SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

KATHRYN CASEY, LAURIE CASNAGOLA, 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, PAMELA RENNA, VITTINA DEGREZIA aka VITTINA LUPPINO, Plaintiffs-Interveners, -against- WHITEHOUSE ESTATES, INC., KOEPPEL & KOEPPEL, INC., DUELL 5 MANAGEMENT LLC d/b/a DUELL MANAGEMENT SYSTEMS, WILLIAM W. KOEPPEL, and EASTGATE WHITEHOUSE LLC, Defendants.	AFFIRMATION IN OPPOSITION App. Div. Case No. 2020-03001 NY County Clerk's Index No. 111723/2011
WHITEHOUSE ESTATES, INC., EASTGATE WHITEHOUSE LLC, and WILLIAM W. KOEPPEL, Third-Party Plaintiffs, -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.	Third-Party Index No. 595472/2017

RONALD S. LANGUEDOC, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following, under the penalties of perjury:

1. I am a member of the firm of HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH LLP, attorneys for plaintiffs-respondents in this action ("Plaintiffs"), along with the

firm of EMERY CELLI BRINCKERHOFF & ABADY, LLP. I am fully familiar with the facts set forth herein.

2. I make this affirmation in opposition to the motion by defendants-appellants Whitehouse Estates, Inc. *et al.* ("Appellants") for an order:

(a) Pursuant to CPLR 5602(b)(1), granting Appellants leave to appeal to the Court of Appeals to review the Order of this Court dated August 5, 2021 (the "Order");

(b) Pursuant to CPLR 5519(c), staying enforcement of the Order and all proceedings in Supreme Court, including, without limitation, the referee's hearing to determine the amount of rents for each of the subject apartments using DHCR's default formula and the amount of the rent overcharges or each apartment, pending determination of the instant motion;

(c) Extending the stay through the determination of the appeal by the Court of Appeals should this Court grant Appeals should this Court grant Appellants leave to appeal; and

(d) Granting Appellants such other and further relief as this Court deems just and proper

APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE DENIED.

3. Appellants' principal argument on the motion is that leave to appeal this Court's August 5, 2021 Order[1] to the Court of Appeals should be granted because, it is alleged, this Court erred in finding that the DHCR's default formula should be applied to the calculation of the legal regulated rents, and the rent overcharges, for the 78 apartments affected by this class action.

4. However, this Court's careful analysis of the voluminous record on appeal was entirely correct, and does not merit further appellate review. Appellants have been delaying this case for years, and further appellate review would only delay the final calculation of the amounts of the

[1] It is noted that this Court's August 5, 2021 Order is a non-final order, inasmuch as further proceedings are required in the lower court before a special referee before the amounts of the legal rents of the affected apartments and the amounts of the overcharge refunds due to each tenant can be determined and a judgment can be entered. That judgment will be subject to further appellate review.

tenants' legal regulated rents, and the amounts of the overcharges, calculations which the tenants have been waiting for since October 14, 2011 when this action was commenced.

5. As noted by this Court's decision, by March 2012, five months after this action was commenced, Appellants had purported to recalculate the legal regulated rents for the affected apartments, and filed retroactive rent registrations for the years 2007 through 2011.

6. In the court below, and in this Court, Appellants argued that the correct calculations were those that Appellants themselves had performed between September 2011 and March 2012, in working with a consultant. Appellants, however, did not produce proof that these calculations correlated with the actual rental history records of the affected apartments.

7. As correctly noted by this Court in its decision, after commencement of this action, Appellants, without court approval, unilaterally registered rents from the base date forward that were not the rents actually paid, and instead registered rents far higher, without explanation.

8. Thus, this Court correctly upheld the decision of the lower court, to the effect that these intentional misstatements of fact – namely the false retroactive DHCR registrations – were intended to artificially increase the rents of the affected apartments and constituted fraud under the prior authorities of the Court of Appeals.

9. Further, this Court correctly upheld the decision of the lower court that the DHCR's default formula was properly applied here, not only because of Appellants' fraud, but also because the rent charged on the base date of October 14, 2007 could not be determined[2] and because Appellants did not provide a full rental history of the affected apartments from the October 14, 2007 base date forward.

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[2] Appellants did not produce leases or leases renewals or any rental records showing the amount of rent charged on the October 14, 2007 base date. The base date is defined by law as the date four years prior to the date of commencement of this action.

10. It is thus misleading for Appellants to claim that this case presents an issue as to the interpretation Court of Appeals' precedents concerning the application of the DHCR's default formula in cases of fraud. True, this case does involve a finding of fraud, but it goes far beyond that because it involves a finding – which cannot be reasonably or legitimately disputed because it is obvious from the lengthy record on appeal – that Appellants never produced the leases of the affected apartments that were in effect on October 14, 2007, nor did the produce the rental history records from October 14, 2007 to date.[3]

11. The holding of this Court was entirely consistent with its past precedent and the past rulings of the Court of Appeals, where it has been determined that the DHCR's default formula must be applied based upon a lack of rental history records showing the rent on the base date and the rent history since the base date.

12. Further, this Court's holding was entirely consistent with the multiple rulings on the issue of fraud. Appellants' belabored attempts to carve out a different standard of fraud when the case involves J-51 tax benefits are unavailing and simply incorrect and false. It is ludicrous to argue that leave to appeal should be granted because allegedly there is massive confusion among New York City landlords who received J-51 benefits as to the standard of fraud.

13. In that regard, it is significant to note that this Court stated that Appellants "*may* have been following the law in deregulating apartments during the period before *Roberts* was decided" (emphasis added). This Court did not determine that Appellants were in fact following the law in

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[3] Appellants have never argued that the legal rents on the base date should be determined from the leases that were in effect at that time. This is understandable, because not for the reasons explained by Appellants, but because Appellants simply never produced those leases. Rather, Appellants have consistently argued that the calculations performed by their consultant in 2011-2012 should be followed, even though the backup documentation was never given. It was Appellants' ludicrous position that the consultant acted in good faith, and that therefore his calculations should be accepted on their face.

that it was never shown on the record that each of the affected apartments' rents were lawfully increased to the $2,000.00 per month threshold required for high rent vacancy deregulation.

14. As this Court correctly stated, the incorrect interpretations of the applicable law which prevailed for a number of years, starting in the 1990's and continuing until October 2009 when *Roberts* was decided, which posited that high rent vacancy deregulation was possible even where a building owner received J-51 tax benefits, did not give "safe harbor" to every owner who received J-51 benefits, nor did it grant an owner carte-blanche in post-*Roberts* cases to willfully disregard the law by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme is uncovered.

15. Here, the evidence was overwhelming that Appellants filed retroactive registrations that reflected rents significantly higher than what was charged; and that many of these registrations false purported to classify the actual rent as a "preferential" rent in a feeble attempt to justify the listing of the higher amount.[4] Further, as noted by this Court's decision, Appellants never submitted any records to justify these outrageous calculations, which were clearly designed to boost Appellants' rent roll and discourage any aggressive attempt to challenge the false registrations.

16. Appellants do not deny that they never provided the court with copies of the tenants' leases showing the actual rent amount charged on the base date of October 14, 2007.

[4] As this Court correctly noted, a rent amount may only be characterized as "preferential" where the tenant is advised in the initial lease of the existence of a higher "legal" rent.

17. Further, Appellants have never presented evidence to substantiate the outrageous calculations performed by their consultant and presented to the tenants in take-it-or-leave it fashion in letters dated October 20, 2011, a few days after this action was commenced.

18. Further, although Appellants note in their papers that they did sign onto a letter in January 2012 notifying the tenants that they should disregard the consultant's letters and calculations, Appellants went ahead and filed hundreds of retroactive forms with the DHCR in November 2011 and March 2012. The record on appeal also shows that Appellants submitted leases and lease renewals to dozens of tenants of the affected apartments based upon these outrageous calculations.[5]

19. Appellants never produced the backup for these outrageous retroactive DHCR registration forms; they never produced copies of leases or other records showing the amount charged on the base date of October 14, 2007; and they never produced records to contradict the detailed summaries provided by Plaintiffs, both on their motion and on their reply papers.

20. To this date, nearly ten years after this action was filed, Appellants have never produced any records, or even a schedule or summary of records, by which they would purport to show what the legal regulated rents of the 78 affected apartments should be, from October 14, 2007 to date.

21. In short, this is not a close case meriting review of this Court's non-final order by the Court of Appeals. Clearly, this Court was correct to affirm the decision and order of the lower court, granting Plaintiffs' motion for summary judgment, and determining that the DHCR's default formula should be applied herein.

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[5] As noted in the record on appeal, the lower court issued an order dated May 21, 2014 (Singh, J.) barring the landlord from issuing lease renewals without leave of court. Nevertheless, as explained above, Appellants submitted literally dozens of lease renewals, in apparent violation of this order, which were attached as an exhibit to Appellants' papers in opposition to Plaintiffs' motion for summary judgment.

22. Not only did the lower court correctly determine that Appellants engaged in a fraudulent scheme to conceal the true rental histories of the 78 apartments; the lower court correctly determined that the default formula must be applied because the full rental histories of the 78 apartments from the base date to present was not provided.

23. Appellants' attempts to establish that there is an issue of law that merits review by the Court of Appeals, particularly given the non-final status of this Court's order, are entirely unavailing. Accordingly, Appellants' motion for leave to appeal to the Court of Appeals should be denied.

APPELLANTS' MOTION FOR A STAY SHOULD BE DENIED.

24. At the outset, it should be noted that Appellants' request for an emergency stay was denied by order of Justice Sallie Manzanet-Daniels dated September 1, 2021 (Exhibit A.).

25. Appellants' papers raise no issue of imminent, irreparable harm that would befall to them if a stay is not granted, nor does their application present sufficient merit for a stay to be granted.

26. Plaintiffs are entitled to allow the hearing before a special referee to go forward, where the calculations of the legal regulated rents and the amounts of the overcharges from October 7, 2007 to date will be reported upon, and recommendations made.

27. Immediately following the issuance of this Court's August 5, 2021 Order, Plaintiffs' counsel began to make attempts to gather the necessary evidence for a special referee hearing in the lower court, where a report with recommendations will be prepared with respect to the legal regulated rents of the affected apartments, as well as the amounts of the overcharge refunds due to each tenant.

28. Prior to this appeal going forward, Plaintiffs' attorneys gathered records and performed calculations to calculate the legal regulated rents on the October 14, 2007 base date for the affected apartments, and to calculate the amounts of the refunds due to each tenant (see Exhibit B).

29. Those calculations only go through July 2017 because the records provided for the special referee hearing pursuant to Plaintiffs' subpoena stopped at that date.

30. This case, which had been assigned to a special referee, Ira Gammerman, had to be reassigned due to his passing, and no new special referee has been assigned.

31. It is now necessary to calculate the overcharges from August 2017 to date, as well as the initial legal rents of any affected tenants who moved into their apartments on or after August 1, 2017.

32. On August 9, 2021, the undersigned contacted Appellants' counsel by e-mail, to request that Appellants provide an updated list of the tenants of the affected apartments.

33. Appellants have not as yet turned over rental history records covering the period August 2017 to date, which are required for Plaintiffs' attorneys to calculate the legal rental amounts and the amounts of the overcharges.[6]

34. Once Appellants turn over those records, Plaintiffs' attorneys will require time to calculate the amounts of the overcharges from August 2017 to date and update the default formula computations.[7] Also, given the realities of the COVID-19 pandemic, it is unknown when this case will be assigned to a new special referee.

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[6] On August 19, 2021, Plaintiffs submitted a proposed Order to Show Cause to Supreme Court, which includes a request for an order directing Appellants to turn over rental history records from August 2017 to date, pursuant to the subpoena issued by Plaintiffs' counsel in 2017, so that the default formula and overcharge computations can be updated. See Exhibit C.

[7] Upon information and belief, numerous tenants have moved in and out of many of the 78 affected apartments since August 2017, and many of these tenants have not been notified as to the existence

35. Appellants' motion papers do not make a *prima facie* case that any irreparable or imminent harm would befall to them in the event that their request for a stay of proceedings in Supreme Court is not granted.

36. Upon assignment to a special referee, the calculations will have to be presented; the special referee will have to issue a report with recommendations; and Plaintiffs' counsel will have to file a motion in Supreme Court to confirm the report. In short, and unfortunately for Plaintiffs, this case is not close to the point where judgment can be entered against Appellants.

37. Under these circumstances, there is no reason for any further delay of Supreme Court proceedings while Defendants' motion for leave to appeal to the Court of Appeals is pending. Defendants' request for an emergency stay is a frivolous delaying tactic and should be denied.

APPELLANTS' ANCILLARY REQUEST FOR A STAY OF THE SEPARATE LOWER COURT ORDER REDUCING U & O PENDENTE LITE SHOULD BE DENIED

38. Appellants' separate request for a stay of separate order of the lower court, is not explained clearly on the Notice of Motion, but it is explained in the affirmation of their attorney and the affidavit of William Koeppel. This motion should be denied. This matter concerns a separate appeal from a separate order of the lower court, which appeal has not yet been perfected (App. Div. Case No. 2021-01304). Appellants' motion for a stay of that order was denied by a full panel of this Court by order dated August 5, 2021 (M-1379) (Exhibit D).

39. Appellants' allegations that they could not afford to pay their mortgage on the building, or that they will not receive sufficient rental income to meet the building expenses, are not backed up with any documentary evidence or any specific evidence of any kind. There has been no showing of any pending foreclosure action or any other imminent financial crisis.

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of this litigation and the resultant effects upon their rent, because Appellants have not turned over information as to these tenants.

40. As stated above, Appellants' request for a stay of the U & O Reduction Order concerns a separate motion filed by Plaintiffs in the lower court, by Order to Show Cause dated August 17, 2020 (Exhibit E).

41. In their motion, Plaintiffs argued, in substance, that modification of the previous orders with respect to payments of rent/use and occupancy *pendente lite* was warranted given Appellants' delay and lack of diligence in perfecting the appeal of the Order granting summary judgment; that Appellants had delayed nearly a year in turning over sufficient records pursuant to a subpoena *duces tecum* to calculate the default formula amounts and the amounts of the overcharges through July 2017; that Appellants had caused further delay by commencing a third-party action sounding in partial indemnity against certain third-party defendants; that Appellants still had not turned over records to calculate the overcharges from August 2017 to date; that the amount due to the entire class through July 2017, with statutory interest, was in excess of $23 million; that Appellants had never made any showing that it was able to refund that amount; and that Defendant William Koeppel had filed for Chapter 11 bankruptcy in 2018, thereby resulting in an automatic stay of this action, which was not lifted until January 2020.

42. On January 11, 2021, the Supreme Court (Lebovits, J.) heard oral argument on the record with respect to the Motion to Reduce U & O. See Transcript annexed hereto as Exhibit F. Ruling from the bench, Justice Lebovits granted Plaintiffs' motion to the extent of lowering prospectively the amount of rent/use and occupancy class members were required to pay *pendente lite* to the default formula amounts calculated by Plaintiffs' attorneys.

> "This motion is granted to the extent that it request that the court modify the amount of use and occupancy from the 2014 interim order to the extent of reducing it to the amounts calculated based on the DHCR default formula....Its legal principals are that courts have broad discretion to determine the amount of use and occupancy pendente lite, and that in determining the amount of use and

> occupancy pendente lite, courts may consider the amount of the last lease, but that amount of the last lease is probative; it's not conclusive....Plaintiffs' main argument in support of its motion is that the change in circumstances, from the time when the 2014 order was issued, requires that the prior order be modified to reflect this Court's later determination in March [2017] on summary judgment on the applicability of the default formula to the rents at issue...."
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> "....[M]odifying the interim order to the extent [of] reducing the amount of use an[d] occupancy based on the default formula would protect plaintiff from paying use and occupancy in excess of the amounts considered by this Court as legal rent until this point. Preserving the status quo about the use and occupancy is not synonymous with determining the amount based on the last lease or keeping the amount unchanged, regardless of the changes of circumstances while an action is pending."
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> "...[S]ettle the order, please, consistent with this decision...."

43. On April 13, 2021, the order was settled before the Supreme Court (Lebovits, J.) granting Plaintiffs' motion for a reduction in payments of use and occupancy *pendente lite*, with an effective date of February 5, 2021 (Exhibit G).

44. As stated above, on August 5, 2021, a full panel of this Court denied Appellants' motion for a stay of the U & O Reduction Order (Exhibit D).

45. In denying the stay, this Court correctly cited to prior authority in which this Court correctly determined that once it has been determined that the default formula is the appropriate calculation methodology, the tenants should only be required to pay, *pendente lite*, the default formula amount pending further proceedings.

46. Appellants have not perfected their appeal from the U & O Reduction Order. The Order of this Court, denying a stay of the U & O Reduction Order, is not subject to review by the Court of Appeals. Reviews of a non-final Order of this Court by the Court of Appeals may only be granted where this Court certifies one or more questions of laws. The Order denying the stay of the U & O Reduction Order does not bring up any questions of law that could be certified by this

Court. Thus, Appellants' remedy, if any, is to perfect their appeal of the U & O Reduction Order, and if this Court affirms the U & O Reduction Order, they may move for leave to appeal with the Court of Appeals.

WHEREFORE, it is respectfully requested that Appellants' motion be denied in all respects, along with such other and further relief as this Court may deem just and proper.

Dated: New York, New York
September 13, 2021

RONALD S. LANGUEDOC