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

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 a/k/a Vittina Luppino,

Intervenor-Plaintiffs,

– against –

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

Defendants-Appellants.

Index No. 111723/11

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-RESPONDENTS

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New York County Clerk's Index No. 111723/11 and 595472/17

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

This brief is respectfully submitted on behalf of Plaintiffs, the tenants in this "post-*Roberts*" class action, in opposition to the appeal by Defendants, landlords and owners of the subject building, from the Order of the Supreme Court, New York County (Lebovits, J.) entered March 28, 2017 ("the Order").

As limited by their brief, Defendants' appeal is primarily confined to that part of the Order as determined that Plaintiffs' legal regulated rents are to be calculated pursuant the default formula of the New York State Division of Housing and Community Renewal ("DHCR"), because Defendants engaged in fraud and because they did not provide sufficient records to determine the legal regulated rents of the seventy-eight apartments involved in this action.

Defendants also contend some of their affirmative defenses should not have been stricken, and that it was improper for the Court to deny their unspecified and poorly-articulated request for further relief regarding the payment of use and occupancy, which in any event had already been ordered by the Court in 2014 without any objection by Plaintiffs.

Defendants do not appeal from that part of the Order as granted Plaintiffs a declaratory judgment to the effect that Plaintiffs' apartments are subject to rent stabilization, and that they are entitled to renewal leases on forms approved by the DHCR at legal regulated rents as established by the Rent Stabilization Law ("RSL");

nor do Defendants appeal from that part of the Order as struck their affirmative defenses, other than those defenses relating to their alleged good faith, and agency.

Plaintiffs do not oppose that part of the appeal as concerns the affirmative defenses that Defendants KOEPPEL & KOEPPEL, INC. and DUELL 5 MANAGEMENT LLC d/b/a DUEL MANAGEMENT SYSTEMS were acting as agents for a disclosed principal.

The Decision and Order of the Court below is impressive in its precision, in the scope of its detail, and in the breadth and depth of its legal analysis. Clearly the Court below understood its role on a motion for summary judgment, and did not take lightly the decision that the legal rent for seventy-eight apartments had to be calculated pursuant to the default formula.

For the Supreme Court to determine that the rents had to be calculated pursuant to the default formula was the correct, and only, decision that could have been made, based on the submissions of the parties. Defendants had nearly three years, during pre-trial discovery, to provide sufficient documentation to determine the legal regulated rents, and failed to do so. On their motion for summary judgment, Plaintiffs' attorneys painstakingly reviewed the records submitted by Defendants on discovery, and provided a detailed and accurate analysis to the Supreme Court showing the deficiencies in Defendants' rental history records as to the seventy-eight apartments. Despite being allowed an additional two months, after filing of

Plaintiffs' motion for summary judgment, to submit additional records, Defendants offered nothing in opposition to the motion except for conclusory denials and blanket assertions that their records were sufficient; and Plaintiffs, on reply, presented another detailed analysis, including the records newly provided by Defendants, and proved, once again, that Defendants could not establish that the apartments were deregulated innocently or in good faith, or that the actions Defendants took to grossly inflate the Building's rental roll, register the apartments at enormous rent amounts, and to demand gigantic rent increases, were justifiable.

In short, the Supreme Court correctly found that this case was far from a classic post-*Roberts* case where landlords overcharged solely based upon prior, mistaken interpretations of the luxury deregulation statutes in the J-51 context, and, when learning of their error, took responsible measures to restore the apartments to regulation. In these circumstances, the Supreme Court correctly found that the default formula was the appropriate, and the only, lawful methodology to calculate the tenants' legal regulated rents.

Thus, and as will be explained in detail below, the Order of the Supreme Court, directing that the default formula be applied, striking Defendants' affirmative defenses relating to their alleged good faith, and denying Defendants' cross-motion requesting unspecified relief as to use and occupancy, which in any case had already been ordered, should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where a landlord advises tenants that their tenancies are protected by rent stabilization, but then (i) recalculates the legal rents as much higher than what they are paying, (ii) files amended registrations listing the much higher rents, (iii) presents tenants with renewal leases for much higher rents, and (iv) refuses to provide the backup documentation for these outrageous calculations, did the landlord engage in fraud?

The Court below correctly found in the affirmative.

2. Where the Court makes statements in a Decision and Order granting class certification, that an overcharge was not willful or fraudulent, without being asked to make any factual findings to that effect, and without reviewing any evidence to that effect, did those statements constitute "the law of the case" such that, later on in the case, the Court was required to disregard the voluminous evidence of fraud submitted in support of the tenants' motion for summary judgment?

The Court below correctly found in the negative.

3. Where a landlord did not produce documentation, as required by two Court Orders, demonstrating how the legal regulated rents of the tenants' apartments had lawfully been increased to over $2,000 per month, and where the landlord did not produce backup documentation to support its outrageous calculations as to the

allegedly legal rent amounts, was the default formula the appropriate method to calculate the legal regulated rent on the base date?

The Court below correctly found in the affirmative.

4. Where two discovery Orders are issued by the Supreme Court directing that Defendants produce documents, which orders are not objected to by Defendants, and where Plaintiffs' attorneys made persistent efforts to obtain those records over a period of nearly three years, and where Defendants made no application to the Court for a protective order or for an extension of time to comply with these discovery Orders, is it proper for the Court to grant summary judgment to the moving party based on the evidence submitted?

The Court below correctly found in the affirmative.

5. Where a motion for summary judgment is supported by an attorney's affirmation attaching extensive, and admissible, documentation, including certified copies of government records, and detailed analyses of records produced by the opposing party on discovery, and where the party opposing summary judgment is afforded every opportunity to submit further documentation in support of its position, but does not contradict the moving party's analysis with anything other than conclusory allegations, is it proper to grant summary judgment?

The Court below correctly found in the affirmative.

6. Where attorneys for a tenant class make a motion for summary judgment as to the methodology for calculating the legal regulated rents, is it appropriate for the Court to make a determination of the methodology for calculating the monthly rent amount, and to refer the issue of calculating the overcharges due to each tenant to a Special Referee for report and recommendations?

The Court below correctly found in the affirmative.

7. Where a landlord, having been granted, two years earlier, an order requiring tenants to pay use and occupancy *pendente lite*, makes a motion with respect to use and occupancy, but does not specify the relief sought, and submits a "document dump" consisting of hundreds of pages of confusingly-marked and poorly explained exhibits, is it proper for the Court to deny said motion, but nevertheless to direct that a Special Referee hear and report with recommendations with respect to the landlord's claims regarding said use and occupancy?

The Court below correctly found in the affirmative.

COUNTER-STATEMENT OF FACTS

A. Unlawful Deregulation of Seventy-Eight Apartments at the Building Without Evidence of the Legal Rents Exceeding $2,000 Per Month

At the time the action was commenced, Defendant WHITEHOUSE ESTATES INC. ("Estates") was the Ground Lessee and Landlord of the Building located at 350 East 52nd Street, New York, New York ("the Building").

In 1984, initial registrations were filed with the DHCR listing 139 apartments in the Building, nearly all of them registered as rent stabilized (R. 11, 101-105).

From 1991 to 2014, Defendants received four J-51 tax abatements for the Building, during overlapping periods (R. 11, 107-131).[1] With the enactment of high rent/vacancy deregulation and high rent/high income deregulation in the 1990's, sometimes called "luxury deregulation," Defendants began deeming apartments deregulated despite their receipt of J-51 benefits.

Defendants never produced rental history records to establish that they lawfully increased the rents to over $2,000 per month, the threshold amount for lawful deregulation, assuming that there were no J-51 benefits in place. Thus, Defendants could not establish that, in purporting to deregulate these apartments, Defendants acted in good faith reliance upon the DHCR's mistaken interpretation of the law (see R. 26-27).

Over the years, until 2011, Defendants gradually designated more and more apartments in the Building as exempt from rent stabilization based on luxury deregulation (R. 145-146). By October 2011, at least seventy-eight apartments were treated as deregulated (R. 227-228, 230).

[1] The last J-51 tax abatement expired effective the third quarter of the 2014-2015 tax year, i.e. December 31, 2014 (R. 131). Defendants have claimed, without backup documentation, that the J-51 benefits expired somewhat earlier, in mid-April 2014 (see e.g. R. 1198).

As each apartment was deemed deregulated, Defendants thereafter entered into market leases with the tenants of these apartments, charged market rates, and stopped registering these apartments with the DHCR as rent stabilized (R. 11). In some cases, apartments were treated as deregulated for many years, while in other cases apartments were first treated as deregulated in 2011, the same year that this action was commenced.

B. The Pleadings

This action was commenced on October 14, 2011 by the ten named Plaintiffs, by the filing of a Summons and Verified Complaint (R. 135-154). All named Plaintiffs are or were tenants at the Building (R. 139-140). The Complaint named as Defendants, *inter alia*, Estates, and WILLIAM W. KOEPPEL President of Estates (R. 140-141).

The Complaint demanded declaratory judgments with respect to the rent stabilized status of Plaintiffs' apartments and their right to stabilized lease renewals at lawful rates, as well as monetary damages for rent overcharges, and attorneys' fees (R. 152-153).

On December 11, 2011, Defendants interposed an Answer to the Complaint, which, as relevant to this appeal, including defenses that Defendants allegedly acted in good faith, in compliance with law, and in reliance upon the DHCR's misinterpretations of the law (R. 158-171).

Plaintiffs interposed an Amended Complaint on June 26, 2016, to name, as an additional Defendant, EASTGATE WHITEHOUSE LLC ("Eastgate"), which became the Assignee of the Ground Lease from Whitehouse in 2014 (R. 1297-1312).[2]

Defendants' interposed an Answer to the Amended Complaint dated July 15, 2016 which included the same three affirmative defenses referenced above, regarding Defendants' allegations of good faith (R. 1352-1362).

C. Defendants' Unlawful Attempts to Exaggerate the Rent Roll

Two years after the *Roberts* decision, Defendants took actions that were clearly intended to unlawfully inflate the Building's rent roll and to convince the tenants that they had no valid rent overcharge claim despite their illegal treatment as market tenants over the previous years (R. 27).

Defendants sent letters to the tenants on or about September 18, 2011, stating, "…[M]any units that were switched into market rates will now need to be converted back to stabilization rates….Although some tenants may soon be paying stabilized rates, other tenants will actually have higher numbers in the stabilization program, due to legal increases we may take…." (R. 103) (emphasis added).

[2] The caption was duly amended by the Clerk of the Court to include Eastgate as a Defendant. Mr. Koeppel, already named as a Defendant in the original Complaint, is also the Managing Member of Eastgate (R. 89-94, 1192).

On October 20, 2011, shortly after this action was commenced, an individual retained by Defendants named Stephen K. Trynosky sent letters to a number of the tenants, attaching copies of newly-prepared DHCR registrations and claiming that the legal regulated rents had been calculated by "establish[ing] a base rent and then us[ing] the authorized guidelines of the past several years to adjust it." The letter went on to state that the amount charged would be considered a "preferential" rent if it was lower than the so-called legal regulated rents (R. 156).

In other words, Defendants concocted a plan whereby Defendants' rents would be converted to "preferential" rents thereby enabling Defendants, so long as they were not caught, to continue to increase the rent at will and have all the benefits of market tenancies while publicly classifying the apartments as rent stabilized.

On November 1, 2011, Defendants filed hundreds of registration forms with the DHCR, based on the illegal and fraudulent methodology described above. These registrations covered the years 2005-2010, during which time dozens of apartments were treated as unregulated and were not registered (R. 419-430).

The calculations, as described, would result in many apartments being designated with a legal regulated rent that was much higher than the amounts actually charged. This was because Defendants purported to add vacancy increases, renewal increases, and other types of increases to the legal regulated rent from the time that the apartments were last registered as rent stabilized, and incorporate those

increases into the legal regulated rent even if the tenants had never been charged those amounts (R. 103). Defendants also claimed that the rents tenants were paying were preferential rents even though no higher rental amount was listed on their market leases (R. 103).

On January 12, 2012, a joint letter was sent to the tenants by counsel for Plaintiffs and counsel for Defendants (R. 173). As explained in the letter, the calculations allegedly performed by Mr. Trynosky purported to calculate the legal regulated rents by using a methodology that "in many cases calculate[d] a purported regulated rent above what was allegedly paid and declared any rent paid below that amount as a 'preferential rent.'" The tenants were directed to ignore than Tyrnosky letters, and advised that the legal rents would be decided by the Court.

The joint letter proved to be a diversion, as Defendants persisted in their efforts to obfuscate the rental history records, by continuing to register apartments with outrageously inflated rental rates, and by demanding that tenants sign renewal leases on rent stabilized forms claiming that their legal rents were much higher than what they were paying.

On March 14, 2012, Defendants filed hundreds more registrations with the DHCR, most of which covered the years 2008-2012 (R. 865-1135). As reflected on the registration rent roll, most of these registrations are listed with an asterisk ("*"),

indicating that they are amended registrations (R. 338, 425-442).[3] It was purported that these registrations incorporated the calculations that had been disavowed by Defendants' counsel in the joint letter two months earlier.

Copies of these registrations were attached to Defendants' papers in opposition to Plaintiffs' motion (R. 864-1135). These registrations evidenced Defendants' illegal scheme to list inflated rents based upon supposed rent stabilized increases that had not been assessed in the years following the deregulation of the apartments.

As an example, a registration form for 2009 lists the tenant Fen Shen Tzu in occupancy pursuant to a lease for a term from January 1, 2009 to December 31, 2010 at a rent of $1,750.00 per month, listed as a preferential rent, with a legal regulated rent of $3,019.12 per month (R. 872). The documentation to back up that calculation, and many other similar calculations, was never provided (R. 1228).

The Record also reflects that dozens of tenants were presented with renewals on rent stabilized forms directing them to agree to pay greatly inflated amounts which were falsely represented as legal regulated rents and/or characterizing lower rents as preferential (R. 22, 27, 487-863).

[3] Until 2014 the DHCR allowed owners to file amended registration forms at will and without question, thus making it easy for unscrupulous landlords, such as Defendants, to alter the rental history record without being caught. Effective January 8, 2014, DHCR began requiring owners to submit an application explaining the reason for the proposed amended registration (R. 1202). Rent Stabilization Code §2528.3(c).

D. Prior to the Order on Appeal, the Court Never Made a Factual Finding, Based on Evidence, That Defendants Did Not Engage in Fraud

On April 11, 2012, Plaintiffs filed a motion for an Order, *inter alia*, certifying this action as a class action pursuant to CPLR Article 9 (R. 177-178). Defendants argued in opposition, *inter alia*, that class actions to recover penalties, such as treble damages pursuant to the Rent Stabilization Law, are not allowed (R. 188-189). In an Order entered August 6, 2012 (Singh, J.), the Court granted Plaintiffs' motion in its entirety.[4]

The Court rejected Defendants' argument with regard to the bar on suing for penalties under CPLR Article 9 as "meritless," inasmuch as tenants were free to waive treble damage claims and seek to recover only actual damages (R. 188-189).

No party requested, on Plaintiffs' motion for class certification, that the Court make a factual finding that Defendants had or had not engaged in fraud or willfully overcharged any of the tenants. Indeed, no evidence was submitted, by either side, as to whether Defendants had engaged in any fraud. Nor would any such evidence have been submitted at stage of the litigation, as to whether Defendants engaged in

[4] The class is defined as "[a]ll current, former, and future tenants of 350 E. 52nd Street whose apartments have been, are currently being, or will be, deregulated by, or subject to attempts to be deregulated by, Defendants, their predecessors in interest, or their successors in interest, pursuant to Luxury Decontrol, while Defendants are or have been in receipt of J-51 tax abatement benefits" (R. 177-178).

fraud, as (a) a finding of fraud had no relevance to Plaintiffs' motion, and (b) no discovery had been conducted.

In making its statements with respect to fraud, the Court referenced prior decisions in other cases where it was determined that – in contrast to the case herein – the landlords had not engaged in fraud. The statements of the Court were made before it came to light, in subsequent cases as well as in appeals in then-pending cases, that it would often be proper to make a finding of fraud, even in the J-51 context, after all the evidence was presented and carefully reviewed.

E. Plaintiffs' Foiled Attempts to Obtain Rental History Records

Subsequent to the Court's grant of class action certification, Plaintiffs' attorneys made numerous diligent attempts to obtain documentation, through pre-trial discovery, that would be adequate to determine the legal regulated rents of the class members' apartments, and to calculate the amount of overcharge damages due and owing to each class member. Before resorting to motion practice, Plaintiffs' attorneys spent nearly three years trying to obtain the necessary documents.

The goal of Plaintiffs' attorneys was to obtain, and review, records of all of the affected apartments showing the legal regulated rent the last time the unit was registered as rent stabilized, the basis for increases in the rent from the last registered amount to an amount over $2,000 per month, and all subsequent leases and lease renewals (see R. 209-210).

Plaintiffs requested the records that were allegedly reviewed by Defendants' expert in 2011 to form the basis of his calculations (see R. 254-255). However, Defendants never produced those records, nor did they ever produce rental history records sufficiently complete to show, for every affected apartment, when and how the rents were legally increased to over $2,000 per month, the market leases that were entered into thereafter for each apartment, and the amount of rent per month collected for each apartment.

On or about January 3, 2013, Plaintiffs served a Demand for Production of Documents relating to the rental histories of apartments included in the class (R. 199-207).

On July 13, 2013, a Preliminary Conference Order was issued (Singh, J.) directing Defendants to produce rental history documents (R. 209-210).

In the interim, Defendants produced some documents. However, on October 16, 2013, Plaintiffs' attorneys sent a letter to Defendants' attorneys, in which they described Defendants' response as "woefully deficient" and inadequate to determine Plaintiffs' legal regulated rents (R. 237-238). Defendants did not respond to that letter or provide any additional documentation

On May 21, 2014, a Status Conference Order was also entered, again directing Defendants to produce rental history documents (Singh, J.) (R. 212-213).

On February 12, 2015, Plaintiffs' attorneys sent another deficiency letter to Defendants' attorneys, attaching multiple exhibits and going into great detail as to the deficiencies in Defendants' discovery responses as of that date (R. 215-244), and including two charts explaining the deficiencies with respect to all the affected apartments (R. 227-228, 230).

In a responsive letter dated March 17, 2015, Defendants' attorneys alleged *inter alia* that Defendants did not have access to records prior to August 11, 2008, the date Mr. Koeppel became President and sole shareholder of Whitehouse Estates, upon taking over from Roberta L. Koeppel (R. 251-252). Defendants' attorneys acknowledged that their clients had turned over the worksheets and calculations from Mr. Tyronsky (R. 252); however, these were never turned over to Plaintiffs' attorneys (R. 254-255).

Defendants never explained how, on the one hand, Mr. Trynosky supposedly had access to records dating from prior to August 2008 (R. 1193, 1197) whereas, on the other hand, Defendants supposedly did not have access to these records inasmuch as they allegedly were in possession of Ms. Koeppel (R. 251-252).

Plaintiffs' attorneys did not accept Defendants' proffered excuse of the change of corporate control of Estates, as Estates was, and remains, a Defendant in this action, and as a corporate Defendant, Estates had the legal obligation to comply with court-ordered discovery (R. 254-255).

F. Defendants Threaten Eviction for Refusal to Sign Illegal Renewal Leases

In April-May 2014, Defendants issued notices of termination of tenancy to two named Plaintiffs, KIRK SWANSON and BETTY FURR, alleging that their tenancies were terminated for refusal to sign lease renewals, which would have required them to pay, while this action as still pending, rents at illegal rates that were not reviewed or approved by the Court. Plaintiffs moved by Order to Show Cause to enjoin Defendants from commencing such proceedings. On May 21, 2014 counsel appeared for argument on the motion before Justice Singh (R. 471). Argument was heard, and a decision was rendered on the record.

Upon hearing argument, the Court found that the tenants' right to maintain this action for rent overcharges outweighed Defendants' desire to unilaterally select the amount of rent to be charged in a renewal lease, and to submit that lease to a tenant in a "take it or leave it" fashion, thereby subjecting tenants to possible eviction proceedings in Housing Court. The Court determined that the proper mechanism for Defendants to seek an increase in use and occupancy, while the case was pending, was to make a motion for such relief, and the Court explicitly granted Defendants leave to make such a motion. The Court also directed, *sua sponte*, that if Defendants found such motion to be too onerous, the tenants were directed to pay interim use and occupancy in the amount of their last expired leases (R. 481-484).

There is nothing in the Record showing that any notice of the Order to pay use and occupancy was ever disseminated to the tenants. Defendants took no further action Court with regard to use and occupancy for over two years.[5]

G. Deciding They Have Given Defendants More Than Enough Time to Produce Documents, Plaintiffs File Motion for Summary Judgment

By December 9, 2015, Plaintiffs' attorneys, having pursued their demands for rental history documents since January 2013, without success, finally filed their motion for an Order, granting leave to interpose an Amended Complaint naming Eastgate, the assignee of the Ground Lease, as an additional Defendant; pursuant to CPLR §3211(b), striking Defendants' affirmative defenses; and pursuant to CPLR §§3126 and 3212(a), granting summary judgment on their cause of action for a declaratory judgment, finding Defendants in default of their discovery obligations, finding that Plaintiffs' rents were to be calculated pursuant to the default formula, finding that Plaintiffs' rents should be frozen due Defendants' failure to properly register their apartments, and calculating the amount of refund due to each Plaintiff and class member (R. 18-22, 41-42).

In support of the motion, Plaintiffs submitted an affirmation of one of their attorneys accompanied by numerous documents, including *inter alia*, a certified

[5] Defendants' papers refer to Housing Court nonpayment proceedings which they brought against specific tenants (R. 1193-1195). These Housing Court cases have no relevance to this appeal, which deals with Supreme Court's determination as to the calculation of the tenant's legal rents.

copy of the DHCR rent roll for the Building for every year from 1984 to 2015, Department of Finance records showing the receipt of J-51 benefits every year from 1991 to 2014, ownership records from ACRIS, and a detailed summary, prepared by them, of the records provided by Defendants to date, consisting of leases by Apartment Number, Name of Tenant(s), Period Lease or Lease Renewal, and Amount Charged (R. 256-278). Plaintiffs also presented two charts analyzing these records to show how these records were insufficient for the purposes of calculating each tenant's legal regulated rent and amount of overcharges (R. 227-228, 230).

One chart included a list of the sixty apartments for which some records had been provided (R. 227-228). On that chart, Plaintiffs indicated whether they had received (i) a copy of the last lease in effect the last time the apartment was registered as stabilized, (ii) copies of all leases from the time the apartment was last registered to present, and (iii) records of any individual apartment improvements between the last rent stabilized lease and the first market lease (R. 227-228). The second chart was a list of twenty-three apartments where Plaintiffs had information indicating those apartments should be part of the class, but for which no records were provide (R. 230).[6]

[6] Plaintiffs based this list of twenty-three apartments on the annual DHCR rent rolls, which showed certain apartments registered as rent stabilized each year until a certain point, and on a list of affected apartments that had been submitted to the Court by Defendants in May 2012 (R. 174-175).

In sum, the evidence submitted by Plaintiffs in support of their motion showed that there was no sufficient documentation, for any of the seventy-eight affected apartments, to show how the rents were increased to over $2,000 per month, what legal increases could be assessed from the point of deregulation to the present, and what rents were actually charged.[7]

H. Defendants Miss Yet Another Opportunity to Provide Adequate Rental History Records, and Seek Unspecified Relief With Respect to Interim Use and Occupancy Payments

On February 26, 2016, Defendants submitted a Notice of Cross-Motion for an order: "1. Determining the fair and reasonable amount of use and occupancy for the plaintiff-class members who have not renewed their leases or paid any rent increase since the inception of this action to present; 2. Specifying and enumerating the Defendants' remedies for the tenant class members['] failure to pay use and occupancy as directed; 3. Granting defendant-landlord use and occupancy pendente lite for the remainder of this action…." (R. 459). Defendants' papers included an attorney affirmation, two affidavits, and several exhibits.

As previously stated, in May 2014 Justice Singh had issued a *sua sponte* Order from the bench, directing class members to pay use and occupancy *pendente lite* in the amount of their last lease, and granting leave for Defendants to make a motion to fix a higher amount of use and occupancy if they chose. In their cross-motion,

[7] Defendants submitted no evidence to contradict Plaintiffs' summaries of the documents.

however, Defendants did not provide any backup documentation to support their calculations of the increased use and occupancy payments they were seeking; they also did not specify any specific remedies as to class members, only two of which were identified, who were in arrears as per Justice Singh's Order; and otherwise, Defendants reiterated the same request for relief as had been granted previously, i.e. an Order directing payment of use and occupancy *pendente lite*.

The paragraphs below contain summaries and analyses of the documents submitted by Defendants.

"Leases of Tenants Last Expired and Proffered but Unsigned" (R. 486-863), presented as what the Court described as a "document dump" (R. 22) in that the submission did not include all leases for each subject apartment in this action; for others there were gaps between years of occupancy or no leases earlier than 2011, when this action was commenced; some were not the actual leases in effect in 2011, but appeared to be leases that Defendants offered after inserting "their own chosen rental amounts" (R. 22); none of the leases indicates how the monthly rental amounts were calculated; the Court below found "that the 'leases' defendants submitted in support of their argument that it [was] now possible to calculate the apartments base rents are both incomplete and unreliable" (R. 22).

"Amended Rent Registrations" (R. 864-1135), presented to show amended registrations filed by Defendants in 2012, which have no evidentiary value since the

backup documentation to support these outrageously high rental rates was never submitted; the Court below found that "the rent calculations contained therein [were] of the defendants['] own devise – not the properly calculated legal rent for each apartment" (R. 23). Further, the Court below found that neither of the two piles of rent registration statements was "accompanied by any evidence (i.e. receipts or work orders) of any repair or renovation work purportedly done to any of the registered apartments" (R. 23), nor were any DHCR orders permitting rent increases submitted (R. 23).

"Chart of Tenant Status" and "Calculations of Non-Renewals" (R. 1180-1191), the Building's 2015 rent roll, which the Court described as "misidentified," and which "sets forth the same apartment rents that defendants calculated themselves" (R. 23), without backup documentation such as older leases to prove that Defendants had the right to vacancy allowances. As correctly noted by the Court below, "Absent any such proof (i.e., dated surrender agreements and/or lease applications evincing when any given apartment was and was not tenanted), defendants are foreclosed from collecting increases, as a matter of law, since they, too, are authorized only after a duly supported application is made to the DHCR [citing Rent Stabilization Code ("RSC") §2522.8]" (R. 23).

Affidavit of Mr. Koeppel (R. 1192-1195), detailing unsuccessful efforts to recover arrears from two class members in Housing Court proceedings.

Affidavit of Mr. Tronsksy (R. 1179-1201), inexplicably dated April 8, 2015, a year earlier, claiming, in conclusory fashion and without attaching supporting documentation, that he "looked at records going back to 2006 and in some cases even further back," and that he "created a worksheet for each individual apartment." He also makes references to "calculations attached to this motion," but no calculations, or even summaries of calculations, were actually attached.

Notably, Defendants did not respond to the detailed and fact-specific charts presented by Plaintiffs' attorneys showing exactly what records were missing, apartment-by-apartment, and explaining how, without those records, the legal regulated rents could not be properly calculated. For example, Defendants did not controvert Plaintiffs' evidence that the records were missing; Defendants did not produce copies of the missing records; they did not even provide summaries of the missing records.[8]

Defendants' opposition to Plaintiffs' motion was a transparent effort to deflect the Court's attention away from the central issue of the overcharge calculations, and

[8] Defendants' Memorandum of Law, which they included in the Record on Appeal (R. 1203-1220), made certain factual representations regarding additional documents submitted in January-February 2016 (R. 1216-1217); they also made representations therein as to the number of apartments affected by the class action (R. 1213). However, a memorandum of law is only to be included in a record on appeal "for the limited purpose of determining whether certain …contentions are preserved for [the court's] review….The memorandum of law otherwise is not properly before [the court], however, inasmuch as it is well settled that '[u]nsworn allegations of fact in [a] memorandum of law are without probative value." *Byrd v. Roneker*, 90 A.D.3d 1648 (4th Dept. 2011), *citing Zawatski v. Cheetowaga-Maryvale Union Free School Dist.*, 261 A.D.2d 860 (4th Dept. 1990), *leave denied*, 94 N.Y.2d 754 (1999).

to attempt to gain the Court's sympathy because of two tenants, out of seventy-eight, who had not paid use and occupancy, and other class members who had not paid outrageous rent increases despite the Court having instructed Defendants in 2014 that they could not calculate increases unilaterally and should make a motion to fix use and occupancy should they believe they were entitled to increases.

I. Plaintiffs' Reply Papers Show that Defendants' Rental History Documents are Completely Inadequate

In reply, Plaintiffs presented a detailed analysis of the additional, late documents that Defendants were permitted to turn over in January-February 2016 (see R. 1228-1241). Plaintiffs showed that, even taking these additional documents into account, Defendants still had not provided sufficient evidence.

Plaintiffs also submitted, in their reply, a copy of the DHCR's J-51 Rent Registration Initiative – FAQ's, dated January 2016 (R. 1242-1246). Notably, the DHCR recommended that the legal rent be calculated by identifying the rent stated in the most recent rent stabilized lease prior to the improper deregulation; then identifying, and adding to the rent, all subsequent vacancy and renewal leases that were in effect at the time, as well as any other lawful and documented increases for Individual Apartment Improvements (IAI) and/or Major Capital Improvements (MCI); if the rent resulting from these calculations is less than the rent being charged to the current tenant, the rent should be adjusted; if the rent resulting from these calculations is more than the rent actually charged to the current tenant, the rent

actually charged should be registered, so that the legal regulated rent to be registered cannot exceed the actual rent being paid by the tenant; and that, in cases where an independent fraudulent scheme to deregulate or willful overcharges exist, greater penalties may be imposed. Also, owners were advised to retain all records and calculations used in arriving at the recalculation of the rent and the rent overpayments.

J. Defendants' Reply in Further Support of their Claim as to Two Tenants

In further support of their cross-motion, Defendants submitted only an arrears report for the same two class members, purporting to show their arrears as of May 10, 2016 (R. 1276-1277). Again, Defendants apparently believed that the class action litigation should stop entirely because of two tenants who were in arrears.

K. The Court's Detailed and Comprehensive Decision and Order

After carefully reviewing all the evidence submitted by the parties, the Court made the following finding:

> "…[D]efendants' evidence is too incomplete to permit an accurate calculation of either the base rent, or the current legal rent, for any of the 78 apartments that plaintiffs assert were improperly deregulated" (R. 23).

The Court went on to emphasize that finding as follows:

> "[D]efenants 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" (R. 26-27).

The Court also made the following findings:

> "The court notes that, while the 78 alleged acts of improper apartment deregulation took place over time between 1995 and 2011, it was on March 8, 2012, that defendants filed back-dated registrations for all 78 apartments with the DHCR for 2007-2011. By back-dating the apartment registrations for five years (six, if one includes 2012, the year in which the amended registrations were filed), defendants were seeking to (1) obviate an official determination that the building's apartments were and are rent stabilized; and (2) impose their own rent calculations, as the presumptively legal rent, for the duration of the statutory four-year look-back period that would normally apply in the overcharge action that plaintiffs had recently commenced. The court finds this en masse filing a fraudulent attempt to (1) avoid the consequences of defendants' previous illicit deregulation of the 78 subject apartments herein; and (2) to use the RSL to prevent plaintiffs from challenging the rents that defendants had unilaterally calculated for those apartments….[T]he 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" (R. 27).

The Court rejected Defendants' argument that there was insufficient evidence of fraud because Justice Singh had "found" in his decision of August 12, 2012 that Plaintiffs were not entitled to treble damages. The Court quoted portions of Justice Singh's decision wherein he stated "that a landlord would not be found to have committed fraud, and thereby subjected itself to liability for treble damages, where that landlord relied 'in good faith …on DHCR's long-standing and unambiguous

interpretation of the luxury decontrol statute.' [*72A Realty Assoc. v. Lucas*, 32 Misc.3d 47, 49 (App. Term 1st Dept. 2011)]" (R. 26). The Court found that, in contrast to cases where the overcharges resulted solely from reliance upon the DHCR's misinterpretation of the law, in this case Plaintiffs "demonstrated the necessary quantum of 'fraud'" (R. 27).[9] The Court directed that a Special Referee hear and report on these calculations (R. 27, 36-37).

The Court also struck Defendants' fourteenth, fifteenth and seventeenth defenses in their Answer,[10] referring to the Court's previous discussion wherein it was determined that Defendants did not act according to the law, or in good faith, or in justifiable reliance upon the DHCR's misinterpretation of the law (R. 34).

Defendants' cross-motion was denied (R. 37). However, clearly Justice Singh's *sua sponte* Order of May 21, 2014 remained in full force and effect. Moreover, the Court directed that the Special Referee make calculations as to use and occupancy (R. 35-36), including the amount "that was to be paid for each plaintiff's apartment" and "the amount of use and occupancy that was actually paid, if any, by each plaintiff in this action to date…." (R 37). Further, the Court directed that "when defendants submit their motion to confirm or deny the Special Referee's

[9] The Court cited to cases where landlords have been found to have engaged in fraud in the J-51 context. See brief *infra*.

[10] These are the eighth, ninth, and tenth affirmative defenses in Defendants' Amended Answer (R. 1361).

report, it shall include a request that the court issue an order requiring those plaintiffs who have not paid any use and occupancy to post a bond, equal to the amount of use and occupancy specified in Justice Singh's May 21, 2014 order, within 20 days after service of a copy of the court's decision on that motion with notice of entry" (R. 35-36).

Following service of Notice of Entry of the March 28, 2017 Order, Defendants were granted a number of enlargements of time to perfect their appeal.

ARGUMENT:

I. IT WAS ENTIRELY CORRECT FOR SUPREME COURT TO AWARD SUMMARY JUDGMENT HOLDING THAT THE LEGAL REGULATED RENTS FOR EACH AFFECTED APARTMENT SHOULD BE CALCULATED USING THE DEFAULT FORMULA

A. Plaintiffs Met Their Initial Burden on Their Motion for Summary Judgment.

1. Plaintiffs' Motion Papers Were Entirely Proper and Sufficient

Plaintiffs moved for summary judgment, seeking *inter alia* a declaratory judgment to the effect that the tenants' legal regulated rents should be calculated pursuant to the default formula.[11] Plaintiffs' motion papers included the affirmation of one of their attorneys, attaching thereto summaries of the rental history records

[11] As limited by their brief, Defendants do not appeal from other portions of the declaratory judgment granted by the Supreme Court (see R. 36, first and second decretal paragraphs), nor do they appeal from the Supreme Court's directions that a Special Referee calculate the amount of monthly rent for each tenant or the amount of the overcharges due for each tenant.

provided by Defendants on discovery, records of J-51 tax abatements, and a certified printout of the DHCR rent roll for the entire building from 1984 to 2015.

When moving for summary judgment, it is perfectly acceptable to do so by the affirmation of an attorney, even if he or she does not have personal knowledge of the facts, as long as it is accompanied by acceptable attachments which do provide "evidentiary proof in admissible form." *Zuckerman v. City of NY,* 49 N.Y.2d 557, 563 (1980).

Plaintiffs' attorneys properly attached to their motion, as exhibits, summaries of the thousands of pages of rental history records provided by Defendants. This was proper, and these summaries were admissible. "As for the best evidence rule, the 'voluminous writings' exception to that rule would apply. That permits the admission of summaries of voluminous records or entries where, if requested, the party against whom it is offered can have access to the original data. (See Richardson, Evidence [10th ed.], § 574.)" *Ed Guth Realty Inc. v. Gingold*, 34 N.Y.2d 440, 452 (1974).

Defendants' allegation in their brief, at 31, that Plaintiffs' motion should have been denied because no affidavits were attached, is incorrect. Plaintiffs' motion was based upon Defendants' own documentation showing the gaps in the rental history records, as well as the DHCR rent roll, and the J-51 records. Affidavits were not necessary and, indeed, would have added nothing to the motion, as the necessary

information as to the entire class obviously was not within the personal knowledge of any of the individual class members.

Neither were Plaintiffs' attorneys required to attach documentation showing the amount of rent paid by each class member; thus, Defendants' allegation in their brief, at 32, that Plaintiffs did meet their burden in that regard is unavailing. To do so would have been impossible in any event.

It was well within the purview of the Supreme Court to order that the issue of the amount of overcharge refunds owing to each class member be determined by a Special Referee (CPLR 3212[c]). Indeed, Defendants have not even appealed from that portion of the Supreme Court's Order as directed the Special Referee to report and make recommendations as to these calculations; Defendants only appeal to the extent that the Supreme Court ordered that the default formula be applied.

As will be seen, Plaintiffs' motion made out all the *prima facie* elements in support of their request that the legal regulated rents be calculated pursuant to the default formula.

2. <u>The Default Formula Is Applicable As a Matter of Law.</u>

The Supreme Court correctly found that, based upon the documents attached to their attorneys' affirmation, Plaintiffs met their threshold burden, on their motion for summary judgment, of establishing that "(i) the rent charged on the base date cannot be determined, or (ii) a full rental history from the base date is not provided,

or (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment…." RSC §2522.6(b)(2).

Where, as here, the tenants have met that threshold burden, "the default formula, used by the DHCR to set the rent where no reliable records are available, [is] the appropriate vehicle for fixing the base date rent…." *Thornton v. Baron*, 5 N.Y.3d 175, 181 (2005), *cited in Matter of Regina Metropolitan, LLC v. DHCR*, 35 N.Y.3d 332, 356 (2020).

As this Court stated in *Simpson v. 16-26 E. 105, LLC*, 176 A.D.3d 418 (1st Dept. 2019), "the default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable."

Plaintiffs, in their motion, established *prima facie* at least two of the alternative grounds for applying the default formula: (1) They established that the rent on the base date could not be determined, and (2) they established that Defendants engaged in a fraudulent scheme.

3. Plaintiffs Established That This Is Not a Garden-Variety Post-*Roberts* Case.

It is, of course, true that this case is one of the cases described by the Court of Appeals in *Regina Metro,* 35 N.Y.3d at 350, that "arose in the wake of …*Roberts* …which rejected DHCR's long-standing statutory interpretation and concluded that

luxury deregulation was unavailable in any building during receipt of J-51 benefits."[12]

And, of course, it is also true that the provisions of the Housing Stability and Tenant Preservation Act ("HSTPA") (L. 2019 ch 36 Part F), which were enacted over two years after the decision of the Supreme Court herein, and which dramatically amended the RSL as to the way overcharge damages are to be calculated, do not apply to this appeal, because these changes in the RSL may not be applied retroactively, and thus this case must be resolved under the law in effect at the time the overcharges occurred. *Regina Metro*, 35 N.Y.3d at 380.

And further, although the Court of Appeals in *Regina Metro*, 35 N.Y.3d at 356, quoted its own decision, six years earlier, in *Borden v.400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 389 (2014), for the general proposition that a finding of willfulness "is generally not applicable to cases arising from the aftermath of *Roberts*," the Court below correctly found that this case is a marked departure from that general observation.

Plaintiffs presented, on their motion for summary judgment, a painstaking analysis summarizing Defendants' discovery documents showing that none of the apartments were properly removed from rent stabilization, even in the absence of J-

[12] *Roberts v. Tishman Speyer Properties L.P.*, 13 N.Y.3d 270, 285-286 (2009).

51 benefits. Further, Plaintiffs established that upon filing retroactive registrations in 2011-2012, Defendants engaged in fraud by performing outrageous calculations, not sanctioned by any provision of the RSL or any DHCR guidance, and then refused to turn over their records of these calculations and unilaterally presented retroactive registration forms, leases, and lease renewals, which contained grossly inflated rents.

It is appropriate to apply the default formula where no reliable rental records are available. *Matter of Partnership 92 LP v. DHCR*, 11 N.Y.3d 859, 860 (2008). Thus, because Plaintiffs demonstrated, in their motion papers, that Defendants had not produced adequate leases, lease renewals, rent ledgers, and other records supporting rent increases such as records of Individual Apartment Improvements or DHCR orders increasing the rents due to Major Capital Improvements for the seventy-eight apartments to "determine the correct legal regulated rent," it was proper for the Court below to find that the rents had to be calculated pursuant to the default formula. *Matter of Bondham Realty Assoc., L.P. v. DHCR*, 71 A.D.3d 477, 477-478 (1st Dept. 2010).

In this case, the base date is October 14, 2007, four years prior to the date this action was commenced by the filing of the Summons and Verified Complaint. RSC §2520.6(f); *Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590, 592 (1st Dept. 2012).

It is acknowledged that prior to the *Regina Metro* decision various methodologies were applied in J-51 cases for the purpose of calculating the legal

regulated rents in cases where there was no fraud and where the rental history records were made available. The *Regina Metro* Court held that, in a case of a good faith deregulation in a J-51 context, a market rent charged on the base date may be used to calculate the legal regulated rent. *Regina Metro*, 35 N.Y.3d at 357; *see also Kuzmich v. 50 Murray St. Acquisition LLC*, 187 A.D.3d 670, 670-671 (allowing market rent charged on base date to be used because of "lack of willfulness by the landlord"); *Corcoran v. Narrows Bayview Co., LLC*, 183 A.D.3d 511, 512 (1st Dept. 2020) (lack of DHCR filings does not preclude using the market rent on the base date where there was no evidence of fraud).

However, the same could not be said here, where Plaintiffs established that the seventy-eight apartments were improperly deregulated, even apart from Defendants' alleged reliance upon misinterpretations of the law regarding J-51 benefits. *Id.*

On a number of occasions, this Court has found that landlords engaged in the fraudulent deregulation of apartments, even in the J-51 context. *See, e.g., Nolte v. Bridgestone Assoc. LLC*, 167 A.D.3d 498, 499 (1st Dept. 2018) ("[D]efendant failed to raise an issue of fact as to whether the rent was improperly increased between 1999 and 2000 based on false claims of individual apartment improvements"); *Kreisler v. B-U Realty Corp.,* 164 A.D.3d 1117, 1118 (1st Dept. 2018) ("[W]e find defendants have not shown that Supreme Court erred in directing the Special Referee

to use the default formula of [RSC] §2522.6(b)(2) to determine plaintiffs' base rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment").

Also, in *Altschuler v. Jobman 478/480, LLC*, 135 A.D.3d 439, 440 (1st Dept. 2016), *leave to appeal dismissed*, 28 N.Y.3d 945 (2016), this Court upheld the application of the default formula in the J-51 context based on findings of fraud:

> "Plaintiff claimed that defendant engaged in a 'fraudulent scheme' to deregulate the apartment by increasing the 1995 rent of $422.04 to over $2,000 in subsequent years, executing market rent leases during a time it was receiving J-51 tax benefits, failing to provide him with a lease rider, and failing to file the required annual registrations with DHCR during his tenancy. Defendant failed to refute these allegations of fraud. Its argument that the apartment was deregulated because it was renovated in 1995 is unavailing, as it fails to support it with sufficient evidence. The affidavit of its lease administrator, stating that at least $6,296.14 of individual apartment capital improvements were performed prior to plaintiff's first lease, is insufficient, as it was unsupported by 'bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the [claimed improvements].'"

Other cases where findings of fraud have been made in the J-51 context include *Townsend v. B-U Realty Corp.*, 67 Misc.3d 1228(A), 2020 N.Y. Misc. LEXIS 2587 at 35 (Sup. Ct. NY Co. 2020) ("In view of defendant's failure to treat plaintiffs' apartments as rent-stabilized, coupled with its failure to timely and accurately report the rents paid by the prior tenants of those apartments, application

of the default formula to fix plaintiffs' legal regulated rents is proper"); *Cooper v. 85th Estates Co.*, 57 Misc.3d 1223(A), 2017 N.Y. Misc. LEXIS 4549 at 21-22 (Sup. Ct. NY Co. 2017) (tenants not provided with notice explaining calculation of rent at over $2,000 per month, and evidence showed rents did not in fact exceed $2,000 per month).

A finding of fraud has been upheld on appeal where "neither tenant nor her predecessor were informed that the apartment was rent stabilized nor offered a stabilized lease, and landlord persisted in charging illegal rents, [and in] addition, landlord failed to file timely and proper annual registrations, and the documentary proof otherwise reveals a pattern of unsubstantiated and unexplained increases in rent." *Vendaval Realty, LLC v. Felder*, 67 Misc.3d 145(A), 2020 N.Y. Misc. LEXIS 3098 at 2-3 (App. Term 1st Dept. 2020).

Plaintiffs also showed, on their motion for summary judgment, that when Defendants purported to recalculate their rents in 2011-2012, they did not set those rents based on the amount actually charged on the base date of October 14, 2007, as would have been allowed by the Court in *Regina Metro* had there been no fraud; rather they 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.

A landlord may not change a rent stabilized lease rent to a preferential rent and claim a higher legal rent without placing language to that effect in the tenant's original lease. *Matter of Rania Misiskli LLC v. DHCR*, 166 A.D.3d 625, 627 (2d Dept. 2018); *Matter of 10th St Assoc. LLC v. DHCR*, 110 A.D.3d 605 (1st Dept. 2013); *Matter of Coffina v. DHCR*, 61 A.D.3d 404, 404-405 (1st Dept. 2009), *leave to appeal denied*, 13 N.Y.3d 702 (2009).

Even after the DHCR issued its guidance in January 2016, recommending that the so-called "reconstruction method" be used only if the calculation resulted in a rent the same or less than what the tenant was already paying (R. 1242-1246), Defendants doubled down and insisted on the correctness of their outrageous calculations whereby they purported to drastically increase the legal rents.

In another case, similar to this case in that it also involved tampering with rental records, *435 Central Park West Tenant Association v. Park Front Apartments, LLC*, 183 A.D.3d 509, 510 (1st Dept. 2020), this Court upheld the denial of a landlord's motion for summary judgment, where the tenants presented "sufficient evidence to raise an issue of fact of whether defendant tampered with a recertification process …and pressured or misled tenants, for the purpose of improperly raising rents …far higher than [legal] rates." The Court rejected the

"defendant landlord's argument that the fraudulent exception to the four-year lookback period applies only to a fraudulent-scheme-to-deregulate case. In the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula…." *Id.* at 510-511.

In summary, Plaintiffs met their initial burden, on their motion for summary judgment, of proving that the rents on the base date were unreliable based upon Defendants' fraudulent deregulation of the seventy-eight apartments, as well as Defendants' machinations in 2011-2012, and the lack of sufficient rental history records.

B. Defendants Failed to Meet Their Burden of Establishing the Existence of a Triable Issue of Material Facts

1. Defendants Did Not Substantively Dispute Plaintiffs' Analysis of the Rental History Records, or Offer Any Counter-Analysis of Their Own.

Once the moving party has met its initial burden on a motion for summary judgment, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [the opposing party] rests his [or her] claim or must demonstrate acceptable excuse for his [or her] failure to meet the requirement of tender in admissible form;

mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman*, 49 N.Y.2d at 562.

"In opposition to a motion for summary judgment it is not enough to say that something will be shown at the trial. As has been so often said, '[i]t is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his [or her] proofs, in order to show that the matters set up in his [or her] answer are real and are capable of being established upon a trial.'" *Cabrera v. Ferranti*, 89 A.D.2d 546, 547 (1st Dept. 1982), *citing DiSabato v. Soffes*, 9 A.D.2d 297, 301 (1st Dept. 1959).

"'Bald conclusory assertions, even if believable, are not enough [to defeat summary judgment]'". *S. J. Capelin Associates Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 342 (1974), *citing Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 (1970). Clearly, if there is evidence that Plaintiffs' rents were properly calculated, that evidence is within Defendants' control. Therefore, Defendants should have presented proof in evidentiary form substantiating their claims. *Id.*

"It is well established that on a motion for summary judgment, the court must determine whether the factual issues presented are genuine or unsubstantiated…. Where the asserted factual issue is merely feigned, summary judgment should be

granted." *Pacheco v. Fifteen Twenty Seven Assocs. L.P.*, 275 A.D.2d 282, 284 (1st Dept. 2000) (citations omitted).

Plaintiffs have shown through documents that there are substantial gaps in Defendants' rental history records, that none of the seventy-eight apartments was lawfully removed from rent stabilization, and that Defendants engaged in a massive cover-up in 2011-2012 intended to grossly inflate the rent roll by outrageously exaggerating the lawful rentals. Although Defendants have access to the same records, their affidavits in opposition merely state in conclusory fashion that their calculations were proper. Moreover, the fact that the affidavit of Mr. Trynosky is dated nearly a year before Plaintiffs even filed their motion is not explained.

In summary, Defendants' bald, conclusory allegations with regard to the supposed legality and good faith of their actions are entirely insufficient to defeat Plaintiffs' motion for summary judgment, and the Supreme Court correctly so found.[13]

2. Supreme Court Was Not Precluded From Finding Fraud By "The Law of the Case Doctrine."

Defendants argue in their brief, at 41-42, that the Decision and Order of Justice Singh dated August 6, 2012 is "law of the case" thereby barring Plaintiffs

[13] Defendants' claims with respect to their affirmative defenses alleging good faith and reliance upon governmental misinterpretation of the law are duplicative of the claims they made with regard to Plaintiffs' motion for summary judgment. As such, Plaintiffs will not belabor this Court with duplicate arguments, but will respectfully refer the Court to this part of their brief for a consideration of that portion of Defendants' appeal.

from claiming that Defendants acted fraudulently or in bad faith. However, Justice Singh's remarks in his Decision regarding willfulness were made without any evidence on the issue being placed before the Court, and without any party requesting that a finding be made in that regard. Moreover, these remarks were made before Plaintiffs even had the opportunity to engage in class-wide discovery.

Further, as explained above, Defendants have taken certain language in Justice Singh's Order and placed it out of context. Justice Singh's comments were made to respond to Defendants' allegation that CPLR Article 9 did not permit tenants to pursue a class action for rent overcharges under the RSL because the RSL authorized an award of treble damages, which constituted a penalty under Article 9. The Court's first response to that allegation was to state, correctly, that tenants were free to waive claims of treble damages and pursue only claims of actual damages. Secondarily, the Court noted that, in other cases in the J-51 context, other Courts had found that landlords did not overcharge willfully and thus treble damages would not be awarded where the overcharge was based solely on prior misinterpretation of law.

Taken in their proper context, Justice Singh's statements regarding willfulness and treble damages in his 2012 Decision and Order do not constitute the law of the case, and did not preclude Plaintiffs from pursuing a claim of fraud in their motion

for summary judgment, filed over three years later, after a careful review of documents produced by Defendants on discovery.[14]

It is not surprising that Defendants would argue to this Court that the law of the case doctrine should apply, because Defendants' submission to the Supreme Court on the substantive issue of rent overcharge, in opposition to Plaintiffs' motion for summary judgment, was weak and devoid of any specific refutations of Plaintiffs' analysis.

As this Court has held, numerous times, the law of the case doctrine is only applicable to "legal determinations that were necessarily resolved on the merits in a prior decision." *J.P. Morgan Securities, Inc. v. Vigilant Insurance Company*, 166 A.D.3d 1, 9 (1st Dept. 2018), citing *Brownrigg v. NYC Housing Authority*, 29 A.D.3d 721, 722 (1st Dept. 2006); see also *Matter of Michael R. v. Amanda R.*, 175 A.D.3d 1134, 1139 (1st Dept. 2019) (same). Justice Singh's so-called "legal determination" as to willfulness, even if it could be characterized as such, was not necessary to the decision to grant class certification.

Importantly, this Court has described the law of the case doctrine as follows:

> "'[W]hile the law of the case doctrine is intended to foster "orderly convenience"…, it is not an absolute mandate which limits an appellate court's power to reconsider

[14] Two years after Justice's Singh's ruling, the Court of Appeals ruled in *Borden,* 24 N.Y.3d at 394-395, that tenants could waive claims for treble damages in order to pursue a class action for actual damages under Article 9 of the CPLR. This proves that, at a minimum, Justice Singh did not "necessarily resolve on the merits" the tenants' claims of fraud.

> issues where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination or a change of law." *J.P. Morgan*, 166 A.D.3d at 9, *citing Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 218 (2d Dept. 2009).

In summary, the Supreme Court was entirely correct to reject Defendants' claim that the law of the case doctrine applies here, and Defendants' similar claims on this appeal should also be rejected.

3. Defendants' Efforts to Analogize This Case to Other Cases in the J-51 Context, Where Fraud Was Not Found, Are Entirely Unavailing.

Defendants' brief cites to cases where landlords registered apartments retroactively in the years after *Roberts*, and this Court found that there was no fraud. However, the critical distinction is that, in those cases, the landlords produced documentation to substantiate the rent amounts listed in those retroactive registrations. In this case, Defendants failed to do so.

For example, *Goldfeder v. Cenpark Realty LLC*, 187 A.D.3d 572 (1st Dept. 2020), involved an apartment that was subject to rent control while the landlord was receiving J-51 benefits. When the apartment became vacant and the apartment was rented to the plaintiffs, it was lawful under the RSL for the landlord to charge a fair market rent. Although the plaintiffs were not initially provided with a rent stabilized lease, the Supreme Court later granted them a declaratory judgment as to their rent stabilized status. Further, the Court found that the plaintiffs were properly served with the Initial Registration Form, and declined to file a Fair Market Rent Appeal at

the DHCR within the statutory time period. *Id.* at 573. Moreover, in that there was a transition between a long-term rent controlled tenant and the plaintiffs, it was obvious that Individual Apartment Improvements had been performed, which the plaintiffs did not refute. *Id.* at 573. On the basis of this detailed assessment of the relevant facts, this Court declined to find that the defendant engaged in fraud.

Similarly, in *Matter of Park v. DHCR*, 150 A.D.3d 105 (1st Dept. 2017), *leave to appeal dismissed*, 30 N.Y.3d 961 (2017), the Court found that the apartment was subject to rent control while the landlord was receiving J-51 benefits, and when the rent controlled tenant moved out, the apartment was rented at a fair market rate agreed to by the subsequent tenant, as allowed by the RSL. *Id.* at 109. The landlord also submitted documentary support for its claim that expenditures for Individual Apartment Improvements exceeded $200,000. *Id.* Thus, although the new tenant did not receive a stabilized lease, there was no overcharge because the rent charged was legal. *Id.* Similarly, when the next tenant, petitioner Park, moved in, after the J-51 benefits expired, there was no overcharge because the rent lawfully had been increased to over $2,000 per month thereby removing the apartment lawfully from rent stabilization. *Id.* at 112.

Another case discussed by Defendants in their brief, where this Court did not find fraud, was *Taylor v. 72A Realty* Assoc., L.P., 151 A.D.3d 95 (1st Dept. 2017), which was one of the cases that went up to the Court of Appeals, and was decided

there as part of the *Regina Metro* decision. In *Taylo*r, the previous rent stabilized tenant was paying a rent of $1,464 per month at the time he moved out. The apartment was subsequently rented to the plaintiffs pursuant to a market lease for $2,200 per month, during the time when the defendant was receiving J-51 benefits. *Id.* at 97-98. The defendant provided documentation of the expenses for Individual Apartment Improvements, which were described in great detail. *Id.* at 98-99. Based upon this review of the evidence, this Court determined that there was no evidence of fraud in the setting of the plaintiffs' initial rent. *Id.* at 107-108.

In summary, the cases discussed above are very different from this case, and Defendants efforts to analogize those cases to this case are entirely unavailing. Contrary to the cases discussed above, in this case Defendants did not produce evidence that the rents for the tenants' apartments were lawfully increased to over $2,000 per month; they did not refute Plaintiffs' analysis of Defendants' rental history records showing gaps and inexplicable increases in the rents; and they did not justify their recalculations done in 2011-2012 where they registered the apartments at outrageously high rents and presented lease renewals to the tenants with inflated rents. In short, the cases discussed above do not provide any help to Defendants, and as such they should not be followed here.

II. THE COURT BELOW DID NOT REACH THE ISSUE OF DISCOVERY SANCTIONS BECAUSE IT PROPERLY FOUND THAT PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT.

In their motion to the Supreme Court, Plaintiffs requested, as an alternative to summary judgment, that discovery sanctions be imposed upon Defendants due to their failure to comply with Court-ordered discovery. The Supreme Court did not reach the issue of discovery sanctions, because it properly found that Plaintiffs met their burden of establishing their right to summary judgment, and further it found that Defendants failed to meet their countervailing burden of proving the existence of a triable issue of any material facts. As such, there was no need for the Supreme Court to address the issue of discovery sanctions.

In this context, Defendants' arguments in their brief that discovery sanctions were not warranted are moot, and should not be considered on this appeal.

III. THE SUPREME COURT PROPERLY DENIED DEFENDANTS' CROSS-MOTION FOR USE AND OCCUPANCY.

On their cross-motion for use and occupancy, Defendants did not meet their burden of setting forth and explaining what relief it was seeking or the basis for that relief. Defendants only showed the following: (i) that the Supreme Court, two years earlier in May 2014, had issued an Order *sua sponte* on the record, directing the tenants to pay use and occupancy in the amount of their last leases; (ii) that said Order was never disseminated to the tenants, nor were the tenants ever notified of the existence of the Order; (iii) that the Court had, in May 2014, also *sua sponte*

granted Defendants leave to move for an Order fixing use and occupancy; and (iv) that Defendants had never moved for such an Order.

Otherwise, Defendants presented evidence showing that two of the tenants were in arrears in use and occupancy payments pursuant to the May 2014 Order, but Defendants did not specify the relief they were seeking with respect to those two tenants, nor did they specify whether there were any other tenants who were in arrears, or by how much.

Further, Defendants presented evidence that they had recalculated the rents for some of the other tenants, and had presented lease renewals to these tenants at outrageously high rents, which those tenants allegedly had refused to sign and whose increased rent the tenants allegedly had refused to pay. However, Defendants presented this evidence in the form of a "document dump" and did not provide the Supreme Court with back up documentation and calculations to support these outrageous rent increases.

Under the circumstances, the Supreme Court's denial of Defendants' cross-motion was correct and should be upheld on this appeal. It should also be noted that, although Defendants' cross-motion was denied, the Supreme Court did direct that the Special Referee report and make recommendations as to any tenants who were in arrears in use and occupancy; and the Supreme Court further directed that any

tenants who were in arrears would be required to furnish a bond; otherwise they would be subject to an action in ejectment.

In summary, Defendants' cross-motion was properly denied by the Supreme Court, and this Court should affirm the Supreme Court's ruling.

CONCLUSION

Plaintiffs have previous stated to this Court that they do not oppose that part of the appeal which deals with Defendants' affirmative defenses that two of the Defendants were acting as agents of a disclosed principal. In all other respects, it is respectfully requested that the Decision and Order of the Supreme Court be affirmed.

Dated: New York, New York
February 3, 2021

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Dated: February 3, 2021