SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PETER ARNOLD, ELI LAZARUS, SEAN ROCHA and MICHAEL SCHILLER,

INDEX NO. 158541/13

Plaintiffs,

-against-

4-6 BLEECKER STREET, LLC, 316 BOWERY REALTY CORP., WALSAM 316 LLC, WALSAM 316 BOWERY LLC, WALSAM BLEECKER LLC, LAWBER BOWERY LLC, and 316 BOWERY NEXT GENERATION LLC,

Defendants.

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JOAN A. MADDEN, J.:

Defendant 4-6 Bleecker Street LLC ("Bleecker") moves for partial summary judgment on its 4th cross-claim for "contractual indemnification" and its 5th cross-claim for attorney's fees against co-defendants, 316 Bowery Realty Corp. ("Bowery"), Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC and 316 Bowery Next Generation LLC (collectively "Walsam," the "Walsam defendants" or the "Walsam entities") (Bleecker and Walsam together as the "Bowery/Walsam defendants") (motion seq. no. 005).

In response to the Bowery/Walsam defendants' motion for leave to renew and reargue (motion seq. no. 006), which this court denied in a Interim Decision and Order dated September 22, 2016,[1] plaintiffs Peter Arnold and Michael Schiller cross-move for: 1) summary judgment

[1]By an Interim Decision and Order dated September 22, 2016, this Court denied the motion by the Bowery/Walsam defendants (motion seq. no. 006) for renewal and reargument of the Court's October 14, 2015 decision and order which denied defendants' prior motion for summary judgment and granted plaintiffs' prior cross-motion for summary judgment to the extent of declaring that their apartments are rent stabilized and awarding them partial summary judgment on the issue of liability on their rent overcharge claims. The instant decision and order

against the Bowery/Walsam defendants on their second cause of action for rent overcharges and treble damages; 2) upon granting summary judgment, entering judgment against defendants in the amount of $361,916.37 in favor of Arnold and the amount of $425,291.32 in favor of Schiller; and 3) granting partial summary judgment against defendants on plaintiffs' fifth cause of action for legal fees and scheduling a hearing to determine the amount of such fees.

Plaintiffs Eli Lazarus and Sean Rocha separately cross-move for: 1) summary judgment against the Walsam defendants based on the reasons set forth in the Court's October 14, 2015 decision and order; 2) summary judgment on their second cause of action for a judgment setting the lawful rent for their apartments; 3) summary judgment against all defendants on their third cause of action for a money judgment for rent overcharges and treble damages, in the amount of $104,450.58 in favor of Lazarus, and the amount of $262,185.84 in favor of Rocha; and 4) summary judgment against all defendants on their fifth cause of action for attorney's fees in an amount to be determined by the Court.[2]

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New

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determines motion sequence no. 005 and plaintiffs' cross-motions to motion sequence no. 006.

[2]It is unclear whether plaintiffs are cross-moving for summary judgment against defendant Bleecker. Although the cross-motions do not specifically name Bleecker, the Lazarus/Rocha notice of cross-motion requests summary judgment against "all defendants" and Bleecker submits an affidavit in opposition to both cross-motions. Under these circumstances, where Bleecker had notice and an opportunity to respond to the cross-motions, and submitted opposition, the cross-motions will be treated as seeking summary judgment against all named defendants, including Bleecker.

York, 49 NY2d 557, 562 (1980). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial. See Winegrad v. New York University Medical Center, supra.

First, as to plaintiffs' cross-motions for summary judgment, pursuant to the Decision and Order dated October 14, 2015, this Court has already held that plaintiffs' apartments were all improperly deregulated and are subject to the protections of the Rent Stabilization Law, and awarded plaintiffs partial summary judgment on the issue of liability on their rent overcharge claims. The Court concluded that the issue of the amount such overcharges was premature, as discovery was necessary to determine the legal regulated rent for each apartment.

In support of the instant cross-motions, plaintiffs now contend that no additional evidence exists and that the legal regulated rents can be determined and the overcharge amounts calculated without the need for discovery. They argue that since it is undisputed that no reliable rent records exist, DHCR's default formula as codified in RSC §2526.1(g) is applicable to the determination of the legal rent for their apartments.[3] Plaintiffs assert that based on the unrefuted

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[3]In 2014, the Rent Stabilization Code was amended to add, *inter alia*, a new subdivision (g) to section 2526.1, so as to codify DHCR's default formula for setting rents when the owner fails to provide appropriate documentation in an overcharge proceeding or the owner engages in a fraudulent scheme to deregulate an apartment. See *RSC Amendment Summary, page 4, New York State Division of Housing & Community Renewal, Office of Rent Administration.* Although the Court's October 2015 decision and order noted that the 2014 amendments were not applicable to the instant action, the Court overlooked Rent Stabilization Code §2527.7 which expressly provides in relevant part that "[e]xcept as otherwise provided herein, unless undue hardship or prejudice results therefrom . . . where a provision of this Code is amended or an

rent registration documents from DHCR and the information submitted with the prior motions, the legal regulated rents can be determined as a matter of law in accordance with RSC §2526.1(g)(1), which provides that "[w]here the rent charged on the base date cannot be determined, a full rent history from the base date is not provided, or the base date rent is the product of a fraudulent scheme to deregulate the apartment . . . the rent shall be established as . . . the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." Plaintiffs maintain that they have identified comparable apartments in the building and registered rents on the dates they first took occupancy, and based on those legal rent amounts, they have calculated the amount of their overcharges including treble damages.

Defendants oppose the cross-motions. In order to give context to the opposition, it is necessary to describe the relationships between the various defendants. Defendant Bowery was the original owner of the building and the landlord on plaintiffs' leases. Pursuant to a Purchase and Sale Agreement dated August 10, 2012, Bowery agreed to convert the building to condominium ownership, and sell the residential portion to defendant Bleecker. In the

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applicable statute is enacted or amended during the pendency of a proceeding, the determination shall be made in accordance with the changed provision."

Here, defendants neither object to the applicability of the 2014 amendments, nor claim "undue hardship or prejudice" under section 2527.7. The Court, therefore, will apply section 2526.1(g) to the instant action, which was pending in 2014 when the Code was amended. See IG Second Generation Partners, LP v. New York State Division of Housing & Community Renewal, 10 NY3d 474 (2008); Versailles Realty Co v. New York State Division of Housing & Community Renewal, 76 NY2d 325 (1990); Storch v. New York State Division of Housing & Community Renewal, 56 AD3d 278 (1st Dept 2008), lv app den 14 NY3d 704 (2010); Cabrini Realty LLC v. New York State Division of Housing & Community Renewal, 6 AD3d 280 (1st Dept 2004); Mountbatten Equities v. New York State Division of Housing & Community Renewal, 226 AD2d 128 (1st Dept 1996).

meantime, until the conversion was completed, Bowery agreed, pursuant to a Net Lease Agreement dated April 13, 2013, to net lease the residential portion to Bleecker. As the net lessee, Bleecker thereafter colleted the tenants' rent. By deed dated June 14, 2014, Bowery transferred its interest in the building to the Walsam defendants.

In opposing plaintiffs' cross-motions, the Bowery/Walsam defendants rely primarily on their arguments in support of their motion for renewal and reargument, which as noted above, were rejected in the Court's September 16, 2016 Interim Decision and Order. Bowery/Walsam additionally argue that issues of fact exist with respect to setting the legal rents and the rent overcharges, discovery is needed to determine the base rents and overcharges, plaintiffs are not entitled to treble damages since they have failed to establish willfulness, and attorney's fees are not warranted. They also argue that since the "new defendants," i.e. the Walsam entities, have not had an opportunity to present any evidence, summary judgment is premature and they would be denied their "right to due process." The Bowery/Walsam defendants further object that the default formula is not applicable to the determination of the legal rent for Arnold's and Schiller's apartments; the comparable apartment "methodology" proposed by Lazarus and Rocha is "improper" and without a "basis in law"; and that "not once has the Court suggested that the default formula is the proper method to determine the base rent in any of the 4-6 Bleecker apartments."

Defendant Bleecker submits separate opposition to the cross-motion, which adopts co-defendants Bowery/Walsam's opposition and additionally opposes plaintiffs' claims for treble damages and attorney's fees on the ground that it did not willfully overcharge plaintiffs. To support its argument as to the lack of willfulness, Bleecker submits an affidavit from its member

Douglas Ballinger, who states that he negotiated and executed on Bleecker's behalf the contracts with Bowery. He asserts that when Bleecker net leased the building from Bowery in April 2013 and began collecting rent in May 2013, Bleecker relied on Bowery's contractual representations regarding the tenants' leases and rents, and that Bleecker stopped collecting rent from plaintiffs once the Court declared that they were rent stabilized tenants and were entitled to damages for rent overcharges. Ballinger also asserts that Bowery did not provide Bleecker with any of the records or documents relating to plaintiffs' rent stabilized status or their legal regulated rents, and that Bleecker did not "collude with or have any relationship with Bowery." He argues that Bleecker's liability, as the net lessee, should be limited to the overcharges it collected between May 2013 and October 2015, and since Bleecker's collection of any overcharges was "clearly not willful," Bleecker is not liable for treble damages or attorney's fees. Ballinger asserts that a hearing is necessary to determine the amount of any such overcharges, but takes no position as to the methodology used to determine the legal regulated rent amounts and specifically the default formula codified in RSC §2526.1(g).

Defendants' arguments in opposition are not persuasive. Contrary to defendants' assertions, this Court's October 14, 2015 Decision and Order expressly held that "where no reliable rent records exist to set the lawful base date rent, the court must use DHCR's default formula which considers the lowest rent charged for a rent stabilized apartment with the same number of rooms in the same building on the relevant base date," citing Thornton v. Baron, 5 NY3d 175, 179-181 (2005). Specifically with respect to Rocha's and Lazarus' apartments, the Court held that the rental history "is neither reliable nor adequate for the purpose of setting the lawful rent on the base date . . . so DHCR's default formula may be the appropriate vehicle for

fixing the base date rent." The Court's decision also analyzed in detail the rent history and DHCR Rent Roll for each apartment, and found that those records do not support, but rather directly conflict with, defendants' proffered explanations for deregulating plaintiffs' apartments. Based on those documents, the Court not only held that each apartment was improperly deregulated, but also that the increases that brought the rents above the then $2,000 threshold were invalid, the rents on the base date were illegal, the substantial rent increases and other circumstances were indicia of a fraudulent scheme to deregulate the apartments, and the rental history prior to the four-year base date must be considered in setting the lawful rents. In view of the foregoing, the Court, at a minimum, "suggested" that plaintiffs' legal rent and their rent overcharge claims would be determined in accordance with DHCR's default formula.

Defendants also argue in a bare and conclusory fashion that issues of fact exist with respect to setting the legal rents and overcharges, without identifying a specific material issue warranting a trial. They likewise argue that summary judgment is premature in the absence of discovery without identifying any information in plaintiffs' exclusive control that has the potential to raise an issue of material fact. See McDaniel v. Code Transport, Ltd, 149 AD3d 595 (1st Dept 2017). Moreover, the Court's September 22, 2016 Interim Decision Order addressed and rejected the Walsam entities' due process and other arguments based on their status as so-called "new defendants."

While defendants assert that the DHCR default formula "is an improper means of determining the legal rent" for Arnold's and Schiller's apartments, they simply rehash their prior argument that the legal rent for apartments 2E and 3E should be determined in accordance with RSC §2526.1(a)(3)(iii). Relying on that provision, defendants assert that those apartments were

temporarily exempt from regulation, and upon the expiration of those temporary exemptions, the legal rent is the rent agreed upon by the landlord and the first tenant. The Court rejected that identical argument as without merit in both the original decision and upon reargument, and will not repeat the reasons for doing so a third time.[4] With respect to the Lazarus and Rocha apartments, defendants essentially concede that the default formula codified in RSC § 2526.1(g)(1) is applicable, as they merely object to the "methodology" used by plaintiffs in designating the apartments comparable to their own.

Based on the foregoing, the Court finds that defendants have failed to raise an issue of material fact as to the applicability of the default formula codified in RSC § 2526.1(g)(1). The Court therefore concludes as a matter of law that the default formula codified in RSC § 2526.1(g)(1) is applicable to the determination of plaintiffs' rent overcharge claims, and pursuant to that provision, the legal rent for their apartments is the lowest rent registered for an apartment in the building comparable to their own apartments on the date they first took occupancy.

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[4]The Court rejected defendants' reliance on the language in RSC §2526.1(a)(3)(iii) which states that "the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption expires." Significantly, the 2014 amendments to the Rent Stabilization Code substantially changed section 2526.1(a)(3)(iii) and eliminated that language. Section 2526.1(a)(3)(iii) now provides as follows:

> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under section 2522.8 of this Title, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this code.

Notwithstanding the Court's conclusion as to the applicability of the default formula, on the record presented, the Court is unable to determine as a matter of law the amount of damages to which plaintiffs are entitled. As determined above, under RSC § 2526.1(g)(1), the legal rent for each of plaintiffs' apartments is the lowest rent registered for a *comparable apartment* in the building on the date they first took occupancy. The amount of the legal rent is therefore dependent on each plaintiff making a prima facie showing of an apartment in the building comparable to their own. Comparability of apartments is generally determined by looking at other apartments in the same building with the same number of rooms. See Grimm v. State of New York Division of Housing & Community Renewal, 15 NY3d 358 (2010); Thornton v. Baron, supra; Levinson v. 390 West End Assoc, LLC, 22 AD3d 397 (1st Dept 2005); Goldman v. New York State Division of Housing & Community Renewal, 6 AD3d 197 (1st Dept 2004).

Here, neither plaintiffs nor their attorneys provide any competent evidence as to the layout or number of rooms in plaintiffs' apartments or the alleged comparable apartments. Plaintiffs do not submit any affidavits, and their affidavits in support of their prior summary judgment motion did not describe the layout or size of their own or any other apartments in the building. On the issue of comparability, plaintiffs rely solely on the affirmations of their attorneys who merely conclude without firsthand knowledge or competent evidentiary support, that certain apartments are comparable to plaintiffs' apartments.

For example, the attorney for Arnold and Schiller merely states that "[i]n as much as Arnold occupies Apartment 2E and Schiller occupies Apartment 3E, the 'comparable' apartment used for the default formula analysis is Apartment 4E." The attorney for Lazarus and Rocha states, without firsthand knowledge, that their apartments in the 6 Bleecker portion of the

building are "studio apartments" and the apartments in the 4 Bleecker portion are "one bedrooms." Despite the different number of rooms, he asserts that with "some minor adjustments" for the difference in square footage, the apartments in the two portions of the building are comparable. Even assuming without deciding that the apartments could be considered comparable, the attorney relies solely on a copy of a one-page undated document from an unnamed source. Although the attorney characterizes the document as "marketing material for the Property used in connection with a proposed condominium conversion," that fact is not clear from the face of the document alone. Moreover, while the address and photographs of the building, layouts of several apartments, and the square footage of all apartments appear on the document, it does not qualify as competent evidence and is insufficient to support the attorney's allegations as to comparability.

Notably, while defendants, as the former and current owners and/or landlords, are in the best position to identify which apartments are and are not comparable to plaintiffs' apartments, they have failed to proffer any affirmative evidence on the issue of comparability. Thus, since plaintiffs have failed to make a prima facie showing on the issue of comparability, which is necessary to the determination of the legal rents and the calculation of plaintiffs' overcharges, plaintiffs are not entitled to summary judgment on the issue of damages.[5]

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[5]The court notes that since the record did not contain a complete copy of DHCR's Rent Roll for the building, on May 11, 2017, the Court issued an Interim Order directing plaintiffs to submit a subpoena for the Court's signature for DHCR to produce a complete copy of the Rent Roll with the 2011 registration information. On May 25, 2017, DHCR delivered the subpoenaed documents to the Subpoenaed Record Room. DHCR provided a complete certified copy of the Rent Roll. The registration information for 2011 appears on page 29, which shows that apartments 2W, 4E and 4W were registered with the identical "legal reg rent" of $858.00. The subpoenaed records will be available for the parties' inspection and copying in Part 11, Room 351, until June 23, 2017, after which time they will be returned to DHCR.

Nevertheless, the Court concludes as a matter of law that plaintiffs are entitled to treble damages. Bowery/Walsam merely argue that plaintiffs are not entitled to treble damages, since they fail to establish that the overcharges were willful. It is well settled, however, that the Rent Stabilization Law creates a presumption of willful overcharges in favor of tenants, and the *owner* has the burden to prove by a preponderance of credible evidence, that the overcharges were not willful. See RSL § 26-516(a); RSC § 2526.1(a)(1); Altschuler v. Jobman 478/480, LLC, 135 AD3d 439 (1st Dept 2016), lv app den, 29 NY3d 903 (2017). Moreover, while Bleecker asserts that it did not wilfully overcharge plaintiffs and submits an affidavit that it relied on Bowery's representations regarding the tenants' leases and rents, and that Bowery provided none of the records or documents pertaining to the tenants' rent regulatory status, such assertions are insufficient to rebut the presumption of willfulness arising from the overcharge. See S.E. & K. Corp v. Division of Housing & Community Renewal, 239 AD2d 123 (1st Dept 1997) (overcharges not excusable by the claimed unavailability of a full rental history from the prior owner when petitioner took title). Thus, in absence of a sufficient showing that the overcharges were not willful, plaintiffs are entitled to treble damages on their overcharge claims.

Likewise, under the circumstances presented, plaintiffs are entitled to an award of reasonable attorney's fees. See RSL §26-516(a)(4); RSC § 2526.1(d); Mohassel v. Fenwick, 5 NY3d 44, 50 (2005). However, since plaintiffs have been awarded treble damages, they are not entitled to pre-judgment interest on any damages awarded in this action. See RSL § 26-516(a); RSC §2526.1(a)(1); RSC § 2526.1(d); Mohassel v. Fenwick, supra at 50. In Mohassel, the Court of Appeals held that the tenant in a rent overcharge proceeding before DHCR was entitled to "prejudgment interest" on his treble damage award of more than $80,000 but only from the date

of the Rent Administrator's decision forward to the date of entry of the judgment. The tenant had commenced the DHCR proceeding in 1984, DHCR issued a decision in 1989, the owner filed an administrative appeal and an Article 78 proceeding, both of which were denied, and the tenant's judgment was not entered until 2002. The Court of Appeals held that "treble damages are imposed in lieu of interest from the date of the monthly overcharge to the date of the Rent Administrator's decision," but "nothing in the rent stabilization scheme restricts the grant of interest from the date of the Rent Administrator's decision forward." Id at 50. The Court of Appeals reasoned that where more than 15 years had elapsed and the tenant had not yet collected any of the rent he overpaid, the "imposition of prejudgment interest ensures that injured tenants will be made whole and encourages both willful and nonwillful violators to make prompt payment." Id at 50-51. Since the facts of the instant action are clearly distinguishable from those in Mohassel, no basis exists to award plaintiffs prejudgment interest.

With respect to the various defendants' liability, pursuant to RSC § 2526.1(f)(2)(i), former and current owners are equally liable for rent overcharges and treble damages, without regard to whether they actually "collected" the overcharges. See 10th Street Associates LLC v. Division of Housing & Community Renewal, 34 Misc3d 1240(A) (Sup Ct, NY Co 2012), aff'd 110 AD3d 605 (1st Dept 2013). Moreover, "owner" is broadly defined to include a "net lessee." RSC § 2500.2(g). Hence, all defendants, Bowery as the former owner, Bleecker as the net lessee and the Walsam entities as the current owner, are liable for plaintiffs' overcharges.[6]

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[6]As to the liability of the Walsam entitles, the Court's September 22, 2016 Interim Decision and Order held, *inter alia*, that as successors-in-interest to Bowery who took title to the building after the commencement of the instant action, the Walsam entities are deemed to be in privity with the prior owner Bowery, and as such are barred from litigating the issues previously decided. See CPLR 1018; Copeland v. Salomon, 56 NY2d 222 (1982); Gramatan Home

As determined in the Court's original decision and order granting plaintiffs partial summary judgment, pursuant to the statute of limitations, plaintiffs cannot recover any overcharges occurring more than four years prior to the commencement of this action. CPLR 213-a; Conason v. Megan Holding, LLC, 25 NY3d 1, reargmt den 25 NY3d 1193 (2015). Treble damage awards are limited to two years prior to the commencement of this action. RSC § 2526.1(a)(2)(I). Since this action was commenced on September 18, 2013, the cut-off date for the overcharge claims is September 18, 2009, and the cut-off date for treble damages is September 18, 2011.

Also, when the default method is used to calculate rent overcharges, a "rent freeze" is imposed and the owner is barred from collecting the Rent Guidelines Board percentage rent increases it would have received at each renewal had it been charging a legal rent stabilized rent. RSL §26-517(e); RSC § 2528.4(a); 215 W88th Street Holdings LLC v. New York State Division of Housing & Community Renewal, 143 AD3d 652 (1st Dept 2016); Jazilek v. Abart Holdings, LLC, 72 AD3d 529 (1st Dept 2010).

Finally, turning to defendant Bleecker's motion, Bleecker seeks an order granting partial summary judgment against co-defendants Bowery and Walsam, on its 4th cross-claim for "contractual indemnification" and its 5th cross-claim for attorney's fees. Bowery and Walsam oppose the motion, and plaintiffs have no response. The motion is denied in its entirety.

As noted above, defendant Bowery was the owner and landlord when plaintiffs executed

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Investors Corp v. Lopez, 46 NY2d 481, 486-487 (1979). Therefore, the Walsam entities are bound by the Court's October 14, 2015 determination granting plaintiffs' prior motion for summary judgment to the extent of declaring that plaintiffs are subject to rent stabilization and awarding them partial summary judgment as to liability on their rent overcharge claims.

their leases. In August 2012, Bowery entered into a Purchase and Sale Agreement with Bleecker, in which Bowery agreed to convert the building to condominium ownership, and sell the residential portion to Bleecker. Pursuant to a Net Lease Agreement dated April 13, 2013, Bowery agreed to net lease the residential portion to Bleecker until the conversion was completed. By deed dated June 14, 2014, Bowery transferred its interest in the building to the Walsam defendants.

To support its 4th cross-claim for "indemnification for rent overcharges," Bleecker relies on paragraph 4 of the Rider to the Purchase and Sale Agreement, which states as follows:

> If there are any complaints, challenges or proceedings pending for the reduction of any of the rentals or if any are filed prior to the closing of title the Seller [Bowery] will comply with and discharge same prior to closing at the Seller's [Bowery's] own cost and expense; and if said complaints, challenges or proceedings are not discharged by the Seller [Bowery], the Seller [Bowery] shall give to the Purchaser [Bleecker] a credit for the cost of such discharge of complaints or proceedings at the closing of title. Seller [Bowery] shall remain responsible for any rent rollbacks, overcharges or refunds for the period prior to the closing of title.

Based on this provision, the 4th cross claim seeks a judgment declaring that Bowery and Walsam: 1) are obligated to tender a defense to Bleecker; 2) have "primary obligations" to pay Bleecker a credit for the cost of discharging any complaints or proceeding prior to the closing of title; and 3) shall remain primarily responsible for any rent roll backs, overcharges or refunds for the period prior to the closing of title. The 4th cross-claim also seeks a money judgment against Bowery and Walsam "in an amount equal to the costs, expenses incurred in this action."

Bleecker is not entitled to any of the foregoing relief. Contrary to Bleecker's assertion, paragraph 4, as quoted above, does not provide Bleecker with a right to a defense in the main action. Moreover, the requested declaratory relief is not only premature, but also unnecessary. See Empire 33rd LLC v. Forward Association Inc, 87 AD3d 447 (1st Dept 2011). "A declaratory

judgment action is generally appropriate only where a conventional form of remedy is not available." Bartley v. Walentas, 78 AD2d 310, 312 (1st Dept 1980).

Although Bleecker's motion seeks "contractual indemnification," paragraph 4 is not an indemnification clause. Paragraph 4 simply imposes a contractual obligation on Bowery and/or Walsam for any rent overcharges during the period prior to the closing of title, and gives Bowery and/or Walsam the option to either "discharge" such liability, presumably by payment, *before* the closing of title, or to provide Bleecker with a "credit for the cost of such discharge" *at* the closing of title. The operative event is the "closing of title," which Bleecker concedes has not yet occurred. Under these circumstances, declaratory relief is not only premature, but also unnecessary, as a conventional claim for breach of contract and damages will be available at the appropriate time, and where Bleecker can be accorded complete relief. See American Insurance Association v. Chu, 64 NY2d 379 (1985); Empire 33rd LLC v. Forward Association Inc, supra; Bartley v. Walentas, supra.

In support of its 5th cross-claim for attorney's fees, Bleecker relies on section 10.9 of the Purchase and Sale Agreement which provides as follows:

> Section 10.9 Attorney's Fees. In the event of any litigation between the parties hereto with respect to their rights and obligations hereunder, reasonable attorneys' fees and costs of the party successful in such action will be borne by the party which is the losing party in such litigation.

Even assuming without deciding that Section 10.9 is broad enough to encompass the cross-claims asserted in this action, since Bleecker has not prevailed on its 4th or any other cross-claim, it is not entitled to attorney's fees at this time.

Accordingly, it is

ORDERED that the motion by defendant 4-6 Bleecker Street LLC for partial summary judgment on its 4th and 5th cross-claims against co-defendants 316 Bowery Realty Corp., Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC and 316 Bowery Next Generation LLC (motion seq. no. 005), is denied in its entirety; and it is further

ORDERED that plaintiffs' cross-motions for summary judgment are granted to the extent that the amount of damages to which plaintiffs are entitled on their rent overcharge claims shall be determined in accordance with this Decision and Order, and the cross-motions are denied to the extent that the amount of damages to which plaintiffs are entitled, including treble damages, cannot be calculated in the absence of a prima facie showing on the issue of comparability (cross-motions to motion seq. no. 006); and it is further

ORDERED that since this action has been transferred to the Hon. Margaret Chan, the parties are directed to contact Justice Chan forthwith to schedule a conference.

DATED: May 31, 2017

ENTER:

HON. JOAN A. MADDEN
J.S.C.