[*1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE J.S.C.

PART 10

Index Number : 106968/2010

DODD, JENIFER

vs

98 RIVERSIDE DRIVE, LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 106968/10

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion seq #002 + #003 are consolidated for consideration. 5/19/11

UNFILED JUDGMENT

This Judgment has not been entered by the County Cle and notice of entry cannot be served based hereon. T obtain entry, counsel or authorized representative mu appear in person at the Judgment Clerk's Desk (Roo

motion (a) and cross-motion (a) are decided in accordance with 141B). the annexed decision/order of even date.

PC set for 12/8/11 @ 9:30 am

Dated: 10/18/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Jennifer Dodd, Robert Tracy, Jeremy Hockenstein, Joanna Samuels, Richard Jardine and Jenny Sun,

Plaintiff (s),

-against-

98 Riverside Drive, LLC, Northbrook Management, LLC, AVJ Realty Corporation and AVJ Managment Corporation,

Defendant (s).

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DECISION/ ORDER

Index No.:106968/10
Seq. Nos.:002, 003

PRESENT:
Hon. Judith J. Gische
JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pl's N/M	1
JD and RT affd., exhibits	2
JH and JS affd., exhibits	3
RJ affd and JS affd., exhibits	4
JH and JS reply affd., exhibit	5
RJ affd and reply JS affd.,	6
Defd's N/M	7
SP affd., exhibit	8
SK affirm., exhibits	9
SK Supplemental affirm., exhibit	10

Upon the foregoing papers, the decision and order of the court is as follows:

This is another litigation arising in the aftermath of the Court of Appeals decision in Roberts v. Tishman Speyer (13 NY3d 270 [2009]). Plaintiffs (sometimes "tenants") have moved for summary judgment on their first, second and seventh causes of action, along with a dismissal of defendants' affirmative defenses. Defendants, 98 Riverside

Drive LLC ("98 Riverside") and Northbrook Management LLC ("Northbrook") (collectively "defendants")[1] have separately moved to stay consideration of the motion for summary judgment, pending resolution of certain cases in appellate courts, that have potential precedential impact on this case. By order dated May 19, 2011, the court consolidated these separate motions for consideration and determination in a single decision.

Issue has been joined and the note of issue has not yet been filed. The motion for summary judgment is, therefore, properly before the court for consideration. CPLR 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004); Chun v. North American Mortgages Co., 285 AD2d 42 (1st dept. 2001).

Preliminarily, the court denies defendants' motion for a stay. Gersten v. 56 7th Avenue LLC (___AD3d___ [1st dept. 2011], 928 NYS2d 515 [nor]) was decided by the Appellate Division, first department on August 18, 2011. 72A Realty Associates v. Lucas, (32 Misc.3d 47 [AT1 dept. 2011]) was decided by the Appellate Term on June 1, 2011. Thus, the two cases which formed the basis for defendants' request for a stay have since been decided, rendering the requested relief moot. The decisions of the appellate courts in these cases, however, inform this court's decision on plaintiffs' motion for summary judgment.

Underlying Facts

Many of the underlying facts are not disputed: Plaintiffs are all tenants in a building located at 98 Riverside Drive in Manhattan ("building"), which is owned by 98

[1]The action has been discontinued against defendants AVJ Realty Corporation and AVJ Management Corporation (See Order November 4, 2010).

Riverside and managed by Northbrook. 98 Riverside acquired the building in January 2008. A predecessor owner had applied for, and was granted, J-51 tax benefits beginning July 1, 1995. (98 Riverside and any prior owner of the building are collectively referred to as "owner"). Before 1995, the building was subject to rent regulation. The J-51 benefits expired on June 30, 2006 (Complaint ¶20, Answer ¶ 7).

Jennifer Dodd and Robert Tracy are the lessees and occupants of apartment 6E at the building ("Apt. 6E"). They moved in October 2005 pursuant to a two year lease, commencing September 1, 2005 and ending August 31, 2007, at a monthly rental of $3,300. The lease was extended for a two year period ending September 30, 2009, at a monthly rental of $3,350. A new lease was signed for the period commencing October 1, 2009 through September 39, 2010, at a monthly rental of $4,250. Even though the last lease has expired, Dodd and Tracy have continued to pay monthly rent at the rate of $4,250. Each of the leases and renewal treated Apt. 6E as deregulated and charged a market rent. On or about August 22, 2005, the owner filed an Owner's Report of Vacancy Decontrol with the New York State Division of Housing and Community Renewal ("DHCR"). None of the leases or the renewal contained any language informing the tenants that Apt. 6E wouldl become subject to deregulation upon the expiration of the J-51 benefits. RSL § 26-504(c).

Jeremy Hockenstein and Joanna Samuels are the lessees and occupants of apartment 9E at the building ("Apt. 9E"). Joanna Samuels moved into Apt. 9E in June 2002, pursuant to a one year lease commencing June 15, 2002 and ending June 30, 2003, at a monthly rental of $3,075. The lease was renewed for a one year period through June 30, 2004. Jeremy Hockenstein and Joanna Samuels were married on

June 20, 2004. Mr. Hockenstein moved into Apt. 9E in or around October 2004. The lease was thereafter renewed in both Ms. Samuels and Mr. Hockenstein's name, for a the period commencing July 1, 2004 through June 30, 2005, at a monthly rent of $2850. In 2006, they renewed the lease for a two year period commencing July 1, 2006 and ending June 30, 2008, at a monthly rental of $3,200. A new lease was made for the period August 1, 2008 through July 31, 2009, at a monthly rental of $3,650. Since August 1, 2009, 98 Riverside has charged, and Samuels and Hockenstein have paid, approximately $3,950 per month. Each of the leases and renewals treated Apt. 9E as deregulated and charged a market rent. The owner filed a 2003 Annual Apartment Registration with the DHCR, stating that as of June 15, 2002, Apt. 9E had become exempt from rent regulation based upon a high rent vacancy luxury decontrol. None of the leases or renewals contained any language informing the tenants that Apt. 9E would become subject to deregulation upon the expiration of the J-51 benefits. RSL § 26-504(c).

Richard Jardine and Jenny Sun are the lessees and/or occupants of apartment 15B at the building ("Apt. 15B"). Mr. Jardine moved into Apt. 15B in November 2003, pursuant to a two year lease commencing November 1, 2003 and ending October 31, 2005 at a monthly rental of $2,700. The lease was renewed for an additional two year period, commencing November 1, 2005 and ending October 31, 2007, at a monthly rent of $2,850. Ms. Sun moved into Apt. 15B in 2006. The lease was again renewed for a two year period commencing November 1, 2007 through October 31, 2009. Mr. Jardine and Ms. Sun were married April 20, 2009. A new lease was offered by 98 Riverside to both Mr. Jardine and Mr. Sun, for a one year term, ending October 31, 2010, at a

monthly rental of $4,450. It was never executed. Each of the leases and renewals treated Apt. 15B as deregulated and charged a market rent. The rent registration records filed by the owner with the DHCR show that, as of July 22, 1999, the owner treated Apt. 15B as exempt based upon high rent vacancy decontrol. None of the leases or renewals contained any language informing the tenants that Apt. 15B would become subject to deregulation upon the expiration of the J-51 benefits. RSL § 26-504(c). Hereinafter, Apt. 6E, Apt. 9E and Apt. 15B are collectively referred to as "apartments."

This action was commenced on May 27, 2010.

In their first cause of action, plaintiffs seek an order:

> a. declaring that the apartments are subject to rent stabilization and the defendants are required to offer renewal leases on forms approved by the DHCR and required by the RSL at legal regulated rents, and to otherwise continue plaintiffs' tenancies under the same terms and conditions as were provided at the inception of their tenancies;
>
> b. declaring that any petitions for deregulation submitted by the owner to the DHCR are invalid and should be withdrawn, and that any deregulation orders issued by DHCR are null and, void;
>
> c. a permanent injunction enjoining defendants from deregulating the apartments Pursuant to Luxury Decontrol; and
>
> d. directing defendants to revise all leases which incorrectly provide that the .. apartments are not subject to rent regulation, and to the extent that any plaintiffs have been denied the continuation of their tenancies on the same terms and conditions that were provided to them at the inception of their tenancies, and to register the subject apartments with the DHCR as required by law.

In their second cause of action, plaintiffs seek money damages for rent overcharge. In particular they seek that the rental amount be determined according the a formula set forth in the Court of Appeals decision in Thornton v. Baron (5 NY3d 175 [2005]). They also seek treble damages.

In their seventh cause of action, plaintiffs seek to recoup their reasonable attorneys' fees.

In their answer, defendants deny the material allegations in the complaint and assert the following affirmative defenses: plaintiffs lack standing (first affirmative defense), estoppel (second affirmative defense), waiver (third affirmative defense); Northbrook did not overcharge plaintiffs (fourth affirmative defense), windfall (fifth affirmative defense), statute of limitation (sixth affirmative defense), failure to exhaust administrative remedies (seventh affirmative defense), res judicata (eighth affirmative defense), collateral estoppel (ninth affirmative defense), exclusive jurisdiction of DHCR (tenth affirmative defense), retroactive damages against Northbrook violates the United States and New York State Constitutions (eleventh affirmative defense), no lease or law authorizes attorneys fees (twelfth affirmative defense), some or all of the plaintiffs are not occupying apartments as their primary residence (thirteenth affirmative defense), defendants properly relied upon the Rent Stabilization Code in deregulating the apartments (fourteenth affirmative defense), plaintiffs are not entitled to retroactive remedies (fifteenth affirmative defense), if a retroactive overcharge is found, there is no willful overcharge (sixteenth affirmative defense), if an overcharge is found, defendants are entitled to relief pursuant to CPLR 5523 (seventeenth affirmative defense) and failure to state a cause of action (eighteenth affirmative defense).

Arguments of the Parties

Plaintiffs argue that, in accordance with the Court of Appeals authority in Roberts v. Tishman Speyer (13 NY3d 270 [2009]), because the building was receiving J-51 benefits at the time they each became tenants, the owner had no right to treat their apartments as deregulated. Plaintiffs argue that, as a matter of law, the Roberts decision should be applied retroactively. They also argue that in setting the legal stabilized rent for the respective apartments, the court should, as a matter of law, apply the default formula set out by the Court of Appeals in the cases of Thorton v. Baron (5 NY3d 175 [2005]) and Matter of Grimm v. DHCR, (15 BY3d 358 [2010]).

In opposition, defendants claim that because no J-51 benefits were in effect for the building since June 2006, the apartments are no longer subject to any rent regulation. In any event, they argue that the Roberts case is not entitled to retroactive application. They argue that the claims brought by Samuels and Jardine are time barred. Defendants argue that there are no overcharges to calculate because the formula in Thorton does not apply to the facts in these cases and that treble damages are not warranted. Finally they claim there is no basis for any award of legal fees.

Discussion

Law applicable to Summary Judgment

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065

(1979). Once met, this burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact, also through admissible evidence Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 91986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1st Dept 2003). On a motion for summary judgment, it is for the court to decide any issues of law that are raised. Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Northbrook Status as an Agent of a disclosed Principal

Preliminarily, defendants argue that tenants are not entitled to summary judgment against Northbrook because it is an agent for a disclosed principal. The leases offered tenants by 98 Riverside expressly identify the owner as either "98 Riverside Drive LLC" or "Northbrook Management LLC, a New York corporation, as agent for 98 Riverside Drive LLC." The rights and obligations that plaintiffs are seeking to establish are those against an owner or landlord under the rent stabilization laws. In general, an agent for a disclosed principal is not personally liable for the obligation of the principal. Saltzman Sign Co v. Beck, 10 NY2d 63 (1962). Plaintiffs have not offered any argument or opposition to Northbrook's argument that it is not responsible for 98 Riverside's obligation. The court, therefore, finds that the summary judgment relief sought in this motion is not available against Northbrook and the motion is denied as to it.

The Application of Roberts v. Tishman Speyer to this Case

In the seminal case of Roberts v. Tishman Speyer, *supra*, the Court of Appeals analyzed the interplay of statutes which allow for tax incentive programs, like the J-51 program, with laws that permit the luxury decontrol or deregulation of certain rent

stabilized apartments. A condition to receiving J-51 benefits is that the underlying multiple dwelling will be subject to rent stabilization. Once the tax benefits terminate, an individual apartment may be deregulated by either a vacancy or, where a lease contains an appropriate notification, upon the termination of the last lease entered into with the tenant before the benefits expired. Rent Stabilization Code ("RSC") §2520.11(o). Luxury decontrol is a separate set of statutes, originally enacted in 1993, which permit certain rent stabilized units to be decontrolled under two circumstances; vacant apartments where the legal regulated rent was $2,000 or more per month and occupied apartments where the legal regulated rent was $2,000 per month and the combined income of all occupants exceeded $250,000 per year. Rent Stabilization Law ("RSL") §§26-504.1; 26-504.3.[2]

Prior to Roberts, the DHCR had taken the position that participation in the J-51 program precluded luxury decontrol only where receipt of the J-51 benefits was the sole reason for the imposition of rent regulation. In 1996, the DHCR issued an advisory opinion to that effect. In 2000, the DHCR incorporated that position into the RSC. Roberts, 13 NY2d at 281-282. The owners, consistent with the DHCR position, deregulated the apartments, even though they were receiving J-51 benefits at the time. The basis for deregulation of each apartment was that there had been a vacancy and the rent exceeded $2,000. Significant to these cases, the deregulation was not the product of any adjudicatory process by the DHCR, nor was there any DHCR order of

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[2]The threshold amounts permitted for rents and income under these laws have changed over time, including most recently in 2011. The changes, however, do not affect the court's analysis in this case. L2011 ch 576 s17. The income threshold is now $ 200,000 and the rent threshold is now $2500.

deregulation. The deregulation occurred upon self reporting by the owner filing informational forms with the DHCR.

The crux of Roberts is that the DHCR's interpretation of the interplay of the laws permitting J-51 benefits and the luxury decontrol laws was incorrect. The court held that regardless of whether a building was rent stabilized prior to receiving J-51 benefits, once it began receiving such benefits, luxury decontrol was unavailable, at least for the benefit period. Roberts, 13 NY3d at 286.

Dodd, Tracy, Hockenstein, Samuels and Jardine have established a *prima facie* case that they are entitled to the benefit of rent regulation. The facts of each of such plaintiffs' tenancies in this case entirely comports with Roberts. All of them took occupancy of the apartments before the J-51 benefits had expired in June 2006. Thus, the owner improperly treated the apartments as deregulated from the inception of their occupancies and charged the tenants' market rents.

Ms. Sun's circumstances are somewhat different. She did not take occupancy until sometime in 2006. It is unclear whether this was before or after the J-51 benefits expired. She was never a lease tenant, although she occupied the apartment with the lease tenant. She and Mr. Jardine were married on April 20, 2009. After that time, she would have been entitled to be added to the lease as a spouse. RSC §2522.5. Consequently, she also has established a *prima facie* right to be declared a rent regulated tenant of Apt. 15B, along with Mr. Jardine.

1.The effect of the expiration of the J-51 benefit

Defendants argue that because the J-51 benefit ended in 2006, plaintiffs are not entitled to the benefit of rent regulation. It is undisputed that the apartments have been

continually occupied by the original lease tenants since before the expiration of the J-51 benefit and that none of their leases or renewals contained the required notification that that upon the expiration of the J-51 benefits, the apartments would become deregulated. In the absence of such a notification, the tenants retain the benefit of a rent regulated status until they vacate their respective apartments. RSL §26-504[c]. Defendants claim that it is unfair to hold it to the notice requirement because the absence of any required notice was a result of it acting in accordance with the DCHR's interpretation of law. These same arguments were considered and rejected by the Appellate Term in the case of 72A Realty Associates v. Lucas, (32 Misc.3d 47 [AT1 2011]). Under identical circumstances, the court held:

> We also sustain Civil Court's ruling that, although the J-51 tax abatement period has now expired, tenant's apartment remains subject to rent stabilization, in the absence of any showing that landlord provided the applicable lease notice informing the tenant that the apartment was to become deregulated at the expiration of the abatement period....We acknowledge that the strict application of the J - 51 notice requirement in the circumstances here present may work a hardship on this landlord. After all, landlord, in good faith reliance on DHCR's long-standing and unambiguous interpretation of the luxury decontrol statute-codified in Rent Stabilization Code (9 NYCRR) § 2520.11(o) and unchallenged for the better part of a decade until determined to be erroneous by the *Roberts* court – proceeded with the understanding that it was exempt from the notice requirement based upon a reasonable, but as it turns out, mistaken, belief that respondent's tenancy was not subject to rent stabilization coverage in the first instance. However, we are constrained to strictly enforce the statutory J-51 notice requirement as written, without engrafting onto the regulatory framework equitable factors not specified therein.

The court follows the reasoning in 72A Realty Associates, *supra*, and finds that

the absence of the required notice is fatal to defendants' argument, that these particular plaintiffs are not entitled to the benefit of rent regulation. While the owners' reliance on the agency's erroneous interpretation of law cannot support the deregulation of the subject apartments, as more fully set forth below, it does impact the method for the calculation of rents and on plaintiffs' requests for the collateral relief of treble damages.

2. Retroactivity

Defendants argue that summary judgment should be denied because Roberts is not entitled to retroactive effect. The majority opinion in Roberts itself, expressly did not reach the issue of retroactivity. Id at 287. In Gersten v. 56 7th Avenue LLC (___AD3d ___[2011], 928 NYS2d 515 [nor]), however, the Appellate Division of this department directly examined the issue and expressly held that Roberts is entitled to retroactive effect. Consequently, the defendants' arguments on this issue are rejected.

3. Statute of Limitations

Defendants also argue that the claims of Samuels and Jardine are time barred, because their tenancies began more that six years before the commencement of this action. The majority opinion in Roberts expressly did not address the issue of the statute of limitations. Id at 287. In the recent case of Gersten v. 56 7th Avenue LLC, *supra*, however, the Appellate Division resolved this dispute by holding that to the extent a tenant is challenging the deregulated status of an apartment, it may do so at any time during the tenancy, because apartment status is a continuous circumstance. Gersten, 928 NYS2d at 523. Plaintiffs' first cause of action, for declaratory judgment, is at its core, a challenge to the deregulated status of the apartments and it is not

barred by any applicable statute of limitations. Nor is the limitation period affected by when a tenant first took occupancy of a particular apartment.

In distinction, rent overcharge claims, like those contained in the second cause of action, are governed by a four year statute of limitations. CPLR §213-a; Partnership 92 LP v. DHCR, 46 AD3d 425 (1st dept. 2007). In this regard, the statute of limitations limits a tenant's claim to the time period of four years immediately preceding the commencement of the action. Since an overcharge may be an ongoing event, the cause of action is not deemed to have finally accrued at the time a tenant takes occupancy. As overcharges continue, the claims continue to accrue.

At bar, the plaintiffs are only seeking overcharges for the period beginning four years prior to them bringing the instant action. Thus, none of the claims for rent overcharge are barred by the applicable statute of limitations.

4. Formula for calculating overcharge

Plaintiffs also seek summary judgment on their second cause of action for a money judgment based on rent overcharge. They argue that the formula to be used is the one set out under Thorton v. Baron (5 NY3d 175 [2005]) and that, after applying the formula, the amount of damages is merely a mathematical calculation. Defendants deny that the Thorton formula applies. They do not, however, advocate for any alternative formula for calculating damages, but merely assert there are no overcharges.

The court again finds precedent in the case of 72A Realty Associates, *supra* for the determination of this dispute.

In Thorton, the Court of Appeals acknowledged that for the most part,

overcharge calculations were determined by a look back to the registered rent for the four year period preceding the filing of an overcharge complaint. CPLR §213-a; RSL §26-516[a]. It made an exception, however, where the rent was established through fraudulent means, in that case, an illusory tenancy. Under such circumstances, the court permitted the rent charged to the tenant immediately preceding the fraudulent illusory tenancy to be used as the basis for setting the legal rent. In 72 A Realty Associates v. Lucas, the court was asked, as here, to apply the Thorton formula to a Roberts overcharge claim, but the civil court declined and the Appellate Term affirmed. Both the lower and appellate courts held that the legal rent should be set by looking back to the rent charged four years immediately preceding the bringing of the overcharge complaint, plus allowable rent guideline board increases. See: 72A Realty Associates v. Lucas, 28 Misc3d 585 (NY City Civ. Ct. 2010) affd. 32 Misc3d 47 (AT1 2011). Judge Wendt, at the trial level, held that Thorton does not apply in the absence of fraud or an intentional evasion of the RSL. In affirming his reasoning, the Appellate Term held: "We agree that no basis was shown for the court to go outside the four-year look back period... tenant having failed to demonstrate a tenable claim of willfulness on the landlord's part. Nor has tenant shown any basis for the application of the *Thorton* default formula."

Relying on such precedent, this court finds that the Thorton formula is unavailable, where, as here, the overcharge resulted from the owner setting a rent consistent with the DHCR's interpretation of the governing law. The court finds, instead, that the allowable rent for each apartment, shall be the rent agreed to in the lease in effect four years immediately preceding the filing of the action, along with the

periodic rent stabilization guideline increases available over the term of the tenancies. The rent overcharge would be the difference between what was actually collected by the owner less what should have been charged.

Although the court has seta formula for making the calculation, the record before the court does not have all of the required information to implement the formula.

5. Treble Damages

Plaintiffs seek a determination on this motion that they are entitled to have the overcharges trebled. A rent stabilized tenant who had been overcharged rent may collect treble damages where the overcharge was wilful. There is even a presumption of wilfulness, which will only be overcome through an owner showing, by a preponderance of the evidence, that there was no willfulness. RSL §26-516, RSC 2526.1, East 163rd Street LLC v. DHCR, 4 Misc3d 169 (NY Sup 2004). The undisputed facts in the case at bar negate the wilfulness required for the punitive imposition of treble damages. In setting the rent the owner simply relied upon the DHCR's, albeit incorrect, interpretation of the applicable law. Consistent with 72a Realty v. Lucas, *supra*, this court holds that no treble damages are warranted under these circumstances.

6. Miscellaneous

Defendants' other arguments, that there are issues of fact about the marital status of certain plaintiffs, are rejected. Dodd and Tracy took occupancy of Apt. 6E at the same time. Hocenkstein was married to Samuels and took occupancy of the Apt. 9E before the J-51 expired. Although Sun and Jardine were married after the J-51 expired, there was continued occupancy by Jardine of Apt. 15 from before the time the

J-51 benefits expired through the date of their marriage. Even if Sun had taken occupancy with Jardine after the J-51 benefit expired, in the absence of a physical vacancy by the original tenant, here Jardine, there could have been no vacancy decontrol. Strasser v. DHCR, 233 AD2d 120 (1st dept. 1996). Thus, all three apartments, as a matter of law, were rent regulated since the time of the initial occupancy by the original plaintiffs and no events occurred that would have altered that status.

7. Relief

In the first cause of action, plaintiffs seek a declaration of rights. The declaration plaintiffs seek, however is far too broad for the rights that they have established on this motion. Plaintiffs have established that they were entitled to the benefit of rent stabilization at the inception of their tenancies and were, thereafter, through the present, entitled to a continued right to be treated as rent stabilized tenants. The additional declarations are either unnecessary (since they are a legal consequence of rent regulation); or they have not been proven (eg: that nature and extent of pending DHCR proceedings between the parties is not known and/or necessary relevant) or they are premature (the court cannot direct at this time that leases be offered because the court cannot presently calculate the legal rents permissible under rent stabilization).

On the first cause of action the court, therefore, grants summary judgment only to the extent of, at this time, declaring that since the inception of the tenancies, the apartments were, and continue to be, subject to rent stabilization and that the defendants are required to otherwise comply with all of the legal requirements and

obligations consistent with rent-stabilized tenancies;

On the second cause of action the court denies summary judgment. The court has determined that the conventional overcharge formula applies in this case but that there is insufficient information to calculate any overcharge according to such formula on this motion. In addition, the court finds that no treble damages are warranted.

Attorneys Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). In the case of residential leases, RPL § 234 provides that when, in any action or summary proceeding, an owner is permitted to recover legal fees from the tenant based upon the failure to perform any covenant or agreement of the lease, there is also an implied reciprocal obligation by the owner to pay the tenant's legal fees, if the tenant otherwise prevails in the dispute. While this reciprocal right will apply to actions commenced by the tenant against a landlord, either directly or by way of counterclaim, its scope is still limited to the rights afforded the landlord by the terms of the underlying lease. Gottlieb v. Such, 293 AD2d 267 (1st dept. 2002).

The leases for these tenants at most permit the owner to collect legal fees when there has been a default under the lease or if the owner has to defend an action as a consequence of the tenants' actions. This action, seeks a declaration of statutory rights and ancillary relief. See: Gersten, *supra*. This is not an action predicated on any lease default per se. Thus, the leases and the reciprocal application of RPL §234 do not justify an award of legal fees. The court does not reach defendants' collateral

argument that under these circumstances it would be unjust to award legal fees. See: 72A Realty Associates, *supra*.

Affirmative Defenses

Plaintiffs move to dismiss all of defendants affirmative defenses. When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law." CPLR § 3211[b]; Vita v. New York Waste Services, LLC, 34 A.D.3d 559 (2d Dept. 2006), Emigrant Mortg. Co., Inc. v. Fitzpatrick, 29 Misc.3d 746, 752 (Sup.Ct. Suffolk 2010). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference. Fireman's Fund Ins. Co. v. Farrell, 57 A.D.3d 721, 723 (2d Dept. 2008).

The determinations on the affirmative defenses[3] follow directly from the court holdings in connection with the summary judgment motion. The court has not, however, considered the extent to which the affirmative defenses may otherwise apply to the pleaded causes of action not the subject of this motion. Insofar as the first, second and seventh causes of action are concerned, the court finds as follows:

Plaintiffs have standing to assert the claims made. The first affirmative defense is dismissed.

Estoppel and Waiver are not defenses to the claims made. Gersten, *supra*. The second and third affirmative defenses are dismissed.

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[3]The court observes that although denominated by defendants as affirmative defenses, many of them are simply defenses.

Northbrook is not responsible for the overcharges. The fourth affirmative defense remains.

There is no affirmative defense of windfall. The fifth affirmative defense is dismissed.

There are no violations of the applicable statues of limitations. The sixth affirmative defense is dismissed.

The DHCR does not have exclusive and/or primary jurisdiction over these claims for declaratory judgment and rent overcharge. Nezry v. Haven Ave. Owner LLC, 28 Misc3d 1226 (A)(NY Sup. NY Co. 2010). The seventh and tenth affirmative defenses are dismissed.

While *res judicata* and collateral estoppel may theoretically be defenses to an Roberts overcharge complaint (see Gersten, *supra*) defendants have failed to raise any prior order that would otherwise deny plaintiffs the relief they seek in this case. The eighth and ninth affirmative defenses are dismissed.

To the extent that defendants claim that retroactive damages against Northbrook violates the United States and New York Constitutions, the affirmative defense is dismissed as moot. The court has already held that Northbrook is otherwise accountable for rent overcharge damages. The eleventh affirmative defenses is dismissed.

The court has already held that plaintiffs have no legal basis for the collection of legal fees. The twelfth affirmative defense, remains.

There are no facts in this record, one way or the other, addressing whether plaintiffs occupy the apartments as their primary residences. There is also no authority cited that relief under Roberts is unavailable to plaintiffs unless they occupy their respective apartments as primary residents. The thirteenth affirmative defense is dismissed.

The court has held that defendants' reliance on the Rent Stabilization code in deregulating the apartments affects the calculation of the overcharge and penalties. The fourteenth affirmative defense remains.

Gerstein, *supra*, held that the application of Roberts, *supra,* is retroactive. The fifteenth affirmative defenses is dismissed.

The court has held that the overcharge is not wilful. The sixteenth affirmative defense remains.

CPLR 5523 does not apply at the trial level, but is a remedy if the trial court awarding a judgment, is reversed or modified, and as a result restitution is warranted. Ithis is not a defense to the underlying action, but a possible remedy available after appeal. The seventeenth affirmative defense is dismissed, but without prejudice to seeking such a remedy at an appropriate time.

The plaintiffs have sufficiently stated causes of action for declaratory judgment and rent overcharge. Plaintiffs do not have a cause of action for legal fees. The eighteenth affirmative defense is dismissed only as to the first and second causes of action.

Conclusion

In accordance herewith, it is hereby;

ORDERED that plaintiffs' motion for summary judgment against Northbrook Management, LLC is denied in its entirety,

ORDERED, DECLARED AND ADJUDGED that plaintiffs motion for summary judgment on the first cause of action is granted only against 98Riverside Drive LLC and only to the extent that is it declared that: plaintiffs were entitled to the benefit of rent stabilization at the inception of their tenancies and were, thereafter, through the present, entitled to a continued right to be treated as rent stabilized tenants, and it is further

ORDERED that plaintiffs' motion for summary judgment on the second cause of action is denied, and it is further

ORDERED that plaintiffs' motion for summary judgment on the seventh cause of action is denied, and it is further

ORDERED that plaintiffs' motion for summary judgment dismissing the defendants' affirmative defenses is granted to the extent that the first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth and fifteenth affirmative defenses are dismissed as they concern the first, second and seventh causes of action, and it is further

ORDERED that plaintiffs' motion for summary judgment dismissing the defendants' affirmative defenses is granted to the extent of dismissing the seventeenth affirmative defense without prejudice as it concerns the first, second and seventh causes of action, and it is further

ORDERED that plaintiffs' motion for summary judgment dismissing the defendants' affirmative defenses is granted to the extent of dismissing the eighteenth affirmative defense as it concerns the first and second causes of action and it is further

ORDERED that plaintiffs' motion for summary judgment dismissing the defendants' affirmative defenses is otherwise denied, and it is further

ORDERED that defendants' motion for a stay is denied, and it is further

ORDERED that a preliminary conference is set for **December 8, 2011 at 9:30 a.m**, no further notices will be sent and it is further

ORDERED that any requested relief not otherwise expressly granted is denied , and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
October 18, 2011

SO ORDERED:

J.G. J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).