Pascaud v B-U Realty Corp.
2017 NY Slip Op 31482(U)
June 23, 2017
Supreme Court, New York County
Docket Number: 161824/2014
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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SYLVAIN PASCAUD, LESLIE PASCAUD, and JEANNE GOFFI,

Plaintiffs,

-against-

B-U REALTY CORP. and PAUL BOGONI,

Defendants.

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Index No. 161824/2014
DECISION/ORDER
Motion Seq. No. 003

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' motion for declaratory relief and damages for rent overcharges plus treble damages and defendant's cross-motion to dismiss.

Papers	**Numbered**
Plaintiffs' Notice of Motion	1
Defendant's Notice of Cross-Motion to Dismiss	2
Defendant's Memorandum of Law in Opposition	3
Plaintiffs' Reply Affirmation	4

Grad & Weinraub, LLP, New York (David A. Weinraub of counsel), for plaintiffs Sylvain Pascaud and Leslie Pascaud.
Ofeck & Heinze, LLP, New York (Patrick J. Jordon, of counsel), for defendant B-U Realty Corp.

Gerald Lebovits, J.:

In this action seeking a rent-stabilized lease and damages for rent overcharges, plaintiffs Sylvain Pascaud and Leslie Pascaud (collectively, the Pascauds) move for partial summary judgment under CPLR 3212.[1] In their motion, plaintiffs seek (1) a declaration that they are entitled to a rent-stabilized lease, at a rent, based on a default formula, of $1490.61 per month; (2) an order freezing their monthly rent at $1106.87, until their apartment is properly registered with the State of New York Division of Housing and Community Renewal (DHCR); (3) rent overcharges in the amount of $154,548.72, plus treble damages; and (4) an award of reasonable attorney fees.

Defendant B-U Realty Corp. (B-U Realty) cross-moves for partial summary judgment under CPLR 3211 (a) (5) or, in the alternative, under CPLR 3212, (1) dismissing the third, fifth, and seventh causes of action for rent overcharges and attorney fees as time-barred, (2) denying

[1] According to counsel for the Pascauds, plaintiff Jeanne Goffi is represented by other counsel and is not part of this motion.

plaintiffs' motion, to the extent that it seeks a declaration that they are entitled to a rent-stabilized lease; and (3) declaring that plaintiffs' apartment became deregulated in June 2016, upon the expiration of the J-51 tax benefits.[2]

The Pascauds became tenants at 945 West End Avenue, New York, New York (the Building), Apartment 4C (Apt. 4C) in 2014, pursuant to a lease dated August 27, 2014, for a one-year term, beginning on September 1, 2014 and ending on August 31, 2015. Their free-market lease provided for a monthly rent of $5400. The Building, which contains approximately 48 apartments, is owned by B-U Realty.

B-U Realty received J-51 tax benefits for the Building from the 2005/2006 tax year through the 2015/2016 tax year.

> "The City's J-51 tax incentive program allows property owners who complete qualifying multiple dwelling improvements to receive tax exemptions and abatements for a period of years. In exchange for receiving such benefits, the landlords subject their properties to the [Rent Stabilization Law] RSL (Administrative Code § 11-243). Accordingly, units not otherwise subject to rent stabilization become rent-stabilized."

Gersten v 56 7th Ave. LLC, 88 AD3d 189, 194 (1st Dept 2011).

When the Pascauds entered into their lease in August 2014, defendant was still receiving J-51 tax benefits. Thus, the Pascauds' apartment was subject to rent stabilization.

The rental history for Apt. 4C is far from clear; the information in the leases and apartment registration statements filed by B-U Realty with DHCR is, in some cases, inconsistent. Based on those documents, however, it appears that, until 2003 or early 2004, B-U Realty treated Apt. 4C as rent stabilized, with the last rent-stabilized tenant, E. Levine, paying rent of $1106.98 ar month. Then, on May 5, 2004, B-U Realty registered the apartment with DHCR as permanently exempt from rent stabilization, on the basis of alleged improvements made to the apartment. *See* Registration Apartment Information, affirmation of David A. Weintraub, dated October 28, 2016, exhibit G. From that time forward, B-U Realty charged market rate rents for Apt. 4C.

Based on copies of the leases obtained by plaintiffs from defendant, the following reflects the tenancies for Apt. 4C and the market-rate rents paid for the apartment from April 15, 2004 through August 1, 2015:

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[2] Defendant Paul Bogoni is the president of B-U Realty. Claims against defendant Bogoni were dismissed by the parties' stipulation of August 6, 2016.

Lease Dates	Tenants	Monthly Rent
4/15/2004-4/14/2005	Sean R. O'Brien/Rebecca Stead	$4000
5/01/2006-4/30/2007	Sean R. O'Brien/Rebecca Stead	$4200
8/01/2007-8/01/2008	Jonathan Faiman	$4950
2/01/2009-2/01/2011	Samuel and Agnes Lev	$4200
2/01/2011-1/31/2012	Samuel and Agnes Lev	$4455.78
2/01/2012-1/31/2013	Samuel and Agnes Lev	$4678.5
2/01/2014-1/31/2015	Samuel and Agnes Lev	$5011.69
9/01/2014-8/31/2015	Sylvain and Leslie Pascaud	$5400

A lease dated 9/11/2011 for an E. Mostrefew, for the period of 9/01/2011-1/31/2013, at a rent of $4945.50, appears to overlap the tenancy of Samuel and Agnes Lev.

Although B-U Realty began receiving J-51 tax benefits in 2005, none of the leases listed above were on forms indicating that they were rent-stabilized leases.

As noted above, until 2004, B-U Realty registered Apt. 4C with DHCR as a rent-stabilized apartment, with E. Levine listed as the last rent-stabilized tenant. On May 5, 2004, however, B-U Realty registered the apartment with DHCR as "Permanently Exempt" from rent stabilization due to a high rent vacancy based upon its improvements. *See* DHCR Registration Apartment Information, Weintraub affirmation, exhibit G. Information provided by DHCR to plaintiffs, in response to their information request dated November 13, 2014 listed Apt. 4C as an "exempt apartment - reg not required" for the years 2005 through 2013. *Id.* Information provided by B-U Realty to DHCR on 10/27/2014, however, listed Apt. 4C as vacant for the 2014 year, with the rent amount missing. *Id.* According to the lease contained in the record and the affidavit of Agnes Lev, Samuel and Agnes Lev were tenants through August 2014.

On August 14, 2014, the New York State Homes and Community Renewal sent a letter to Bogoni, notifying him that, due to the receipt of a J-51 tax abatement for the Building since 2005, the landlord was precluded from using the "high rent" or "high income" tax abatement to remove apartments from rent stabilization. Letter to Paul Bogoni, annexed to complaint, exhibit A. Nonetheless, on August 27, 2014, two weeks after receiving the letter regarding the impact of the J-51 tax abatement, B-U Realty signed a market-rate lease agreement with the Pascauds that was not on a form for rent-stabilized leases.

In August 2015, after this litigation was initiated, and for the first time, B-U Realty offered the Pascauds a rent-stabilized lease for the term of 12/1/15 through 11/20/16, at a monthly rent of $5,508.00, which the Pascauds refused to sign. It would appear, however, that the Pascauds have continued to reside in Apt. 4C, and have continued to pay rent of $5400 per month, at least through January 2017.

On January 26, 2015, B-U Realty provided revised registration information to DHCR listing Apt. 4C as exempt for the registration years 2004 and 2005, but listing O'Brien & Stead

as rent-stabilized tenants from 4/15/2005 through 4/14/2006, at a rent of $4100 per month,[3] and from 5/01/2006 through 4/20/2007, at a rent of $4200 per month. In the revised registration information, Apt. 4C was listed as vacant for the registration years 2008, 2009, 2010 and 2011. The apartment was registered as rent stabilized from 2012 through 2015, with Mostrefew listed as the rent-stabilized tenant for the period from 9/01/2011 through 1/31/2013, at a rent of $4945.50 per month;[4] Lev listed as the rent-stabilized tenant for the period from 2/01/2013 through 1/31/2014, at a rent of $4818.93 per month,[5] and from 2/01/2014 through 1/21/2015 at a rent of $5011.69 per month; and the Pascauds listed as rent-stabilized tenants for the period from 9/01/2014 through 8/31/2015, at a rent of $5400 per month. *See* DHCR Registration Apartment Information, Weinraub affirmation, exhibit H.

Finally, according to B-U Realty's rent ledger, from January through April of 2004, a tenant named Mastrogiorno resided in Apt. 4C, paying a rent of $1407.93 per month. *See* Weinraub affirmation, exhibit I; *see also* Bogoni tr at 90-92 (stating that some of the entries indicated the payment of security rather than rent, and that "tenant probably stayed a half month, and then took off"). However, while one page of the rent ledger contains check marks indicating that the apartment was vacant in February and April, as well as in May through December of 2004, another page lists O'Brien and Stead as tenants of the apartment, beginning on April 15, 2004.

Plaintiffs contend that for 10 years, defendant fraudulently treated Apt. 4C as a free-market apartment, despite its receipt of a J-51 tax abatement for the Building from 2006-2016 and despite Bogoni's admission that, at least by 2009 or at the latest, by 2011, he was aware that the Building was subject to rent stabilization. See Bogoni tr at 83-84. Plaintiffs further note that even after Bogoni was notified that the apartments in the Building were subject to rent stabilization, defendant still offered plaintiffs a non-rent-stabilized lease for Apt. 4C.

Plaintiffs also challenge the validity of the improvements that B-U Realty allegedly made to Apt. 4C in 2004, which provided the basis for its original claim that the apartment was exempt from rent stabilization as a high rent vacancy apartment.

Plaintiffs contend that, as a result of defendant's actions, the base rent is unreliable; therefore, the default formula, used by DHCR to set the base date rent where reliable rent records are unavailable, should be utilized to calculate the rent overcharges. Plaintiffs further argue that because defendant's removal of the apartment from rent stabilization was willful, plaintiffs are

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[3] According to their lease, the O'Brien/Stead rent for that period was $4000 per month.

[4] As noted above, the leases of tenants Samuel and Agnes Lev, covering the period from 2/1/2009 through 1/31/2015, indicate that they were the tenants during that period of time. *See also* affidavit of Agnes Lev (stating that she and her husband resided in Apt. 4C from January 2009 through August of 2014).

[5] This amount of rent is not reflected in any of the leases signed by the Levs.

entitled to treble damages.

Defendant, through its president, Bogoni, first contends that, although he consulted with his attorneys when he applied for a J-51 tax abatement, they never informed him that receipt of the tax abatement would mean that the apartments in the Building would be subject to rent stabilization for the period that B-U Realty received the tax benefits. Conceding that he is now aware of the impact of the J-51 tax abatement, Bogoni is not clear about when, exactly, he learned about those regulatory consequences, although he has testified that he was aware of those consequences by at least 2009 or 2011. Bogoni contends that any error in his efforts to bring documents for the Building into compliance with rent stabilization requirements, including reporting requirements, were purely the result of his being overwhelmed by those efforts, and were neither willful nor an indication of fraud. Defendant argues that its good faith is underscored by the fact that the Pascaud's 2014-2015 lease contained a rent stabilization rider, and, therefore, the lease complied with the rent stabilization law. Finally, defendant contends that a four-year statute of limitations applies to calculating rent overcharges and that using a four-year base date rent, plaintiffs cannot show that they were overcharged. Therefore, according to defendant, plaintiffs' case must be dismissed.

Since 2009, with the decision of the Court of Appeals in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), a landlord that receives a J-51 tax abatement cannot take advantage of the high rent decontrol provisions of the Rent Stabilization Law. In 2011, the Appellate Division, First Department, held that *Roberts* has retroactive application. *Gersten v 56 7th Ave. LLC*, 88 AD3d at 207. As noted above, because B-U Realty was receiving J-51 benefits for the Building, Apt. 4C became subject to rent stabilization in, at least, the 2005/2006 tax year.

Even after such tax abatements have ended, an apartment may not be removed from rent stabilization unless a rent stabilization rider, notifying the tenant of the date that the apartment will be removed from rent stabilization, is provided to the tenant with his or her lease. Rent Stabilization Code, 9 NYCRR 2520.11(o); *East W. Renovating Co. v N.Y. St. Div. of Hous. & Community Renewal,* 16 AD3d 166, 166-167 (1st Dept 2005). At the very least, plaintiffs were entitled to a rent-stabilized lease when they signed their lease for Apt. 4C in 2014. Questions remain, however, about how to calculate any rent overcharge resulting from the failure to treat the apartment as rent-stabilized and whether the protections of rent stabilization ceased in 2016, when defendant's J-51 benefits ended.

As defendant argues, a four-year limitation exists in calculating rent overcharges under the Rent Stabilization Law. *Thornton v Baron*, 5 NY3d 175, 180 (2005). That four-year limit does not apply in some circumstances when an apartment is improperly removed from the protections of rent stabilization. As the Court stated in *Thornton,* where the lease reflects

> "an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York, [that] lease was void at its inception. Further, because the rent it purported to establish was therefore illegal, the ... rent registration statement listing this illegal rent was also a nullity. Under those circumstances, . .

. the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here."

Id. at 181. *See also Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.,* 15 NY3d 358, 365-366 (2010).

Here, on the base date of August 2010 suggested by defendant, Apt. 4C should have been treated as a rent-stabilized unit, and the rent should have been set accordingly, but was not. Even assuming, as Bogoni contends, that he was not initially aware that the Building became subject to rent stabilization in 2005, with the receipt of J-51 tax benefits, it is undeniable that, at least from 2009 or 2011, when *Roberts* and *Gersten* were decided, Bogoni knew that the receipt of a J-51 tax abatement subjected the Building to rent stabilization. *See* Bigoni tr at 83-84. Nonetheless, according to Agnes Lev, who resided in Apt. 4C with her husband from January 2009 to August 2014, B-U Realty never offered her a rent-stabilized lease or provided rent stabilized riders during their tenancy. *See* Lev aff, ¶¶ 1, 3. B-U Realty's continued treatment of Apt. 4C as a free-market apartment constituted an attempt to circumvent the Rent Stabilization Law, and any lease issued after that period were nullities.

Since the receipt of a J-51 tax abatement rendered Apt. 4C subject to rent stabilization, B-U Realty was required to change its registration with DHCR to reflect that fact. Even though Bogoni concedes that he was aware of the impact of the receipt of the J-51 tax abatement by 2009 or 2011, it appears that B-U Realty did not change the DHCR registration of Apt. 4C to rent-stabilized until January 26, 2015, after this litigation was initiated on December 1, 2014. *See* Weintraub affirmation, Exhibit H. Moreover, as discussed above, the information defendant provided on that date to DHCR, contained many inaccuracies and inconsistencies. Whether the many obvious inconsistencies and errors in the registration information provided by B-U Realty to DHCR in 2014 and 2015 are evidence of fraud, or just carelessness, they indicate a disregard for the Rent Stabilization Law.

Finally, even after Bogoni received the August 14, 2014, letter from New York State Homes and Community Renewal, directly notifying him of the J-51 problem, B-U Realty entered into a market-rate lease with plaintiffs. Pointing to a Rent Stabilization rider, which defendant claims was annexed to the lease, defendant argues that the 2014 lease shows that there was no scheme to defraud or intent to deregulate, because the rider shows that plaintiffs were recognized by B-U Realty as rent-regulated tenants. The court notes, however, that the rider is dated October 1, 2014, four days after the lease was signed by Leslie Pascaud; that it was not signed by her; and that, in his deposition testimony, Bogoni admitted filling in the name L. Pascaud on the rider. *See* Tax Benefits Rider, annexed to Pascaud lease, Weinraub affirmation, exhibit E; Bogoni tr at 138. Moreover, according to Leslie Pascaud, neither she, nor her husband, received a copy of the rider at the time it was dated, and had never seen the document until it was produced by defendant in the context of this litigation. Leslie Pascaud reply aff, ¶ 3.

Furthermore, there is the additional complication that Apt. 4C was initially removed by defendant from the protections of rent stabilization based on the cost of the improvements that it

allegedly made to the apartment in 2004. Under the Rent Stabilization Code, certain expenditures by a landlord could justify an Individual Apartment Improvement (IAI) increase of rent (*see* Rent Stabilization Code, 9 NYCRR § 2522.4 [a] [1]),[6] which could place the apartment over the threshold for luxury decontrol, which, at the time, was $2000 per month. Administrative Code § 26-504.2; Rent Stabilization Code, 9 NYCRR 2520.11 (r) (4). However, not all expenditures by a landlord qualify as IAI's justifying an increase in rent.

> "[I]n evaluating the legitimacy of an IAI increase, the court is required to determine (1) whether the owner made the improvements to the apartment during the relevant time period, (2) whether those improvements constitute legitimate individual apartment improvements within the meaning of the regulations, (3) the total cost of the improvements, (4) one fortieth of that cost, and (5) the sum of one fortieth of the costs plus the monthly rent level after any other increases to which the owner may be entitled."

Matter of Rockaway One Co., LLC v Wiggins, 35 AD3d 36, 42 (2d Dept 2006)

According to the work proposal from BrasAl Construction Corp. (BrasAl), on which the landlord relies, the following work was to be done at a total cost of $32,000: "Scrape, plaster and sand all the walls; electrical renovation; prime and paint the walls; install a new Freeze (sic) on the kitchen and new toilete (sic) on the bathroom; scrape and polish the floor on all apt."[7] BrasAl Proposal, Weintraub affirmation, exhibit J. Applying the formula contained in section 2522.4 of the Rent Stabilization Code which would permit an increase in rent of 1/40th of the alleged $32,000 in expenditures for the improvements, defendant contends that the rent of Apt. 4C in 2004, exceeded the $2000 threshold for high income vacancy decontrol.

Defendant has produced checks in the amount of $5000 (check # 4711, dated February 24, 2004) and $27,660 (check # 4780, dated March 18, 2004) payable to BrasAl Construction Corp. to substantiate that the work proposed by BrasAl was done. As plaintiffs point out, however, there are two different copies of the $5000 and $27,660 checks in the record. One copy

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[6] Under section 2522.4 "An owner is entitled to a rent increase where there has been a substantial increase . . . of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase. In the case of vacant housing accommodations, tenant consent shall not be required." Rent Stabilization Code, 9 NYCRR § 2522.4 (a) (1); *see also* Administrative Code § 26-511 (13).

[7] "Prior to September 24, 2011, the increase in the monthly stabilization rent for the affected housing accommodations when authorized pursuant to paragraph (1) of this subdivision shall be 1/40th of the total cost, including installation but excluding finance charges." Rent Stabilization Code, 9 NYCRR § 2522.4 (a) (4).

of check # 4711 contains a notation on the memo line, "on acct. wds. 4C-5C." The other copy merely states "on acct." on the memo line. *See* Weinrub affirmation, exhibit N. The two copies of check # 4780 also differ - one copy has a handwritten memo, "4-C." The other copy has a blank memo line. Although the BrasAl invoice identifies Apt. 4C as the project which is the subject of the invoice, the inclusion of the reference to Apt. 5C, on check #4711, certainly raises questions about whether the proposed work was to occur only in Apt. 4C, or in Apt. 5C, as well.

The nature of the expenditures presents an even greater problem. In his affidavit in support of defendant's motion to dismiss, Bogoni stated that the apartment

> "was in absolute disrepair, many of the walls had holes in them, electrical work was required, plumbing had to be redone (because they had apparently installed their own machine) windows were replaced, the entire apartment needed to be refinished and painted, the floors needed to be redone and the bathroom required a new toilet bowl among other things."

Bogoni aff, ¶ 54.

"It is [the owner's] burden to prove that each of the improvements that entitled landlord to the IAI were actually made, and that the improvements were beyond ordinary repairs." *Ernest & Maryanna Jeremias Family Partnership, LP v Matas*, 39 Misc 3d 1206(A), 2013 NY Slip Op 50505(U), *4 (Civ Ct, Kings County 2013); *see also Matter of Mayfair York Co. v New York State Div. of Hous. and Community Renewal,* 240 AD2d 158 (1st Dept 1997); *see also Lirakis v 180 Seventh Ave. Assoc., LLC*, 12 Misc 3d 1173(A), 2006 NY Slip Op 51211(U), *3 (Civ Ct, NY County 2006), *affd* 15 Misc 3d 128(A) (App Term, 1st Dept 2007) (work must constitute improvements and may not amount to "normal maintenance, ordinary repair and decorating"). For example, expenditures for painting, plastering and floor maintenance do not constitute improvements. *Matter of Graham Ct. Owners Corp. v Division of Hous. & Community Renewal*, 71 AD3d 515, 515 (1st Dept 2010); *see also Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d at 158 (painting, skim coating, partial floor replacement and partial rewiring disallowed as normal maintenance); *Ernest & Maryanna Jeremias Family Partnership, LP v Matas*, 39 Misc 3d 1206(A), 2013 NY Slip Op 50505(U), *5 (painting and even removing rotten beams do not qualify as individual apartment improvements justifying an increase in rent).

As the above decisions reflect, the proposed costs of scraping, plastering and sanding the walls ($11,000), priming and painting the walls ($4960), and scraping and polishing the floor ($10,200), which total $25,600, or more than half of the $32,600 proposal, constitute normal maintenance and do not justify an increase in rent. Thus, even assuming that all of the work proposed was done in Apt. 4C, at best, only $7,000 of those costs could be allocated to high rent vacancy deregulation. Utilizing the 1/40 formula under the regulations (*see* Rent Stabilization Code, 9 NYCRR 2522.4 [a] [4]), only $175 could be added to the prior rent of $1106.98, plus any permissible adjustment upon a vacancy (*see* Rent Stabilization Code, 9 NYCRR 2522.8 [a] [2]), this amount falls far short of the $2000 threshold for high rent vacancy deregulation in

effect in 2004. Rent Stabilization Code, 9 NYCRR 2520.11 (r)(4); Administrative Code § 26-504.2.

Although the replacement of windows, claimed by Bogoni in his affidavit, could possibly constitute an IAI, nothing in the BrasAl proposal indicates that such work was to be done, and defendant has not submitted any evidence indicating that the windows were replaced.[8]

There are also question about whether a new freezer, included in the BrasAl proposal, was, in fact, installed. At least two of the tenants who resided in Apt. 4C after the "improvements" were allegedly made in 2004, state that no such appliance was in the apartment during their tenancies. *See* O'Brien aff, ¶ 2; Lev aff, ¶2.

Even assuming that a new freezer and toilet were installed, as called for in the proposal, as the court concluded above with respect to approximately two-thirds of the items in the proposal, B-U Realty has failed to meet its burden of establishing that such repairs, if made, constituted more than just ordinary repairs, as required to justify an increase in rent. *Ernest & Maryanna Jeremias Family Partnership, LP v Matas*, 39 Misc 3d 1206(A), 2013 NY Slip Op 50505(U), *5.

Defendant's documents also raise questions about when the work was purportedly carried out, and whether the apartment was vacant at the time, as defendant contends. If the apartment was not vacant, the defendant would have been required to obtain written consent of the existing tenant. *See* Rent Stabilization Code, 9 NYCRR § 2522.4 (a) (1). Even if the apartment was vacant, defendant was required to provide notice to the next tenant, to enable that tenant to seek DHCR review to determine whether the repairs or improvements justified terminating the rent-stabilized status of the apartment. Rent Stabilization Code, 9 NYCRR 2520.11 (u). Defendant has provided no evidence of such notice.

Based on the totality of irregularities discussed above, the court concludes that defendant's actions "[r]eflect[] an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York" that renders the Pascauds' lease "void at its inception." *Thornton v Baron*, 5 NY3d at 181.

It is appropriate to use a default formula to set the base date for the proper rent, using the last rent-stabilized lease to fix the proper base rent (*Thornton,* 5 NY3d at 181) given the many irregularities and contradictions that appear in the rent records and documents currently in the record of this case, including, but not limited to, the various leases for Apt. 4C, B-U Realty's rent ledger, the DHCR apartment registration information documents and given defendant's failure to meet its burden to establish that qualifying repairs were made, justifying the 2004 removal of

[8] According to defendant's counsel, B-U Realty no longer has any business dealings or other relationship with BrasAl. Counsel further indicates that he attempted, unsuccessfully, to reach the company and its president, but phone messages were not returned. Affirmation of Patrick J. Jordon at ¶¶ 6-9.

Apt. 4C from rent stabilization.

Permissible rent increases under rent stabilization are based on, among other things, the vacancies for the apartment. *See* Rent Stabilization Code, 9 NYCRR § 2522.8. Because of the factual inconsistencies and errors in the documents discussed above, the matter of calculating an appropriate rent and rent overcharges for plaintiffs will be referred to a Special Referee to hear and report with recommendations.

Given the court's conclusion that defendant acted to circumvent the Rent Stabilization Law, defendant has failed to rebut the presumption that any overcharges were willful. *Matter of Mayfair York Co. v N.Y. St. Div. of Hous. & Community Renewal*, 240 AD2d at 158. Plaintiff's request for treble damages is referred to a Special Referee, upon the Special Referee's calculation of rent overcharges, if any.

In light of the above, defendant's motion to dismiss the third, fifth, and seventh causes of action based upon a four-year statute of limitations is denied.

Finally, plaintiffs seek a ruling that they are entitled to a rent-stabilized lease, and defendant seeks a declaration that the apartment became deregulated as of June 2016, when the J-51 benefits expired. Because the court has concluded that the apartment was improperly deregulated in 2004, when defendant initially claimed a high rent vacancy deregulation, without first calculating the appropriate stabilized rent for the apartment, it cannot be determined whether the expiration of the J-51 tax benefits alone will terminate the rent-stabilized status of Apt. 4C. That will, in part, depend on the calculation of the rent-stabilized rent for the apartment. And, even assuming that the rent exceeds the current deregulation rent threshold that triggers the process for high-income deregulation, defendant still must go through that process, which includes a determination of the tenants' income. *See* Administrative Code § 26-504.3. The issue whether plaintiffs are entitled to a rent-stabilized lease going forward is, therefore, referred to the Special Referee to hear and report, as discussed above.

That aspect of plaintiffs' motion and defendant B-U Realty's cross-motion seeking attorney fees is denied without prejudice as premature.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted to the extent that a Special Referee shall be designated to hear and report to this court the following issues: (1) calculate the rent-stabilized rent for the apartment; (2) calculate the rent overcharges, if any; (3) calculate the amount of treble damages, if any; and (4) whether plaintiffs are entitled to a rent-stabilized lease going forward; and it is further

ORDERED that defendant B-U Realty's cross-motion (1) to dismiss the third, fifth, and seventh causes of action is denied; and (2)to declare that plaintiffs' apartment became deregulated in June 2016 is denied. The remaining aspect of its cross-motion is otherwise

granted to the extent that a Special Referee will hear and report whether plaintiffs are entitled to a rent-stabilized lease, as discussed above; and it is further

ORDERED that plaintiffs' motion and defendant B-U Realty's cross-motion seeking attorney fees is denied without prejudice as premature; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including all witnesses and evidence they seek to present, and shall be ready to proceed, on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury, CPLR 4320 (a) — in that the proceeding will be recorded by a court reporter, the rules of evidence apply, etc — and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the balance of this action shall continue.

Dated: June 23, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.