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

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 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.

Appellate Case No.: 2020-03001

Index No. 111723/11

(For Continuation of Caption See Inside Cover)

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

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

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

Third-Party Plaintiffs-Appellants,

– against –

ROBERTA L. KOEPPEL and 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., Koeppel & Koeppel, Inc. ("K&K"), Duell 5 Management LLC d/b/a Duell Management Systems ("Duell"), William K. Koppel and Eastgate Whitehouse LLC (collectively and/or individually, "Landlord"),[1] respectfully submit this reply brief in further support of their appeal from the Order (R. 7-38)[2] insofar as Supreme Court, *inter alia*: (a) granted Tenants' Motion, "pursuant to CPLR 3126 and 3212(a)," for summary judgment on their first cause of action for a declaratory judgment, and (b) directed a Special Referee to calculate (i) the base rent date for each Tenants' apartment utilizing the DHCR's "default formula", and (ii) the amount of use and occupancy ("U&O") that was to be paid and was actually paid; (c) dismissed Landlord's (i) second and third affirmative defenses that K&K and Duell, as managing agents, are not liable for Tenants' rent overcharge claims,[3] and (ii) fourteenth, fifteenth and seventeenth affirmative defenses that Landlord, in good faith, relied on DHCR's legal interpretation in deregulating apartments during the receipt of J-51 tax benefits; and (d) denied Landlord's Cross-Motion to enforce the 2014 U&O Order (R. 36-37).

Landlord established that the Order should be reversed because, *inter alia*:

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1 Any capitalized terms not defined herein have the meanings ascribed to them in Landlord's Brief in Chief ("LL. Br.").

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

3 In their Brief in Opposition ("Opp. Br."), Tenants expressly did not oppose this argument (Opp. Br. 1-2).

a. Prior to the completion of discovery, and without seeking to compel the production of documents, Tenants sought summary judgment only because Landlord was allegedly "in default of its discovery obligations" (R. 39-40);

b. Tenants did not argue or establish on their Motion for summary judgment that the default formula should be applied because Landlord engaged in a fraudulent scheme, but rather only argued that the default formula should apply because Landlord allegedly failed to produce rental records going all the way back to the last registered rent-stabilized rent for each apartment (*see*, *e.g.*, R. 81);

c. The Court of Appeals in *Matter of Regina Metro Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332, 355-356, 361 [2020]) ("*Regina*") clarified the unsettled law by holding that "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… the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud," as is the case here (*Regina*, 35 NY3d at 355-356, 361 [emphasis supplied]; *see also*

Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 283-288 [2009] ["Roberts"]);

d. Tenants' sole argument on their Motion for summary judgment, which Supreme Court accepted, was that the Court should apply the default formula because Landlord allegedly failed to produce rental records going back in time to the last registered rent-stabilized rent, seeking to reconstruct the rental history prior to the October 14, 2007 Base Date (the "Base Date") by using the reconstruction or "bridge the gap" methodology, which methodology was expressly rejected by the Court of Appeals in *Regina* as the wrong method to calculate the legal rents and any overcharges (*see Regina*, 35 NY3d at 382);

e. Tenants' Motion for summary judgment was insufficient because they failed to submit any affidavit or any admissible proof of any rent overcharges as required on summary judgment;

f. Landlord did not engage in fraud as a matter of law because (i) promptly after this Court decided *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]) ("Gersten"), Landlord, in good faith, notified Tenants that their previously deregulated Affected Apartments would be subject to rent stabilization and registered

with DHCR and offered Tenants rent stablized leases, and (ii) Supreme Court erred by ignoring the law of the case that Landlord did not commit fraud, namely, Justice Singh's 2014 Order which held that "the facts alleged cannot support a finding that the [L]andlord fraudulently or purposefully evaded the Rent Stabilization Law" (R. 189-191);

In a futile attempt to oppose Landlord's arguments, Tenants depart from their prior arguments and assert, for the first time on appeal, that they had "established that Defendants engaged in a fraudulent scheme" as another basis to apply the default formula (Opp. Br. 31). This is simply not true and, in any event, is unpreserved for this Court's review.

On their Motion for summary judgment, Tenants failed to assert fraud as the basis to apply the default formula. Rather, they sought the default formula only because Landlord did not comply with its discovery obligations to produce all documents back to the last registered rent-stabilized rent. On appeal, however, Tenants allege that, *inter alia*, after Landlord recognized the Affected Apartments as rent stabilized, Landlord created inflated rents and filed DHCR registration forms based on an illegal and fraudulent methodology and, thereafter, "engaged in fraud by performing outrageous calculations, not sanctioned by the RSL" (Opp. Br. 10 and 33).

Not only does this new argument fail because Tenants did not raise it below on their Motion for summary judgment, this new fraud argument is belied by Tenants' admissions that "prior to the *Regina Metro* decision various methodologies were applied in J-51 cases for the purpose of calculating the legal regulated rents" because there was confusion as to how to do so (Opp. Br. 33-34). Indeed, counsel for the parties agreed in their January 12, 2012 joint letter to Tenants that the amount of the rents would be decided by the Court (R. 173), and it took almost ten years for *Regina* to set forth the proper methodology -- the four-year lookback rule -- to calculate the legal rents in this classic *Roberts* type case. Given this confusion, and based upon Landlord's prompt acknowledgment that the previously deregulated Affected Apartments are rent stabilized and its good faith attempt to calculate the proper rents by retaining an expert and offering rent stabilized leases, there was no, nor can there be any fraud, as a matter of law. Now that *Regina* has resolved that confusion as to how to calculate the rents using the four-year lookback rule, Tenants' attempt to avoid that holding is disingenuous.

Tenants' argument that they established entitlement to summary judgment, as a matter of law, based upon their attorney's affirmation and inadmissible summaries drafted to allegedly convey Landlord's allegedly insufficient document production, is also contrary to well-established law. Moreover, at the very least, there are

genuine issues of material facts as to what the legal rent was on the Base Date for each apartment at issue and whether there was any overcharge.

Lastly, Tenants do not contest that Justice Lebovits violated the law of case doctrine by superseding Justice Singh's 2014 U&O Order, which Justice Lebovits admittedly had no authority to supersede the 2014 U&O Order.

Accordingly, it is respectfully submitted that the Order should be reversed, and the case should be remanded for completion of all pre-trial proceedings and an eventual determination of the Base Date rents and any alleged overcharges in accordance with *Regina*.

ARGUMENT

POINT I

TENANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT APPLYING THE DEFAULT FORMULA

While Tenants admit that *Regina* requires that this J-51 case must "be resolved under the law in effect at the time the overcharges occurred" (Opp. Br. 32), they flagrantly ignore *Regina's* holding in situations such as this -- that the Base Date rent is 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.

* * *

> 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.
>
> * * *
>
> 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

(*Regina*, 35 NY3d at 350-351, 355-356, 361 [emphasis supplied; internal citation omitted]).

Tenants' attempt to avoid the holdings of *Regina* and *Roberts* are completely without merit.

A. Tenants Arguments are Unpreserved and, Thus, are not Properly before this Court

In their Motion, made before the completion of discovery and without, *inter alia*, an affidavit from any Tenant, Tenants' first point seeking summary judgment in their memorandum of law (Point III), which consisted of barely more than one page, set forth only legal reasons why the apartments are rent stabilized as a result of the Building having received J-51 benefits (R. 1337-1338). No fraudulent scheme to deregulate apartments is mentioned therein, let alone established (R. 1337-1338).[4]

Tenants' next point explained that the default formula should be applied because (a) "Defendants Are In Default of Their Discovery Obligations," (b) a "Complete Review of the Rent Histories" was required to be produced by Landlord, (c) "Defendants' Documents Are Insufficient to Determine the Legal Regulated Rents," (d) Landlord failed to provide any explanation for missing documents, making it impossible to calculate the legal rent on the base date, (e) "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," and (f) the "RSC

[4] Contrary to Tenants' claim (Opp. Br. 23 fn 8), their memorandum of law was properly included in the Record because it was submitted to show whether an issue was preserved on appeal (*see DiLorenzo v Windermere Owners LLC*, 36 NY3d 965, 966 [2020]). As established herein, these arguments were not previously raised and, thus, not preserved by Tenants for appeal.

Requires That the Default Formula Be Applied in this Case" (R. 1338-1345). Like Tenants' first point seeking summary judgment, this second point was devoid of any allegations of fraud.[5] More specifically, Tenants argued:

> it has never been the case that the Default Formula would be applied only in a case of fraud; rather it is appropriate to apply the Default Formula where a landlord refuses, or is unable, to provide complete and reliable rental records sufficient to establish the legal rent.
>
> * * *
>
> Thus, as clearly laid out in the RSC, the Default Formula is to be applied not only where a landlord committed fraud or engaged in a scheme to evade rent regulation, but also <u>in any case where the rental history records sufficient to establish the base date rent are unreliable or unavailable.</u>
>
> * * *
>
> <u>Accordingly, because Defendants have failed to produce adequate and credible rental records sufficient to determine the legal base rent for Plaintiffs' apartments, the rents must be calculated pursuant to the Default Formula</u>

(R. 1344-1345 [emphasis supplied]).

Accordingly, Tenants asked Supreme Court to apply the default formula <u>only</u> because Landlord failed to produce reliable and historical rent records to establish

[5] The same is true in Tenants' subsequent points (R. 1345-1349).

the legal rent on the Base Date by using the "bridge the gap" or reconstruction method, which has now been expressly rejected by the Court of Appeals in *Regina*. In the absence of any allegations of fraud, Tenants' clearly did not establish fraud as a matter of law. Indeed, the finding of fraud was undisputedly made *sua sponte*.

Faced with the clear impact from *Regina*, Tenants' opposition on appeal changed course. Now, for the first time on appeal, and without citing to the Record, Tenants argue that the default formula should apply because "they established that Defendants engaged in a fraudulent scheme" (Opp. Br. 31). Tenants allege that after Landlord recognized the Affected Apartments as rent stabilized, Landlord "concocted a plan whereby [Landlord's] rent would be converted to 'preferential' rents thereby enabling [Landlord], so long as they were not caught, to continue to increase the rent" (Opp. Br. 10), and created inflated rents and filed DHCR registration forms based on an illegal and fraudulent methodology "by performing outrageous calculations, not sanctioned by any provision of the RSL" (Opp. Br. 10 and 33) -- "Landlord purported to apply a series of unjustified and undocumented increases over a period of years to arrive at outrageous, and grossly enlarged amounts, that were clearly designed to inflate the rent roll and to effectively maintain the seventy-five apartments at market rates by setting legal rents far above the market, and unilaterally categorizing the tenants' rents as preferential rents" (Opp. Br. 36-37).

Having failed to raise fraud as a basis for their Motion for summary judgment, Tenants cannot raise this argument now for the first time on appeal. Thus, it must be rejected on this basis alone (*see DiLeo v Blumberg*, 250 AD2d 364, 366 [1st Dept 1998]). In any event, and as established below, Landlord has not engaged in fraud and Tenants failed to prove otherwise.

B. Justice Singh's Determination that Landlord Did not Commit Fraud is the Law of the Case

It is ironic that Tenants claim that Justice Singh's 2012 certification order is essentially non-binding to the extent that it determined that Landlord could not be charged with fraud because no "party request[ed] that a finding be made in that regard" (Opp. Br. 41) when, on this appeal, Tenants are defending Justice Lebovits' finding of fraud in the Order even though Tenants did not "request that a finding be made in that regard." Moreover, Tenants did not appeal from Justice Singh's finding, in the 2012 Order, that the facts alleged in the Complaint cannot support a finding of fraud, whereas Landlord has appealed from the Order.

To avoid the well-settled law that the subsequent judge on a case cannot overrule an order by the prior judge, Tenants argue that Landlord took Justice Singh's "statements" regarding Landlord's lack of willfulness out of context (Opp. Br. 41). This argument is disingenuous because the Court was addressing whether the Complaint should be certified as a class action in which Tenants alleged that they

were entitled to treble damages because Landlord willfully overcharged them, as alleged in the Complaint (R. 151).

In addressing Landlord's argument that Tenants were not entitled to treble damages based upon willfulness, Justice Singh found that, as a matter of law, the facts alleged in the Complaint could not "support a finding that the landlord fraudulently or purposefully evaded the Rent Stabilization Law" because Landlord "was acting in good faith reliance upon the DHCR's misinterpretation of the law" (R. 191). Thus, contrary to Tenants' claim, this issue was necessarily decided, and Tenants did not appeal. Perhaps Tenants did not base their Motion for summary judgment upon fraud because they knew that they could not avoid this prior order.

Lastly, Tenants cite *J.P. Morgan Sec., Inc. v Vigilant Ins. Co.* (166 AD3d 1 [1st Dept 2018]) for the proposition that this Court is not limited by the law of the case doctrine (Opp. Br. 42-43). Such case, however, limits this Court's review only "where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination or a change of law," none of which are alleged or present here (*J.P. Morgan Sec., Inc.*, 166 AD3d at 9 [internal quotation marks omitted]).

C. Contrary to Tenants' Claim, this Case is a Classic *Roberts*-Type Case -- Landlord Did not Commit Fraud as a Matter of Law

Promptly after *Gersten* was decided and before (a) the appeal therefrom to the Court of Appeals was withdrawn (18 NY3d 954 [2012]) thereby rending this Court's

decision final, (b) this action was commenced in October 2011, Landlord advised Tenants in writing that, based upon that "recent court decision," Landlord would be registering and treating the Affected Apartments as rent stabilized (R. 156). Landlord also retained Stephen K. Trynosky, an expert in calculating rent stabilized rents, who, in a good faith effort, calculated "the legal reregulated rents using DHCR guidelines for all of the apartments" at the time (R. 1196). Since the proper methodology was not yet settled by the courts, counsel for the parties agreed, in their January 12, 2012 joint letter to Tenants, that the amount of the legal rents would be decided by the Court (R. 173). Thereafter, in early 2012, Landlord registered the Affected Apartments with DHCR and offered the tenants rent-stabilized renewal leases (R. 11, 27, 423-446, 486-1135, 1197, 1199.)

Based upon very similar facts here, the *Regina* Court held:

> 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

(*Regina*, 35 NY3d at 356).

Moreover, this Court, relying on *Regina,* most recently stated in *Montera v KMR Amsterdam LLC*, --- AD3d ---, 2021 NY Slip Op 00805 * 2 (1st Dept 2021), that there can be "no colorable claim of fraud" where, as is the case here, the apartments "were deregulated in accordance with the then-prevailing DHCR regulations and guidance" (s*ee also 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]; *Kuzmich v 50 Murray St. Acquisition LLC,* 187 AD3d 670, 670-671 [1st Dept 2020]; *Corcoran v Narrows Bayview Co., LLC*, 183 AD3d 511, 511-512 [1st Dept 2020]; *Goldfeder v Cenpark Realty LLC*, 187 AD3d 572, 573 [1st Dept 2020]).

Tenants' new argument that Landlord committed fraud by failing to properly calculate rents after regulating the previously deregulated Affected Apartments is extremely disingenuous in light of their admission that "prior to the *Regina Metro* decision various methodologies were applied in J-51 cases for the purpose of calculating the legal regulated rents" (Opp. Br. 33-34). Because landlords, tenants and courts were unsure how the rents should be calculated, *Regina* expressly clarified the confusion ten years later when it enunciated that the four-year lookback rule applies in *Roberts* overcharge cases absent fraud, and rejected the reconstruction

methodology that Tenants incorrectly argued on summary judgment should be applied. Thus, contrary to Tenants' claim, this case presents the classic *Roberts*-type scenario and *Regina* controls.

Tenants have failed to establish any basis to avoid the four-year lookback rule confirmed in *Regina*, and their attempt to continue to apply the reconstruction or "bridge the gap method" to reconstruct what they claim is the proper legal rent on the Base Date based upon 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, must be rejected as it was in *Regina* (*see Regina*, 35 NY3d at 353).

In another futile attempt to avoid *Regina*, Tenants also claim "none of the apartments were properly removed from rent stabilization, even in the absence of J-51 benefits," by relying on inapplicable pre-*Regina* cases (Opp. Br. 32-33). For example, Tenants rely on *Nolte v Bridgestone Assocs. LLC* (167 AD3d 498 [1st Dept 2018]) and *Kreisler v B-U Realty Corp.* (164 AD3d 1117 [1st Dept 2018], *lv dismissed* 32 NY3d 1090 [2018]). *Nolte* does not apply because there, unlike here, the Court looked beyond the four-year base date because the deregulated apartments were not promptly registered in March 2012 after *Gersten* was decided, whereas here, Landlord did promptly notify Tenants and register the Affected Apartments as rent-stabilized (*see Nolte*, 167 AD3d at 498-99 ["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"]). *Kreisler* also does not apply because there, unlike here, the landlord deregulated apartments after *Roberts* was decided, and the Court found same to be a fraudulent scheme (*see Kreisler*, 164 AD3d at 1117-1118). *Matter of Partnership 92 LP v DHCR* (11 NY3d 859 [2008]), does not apply because there, unlike here, the Court applied the default formula since an illusory tenancy was established (*see Matter of Partnership 92 LP*, 11 NY3d at 860). Moreover, that case was an Article 78 proceeding involving different burdens of proof.

Tenants also cite to a post-*Regina* case from Justice Lebovits, which Landlord addressed in its Brief in Chief (LL. Br. 45-46). In *Townsend v B-U Realty Corp.* (67 Misc 3d 1228 [Sup Ct, NY County 2020]), Justice Lebovits found that the landlord there, unlike here, did not "promptly register its apartments as rent-stabilized when the applicability of *Roberts* was clear in March 2012" (*Townsend v B-U Realty Corp.*, 67 Misc 3d 1228, at *12 [emphasis supplied]). Since Tenant cites to this case, it bears repeating that therein, unlike this case, Justice Lebovits engaged in a detailed analysis as to whether there was an overcharge for each of the Apartments (*see id.* at * 9-10). In this case, however, he did not perform any such analysis. In this case, Justice Lebovitz "accepted" the analysis performed by Tenants' counsel that Landlord had failed to produce sufficient rental records under the incorrect

reconstruction method to establish the Base Date rents, as opposed to the four-year lookback rule.

Tenants' citation to *Vendaval Realty, LLC v Felder* (67 Misc 3d 145[A] (App Term, 1st Dept 2020) (Opp. Br. 36) is also factually distinguishable, as the landlord there, like in *Townsend*, did not register the apartments as rent stabilized (*see Vendaval Realty, LLC*, 67 Misc 3d at *1). Tenants' citation to *435 Cent. Park W. Tenants Assn v Park Front Apts., LLC* (183 AD3d 509 [1st Dept 2020]) also does not help them because in that case summary judgment was not warranted as there were issues of facts as to whether the landlord tampered with the recertification process involving apartments previously regulated by the United States Department of Housing and Urban Development, and such certification process is not present here (*see 435 Cent. Park W. Tenants Assn*, 183 AD3d at 510).

Tenants' argument on appeal that none of the Affected Apartments were properly removed from rent stabilization, even in the absence of J-51 benefits (*see, e.g.*, Opp. Br. 34) also raises a new argument not asserted below. Tenants' Complaint stresses that this is a *Roberts* type J-51 case. For example, the Complaint alleges:

> A principal common question of law is whether Defendants and their predecessors in interest wrongfully deregulated apartments and charged market rents to tenant while at the same time taking advantage and receiving J-51 tax benefits.

(R. 148 [emphasis supplied]; *see also* R. 146).

Consistent therewith, Tenants' motion for class certification defined the class 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 [emphasis supplied]).

As established above, Tenants' Motion for summary judgment was based upon Landlord's allegedly improper deregulation of the Affected Apartments during the receipt of J-51 tax benefits. Tenants' belated challenges on this appeal to decades-old rental increases are not raised in the Complaint and are barred by the four-year lookback rule. Significantly, Tenant's Motion for summary judgment was devoid of any attempt to establish that any of the Affected Apartments were improperly removed from rent stabilization in the absence of J-51 benefits. Indeed, Tenants fail to provide any factual analysis as to how any apartment was improperly deregulated, apart from receiving J-51 benefits. Thus, Tenants' new argument requires this Court to review rental records beyond the Base Date, which is prohibited in the absence of fraud.

Moreover, Supreme Court erred by also failing to conduct any such analysis to determine whether there was a fraudulent overcharge for even one apartment. Rather, Supreme Court merely held that the Affected Apartments were improperly deregulated because (a) Landlord was receiving J-51 benefits and applied the default formula on its baseless finding of fraud, and (b) the Base Date rents allegedly could not be determined since Landlord failed to produce records dating back to the registered last rent-stabilized rent to establish the Base Date rents, which is the wrong methodology (R. 7-38).

Simply, on its Motion and in opposition, Tenants failed to establish fraud or any other basis to apply the default formula and the issue as to what was the amount of legal rent on the Base Date and whether there was an overcharge are still open issues of fact regarding the Affected Apartments -- the Base Date rents for the Affected Apartments must be determined by Supreme Court pursuant to *Regina* after discovery is completed.

D. Tenants' Motion did not Establish Entitlement to Summary Judgment -- There are Genuine Issues of Material Fact

Tenants' opposition failed to deny that: (a) it was their burden on summary judgment to "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]); (b) they must establish their claims by tendering affidavits and evidentiary proof in

admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]); (c) they were obligated "to produce all the evidence within its ken, as upon trial" (*Bank of Smithtown v Beckhans*, 90 AD2d 508, 508 [2d Dept 1982]); and (d) if they failed 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).

As established in the LL. Br., 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.

In defiance of the summary judgment standards set forth above, Tenants argue that they did not submit any affidavits from any of the Tenants to establish because they "would have added nothing to the motion" (Opp. Br. 29) since their attorney's affirmation was sufficient as a conduit to submit "acceptable attachments" "as exhibits, summaries of thousands of pages of rental history records provided by Defendants" (*id*.), which "attachments" they did not even bother to identify by citing to the Record. This argument fails for several reasons.

First, the unidentified "summaries" were not submitted to prove specific rent overcharges for each of the many apartments, but to support Tenants' primary claim that the default formula should be applied because Landlord did not comply with

their discovery obligations to produce rental records going back to the last registered rent-stabilized rent for each Affected Apartment. Tenants' exhibits submitted show "gaps in the rental history records, as well as the DHCR rent roll, and the J-51 records" (Opp. Br. 29). For example, annexed to their summary judgment motion was a "Summary of Documents Provided by Defendants" (R. 245-247). This summary is a chart of apartments showing whether or not certain documents were produced by stating either "Yes" or "No." Another purported summary was Tenant's "List of 23 Deregulated Apartments for Which No Discovery Documents were Provided" (R. 248-249), which again allegedly showed documents not produced. Clearly, these or any other summaries submitted were not used to establish fraud as a basis for summary judgment.

Second, Tenants failed to lay bare their proof and "produce all the evidence within [their] ken" in their moving papers, such as leases, rent bills, payments and the like (*Bank of Smithtown v Beckhans*, 90 AD2d at 508). Instead of producing any affidavits from Tenants or those types of documents in their possession, as opposed to relying on documents Landlord did or did not produce, Tenants' Motion relies on "thousands of pages" (Opp. Br. 29) that are not part of the 1365-page Record and an attorney's affirmation. Based thereon, Tenants have not established fraud or any other basis to apply the default formula.

Notably, Tenants failed to address Landlord's case of *580-585 Realty, LLC v Keselman* (59 Misc 3d 139[A], *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]), which denied a tenant's motion for summary judgment 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" (*580-585 Realty, LLC v Keselman*, 59 Misc 3d 139[A] at *1). The reason for this ruling is obvious -- if any Tenant did not pay any rent/U&O, such as those that owe, in total, hundreds of thousands of dollars in this case (R. 1193-1194, 1276-1277), such tenant cannot make out a case for rent overcharge damages (*see generally 699 Venture Corp. v Zuniga*, 64 Misc 3d 847, 848-849 [Civ Ct, NY County 2019], *mod* 69 Misc 3d 863 [Civ Ct, NY County 2020]).

Third, Tenants' citation to *Zuckerman v City of New York* (49 NY2d 557, 562-563 [1980]), does not help them because there, just as here, the attorney affirmation submitted on summary judgment was not sufficient. Here, the affirmation from Tenants' attorney is insufficient because it was used to submit attorney summaries and the like, which is not evidentiary proof in admissible form.

Fourth, in an attempt to save their fatally deficient motion, Tenants claim that the unidentified summaries are admissible based upon the "voluminous writings exception" based upon *Ed Guth Realty, Inc. v Gingold* (34 NY2d 440 [1974]). That case involved computer printouts prepared using "compiling and feeding data into a

computer" (*Ed Guth Realty, Inc. v Gingold,* 34 NY2d at 451). The summaries relied on by Tenants were not prepared using routine entries of data into a computer. Rather, they were prepared by counsel for the purposes of litigation. Thus, that exception does not apply. In any event, the summaries were submitted to prove what documents were not produced, under the wrong "reconstruction" method for determining the Base Date rent.

Because Tenants' motion was fatally deficient, Tenants improperly attempt to shift the burden to Landlord by arguing that Landlord did not comply with its discovery obligations and sought discovery sanctions under CPLR 3126. This is not the correct standard upon which to base summary judgment.

Tenants' claim that the amount of rent for the Affected Apartments on the Base Date of October 14, 2007 could not be determined (Opp. Br. 31) is belied by the Record. In fact, even Tenants' own attorneys' summaries of the documents that Landlord had produced demonstrates that Landlord had produced the lease in effect on the October 2007 Base Date for at least 48 of the Affected Apartments (R. 256-267). Those leases alone are enough to determine the rent "actually charged on the base date" as required by *Regina*. Moreover, such summary does not include the 17,000 additional pages of documents that were produced by Landlord with Tenants' consent after the Motion was filed and while it was being submitted (R. 1216-1217, 1257-1258).

Moreover, Landlord's DHCR's Annual Apartment Registrations show the rent actually charged on the Base Date for many of the Affected Apartments. For example, for apartment 2B, the rent paid on the Base Date was $2,200.00 based upon a lease from October 7, 2007 to September 30, 2008 (R. 870) and based upon *Regina*, that is the legal rent as a matter of law. In one of Tenants' unauthenticated summaries submitted in reply on summary judgment that set forth documents allegedly not yet produced, Tenants do not state that they do not have the lease(s) on the Base Dates or subsequent leases for that same apartment for a majority of the Affected Apartments (R. 1228-1241). In other words, Tenants concede that they have the leases on the Base Date for these apartments. In any event, Tenants do not submit any of the relevant documents or proof on summary judgment, and instead relied on inadmissible summaries and an attorney's affirmation that has no probative value.

In furtherance of their reliance upon Landlord's alleged failure to comply with its discovery obligations, Tenants allege that "Defendants did not have access to records prior to August 11, 2008" and, thus, imply that Landlord did not have any records on the Base Date (Opp. Br. 16). This is a flagrant attempt to mislead the Court. In his March 17, 2015 letter, Landlord's counsel stated only that Landlord did not have "rent rolls" because those types of documents for the period prior to August 11, 2008 could not be obtained from the prior owner of the Building (R. 251-

252). Therein, Landlord did not state that it did not have any other documents, such as leases, prior to August 11, 2008, and many other documents were admittedly produced (R. 486-1135).

Lastly, as stated in *Regina*, by requiring the reconstruction method by going further back into the rent history beyond the four-year lookback rule, to the extent a landlord may not have historical records available, "an owner would be penalized indirectly for a disposal of records that was legal under the prior law but will now hinder the owner's ability to establish the legality of (and non-willfulness of any illegal) rent increases outside the lookback period…even in the absence of fraud" (*Regina*, 35 NY3d at 369-370). Thus, even if Landlord does not have all records, the default formula cannot be used in the absence of fraud.

POINT II

SUPREME COURT ERRED BY SUPERSEDING THE 2014 U&O ORDER

Tenants fail to respond to and, thus, concede Landlord's argument that Justice Lebovits also violated the law the of case doctrine admittedly superseding Justice Singh's 2014 U&O Order, despite admitting that it had to be followed. Tenants also fail to oppose Landlord's argument that the Order improperly permitted Tenants to continue living in their apartments rent free in contravention of the 2014 U&O Order, requiring the rent/U&O to be paid on a monthly basis.

Instead, Tenants claim that Landlord had not met its burden. Even if that was the case, it did not give Supreme Court any right to supersede the 2014 U&O Order.

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
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I, Howard W. Kingsley, an attorney for defendants-appellants, hereby certify that this brief is in compliance with 22 NYCRR § 1250.8(j). 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 § 1250.8. The brief contains 5,926 words as counted by the word processing program.

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