documents produced by Landlord in January and February 2016 are not part of the Record.

With respect to Tenants' request that the legal rents for each apartment should be determined by applying the DHCR's default formula because Landlord had allegedly failed to produce sufficient records back to the last registered rent to determine the legal Base Date rents for the Affected Apartments (R. 22), Supreme Court also purportedly "agree[d] that plaintiffs have demonstrated the necessary quantum of 'fraud'" (R. 26-27). Specifically, Supreme Court *sua sponte* found:

> After reviewing the evidence, the Court agrees that plaintiffs have demonstrated the necessary quantum of "fraud."…The court already determined that defendants failed to present documentary evidence to support their claim that the 78 subject apartments were legally and validly deregulated. As a result, defendants also have failed to establish that the rents set forth in the various apartments' leases are legal, as well…. it was on March 8, 2012, that defendants filed back-dated rent registration statements for all 78 apartments with the DHCR for 2007-2011. By back-dating the apartment registrations for five years…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…
>
> The court finds this en masse filing 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. In other words, it satisfies the "fraud" showing specified in *Grimm*…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 rent date and to calculate the rent for each of the 78 subject apartments herein. The court directs a Special Referee to hear and report on such calculations

(R. 26-27 [emphasis supplied]).

The basis for Supreme Court's finding of fraud was Landlord's timely attempt to do what other courts have routinely said should be done - promptly register the apartments as rent stabilized. As for the rent amounts, Landlord made a good faith attempt to calculate the legal rents at a time when it was unclear to all what methodology would ultimately be deemed proper. It could not have been an attempt to prevent Tenants from challenging the rents that Landlord had calculated because even registered rents are subject to challenge under the Rent Stabilization Law.[11]

Moreover, expressly rejecting the 2012 Order (R. 25-27), and without determining as a matter of law that there was a rent overcharge for one apartment, let alone for each of the more than 70 Affected Apartments, Supreme Court:

[11] As it turns out, the Court of Appeals in *Regina* adopted the four-year methodology argued by Landlord in opposition to Tenants' Motion, making the majority of the documents sought, and claimed to be required, by Tenants (and Supreme Court) irrelevant.

1. Determined that "the default formula should be used to determine the base rent date and to calculate the rent for each of the 78 subject apartments herein;" (R. 27) and

2. Referred to a Special Referee to hear and report on the following issues:

    i. "calculating the base rent date for each plaintiff's apartment…utilizing the DHCR's 'default formula';"

    i. "calculating the maximum legal regulated rent for each plaintiff's apartment;"

    ii. calculating the amount of U&O that was to be paid for each plaintiff's apartment pursuant to the 2014 U&O Order; and

    iii. calculating the amount of U&O paid by each Tenant.

(R. 36-37).

B. <u>Tenants' Second Cause of Action for Damages</u>

Supreme Court perplexingly deduced that Tenants mistakenly sought summary judgment on their second cause of action for damages, but actually meant to seek only a declaratory judgment on their first cause of action with respect to application of the default formula (R. 20-21). Supreme Court explained that:

> [t]he next section of plaintiffs' motion, which incorrectly requests summary judgment on their *second* cause of action, seeks a declaration that "the legal regulated rents for

> plaintiffs' apartments should be determined based upon the DHCR's default formula"

(R. 20 [emphasis in italics in original]).

Supreme Court then "elect[ed] to treat this section of plaintiffs' motion as pertaining to their first cause of action and not to the second (especially since plaintiffs' arguments are clearly inapposite to a claim for money damages)" (R. 21 [emphasis supplied]). As a result, Supreme Court purportedly denied Tenants' motion as it pertained to the second cause of action for damages (R. 21).

C. Tenants' Motion to Dismiss Landlord's Affirmative Defenses

Supreme Court dismissed Landlord's second and third affirmative defenses, which alleged the well-settled principle that Landlord's managing agents cannot be held liable for rent overcharges. Supreme Court based its determination only on the definition of "owner" in the New York City Administrative Code, which encompasses "agents" of the landlord (R. 32).

Supreme Court also dismissed Landlord's fourteenth, fifteenth and seventeenth affirmative defenses asserting that Landlord is not liable for fraud because it relied on DHCR's misinterpretation of the law in deregulating apartments in a building receiving J-51 benefits prior to *Roberts*, and registered the Affected Apartments promptly after *Gersten* was decide (R. 34).

D. Landlord's Cross-Motion

While Supreme Court stated that it was not "relieve[d] from its obligation to enforce Justice Singh's 2014 [U&O Order], and to ensure plaintiffs' compliance with RPL § 220" (R. 31) by paying U&O to Landlord on a monthly basis "prospectively until the completion of this case" (R. 28, 483), Supreme Court nevertheless abrogated the 2014 U&O Order by (a) "direct[ing] that the parties prepare [certain] documents and calculations and present them to the Special Referee, who shall compare them and incorporate the result into his/her proposed findings of fact" (R. 31) and (b) with respect to the non-paying tenants, "require[ing] them to post a bond equal to the amount set forth in the Special Referee's findings, pending the final resolution of this action" (R. 31).[12]

E. Summary of the Order

Supreme Court summarized its Order as follows:

> In conclusion, the court has determined that (1) plaintiffs are entitled to partial summary judgment on their first cause of action, to the extent of awarding them the two proposed declarations set forth in their complaint; (2) this matter shall be submitted to a Special Referee on the issues of (a) calculating both the base rent dates and legally regulated

[12] Justice Lebovits stated, in another action between Eastgate and a named plaintiff/class representative Laurie Cagnassola, in which Landlord sought to enforce the 2014 U&O Order, that "the specific requirements of [the 2014 U&O Order] were superseded by the U&O provisions of this court's 2017 order," which is the Order that Landlord is now appealing (*Eastgate Whitehouse LLC v Cagnassola*, 67 Misc 3d 1231[A] at * 5 [Sup Ct, NY County 2020] [emphasis supplied]).

> (rent-stabilized) rents for each plaintiffs' apartments, utilizing the DHCR's default formula; and (b) identifying how much use and occupancy, if any, each plaintiff has paid to date and how much was actually due; (3) that defendants' cross motion shall be denied

(R. 35).

ARGUMENT

POINT I

SUPREME COURT ERRED BY AWARDING SUMMARY JUDGMENT HOLDING THAT LANDLORD ENGAGED IN FRAUD AND THAT THE LEGAL RENT FOR EACH AFFECTED APARTMENT SHOULD BE CALCULATED USING THE DEFAULT FORMULA

A. The Summary Judgment Standard

As has long been observed by the Courts of this State, the court's function upon a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Gale v Kessler*, 93 AD2d 744, 745 [1st Dept 1983]). Summary judgment is a drastic remedy which deprives a litigant of its day in court and should not be granted where there is any doubt as to the existence of a triable issue of fact, or where the issue is even arguable (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). As was stated by the Court of Appeals in *Stone v Goodson*:

> Once again we are faced with the propriety of the granting of summary judgment, and our sole inquiry, therefore, is to the existence of a material issue of fact. It now seems well

> established that if the issue is fairly debatable a motion for summary judgment must be denied

(*Stone v Goodson*, 8 NY2d 8, 12 [1960] [citations omitted]).

In order for a party to obtain summary judgment, "it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment in [the movant's] favor'" (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). By this, the movant is obligated "to produce all the evidence within its ken, as upon trial" (*Bank of Smithtown v Beckhans*, 90 AD2d 508, 508 [2d Dept 1982]).

As the Court of Appeals stated in *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985):

> The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case

([citations omitted] [emphasis supplied]).

Thus,

> A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers

(*Cugini v System Lumber Co., Inc.*, 111 AD2d 114, 115 [1st Dept 1985] [emphasis supplied], *citing Winegrad*, 64 NY2d at 853).

The proponent of a summary judgment motion must also:

> establish his [or her] cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his [or her] favor (CPLR 3212, subd [b]), and he [or she] must do so by tender of evidentiary proof in admissible form

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Moreover, CPLR 3212(b) states:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit

(CPLR 3212[b] [emphasis supplied]; *see S. J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] ["the motion must be supported by an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof"]). Motions supported only by an attorney's affirmation, without an affidavit from someone with personal knowledge, such as Tenants' Motion, are fatally defective (*see Simpson v Term Indus.*, 126 AD2d 484, 485 [1st Dept 1987]; *see also Matter of 2084-2086 BPE Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 15 AD3d 288, 289 [1st Dept 2005] [attorney affirmation is "without

evidentiary value"], *lv denied* 5 NY3d 708 [2005], *citing Zuckerman v City of New York*, 49 NY2d at 563).

The standards on a summary judgment motion are the same when seeking judgment on a cause of action for a declaratory judgment -- the movant must establish all *prima facie* elements of its cause of action and the absence of any issues of fact (*see, e.g.*, *Finger v 162 Grand St. Realty, LLC*, 184 AD3d 551, 553 [1st Dept 2020]; *PH-105 Realty Corp. v Elayaan*, 183 AD3d 492, 493 [1st Dept 2020]).

On a motion for summary judgment on a rent overcharge cause of action, the tenant must show the legal regulated rent on the base date and that it paid amounts in excess thereof (*see, e.g., 580–585 Realty, LLC v Keselman*, 59 Misc 3d 139[A], *1 [App Term, 2d Dept 2018] [tenant's motion for summary judgment denied because "we find that tenant's proof did not establish that rent had been paid during the period in question which allegedly exceeded the reduced rent determined by DHCR"]). Since Tenants have failed to provide any such proof, their Motion fails on this basis alone, as established below.

B. *Roberts* and its Progeny

In *Roberts*, the Court of Appeals held that, contrary to DHCR's long-standing policy, rent stabilized apartments could not be deregulated while the building received J-51 tax benefits (see *Roberts*, 13 NY3d at 286-287). Thereafter, there was an issue as to whether the *Roberts* decision should be applied retroactively. In 2011,

this Court, in *Gersten*, held that Roberts must be applied retroactively (*see Gersten*, 88 AD3d at 196-198).

In the ensuing decade after *Roberts*, other issues arose. For example, New York Courts disagreed on the proper method to calculate the legal rents in a *Roberts* type J-51 rent overcharge case.[13] In April 2020, the Court of Appeals settled the issue in *Regina*, which involved four consolidated appeals of *Roberts* type J-51 rent overcharge cases (*see Regina*, 35 NY3d at 350-351). The *Regina* Court determined the proper method of calculating rent overcharges in post-*Roberts* cases under "the statutory scheme in effect when the overcharges occurred" (*id.* at 351), which statutory scheme applies int his action. As the Court of Appeals explained:

> Each of these cases involves an apartment that was treated as deregulated consistent with then-prevailing DHCR regulations and guidance before this Court rejected that guidance in *Roberts*…After we decided *Roberts*, these tenants commenced overcharge claims under the RSL…The central issue below in each of these cases…was how to calculate the "legal regulated rent" in order to determine whether a recoverable overcharge occurred and its amount

[13] *See Regina*, 35 NY3d at 357-358; *compare 72A Realty Assoc. v Lucas,* 101 AD3d 401, 401-402 (1st Dept 2012) (a court is required to examine the entire rental history of an apartment to reconstruct the base date rent), and *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 105-108 (1st Dept 2017) (same), *affd as mod sub nom. Regina*, 35 NY3d 332 [2020], with *Raden v W 7879, LLC*, 164 AD3d 440, 441 (1st Dept 2018) (review of the rental history is limited to the four-year period preceding the filing of the complaint, and the base date rent is the rent actually charged on the base date), *affd sub nom Regina*, 35 NY3d 332 (2020).

(*Regina*, 35 NY3d at 350-351 [emphasis supplied]).

The Court of Appeals then re-examined the applicable sections of the Rent Stabilization Law and Rent Stabilization Code[14] and the post-*Roberts* split between the Courts, and held that:

> The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred -- not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations. In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period.
>
> * * *
>
> We therefore decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud

[14] *See* former CPLR 213-a; former RSL § 26-516(a)(2); RSC § 2526.1(a)(2); RSC § 2526.1(3)(i); RSC § 2520.6(e); RSC § 2520.6(f)(1); former RSL § 26-516(g); RSC § 2523.7(b).

(*Regina*, 35 NY3d at 355-356, 361 [emphasis supplied; internal citations omitted]).

With respect to determining whether a landlord had committed fraud in *Roberts* type J-51 rent overcharge cases, the *Regina* Court went on:

> In stark contrast to *Thornton, Grimm* and *Conason*, in which tenants came forward with evidence of fraud, in these Roberts cases, the owners removed apartments from stabilization consistent with agency guidance. Deregulation of the apartments during receipt of J-51 benefits was not based on a fraudulent misstatement of fact but on a misinterpretation of the law -- significantly, one that DHCR itself adopted and included in its regulations. As we observed in *Borden v 400 E. 55th St. Assoc., L.P.*, a finding of willfulness "is generally not applicable to cases arising in the aftermath of *Roberts*" (24 NY3d 382, 398 [2014]). Because conduct cannot be fraudulent without being willful, it follows that the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims

(*Regina*, 35 NY3d at 356).

Notably, this Court, in 2017, had previously reached the same conclusion in *Matter of Park*, a post-*Roberts* type J-51 rent overcharge case, when it held that:

> When the owner treated the apartment as deregulated in 2005 and discontinued rent registrations with DHCR, it did so based on a justifiable belief that the apartment was no longer subject to rent regulation and such filings were unnecessary…

> DHCR…properly concluded that there was no basis to look beyond the four-year limitation period…to challenge the rent…
>
> …in this case, there is simply no evidence or indicia that the owner engaged in a fraudulent deregulation scheme to remove the apartment from the protections of the rent stabilization law…DHCR properly concluded that the owner did not engage in fraud when it removed the apartment from rent regulation in 2005 because it was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations. Similarly, DHCR rationally concluded that there was no fraud in the owner's failure to re-register the apartment until 2012, when the issue of the retroactive application of Roberts became apparent

(*Matter of Park*, 150 AD3d at 113-115 [emphasis supplied; internal citations omitted]).

Similarly, in the recent rent overcharge case of *Kuzmich v 50 Murray St. Acquisition LLC* (187 AD3d 670 [1st Dept 2020]), this Court, citing *Regina*, held that the use of default formula did not apply:

> because the motion court found a lack of willfulness by the landlord…Instead, as indicated, the base date rent is the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges are to be calculated by adding the rent increases legally available to the owner under the RSL

(*Kuzmich v 50 Murray St. Acquisition LLC*, 187 AD3d at 671 [emphasis supplied; citations and internal brackets omitted]; *see Corcoran v Narrows Bayview Co., LLC*, 183 AD3d 511, 511-512 [1st Dept 2020] ["Given the lack of evidence that defendant engaged in fraud in deregulating the apartment, plaintiffs' claims for rent overcharge and to calculate the legal regulated rent are subject to a four-year look back period…A finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*, where defendant followed DHCR's guidance when deregulating the unit"]; *Goldfeder v Cenpark Realty LLC*, 187 AD3d 572, 573 [1st Dept 2020] ["The fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims, where the landlord relied on pre-*Roberts* administrative guidance to deregulate" [internal quotation marks and brackets omitted]; *West v B.C.R.E.-90 W. St., LLC*, 68 Misc3d 696, 701-702 [Sup Ct, NY County 2020] ["here, where plaintiffs have not alleged a fraudulent scheme, under the principles recently established by the Court of Appeals in *Matter of Regina Metro. Co.*, in order to determine rent overcharges, if any, the base date is the rent in effect four years prior to the filing of this action, plus any increases legally available under the formulas established by the Rent Stabilization Law and regulations. This formula must apply, even if the base date rent was a market rent"]).

Based thereon:

- A landlord will not be found to have committed fraud in deregulating apartments during the receipt of J-51 benefits if it "removed apartments from stabilization consistent with agency guidance" at the time, but then promptly re-registered the apartments as rent-stabilized after *Gersten* was decided, as Landlord did here; and
- In the absence of fraud, the four-year lookback rule and standard method of calculating the legal regulated rent govern in *Roberts* overcharge cases and, thus, the default formula is not to be used to calculate the Base Date rent or any overcharge.

C. Supreme Court's Order is Contrary to Law

1. Supreme Court Erred by Finding that Landlord Engaged in Fraud

Shortly after this Court determined the retroactivity of *Roberts* in *Gersten*, Landlord promptly advised Tenants of the Affected Apartments of *Roberts*, recalculated Tenants' rents pursuant to a good faith effort to comply with *Roberts*, sent Tenants rent stabilized leases, and retroactively registered all of the Affected Apartments as rent-stabilized by March 2012 (R. 27, 132-133, 423-454, 864-995,

996-1135, 1192-1193, 1196-1201). Accordingly, as in the *Matter of Park*, there cannot here be any colorable claim of fraud (*see Matter of Park*, 150 AD3d at 115).[15]

Moreover, in *Taylor v 72A Realty Associates, L.P.* (151 AD3d 95 [1st Dept 2017]) one of the four cases decided by *Regina*, the Court of Appeals held that the landlord did not engage in any fraud when it retroactively registered the subject apartments in 2014, which was two years after Landlord did so here (see *Taylor v 72A Realty Associates, L.P.*, 151 AD3d at 100 ["On March 24, 2014, shortly after plaintiffs commenced this action, the owner first filed annual rent registrations for years 2009 through 2013"]; *Regina*, 35 NY3d at 357-358, n. 9). Thus, it cannot be said that Landlord committed fraud when it retroactively registered the Affected Apartments two years earlier in 2012 (just as the landlord did in *Matter of Park*).

However, that is exactly what Supreme Court incorrectly held in the Order -- it found that such retroactive registration promptly after *Gersten* established "the necessary quantum of 'fraud'" (R. 26). What makes the holding all the more egregious is that it was made *sua sponte*, in that Tenants did not even assert "fraud" or a fraudulent deregulation scheme in their Motion. As such, Tenants could not have met, and did not meet, their burden of establishing a fraudulent deregulation

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[15] This Court has held that it would have been fraud if Landlord did <u>not</u> act to register the apartments in the building as rent stabilized immediately after *Gersten* was decided (*see Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498, 498-499 [1st Dept 2018] ["The record shows that defendant failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of *Roberts*... was clear"]; *citing Matter of Park*, 150 AD3d at 110).

scheme as a matter of law on summary judgment. Accordingly, it was error for Supreme Court to find that Landlord engaged in fraud, and that, as such, the default formula should be used to calculate the Base Date rent for every Affected Apartment.

2. Supreme Court Erred by Expressly Rejecting the 2012 Order

Justice Singh's 2012 Order held that Landlord acted in good faith reliance on DHCR's misinterpretation of the law and in registering the Affected Apartments as rent stabilized after *Roberts* and *Gersten*, and, moreover, that "the facts alleged cannot support a finding that the [L]andlord fraudulently or purposefully evaded the Rent Stabilization Law" (R. 189-191 [emphasis supplied]). That 2012 Order is law of the case and should not have been disturbed even if Justice Lebovits believed that Justice Singh was wrong (R. 26). It is well-settled that:

> The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned

(*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]).

The Court of Appeals has held "that the law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*People v Evans*, 94 NY2d 499, 504 [2000] [emphasis supplied]). This Court, in *Ayala v S.S. Fortaleza* (40 AD3d 440 [1st Dept 2007]), citing *People v Evans*, held:

> It is axiomatic that one judge may not review or overrule an order of another judge of coordinate jurisdiction in the same action or proceeding. The motion court appropriately refused to interfere with any prior rulings by another Justice in this matter

(*Ayala v S.S. Fortaleza,* 40 AD3d at 441; *see Allen v Rosenblatt*, 5 Misc 3d 1032[A] at *2 [Civ Ct, NY County 2004] [Lebovits, J.] ["the law-of-the-case doctrine precludes re-adjudication by a court of coordinate jurisdiction."], *citing Martin v City of Cohoes,* 37 NY2d 162, 165 [1975]).

Based thereon, Justice Lebovits was bound to follow Justice Singh's prior decision regarding fraud, whether or not he agreed with it.

3. Supreme Court Erred by Finding that the Default Formula Applies

Supreme Court held that the default formula is to be used to calculate the rents because (1) Landlord committed fraud, and/or (2) "the rent history in this action is unreliable" since "defendants' evidence is too incomplete to permit an accurate calculation of either the base rent, or the current legal rent, for any of the [Affected Apartments]" (R. 23, 27).

Because there was no fraud, as established above, that finding provides no basis for the application of the default formula. As to the second basis, Supreme Court agreed with Tenants' argument, based upon *72A Realty Assoc. v Lucas* (101 AD3d 401 [1st Dept 2012]) ("*Lucas*"), that the rents must be calculated using the default formula because Landlord had allegedly failed to produce sufficient records

to review the entire rental history going all the way back to the last registered rent-stabilized rent for each apartment, as opposed to records only dating back to the Base Date (R. 75-79, 1257-1258, 1338-1342). However, such method of calculation of the Base Date rent (and the holding in *Lucas*) was expressly rejected by the Court of Appeals in *Regina*, and thus, Supreme Court's (and Tenants') reliance on *Lucas* and the "reconstruction" method was error (*see Regina*, 35 NY3d at 357-359).

More specifically, Tenants incorrectly argued, *inter alia*:

> in this case, in order to establish the legal regulated rents for Plaintiffs' apartments, it is necessary to review the entire rental histories of those apartments. However, the records produced by Defendants are entirely inadequate to perform the necessary review and make the required calculations.
>
> * * *
>
> Plaintiffs' attorneys have thoroughly analyzed the documents provided by Defendants. Defendants have not provided sufficient documents to calculate the legal regulated rent for a single apartment. It is therefore impossible to calculate the legal regulated rent amount for any apartment occupied by Plaintiffs or any member of the Plaintiff class, using the methodology required by the Appellate Division in *Lucas*

(R. 1340-1342 [emphasis supplied]).

Tenants, thus, argued that "the correct methodology is to determine the last proper legal rent and 'bridge the gap' between that time and the base date by deeming allowable rent increases" (R. 1339).

Purporting to have reviewed all of the relevant discovery material, Supreme Court "agree[d] with Plaintiffs assessment" that Landlord was required, but had failed, to produce a complete rent history back to the last stabilized rent for every apartment in order to "reconstruct" the base date rent, such that the records were insufficient to determine the Base Date rent (R. 22). This was error because the Court of Appeals in *Regina* explicitly rejected the "reconstruction" or "bridge the gap" method that was used in *Lucas* (and *Taylor*), explaining that:

> Citing *Lucas*, DHCR (in *Regina Metro.*) and the Appellate Division (in *Taylor*) determined that, even in the absence of fraud, an overcharge in a *Roberts* case should not be calculated in accordance with the four-year lookback rule but, instead, by reconstructing what the legal regulated rent would have been on the base date if the apartment had not been improperly deregulated. DHCR and the *Taylor* court determined that this reconstruction should be conducted by identifying the last legal regulated rent before improper deregulation -- even though the apartment was deregulated more than four years prior to imposition of the claim -- and applying all permissible rent increases between the date of that regulated rent and the base date (*Regina Metro.*, 164 AD3d at 422-423; *Taylor*, 151 AD3d at 105-106).

> The reconstruction method, applied by DHCR in *Regina Metro.* and approved by the *Taylor* court, violated the pre-HSTPA law by requiring review of rental history outside the four-year limitations and lookback period in the absence of fraud…The tenants' theory that *Thornton*, *Grimm* and *Conason* preclude adoption of a market base date rent is mistaken. Although in those cases we characterized base date rents resulting from fraud as "illegal" or "unreliable," we never suggested that an alternative method of setting the base date rent could apply to a less blameworthy owner where not authorized by the statutory scheme. Indeed, use of the reconstruction method violated the legislative mandate that "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" (former RSL § 26-516 [a] [2]; *see* former CPLR 213-a). Moreover, it utilized rental history in a manner that this Court refused to sanction even in fraud cases, in which we authorized consideration of rental history outside the lookback period only for the "limited purpose" of determining whether a fraudulent scheme existed (*Grimm*, 15 NY3d at 367).
>
> We are also unpersuaded by the tenants' arguments that use of a default formula or the other alternative approaches to determining base date rent would comply with pre-HSTPA law if applied to these cases

(*Regina*, 35 NY3d at 357-359 [emphasis supplied]).

Thus, the default formula does not apply as a matter of law. Supreme Court erred in agreeing with Tenants' assessment that the discovery material produced by Landlord was insufficient to determine the Base Date rent under the reconstruction method, and thus, erred in holding that the default formula should be used to calculate the Base Date rents for the Affected Apartments. Supreme Court did not determine, as required by *Regina*, the actual rent charged on the Base Date and, instead, relied upon an incorrect standard for determining the Base Date rent.

4. Tenants Failed to Establish Summary Judgment

Tenants sought summary judgment, pursuant to CPLR 3126 and 3212, because Landlord was allegedly "in default of [its] discovery obligations" (R. 39-40). Needless to say, this is not the correct standard. As established above, Tenants were required to prove, with admissible evidence, such as affidavits and other proof, that there were no issues of fact and they are entitled to judgment as a matter of law. Tenants failed to set forth the standards or even attempt to mention, let alone establish, that there were no issues of material fact as to its rent overcharge claims. Certainly, Tenants did not establish the rents for each apartment on the Base Date and any overcharge, nor did Supreme Court engage in a per apartment analysis of any of the Affected Apartments to determine whether there was a rent overcharge for each (or any) of them. Justice Lebovits, however, did engage in such a per apartment analysis a recent summary judgment decision, also in a recent *Roberts* J-

51 rent overcharge case (*see Townsend v B-U Realty Corp.*, 67 Misc 3d 1228, * 2 [Sup Ct, NY County 2020]). Therein, after finding fraud because the landlord there *did not* "promptly register its apartments as rent-stabilized when the applicability of *Roberts* was clear in March 2012" (*id.* at *12 [emphasis supplied]),[16] Justice Lebovits spent many pages analyzing each apartment's history of rents, leases and tenancies to determine whether there was an overcharge. Supreme Court's failure to undertake such an analysis as to even one Affected Apartment here underscores the many errors it made in this case.

Accordingly, Supreme Court erred in granting summary judgment to Tenants, without an affidavit in support of their Motion and without determining whether material issues of fact existed. Moreover, Supreme Court erred in *sua sponte* finding that Landlord engaged in fraud such that the default formula applies in this case.

It is respectfully submitted that the Order should be reversed to such extent, and that this matter should be remanded for completion of all pre-trial proceedings, such as document discovery and depositions, and an eventual determination of the Base Date rents and any alleged overcharges in accordance with *Regina* -- namely, "the base date rent [is] the rent actually charged on the base date…and overcharges

[16] Justice Lebovits' holding in that case is inconsistent with its holding in this action. Apparently, both registering and not registering apartments pursuant to *Gersten* constitutes fraud.

[are] to be calculated by adding the rent increases legally available to the owner under the RSL" (*Regina*, 35 NY3d at 355-356).

POINT II

TENANTS ARE NOT ENTITLED TO ANY DISCOVERY SANCTIONS UNDER CPLR 3126

Apparently because they knew they could not establish summary judgment by admissible evidence, Tenants' Motion sought "summary judgment" on their first two causes of action pursuant to CPLR 3126 and 3212 because Landlord allegedly was "in default of [its] discovery obligations" (R. 39-40). This nonsensical request conflates totally dissimilar standards -- summary judgment (*see* CPLR 3212) and penalties for refusal to comply with discovery orders (*see* CPLR 3126).

To the extent Supreme Court ruled against Landlord because it was unhappy with Landlord's document production or the manner in which documents were produced, the failure to produce documents is not a basis to award summary judgment under CPLR 3212. CPLR 3126 is entitled "Penalties for Refusal to Comply With Order or to Disclose" and states:

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with

> regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order

(CPLR 3126 [emphasis supplied]).

A motion for CPLR 3126 discovery sanctions is premature without the complaining party first moving to compel or getting a conditional order requiring production (*see W & W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438, 438 [1st Dept 2011]; *see also Michaluk v New York City Health and Hosps. Corp.*, 169 AD3d 496, 496 [1st Dept 2019]). Here, Tenants made no such motion to compel, nor did they obtain a conditional order from the Court prior to moving pursuant to CPLR 3126.

Moreover, CPLR 3126 sanctions, the "harshest available penalty" (*W & W Glass*, 83 AD3d at 438), will be granted only where a party willfully, deliberately and contumaciously disobeys court-ordered disclosure, or acts in bad faith (*see Banner v NYC Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]; *Mateo v T & H Enters.*, 60 AD3d 411, 412 [1st Dept 2009]; *Reyes v Riverside Park Community (Stage I), Inc.*, 47 AD3d 599, 599 [1st Dept 2008]; *Rosado v Edmundo Castillo Inc.*, 54 AD3d 278, 279 [1st Dept 2008]; *Dauria v City of New York*, 127 AD2d 459, 460 [1st Dept 1987]; *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Tenants' Motion, to the extent it seeks relief under CPLR 3126, failed in all respects. First, Tenants have not identified one discovery order that was willfully violated or that Landlords refused to obey -- the last discovery order they mention is the May 21, 2014 status conference order, which did not set forth any date by which Landlord had to produce documents.

Second, Tenants' Motion is premature without making any motion to compel.

Third, in any event, Tenants' stipulated twice that Landlords could produce additional documents *after* the Motion was filed (R. 455-458), and Tenants acknowledged that, during the pendency of the Motion, Landlord produced at least 10,000 additional pages of documents (R. 1258). The Stipulations in which Tenants agreed that Landlord could produce documents during the pendency of the Motion (R. 455-457), and Landlord's production, which Supreme Court acknowledged was "a large volume of discovery material" (R. 22), completely undermine Tenants' claim for CPLR 3126 relief. As a result, Tenants failed to establish that Landlord deliberately refused to obey or willfully failed to comply with a court order as required by the statute (*see Michaluk v New York City Health and Hosps. Corp.*, 169 AD3d at 496; *Dauria v City of New York*, 127 AD2d at 460; *see also Kinge v State of New York*, 302 AD2d 667, 669 [3d Dept 2003] [willful or contumacious conduct must be clearly shown]; *Mancusi v Middlesex Ins. Co.*, 102 AD2d 846, 846 [2d Dept 1984]). Indeed, "[t]he willful failure to comply with a discovery order assumes 'an

ability to comply and a decision not to comply'" (*Dauria v City of New York*, 127 AD2d at 460, *citing* 3A Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3126.04).

Here, that was not the case. Accordingly, Landlord cannot be sanctioned under CPLR 3126 and the Court erred in finding that Landlord's alleged failure to produce sufficient documents in discovery to date to determine the Base Date rent (under the incorrect standard) warranted an award of summary judgment.

POINT III

SUPREME COURT ERRED BY DISMISSING LANDLORD'S SECOND AND THIRD AFFIRMATIVE DEFENSES THAT THE MANAGING AGENT IS NOT LIABLE FOR THE RENT OVERCHARGE

A. The Defense that Duell and K&K Were Improperly Named as Defendants Has Merit

Landlord' second and third affirmative defenses assert that defendants Duell and K&K, as the managing agents for the Building, cannot be held liable for rent overcharges because each is an agent for a disclosed principal.

It is well settled that a managing agent for a disclosed principal cannot be held liable for rent overcharges unless there is clear and explicit evidence of the agent's intention to substitute or add its personal liability for, or to, that of its principal (*see Paganuzzi v Primrose Mgmt. Co.*, 181 Misc 2d 34, 36 [Sup Ct, NY County 1999], *affd* 268 AD2d 213 [1st Dept 2000]; *Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 [1st Dept 1998]). In affirming the Supreme Court's decision in *Paganuzzi*, this

Court held that: "The action was properly dismissed as against the managing agent, since it always acted as an agent for a disclosed principal" (*Paganuzzi*, 268 AD2d 213, 213-214 [1st Dept 2000]; *see also Sargoy v Wamboldt*, 183 AD2d 763, 765 [2d Dept 1992] ["[i]t is well settled that when an agent acts on behalf of a disclosed principal on a contract, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be so bound…This is so even if the agent, in the course of his agency, induces the principal to breach the contract"]; *Siguencia v BSF 519 West 143rd Street Holding, LLC*, 2018 WL 6198380 [Sup Ct, NY County 2018]; *Fuentes v Kwik Realty LLC*, 2017 WL 4647784, at *7 [Sup Ct, NY County 2017], *mod on other grounds* 186 AD3d 435 [1st Dept 2020]; *Lamb v 118 2nd Ave. NY LLC*, 2017 WL 6039503, at *2 [Sup Ct, NY County 2017]; *Napolitano v 118 2nd Ave. NY LLC*, 2017 WL 6039502, at *2 [Sup Ct, NY County 2017]; *Frederick v University Towers Associates*, 2002 NY Slip Op 50501[U] [Sup Ct, Kings County 2002]).

Tenants' argument with respect to the definition of "owner" in the New York City Administrative Code, on which Supreme Court relied, has been rejected by other Courts (*see West v B.C.R.E.-90 W. St., LLC*, 65 Misc 3d 349, 361 [Sup Ct, NY County 2018], *revd on other grounds* 161 AD3d 566 [1st Dept 2018], *revd sub nom. Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84 [2019]), *and op withdrawn on other grounds on rearg sub nom. West v B.C.R.E.-90 W. St., LLC*, 68 Misc 3d

696 [Sup Ct, NY County 2020]), and, in any event, does not overcome the well-settled case law from this Court that a managing agent is not liable for rent overcharges if it acted as an agent for a disclosed principal (*see Paganuzzi v Primrose Mgmt. Co.*, 268 AD2d at 213-214; *Crimmins v Handler & Co.*, 249 AD2d at 91-92).

Here, Tenants expressly acknowledge that Duell and K&K are the managing agents for the owner of the Building, and therefore, are agents for a disclosed principal, Landlord. Tenants, however, failed to establish by "clear and explicit evidence" that they were intended to be held personally liable.

Accordingly, Supreme Court erred in dismissing Landlords' second and third affirmative defenses on summary judgment.

B. The Defenses that Landlord Did Not Commit Fraud Because they Registered the Apartments Have Merit

Landlord's fourteenth, fifteenth and seventeenth affirmative defenses allege that it is not liable for fraud because it acted in good faith by relying on the applicable pre-*Roberts* industry-wide interpretation of the law (R. 168-169). Dismissal of those defenses was in error because, as established above, Landlord acted in good faith reliance on DHCR's own interpretation of the law prior to *Roberts*, and promptly acted to treat the Affected Apartments as rent stabilized after *Gersten* was decided, while Tenants failed to prove any rent overcharge based upon the "four year rule."

POINT IV

SUPREME COURT ERRED BY SUPERSEDING THE 2014 U&O ORDER

Just as Supreme Court violated the law the of case law doctrine by not respecting Justice Singh's 2012 Order as established above, Justice Lebovits admitted that he failed to adhere to such doctrine by "superseding" Justice Singh's prior 2014 U&O Order (*see Eastgate Whitehouse LLC v Cagnassola*, 67 Misc 3d 1231[A] at * 5 [Sup Ct, NY County 2020]; *see also Eastgate Whitehouse LLC v Geller*, 67 Misc 3d 1231[A] at * 5 [Sup Ct, NY County 2020]). It was error for Supreme Court to do so, especially when it admitted that it was obliged "to enforce" Justice Singh's 2014 U&O Order (R. 30-31).

The significance of Supreme Court's error is that it has precluded Landlord from seeking to enforce the 2014 U&O Order against tenants, such as Ms. Cagnassola (Index No. 161569/19, NYSCEF Doc. No. 1) and Mr. Geller (Index No. 161572/19, NYSCEF Doc. No. 1), who, in the aggregate, owed more than $250,000 more than one year ago (R. 1193-1994, 1276-1277). As a result, the Order has improperly permitted tenants such as Ms. Cagnassola and Mr. Geller to continue living in their apartments rent free, until a Referee's hearing, which will not occur

any time soon.[17] In fact, this significant delay is inconsistent with the very reason why U&O was directed to be paid *pendente lite* in the first place.

CONCLUSION

THE COURT SHOULD REVERSE THE ORDER AND THE MATTER SHOULD BE REMANDED FOR, AMONG OTHER THINGS (A) COMPLETION OF PRE-TRIAL PROCEEDINGS, AND (B) A DETERMINATION OF THE BASE DATE RENTS AND ANY OVERCHARGES IN ACCORDANCE WITH *REGINA*.

Dated: New York, New York
December 31, 2020

ROSENBERG & ESTIS, P.C.
Attorneys for Defendants-Appellants

By: _____
Howard W. Kingsley
733 Third Avenue
New York, New York 10017
(212) 867-6000

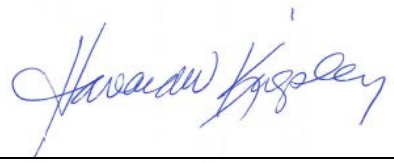
WARREN A. ESTIS
HOWARD W. KINGSLEY
ETHAN R. COHEN
Of Counsel

[17] Landlord has perfected its appeal from different order of the Supreme Court in which Supreme Court held that the tenant could remain in possession without complying with the 2014 U&O Order and without being evicted pre-COVID, which appeal is currently scheduled to be heard in the March 2021 Term, as is this appeal (*see* Appeal Nos. 2020-05010 and 2020-05011).

PRINTING SPECIFICATIONS STATEMENT

I, Howard W. Kingsley, an attorney for defendants-appellants, hereby certify that this brief is in compliance with 22 NYCRR § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2010. The typeface is Times New Roman. The main body of the brief is in 14 pt. Footnotes and Point Headings are in compliance with 22 NYCRR § 600.10. The brief contains 11,906 words as counted by the word processing program.

Dated: New York, New York
December 31, 2020



Howard W. Kingsley

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

Appellate Division – First Department

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

Plaintiffs-Respondents,

– and –

PAMELA RENNA and VITTINA DEGREZIA aka VITTINA LUPPINO,

Intervenor-Plaintiffs,

– against –

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

Defendants-Appellants.

Index No. 111723/11

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

1. The index numbers of the case in the court below are 111723/11 and 595472/17.

2. The full names of the original parties are as above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about October 14, 2011, by the filing of a Summons and Verified Complaint. The Answer was served on or about December 16, 2011. Plaintiffs thereafter filed an Amended Complaint on or about June 28, 2016. An Answer to the Amended Complaint was served on or about July 15, 2016.

5. The nature and object of the action is as follows: commercial matter relating to rent stabilization and rent control.

6. The appeal is from a decision and order of the Honorable Gerald Lebovits, entered on March 28, 2017, which, *inter alia*, (1) granted Plaintiffs' motion for leave to serve an Amended Complaint and for partial summary judgment, and (2) denied Defendants' cross-motion to enforce an order in this action concerning payments for use and occupancy.

7. This appeal is being perfected on a full reproduced record.