Gerard v Clermont York Assoc. LLC
2017 NY Slip Op 30649(U)
March 30, 2017
Supreme Court, New York County
Docket Number: 101150/10
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

PAULA GERARD, SHERRI LYDELL, LISA QUITONI, and LAURA ZINGMOND, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

CLERMONT YORK ASSOCIATES LLC,

Defendant.

----------X

DECISION AND ORDER

Index No.: 101150/10
Motion Seq. No. 004

CAROL R. EDMEAD, J.S.C.:

In a class action involving tenants who live in defendant Clermont York Associates LLC's (Clermont) building, Clermont moves, pursuant to CPLR 2221 (d), for reargument of the court's decision, order and judgment entered November 7, 2016 (the November 2016 decision). Plaintiffs cross-move to reargue the same decision.

BACKGROUND

This case involves the remedies available to tenants who realized, after the Court of Appeals' decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), that Clermont had improperly deregulated their apartments.[1] The November 2016 decision resolved motion sequence No. 003, in which plaintiffs moved to dismiss Clermont's affirmative defenses, and for declaratory judgments on the issues of the regulatory status of their apartments and the proper method for calculating damages. Clermont cross-moved for declarations that all of the apartments in its building are subject to possible deregulation, and in favor of its own preferred methodology for calculating damages.

[1] For a fuller description of the facts, see the November 2016 decision.

The court, in the November 2016 decision, granted the branch of plaintiffs' motion that sought dismissal of Clermont's affirmative defenses, with the exception of laches. As to the proper methodology for assessing overcharges, the court sided with Clermont, adjudging and declaring that "the base date for determining rent overcharges in this case is January 27, 2006" (November 2016 decision at 21). Essentially, the court found that plaintiffs are constrained, for the purpose of calculating overcharges, by CPLR 213-a, which precludes, for the purpose of determining rent overcharges, "examination of the rental history" prior to four years preceding commencement of the action.

As to regulatory status, the court sided with plaintiffs, adjudging and declaring that any of plaintiffs' apartments that "were destabilized or not returned to a rent stabilized status during the period in which defendant received J-51 tax benefits are subject to rent stabilization" and that Clermont "is required to offer renewal leases on forms required by the RSL and approved by DHCR at regulated rents to those leaseholders, and such plaintiffs may continue their tenancies under the same terms and conditions as were provided at the inception of their tenancies" (November 2016 decision at 20).

Clermont contends that reargument should be granted, as the court erred by holding that "pre-base date" records may be reviewed to determine future rents, and by holding that plaintiffs' apartments are not subject to luxury deregulation. While Clermont filed its motion to reargue 30 days after notice of entry of the November 2016 order, plaintiffs filed a cross motion for reargument 42 days after notice of entry. In the cross motion, plaintiffs argue that the court erred in determining that records prior to the base date could not be reviewed for the purpose of determining overcharges, and in failing to specifically declare that the rent forfeiture provisions of the Rent Stabilization Law (RSL) and the Rent Stabilization Code (RSC) are applicable for

the purpose of calculating the amount of overcharges and the amount of rents going forward, even if the last registration occurred prior to the base date.

ANALYSIS

CPLR 2221 (d) (2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221 (d) (3) provides that such a motion "shall be made within thirty days after service of a copy of the order determining the prior motion and the written notice of its entry."

I. Clermont's Motion For Reargument

Clermont argues that the court has misapprehended the relevant law in two ways: (1) by holding that New York's Division of Housing & Community Renewal (DHCR) may review records prior to the base date to calculate future rents; and (2) by holding that plaintiffs are entitled to regulated rents. The court grants reargument to evaluate Clermont's claims.

A. Review of Records Prior to the Base Date

The November 2016 decision held that CPLR 213-a precluded review of records prior to the base date for purposes of determining rental overcharges. CPLR 213-a, entitled "Actions to be commenced within four years; residential rent overcharge," provides that:

> "An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

While the November 2016 decision acknowledged that "case law has worked exceptions into this preclusion," the court found that plaintiffs were not entitled to one, since they did not allege "fraud or willfulness," or present "any compelling policy concerns justifying" an exception to CPLR 213-a (November 2016 decision at 18). However, the court found that the issues of determining overcharges and regulatory status are "decoupled under CPLR 213-a" (*id.* at 19); that is, CPLR 213-a applies specifically to rent overcharge actions, but does not make any reference to determining regulatory status or future rents. In so finding, the court quoted *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal* (16 AD3d 166 [1st Dept 2005]), noting that "'DHCR's consideration of events beyond the four-year period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated'" (November 2016 decision at 19, quoting East W. Renovating (16 AD3d at 167).

Clermont argues that the court misconstrued the language of CPLR 213-a. Specifically, Clermont takes a broad reading of the second sentence of the statute, which provides that: "This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action." That is, Clermont argues that this is a general proscription and is not limited to rent overcharge actions, as might be suggested by the reference to "residential rent overcharge" actions in the title of the provision, and in its first sentence.

On reargument, Clermont cites to *277 Enters., LLC v Lebron* (17 Misc 3d 67 [App Term, 2d Dept 2007]), a case that it did not cite in its memorandum of law in the underlying motion. In *Lebron*, the Appellate Term granted the tenant dismissal of the landlord's nonpayment proceeding and upheld an underlying DHCR overcharge award that cancelled out any unpaid

rent (*id.* at 69). In so doing, the Appellate Term examined "rent records that are more than four years old" (*id.* at 69). Clermont quotes the reasoning that the Appellate Term used to justify its decision to look back past the four-year limit outlined in CPLR 213-a:

> "the examination [was] necessary for the proper enforcement of the DHCR award and is permissible because the rent records are not being examined for the purpose of determining the legal regulated rent or for the purpose of calculating an overcharge, but for the purpose of determining whether the DHCR award ha[d] been satisfied"

(*id.* 69-70).

To the extent that Clermont interprets this dicta to mean that CPLR 213-a applies beyond the context of rent overcharge claims, such interpretation is in conflict with the First Department's holding in *East W. Renovating*, which permits a court to look beyond the statutory period, "if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated" (16 AD3d at 167). To avoid this conflict, Clermont argues that *East W. Renovating* applies only to the determination of rent regulation status, and not to the calculation of future rents.

However, the court is not persuaded by this interpretation, as separating the issues of rent regulation and the calculation of future rents would install a new technicality in an area of law already rife with them -- one that defies common sense, is extra-statutory, and weakens the purpose of rent regulation laws (*see generally Rima 106 v Alvarez*, 257 AD2d 201, 204 [1st Dept 1999] [eschewing an overly technical approach, which, in the specific circumstances of *Rima*, would create a "tenurial hippogriff whose continued existence would violate the fundamental policies and purposes of the statutory rent regulation scheme"]; *see also Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18, 22 [2008] [citing *Rima* and also declining to use a technical approach that creates results that veer from the purpose of rent stabilization laws]).

In other words, what is the purpose of rent regulation if the regulation status is not tied to the rents charged to tenants? The First Department has stated that the

> "pervasive policy of the rent stabilization scheme is to provide an adequate supply of affordable housing in the City of New York. The central, underlying purpose of the [Rent Stabilization Law] is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Central to the statutory scheme is preventing the exaction of excessive rents by landlords"

(*Drucker v Mauro*, 30 AD3d 37, 40 [1st Dept 2006] [internal quotation marks and citations omitted]).

CPLR 213-a explicitly refers only to rent overcharge cases. To extend its reach to encompass the calculation of future rents would undermine the purpose of the statutory scheme, and show insufficient deference to the legislature, which chose to limit the scope of CPLR 213-a to rent overcharge cases (*see generally Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 28 [2006] [holding that "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government," and that the judiciary's deference to the Legislature in such areas is based on "respect for the separation of powers upon which our system of government is based"] [internal quotation marks and citations omitted]).

Thus, the court declines Clermont's invitation to rewrite CPLR 213-a and extend its application (*see Wilson v One Ten Duane St. Realty Co.*, 123 AD2d 198, 201 [1st Dept 1987] [noting that the purpose of the Emergency Tenant Protection Act of 1974 is "to extend the protection of rent stabilization in the face of a declared emergency brought about by housing shortages and their attendant problems," and holding that this purpose "is best served by following the plain language of the statute and refraining from supplying an uncalled for base date that would only restrict its purpose"]). As CPLR 213-a is limited to rent overcharges

claims, it is not error to permit review of records prior to the 213-a base date for the purpose of determining the proper rent going forward. Accordingly, upon reargument, the court adheres to its prior ruling on this issue in the November 2016 decision.

Clermont argues that this result is inconsistent, as plaintiffs are allowed a look past the four-year lookback period for the purpose of determining future rents, but not for the purpose of determining overcharges. The court readily acknowledges that there is an inconsistency, but notes that it is one created by the Legislature's decision to forbid looking back past four years for the latter purpose, but not for the former. In this case, the inconsistency creates a balance, as exorbitant overcharge damages might be harsh for Clermont, which, prior to *Roberts*, did not know it was violating the rent stabilization scheme; and a thoroughgoing method for determining future rents protects plaintiffs' rights, which are supposed to be defended by that scheme. While Clermont should not necessarily be punished for its misapprehension of the law, neither should plaintiffs lose their rights because of it.

Such a balance is consistent with the approach taken by the First Department in cases, such as *Matter of Ador Realty, LLC v Division of Hous. & Community Renewal* (25 AD3d 128 [1st Dept 2005]), where the Court, faced with the question of whether DHCR could go beyond the four-year lookback period in CPLR 213-a to determine whether the landlord was entitled to a longevity increase, held that DHCR could do so, as "the overarching purpose of these provisions is the fair and reasonable implementation of the complex rent regulatory scheme established by the Legislature" (*id.* at 138). The Court held that the DHCR had correctly harmonized the competing interests "by refusing to be bound by the four-year restrictions in determining the owner's entitlement to a longevity increase" (*id.*).

B. Plaintiffs' Entitlement to Regulated Rents

The court held, in the November 2016 decision, that plaintiffs were entitled "to a declaration that their apartments are subject to rent stabilization and that Clermont is required to offer renewal leases on forms required by the RSL and approved by DHCR at regulated rents" (November 2016 decision at 19). The court, citing *Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal* (96 AD3d 524 [1st Dept 2012]), found that the expiration of J-51 benefits was not an obstacle to this relief.

73 Warren was a CPLR article 78 petition that challenged DHCR's denial of a landlord's application "to deregulate a rent-stabilized apartment pursuant to the high-income rent decontrol provisions" (96 AD3d at 525). The building in *73 Warren* was subject to rent stabilization for the exclusive reason that it received J-51 tax benefits from 1977 until 1990 (*id.* at 525-526). In *73 Warren*, the First Department held that "Administrative Code § 26-504.1 expressly states that, generally, luxury decontrol shall not apply to buildings that are stabilized because of their receipt of tax benefits pursuant to either the RPTL 421-a program or the J-51 program" and that "the exception to this exclusion refers to the former only" (*id.* at 530-531).

Clermont argues that the court misapplied *73 Warren* to its own tenants, as its building, in contrast to the one in *73 Warren*, was included in the rent stabilization regime prior to its receipt of J-51 benefits. Clermont notes that DHCR's initial denial of deregulation, in *73 Warren*, was based on this distinction (96 AD3d at 525-526), which was rejected, in a different context, by the Court of Appeals in *Roberts* (13 NY3d at 283). Clermont argues that a subsequent decision by the First Department, *Matter of Schiffren v Lawlor* (101 AD3d 456 [1st Dept 2012]), instead of *73 Warren*, should be dispositive of this issue.

Schiffren involved an article 78 proceeding that raised the question of "whether, as a matter of law, a dwelling unit that was subject to rent regulation before an owner received J-51 tax benefits can be subject to luxury deregulation once those tax benefits expire" (101 AD3d at 457). The Court held that such a dwelling may be deregulated under certain circumstances:

> "The plain language of Administrative Code §§ 11-243 and 26-504 (c) supports the conclusion that the Legislature intended to provide that a building that is already regulated when it receives J-51 benefits will continue to be regulated under the original rent-regulation scheme when the tax benefits expire. We conclude that the reversion to pre-J-51 benefit rent-regulation status includes the right of an owner to seek luxury deregulation in appropriate cases. While there is a collateral issue regarding whether tenant vacatur or notice in the lease is necessary to trigger reversion of a dwelling unit to the original rent-regulation regime, petitioner does not advance, and we do not decide, this issue on appeal. We only hold that luxury decontrol is not per se prohibited once the J-51 tax benefits expire on a dwelling unit that was subject to rent regulation before the tax benefits were obtained. The article 78 court, therefore, correctly concluded that upon expiration of the owner's receipt of J-51 tax abatements, petitioner's apartment continued to be subject to regulation under the same terms and conditions as before the receipt of J-51 abatements, making it subject to luxury decontrol"

(*id.* [internal citation omitted]).

In the quoted language, the First Department refers, in talking generally about the statutory scheme, to "a building," but when it makes its specific holding, it returns to the term it used in the question presented, "a dwelling unit." This is an important distinction because Clermont's building was once subject to rent regulation unrelated to the J-51 tax benefits, prior to receipt of those benefits, but plaintiffs' units all were deregulated by the time the J-51 benefits expired. As such, plaintiffs urge the court to analyze the issue of regulatory status from the point of view of their dwelling units, while defendants urge the court to analyze it from the point of view of the building as a whole.

Here, it seems plain that *Schiffren*, and other cases that refer to "buildings" instead of dwelling units, assume a uniformity of regulation within the building. When there is heterogeneity of regulation within a building, courts look to the details of specific units (*see Schiffren*, 101 AD3d at 457). This makes sense, as the Legislature passed the rent stabilization law to ensure adequate affordable housing to tenants (*Drucker*, 30 AD3d at 40), and tenants of multi-family dwellings typically rent by the unit, not by the building. Conversely, the approach urged by defendants would lead to a nonsensical result, as there was no rent-regulation scheme to revert to when the J-51 benefits expired.

Moreover, this approach -- of looking, in a granular way, at dwelling units, instead of at the building as a whole -- comports with the text of Administrative Code § 26-504 (c), which provides:

> "Upon the expiration or termination for any reason of the benefits of section 11-243 or section 11-244 of the code or article eighteen of the private housing finance law any such *dwelling unit* shall be subject to this chapter until the occurrence of the first vacancy of such unit after such benefits are no longer being received or if each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period has included a notice in at least twelve point type informing such tenant that *the unit* shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire, such *dwelling unit* shall be deregulated as of the end of the tax benefit period; provided, however, that if such *dwelling unit* would have been subject to this chapter or the emergency tenant protection act of nineteen seventy-four in the absence of this subdivision, such *dwelling unit* shall, upon the expiration of such benefits, continue to be subject to this chapter or the emergency tenant protection act of nineteen seventy-four to the same extent and in the same manner as if this subdivision had never applied thereto"

(id. [emphasis added]).

The Legislature's repeated use of the term "dwelling unit" clearly indicates that it intended for courts to analyze a particular unit, for purposes of the provision's application,

independent of the building as a whole. Thus, the reasoning of *Schiffren* does not apply, as plaintiffs' dwelling units, despite the history of the building and the status of other units in the building, were not subject to rent stabilization other than as a result of Clermont's receipt of the J-51 tax benefits. Accordingly, under Administrative Code § 26-504 (c), plaintiffs are still entitled to rent stabilization (*see 73 Warren*, 96 AD3d at 530-531). As a result, the court, upon reargument, adheres to its prior decision regarding plaintiffs' entitlement to regulated rents.

II. Plaintiffs' Cross Motion For Reargument

The threshold issue here is whether the court should entertain plaintiffs' untimely cross motion. Under 2221 (d) (3), a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." The Court of Appeals has held that, "regardless of statutory limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see also Garcia v The Jesuits of Fordham*, 6 AD3d 163, 165 [1st Dept 2004] [holding that "although plaintiff's motion for reargument was technically untimely pursuant to CPLR 2221 (d)," the trial court did not improvidently exercise its discretion in reconsidering the prior ruling] [internal citation omitted]).

Since plaintiffs' application for reargument was made as a cross motion, another layer of analysis is added. In the context of summary judgment, it is well established that a late cross motion may be heard where a timely motion was made "seeking relief nearly identical to that sought by the cross motion (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1stDept 2006] [quotation marks and citation omitted]). Trial courts have extended the logic of

Filannino to applications for reargument (*see e.g. Miller v New York City Hous. Auth.*, 2010 NY Slip Op 32908 [U] [Sup Ct, Kings County 2010]). The court will analyze each branch of plaintiff's application for reargument, which is 12 days late, separately.

A. Methodology For Calculating Overcharges

First, the court notes that the issue of the proper methodology for calculating overcharges was not the subject matter of Clermont's timely motion to reargue. While it is, nonetheless, still within the court's discretion to review its decision on this issue, the court declines to exercise that discretion, as none of plaintiffs' arguments convince the court that it incorrectly analyzed this issue in the November 2016 decision. Thus, plaintiffs' application for leave to reargue the issue of the proper methodology for analyzing overcharges is denied.

B. Rent Freezes For Calculating Future Rents

Rent freezes for calculating future rents was not explicitly raised by Clermont in its moving papers, but the more general topic, the proper methodology of calculating future rents, was. The court exercises its discretion to grant the branch of plaintiffs' motion that seeks reargument of this issue.

Plaintiffs' argument for rent freezes in calculating future rents derives from RSL § 26-512 (e) and RSL § 26-517 (e). The first provision, RSL § 26-512 (e), provides that "the legal regulated rent authorized for a housing accommodation subject to the provisions of this law shall be the rent registered pursuant to section 26-517 of this chapter subject to any modification imposed pursuant to this law." The latter provision, RSL 26-517 (e), provides that:

> "The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing

> accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee."

Plaintiffs rely on a spate of recent cases from the First Department, including *Altman v 285 W. Fourth LLC* (143 AD3d 415 [1st Dept 2016]), which held that the defendant was "not entitled to longevity increases or any increases allowed by law for the period in which the apartment was illegally removed from rent stabilization" (*id.* at 416). *Altman* was in a different posture from the present case, however, as the Court found that the landlord had failed to rebut a presumption of willfulness (*id.* at 415).

Similarly, *Altschuler v Jobman 478/480, LLC* (135 AD3d 439 [1st Dept 2016]), involved a "colorable claim of fraud" (*id.* at 440). The owner contended that it deregulated the apartment in reliance on the 1996 DHCR advisory opinion that was rejected by *Roberts*, but the First Department held, nevertheless, that "Supreme Court properly imposed a rent freeze on the apartment, since defendant collected the unlawful rent overcharges before filing late rent registrations" (*id.* at 441).

In *Matter of 215 W 88th St. Holdings LLC v New York State Div. of Hous. & Community Renewal* (143 AD3d 652 [1st Dept 2016]), another case relied on by plaintiffs, the Court stated that "RSC § 2528.4 provides that an owner who filed an improper rent registration is barred from collecting rent in excess of the base date rent," and, like RSL 26-517 (e), is "retroactively relieved of that penalty upon filing a proper registration only when increases in the legal regulated rent were lawful except for the

failure to file a timely registration" (*id.* at 653 [internal quotation marks and citation omitted]).

The First Department found that a fraudulent lease, executed twelve years before the owner bought the property, justified looking beyond the four-year lookback window for overcharge purposes, as well as application of the "default method" (*id.* at 652, citing *Thornton v Baron*, 5 NY3d 175 [2005]). In contrast to *Altman* and *Altschuler*, however, the Court in *215 W 88th St.* did not find that the current owners engaged in any willfulness or fraud, as the owners "purchased the building 12 years after the initial illegal lease, and could not reasonably be deemed to have been aware of it" (*id.* at 652).

The Court found that RSC § 2528.4 applied, as it was clear that the rents were not lawful, "except for the failure to file a timely register" (*id.* at 653). Accordingly, it held that, as "[t]he statute makes no allowance for circumstances such as a successor owner's good faith or reliance on agency determinations in its favor that are later rescinded [,] . . . notwithstanding the arguably harsh result here, the agency did not have the discretion to add [Rent Guideline Board Order] increases" (*id.*). This, clearly, is strong support for plaintiffs' position, as the First Department imposed a rent freeze for calculation of future rents without regard to the owner's good faith.

Defendants argue, initially, that the November 2016 decision rejected a rent freeze. This is true only to the extent that the November 2016 decision implicitly rejected rent freezes in the rent overcharge context, where applying a rent freeze would come into conflict with CPLR 213-a. The November 2016 decision, however, did not rule out rent freezes for calculation of rents going forward; instead, it ordered that

Clermont "is required to offer renewal leases on forms required by the RSL and approved by DHCR at regulated rents to those leaseholders" and that plaintiffs may "continue their tenancies under the same terms and conditions as were provided at the inception of their tenancies" (November 2016 decision at 20).

To resolve any ambiguity here, plaintiffs are entitled to a modification of the November 2016 decision, so that it explicitly states that plaintiffs are entitled to rent freezes in the calculation of future rents, from the time that Clermont should have, but failed to, file registration statements. Clermont argues that this result is inequitable because they are effectively being penalized for a failure to register that was neither willful nor fraudulent. However, what the First Department said in *215 W 88th St.*, with respect to RSC § 2528.4, is equally true for RSL 26-517 (e), i.e., that "[t]he statute makes no allowance for circumstances such as a successor owner's good faith or reliance on agency determinations in its favor that are later rescinded" (143 AD3d at 653). As in *215 W 88 St.*, "notwithstanding the arguably harsh result here, the agency did not have the discretion" to add increases (*id.*).

Any harshness in this result for Clermont is mitigated by the relief, provided in the rent overcharge context, by CPLR 213-a. While the decoupling of the calculation of overcharges and future rents is, as discussed above, compelled by statute, the statutory framework here provides an equitable result that upholds the purpose of the rent stabilization scheme without being overly punitive to Clermont.

The court acknowledges that this result runs counter to the result in *Rosenzweig v 305 Riverside Corp.* (35 Misc 3d 1241 [A] [Sup Ct, New York County 2012]), where the court held that "[f]ixing the rent stabilization rent in hindsight under the failure to register

provisions of the RSL and RSC would, under these circumstances, be unduly punitive for what was action otherwise taken in good faith, relying upon the agency's own interpretation of the law" (*id.* at * 4-5). The view of the court in *Rosenzweig*, as to the harshness of the application of a rent freeze, may have been informed by the fact that the difference between the current rent in that apartment, and its last registered rent was over $7,000. In any event, subsequent First Department decisions, such as *215 W 88th St.*, preclude the court from following the path of *Rosenzweig*. As to Clermont's contention that applying rent freezes in calculating the proper rent for plaintiffs' apartments conflicts with DHCR policy, "[i]t is the courts, not the [DHCR], that should address these issues in the first instance" (*Gerard v Clermont York Assoc., LLC*, 81 AD3d 497, 497-498] [1st Dept 2011]).

RSL 26-517 (e) provides that the failure to properly file timely registrations bars owners from "applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements" of rent stabilization. There is no exception for good faith under the statute. A late filing results in elimination of this sanction only if the legal regulated rent was lawful, except for the late filing. That is not the case here, as Clermont unlawfully deregulated these apartments, even if they did so in good faith.

As a result, plaintiffs are entitled to a modification of the November 2016 decision, to state that, for purposes of determining the proper rent going forward, Clermont is not entitled to increases allowed by law for the period in which the

apartments were illegally removed from rent stabilization. However, consistent with the November 2016 decision, plaintiffs are not entitled to rent freezes for the purpose of determining rental overcharges, as doing so would require an inquiry that would violate CPLR 213-a.

CONCLUSION

Accordingly, it is

ORDERED that defendant Clermont York Associates LLC's application for reargument is granted, and, upon reargument, the court adheres to its prior decision filed on November 7, 2016; and it is further

ORDERED that plaintiffs' cross motion to reargue is granted, but only with respect to the issue of whether rent freezes are appropriate for calculating future rents, and, upon reargument, the court adheres to its prior decision filed on November 7, 2016; however, the court modifies its November 7, 2016 decision to clarify that rent freezes are appropriate for the calculation of future rents, and to specify that Clermont is not entitled to increases allowed by law for the period in which the apartments were illegally removed from rent stabilization; and it is further

ORDERED that counsel for defendant Clermont shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: March 30, 2017

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.