SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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ZOE DAVIDSON,

Plaintiff,

Index No.
150341/2014

-against-

DECISION AND
ORDER

730 RIVERSIDE DRIVE, LLC, A&E REAL ESTATE MANAGEMENT, LLC and "JOHN DOE #1" THROUGH "JOHN DOE #10" THE NAME OF THE LAST TEN DEFENDANTS BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF INTENDING TO DESIGNATE THEREBY PERSONS OR PARTIES HAVING OR CLAIMING TO HAVE AN INTEREST IN OR LIEN UPON THE DESCRIBED PREMISES,

Defendants.

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Robert D. Kalish, J.:

Upon the foregoing papers, the Plaintiff Zoe Davidson's motion pursuant to CPLR §3212 for partial summary judgment on her first and sixth causes of action as set forth in her verified complaint (for rent overcharge and attorney's fees respectively) is hereby denied, and the Plaintiff's first cause of action is hereby severed, dismissed without prejudice and the Plaintiff is directed to make an appropriate claim before the New York State Division of Housing and Community Renewal ("DHCR") for rent overcharge as follows:

Background and Procedural History

In the underlying action the Plaintiff alleges in sum and substance that the prior owner of the building located at 730 Riverside Drive improperly "deregulated" a rent controlled apartment in said building through "luxury decontrol"[1], while still receiving J-51 tax benefits[2]. The Plaintiff alleges six causes of action, the first for rent overcharge and the sixth for attorneys' fees. The Plaintiff now moves for summary judgment on her first and sixth causes of action. Without reiterating the entirety of the pleadings, the following recitation of facts includes the factual allegations that are directly relevant to the Plaintiff's instant motion for partial summary judgment on her first and sixth causes of action.

On January 15, 2013, the Defendant 730 Riverside Drive, LLC (Owner) purchased 730 Riverside Drive, the subject building. The Defendant A&E Real Estate Management, LLC (A&E) became the managing agent on that same date. The Owner purchased the building with the Plaintiff as a preexisting tenant, having moved into the subject apartment, Apartment 2C (the "Premises"), on February 9, 2011. Plaintiff's tenancy in the Premises was pursuant to a one-year rent stabilized lease, the term of which began on February 1, 2011 and ended on January 31, 2012 (the "Lease"). Prior to signing the Lease, Plaintiff was told that the monthly rent for the unit was $3,685.58, but that she had been given a preferential monthly payable rent of $2,750.00.

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[1] "luxury decontrol" is a method whereby a property owner is allowed to "decontrol" a vacant formerly rent controlled apartment where the legal regulated rent was $2,000 per month or more. "Luxury decontrol" is authorized pursuant to the Rent Regulation Reform Act as codified under NYC Administrative Code §§ 26-504.1, 26-504.2. The Court will address "luxury decontrol" under the Rent Regulation Reform Act in greater detail in the Analysis section of the instant decision.

[2] The New York City J-51 program is a tax exemption authorized by Real Property Tax Law § 489 and codified in NYC Administrative Code 11-243 that provides property owners who perform certain capital improvements and renovation with tax exemptions and/or abatements that continue for a period of years. The Court will address the J-52 program in greater detail in the Analysis section of the instant decision.

With respect to this rent, paragraph 3 (A) & (C) of the Lease read as follows:

> Paragraph 3 (A):
>
> "The monthly rent payable by Tenant during the term of this Lease for its use and occupancy of the Apartment is as follows: for the period from February 1, 2011 to January 31, 2012 Two thousand Seven hundred and fifty Dollars ($2,750.00) unless adjusted pursuant to Article 4 below"
>
> Paragraph 3 (C) of the Lease describes a higher "legal rent":
>
> "The legal regulated rent for the Apartment as of the date hereof is Three thousand Six hundred and Eighty Five point Five Eight Dollars ($3,685.58)"

(Eisenberg affidavit, exhibit E at 2).

The Lease states that it is entered into pursuant to the rent stabilization laws, and also contains a "preferential rent rider," which states that the Plaintiff agrees to pay a preferential rent in the amount of $2,750.00, instead of the "current legal regulated rent of $3,685.58 per month that Owner is entitled to charge and collect under the Rent Stabilization Law . . ." (id. at 16). According to this rider, "the tenant acknowledges that the Apartment will be appropriately registered at the DHCR at the current legal regulated rent of $3,685.58 per month" and the preferential rent offered for the one-year term of the Lease will not affect the legal rent (id.).

The Lease also includes a second rider setting forth the calculation of the Plaintiff's legal rent. The second rider explains that the last legal regulated rent was $3,130.00. According to the second rider, the Plaintiff's rent was calculated by adding a statutory vacancy allowance of 17.75%, or $555.58, to $3,130.00 to arrive at $3,685.58. The Plaintiff renewed the Lease on two occasions: (1) the Lease was renewed for one year, starting on February 1, 2012, and ending on January 31, 2013, at a monthly legal regulated rent of $3,823.78, and a preferential rent of $2,853.13; and (2) she signed a second renewal lease on May 28, 2013, to begin on September 1,

2013, and end on August 31, 2014, at a legal regulated rent of $3,900.26, and a preferential rent of $2,910.19.

The limited DHCR records submitted to the Court indicate that from 2007 through 2010, the Premises was exempt from regulation, and registration was not required. In 2011 and 2013, however, the DHCR records reflect that the Premises is "RS," or rent stabilized. According to the DHCR records, the Plaintiff is the tenant, the legal regulated rent for 2011 was $3,685.58, and the "actual rent paid" is $2,750.00. The DHCR records show that in 2013, the Premises was again registered as "RS," rent stabilized, the legal regulated rent was $3823.78 and the preferential rent was $2,853.13. The DHCR records do not include an amount for the actual rent paid in 2013 (Plaintiff aff, exhibit J).

With respect to the subject building, the Owner's predecessor obtained a J-51 tax abatement, which was in place in 2004/2005, and was set to continue for 14 years thereafter. According to Plaintiff's affidavit in support of her motion, the Defendants did not notify her that the subject building had been receiving J-51 tax abatements since 2004.

Further, according to the DHCR records submitted on this motion, the Premises was registered in 1984 as "RC," subject to rent control, at a legal regulated rent of $345.22 (Plaintiff aff, exhibit J). At the time, the Premises was occupied by Lillian Davis (Davis), as a rent-controlled tenant. Davis resided in the Premises until July 31, 2005, and her last regulated rent was $599.12 (Plaintiff aff, exhibit J).

According to the DHCR "registration apartment information," the entry for 2005 is "VA 7/31/2005 599.12" (Eisenberg aff, exhibit B). As indicated by this DHCR document, upon Davis's vacancy, the prior owner registered the Premises, as of July 31, 2006, as "high rent vacancy" and "exempt" from legal regulated rent, and "vac/lease imprvmnt" (id.).

According to the Defendants' records, after Davis vacated, the Premises remained vacant until January 2006. The prior owner then leased the Premises to Janice Biggs and Stephen Rudy, pursuant to a lease dated December 23, 2005, which states that the Premises is subject to the rent stabilization laws. The agreed-upon monthly rent was $2,400.00, which began on January 1, 2006. At the time when Biggs and Rudy took possession, the prior owner was receiving J-51 tax benefits. Biggs and Rudy vacated the Premises in December 2007 or January 2008. The next tenant to occupy the Premises was Peter Romaniuk, pursuant to a lease, dated July 6, 2008, which states that it is not subject to the rent control or rent stabilization laws. The period of tenancy set forth in the lease began on August 1, 2008 and expired on July 31, 2010, at a monthly rent of $3,325.00.

In her affidavit in opposition to Plaintiff's motion, Wendy Eisenberg, an A&E employee, avers: "the prior owner reasonably believed that the Premises was properly deregulated in 2006 following the termination of Ms. Davis' rent controlled tenancy. Therefore, the prior owner reasonably believed that the subsequent tenants were market tenants who did [not] require rent stabilized leases, rent stabilized riders, or any information pertaining to the Building's receipt of J-51 benefits" (Eisenberg affidavit, ¶ 5 typo).

Eisenberg's affidavit does not contain any information concerning repairs to the Premises to justify raising the rent from $599.12 to $2,400.00. In Plaintiff's affidavit in support of the motion, however, she states: "[a]ccording to Defendants' records, the only purported renovation to the Apartment in its entire history was six months later - on or about July 4, 2008 in the total sum of $10,000" (Plaintiff aff, ¶ 19). Plaintiff's affidavit refers to defendants' "legal rent calculation worksheet" (Plaintiff aff, exhibit F). This worksheet contains a chart that indicates that the last legal rent for the Premises was $2,400, starting in January 2006, which was the Biggs' lease. The subsequent rent, when Romaniuk took possession, was increased by the vacancy allowance adjustment of 17.25% in the amount of $414, and by 1/40th of the $10,000 cost of the upgrades and improvements, $250.00. The remaining pages of this worksheet reflect work done in the Premises in May to July of 2008, including painting, new kitchen countertops, and work on the wood flooring and to the electrical outlets, renovation of the bathroom and some carpentry, for a total cost of $10,000.00.

The Plaintiff filed the underlying action in January 2014. The Plaintiff's first cause of action claims in sum and substance that the Defendants and/or the prior owner's improper deregulation of the Premises was "willful and improper". Plaintiff seeks a permanent injunction barring the Defendants from charging and collecting rent from the Plaintiff in excess of the legally regulated rent, and damages in the amount of the rent overcharge including treble damages. The Plaintiff's sixth cause of action seeks reasonable attorneys' fees, costs and disbursements from the Defendants pursuant to the Rent Stabilization Law and/or Property Law §234.

Plaintiff now moves for partial summary judgment on the rent overcharge portion of her first cause of action and on her sixth causes of action for attorneys' fees. The Defendants submitted opposition papers, the Plaintiff submitted reply papers to the Defendants' opposition, and the Parties appeared before this Court for oral argument on June 30, 2015.

Parties' assertions

The Parties do not dispute that in 2006, prior to the Plaintiff's occupation of the Premises, the prior owner improperly deregulated the Premises while still receiving tax benefits under the J-51 program. Further, there is no dispute that the Plaintiff's claim for a rent overcharge is limited to the four year period from January 14, 2010 to January 14, 2014, the date that the Plaintiff filed the complaint.[3] The major point of contention between the parties on the Plaintiff's first cause of action is how the Court should determine whether or not the Plaintiff incurred a rent overcharge of the period from January 14, 2010 to January 14, 2014. In order to make said determination, the Court must first decide upon a "base rent" to be measured against the Plaintiff's rent paid for the period from January 2010 to January 2014.

[3] Of course the Plaintiff can only claim for overcharges that allegedly occurred while she was a tenet of the Premises. As such, her claim for rent overcharge is limited to the period from February 2011 (the date she began her tenancy) to January 1, 2014 (the date she filed the complaint).

As a general rule, the "base rent" for determining a rent overcharge is the rent that was charged on the Premises four years prior to the date the Plaintiff files an overcharge complaint. In the instant action, the parties agree that the Plaintiff filed the underlying action in January 2014 and that the rent charged on the Premises on January 14, 2010 (the "Base Rent Date") was $3,325.00. However, the Plaintiff argues in the instant motion that this Court should not determine the "base rent" based upon the Base Rent Date of January 14, 2010.

Specifically, the Plaintiff agues that in 2006, the prior owner illegally increased the rent on the premises to $2,400.00. Plaintiff argues that said rent increase was illegal for two reasons: (1) the prior owner was still receiving J-51 tax benefits on the subject building when it deregulated the Premises through "luxury decontrol" and (2) the repairs that the prior owner performed on the Premises did not justify raising the rent to $2,400.00, above the $2,000.00 rent threshold for "luxury decontrolled" apartments pursuant to 9 NYCRR § 2522.4 (1).[4] In the years thereafter, the Defendant continued to incrementally increase the rent from $2,400.00, so that by the Base Rent Date, the rent on the Premises was $3,325.00.[5] Therefore, the Plaintiff argues that since the $3,325.00 rent on the Base Rent Date stems from the illegally deregulated 2006 rent of $2,400.00, the $3,325.00 rent should not be used as the "base rent" to determine whether or not the Plaintiff's incurred a rent overcharge.

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[4] 9 NYCRR § 2522.4 (1) allows for a landlord to increase the legal regulated rents of a building based upon certain improvements and major capital improvements that the landlord performed on the regulated building.

[5] The Court notes that the Plaintiff does not argue in her first cause of action that the rents charged by the Defendants and/or the prior owner on the Premises from January 2010 to January 2014 were illegal for any reason other than the improper deregulation that raised the rent from $599.12 to $2,400.00 in 2006. Specifically, the Plaintiff does not take issue with any of the incremental rent increases that occurred between 2006 and 2010, apart from the fact that said incremental increases were based upon the illegal 2006 rent of $2,400.00

In support of said argument, the Plaintiff further argues that the prior owner's illegal deregulation of the Premises in 2006 was fraudulent, willful and intentional. The Plaintiff argues that the prior owner's lease with Biggs and Rudy in December of 2005 did not indicate that they were advised that the prior owner was receiving J-51 benefits for the building. The Plaintiff further argues that said lease did not include any indication that Biggs and Rudy were notified of their right to challenge the rent pursuant to a Fair Market Rent Appeal "("FMRA") with the DHCR. The Plaintiff further argues that the prior owner's lease with Romanuik in July 2008 did not indicate that he was advised that the prior owner was receiving J-51 benefits for the building. The Plaintiff further argues that upon Davis' vacature of the Premises, the prior owner fraudulently and unlawfully registered the Premises as a "high rent vacancy" and "exempt" from legal regulated rent, while still receiving J-51 tax benefits.

The Plaintiff argues in sum and substance that since the prior owner illegally, willfully and fraudulently deregulated the Premises in 2006, the Court should determine the "base rent" based upon a default formula used by the DHCR to set the base date rent in overcharge cases where no reliable rent records are available (the "Default Formula"). The Default Formula sets the "base rent" as the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date (See Thornton v. Baron, 5 N.Y.3d 175, 180 fn 1 (NY 2005)). The Plaintiff argues that the lowest rent registered for a comparable apartment in the subject building is $928.69 as listed in the Defendants' 2011 DHCR Registration Rent Roll and therefore the "base rent" should be set at $928.69 for determining her rent overcharge. Applying a "base rent" of $928.69, the Plaintiff argues that she incurred a rent overcharge of $80,887.42 for the period from January 2010 to January 2014. Plaintiff further

argues that since said overcharge was "willful and intentional", the Plaintiff is also entitled to treble damages for a total overcharge claim of $198,950.82.

As stated, the Defendants concede that the prior owner illegally deregulated the Premises in 2006 while receiving tax benefits under the J-51 program. However, the Defendants argue in opposition to the Plaintiff's motion that said illegal deregulation were not "willful or intentional" as alleged by the Plaintiff. The Defendants further argue that there is no indica of fraud in connection with the prior owner's improper deregulation of the Premises. The Defendants argue that the prior owner reasonably believed that the Premises was properly deregulated in 2006 following Davis' vacature. Said reasonable though mistaken belief was due to the uncertainty of the law and lack of judicial guidance on this issue prior to Court of Appeals's decision in Roberts v Tishman Speyer Props., L.L.P., (13 NY3d 270 (NY 2009). As such, any failure by the prior owner to provide the subsequent tenants with rent stabilized leases, rent stabilized riders, or any information pertaining to the Building's receipt of J-51 benefits was based upon the prior owner's reasonable though mistaken belief that said tenants were market tenants. Defendants further argue that after the Court of Appeals issued its decision in Roberts v Tishman Speyer Props., L.L.P., (13 NY3d 270 (NY 2009) and the issuance of subsequent decisions suggesting that the Premises was subject to rent stabilization, the prior owner took all of the necessary steps to register the Premises with DHCR and provided Plaintiff with renewals pursuant to the rent stabilization laws.

The Defendants argue in sum and substance that although the prior owner improperly deregulated the Premises in 2006, said deregulation was not willful, intentional or the result of fraud on the part of the landlord. Therefore, the Defendants argue that the Court should set the "base rent" as $3,325.00 (the rent on the Premises as of the Base Rent Date) in accordance with the four year rule. The Defendants further argues that applying a "base rent" of $3,325.00 would not support a finding of the rent overcharge, since the rent increases following the Base Rent Date were lawful.

The Defendants further argue that the 2006, post-deregulation rent of $2,400.00 was a legal rent due to the fact that none of the tenants (subsequent to Davis) filed a FMRA challenging said rent. The Defendants argue that pursuant to RSC 2521.1(a)(1) and 2522.3, when a rent controlled apartment is vacated, the only way the subsequent tenant can contest the rent is through the FMRA process. The Defendants further argue that the statute of limitations for filing a FMRA is four years and that none of the tenants subsequent to Davis ever filed a FMRA within said statute of limitations. As such, the Defendants argues that the 2006 rent of $2,400.00 was a legal initial rent and that all the subsequent rents on the Premises, including the $3,325.00 rent in effect on the Base Rent Date were therefore legal.

In her reply papers, the Plaintiff reiterates her argument that the "base rent" for determining her rent overcharge should be determined according to the Default Formula as stated in Thornton vs. Baron (5 NY3d 175 (NY 2005) and not according to the Base Rent Date. Specifically, the Plaintiff argues that the Default Formula for calculating "base rent" is not applied solely to instances where the illegal deregulation was part of profiteering or fraudulent schemes on the part of a landlord, but rather is applied whenever a landlord unlawfully deregulates an apartment by claiming an illegal increase over the $2,000 per month luxury deregulation threshold. The Plaintiff reiterates her arguments that the monthly rent for January 2010 was unlawful based upon the prior owner's improper deregulation of the Premises, and therefore cannot be used as the "base rent" for determining the Plaintiff's overcharge claim. The Plaintiff further argues that the prior owner's conduct after the Court of Appeals' determination in Roberts v Tishman Speyer Props., L.L.P., (13 NY3d 270 (NY 2009)) evidences the "willful nature of its scheme to unlawfully destabilize and/or overcharge for the subject premises" (Plaintiff's Memorandum of Law in Reply p. 10).

The Plaintiff further argues in sum and substance that the reason none of the tenants subsequent to Davis filed a FRMA to contest the rent was due to the fact that the prior owner and the Defendants failed to serve the requisite notices (now commonly known as "RR-1", previously known as "DC-1" or "DC-2") upon the tenants, including the Plaintiff. Further, neither the Defendants nor the prior owner filed a Report of Vacancy or Vacancy Decontrol with the DHCR. As such, the Plaintiff argues that following the illegal deregulation of the Premises, neither the Defendants nor the prior owner notified any of the tenants of their right to challenge the rent pursuant to a FMRA.

The Plaintiff further argues that it is not precluded from claiming an overcharge in the instant action due to the lack of a prior FRMA rent challenge. The Plaintiff refers to the Court of Appeals' decision in Thornton vs. Baron (5 NY3d 175 (NY 2005) and subsequent cases in which the courts have ruled in favor of the tenants' overcharge actions. Plaintiff argues that the courts have used the Default Formula to calculate the "base rent" where, as in the instant action, the landlord failed to serve tenants with proper notice of their FRMA rights, the monthly rent was admittedly illegal and the four year statute of limitation for filing a FRMA had expired.

Analysis

Summary Judgment Standard

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 (b)), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 NY2d 557, 562 (NY1980)).

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (Vega v. Restani Constr. Corp., 18 NY3d 499, 503 (NY 2012) citing Alvarez v. Prospect Hosp., 68 NY2d 320 (NY 1986). "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." (Ostrov v. Rozbruch, 91 AD3d 147, 152 (NY App Div 1st Dept 2012) citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (NY 1985); Alvarez v Prospect Hosp., 68 NY2d 320 (NY 1986)). The proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v. AJI Indus., Inc., 10 NY3d 733, 735 (NY 2008)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)).

The NYC J-51 Program

Under the New York City J-51 program, landlords may be eligible for tax benefits and abatements for a period of years based upon certain rehabilitations and capital improvements they perform upon their buildings (with multiple dwellings). The J-51 program is authorized pursuant to NY CLS RPTL § 489, which allows for cities to create tax abatement and exceptions for the purposes of encouraging landlords to rehabilitate and make certain improvements upon their multiple dwelling properties (See Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 280 (NY 2009). The types of projects and capital improvements that qualify for a tax abatement under the J-51 program are codified in NYC Administrative Code 11-243 and 28 RCNY 5-03.

The New York City rent stabilization laws as codified in NYC Administrative Code 26-504 specifically states that it applies to "[d]welling units in a building or structure receiving the benefits of section 11-243." (NYC Administrative Code 26-504). As such, when an owner receives tax benefits for a multi-dwelling building under the J-51 program , said building is subject to the rent-stabilization laws for at least as long as the J-51 benefits are in force (See Gersten v 56 7th Ave. LLC, 88 AD3d 189 (NY App Div 1st Dept 2011) citing Eastern Pork Prods. Co. v. New York State Div. of Housing & Community Renewal, 187 AD2d 320 (NY App. Div. 1st Dept 1992); see also Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270 (NY 2009)).

Luxury Decontrol under the Rent Regulation Reform Act

In 1993, the Legislature enacted the Rent Regulation Reform Act ("RRRA") as codified in NYC Administrative Code 26-504.1 and 26-504.2. The RRRA provides for the "luxury decontrol" of rent-stabilized apartments under two conditions: "(1) in vacant apartments where the legal regulated rent was $2,000 per month or more; and (2) in occupied apartments where the legal regulated rent was $2,000 per month or more and the combined annual income of all occupants exceeded $250,000 per year" (Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 280 - 281 (NY 2009) citing NYC Administrative Code §§ 26-504.1, 26-504.2)). The RRRA specifically indicates that luxury decontrol "shall not apply to housing accommodations which became or become subject to this law(a) by virtue of receiving tax benefits pursuant to section four hundred twenty-one-a or four hundred eighty-nine of the real property tax law [the NYC J-51 benefits]" (RSL §§ 26-504.1, 26-504.2 [a]; see also Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270 (NY 2009)).

The DHCR's January 16, 1996 Advisory Opinion and February 2004 and January 2007 fact sheets.

On January 16, 1996 the DHCR issued an advisory opinion, which stated that participation in the J-51 program only precluded luxury decontrol "where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation". In February 2004, DHCR issued (and subsequently reissued in January 2007) Fact Sheet 36, entitled "High-Rent Vacancy Decontrol and High-Rent High-income Decontrol," which similarly specified that "[a]partments that are subject to rent regulation only because of the receipt [of J-51 benefits] do not qualify for high-rent vacancy decontrol" (emphasis added) (See Roberts v

Tishman Speyer Props., L.P., 13 N.Y.3d 270, 281-282 (NY 2009)). The DHCR issued this advisory opinion in 1996 and the fact sheet in 2004, respectively ten and five years prior to the Court of Appeals decision in Roberts v Tishman Speyer Props., L.P. 13 N.Y.3d 270, 281-282 (NY 2009).

The Court of Appeals' decision in Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 281-282 (NY 2009) "overturning" the DHCR's January 16, 1996 advisory opinion and February 2004 and January 2007 fact sheets.

In Roberts v Tishman Speyer Props., L.P. (13 NY3d 270 (NY 2009)) the Court of Appeals found that luxury decontrol is unavailable to building owners who take advantage of "'another system of general public assistance' such as J-51 benefits" (Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 287 (NY 2009). In doing so, the Court of Appeals specifically referred to the DHCR's January 16, 1996 advisory opinion and February 2004 and January 2007 fact sheets wherein the DHCR indicated that the J-51 program only precluded luxury decontrol "where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation" (Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 281-282 (N.Y. 2009)). However, the Court of Appeals found that the DHCR's reading of the RRRA conflicted with a natural reading of the statutory language. The Court of Appeals concluded that pursuant to the statutory language of the RRRA statute, luxury decontrol is unavailable to building owners who take advantage of another system of general public assistance, such as J-51 benefits. As such a landlord cannot deregulate a property while still receiving J-51 tax benefits.

Further, the Appellate Division, First Department has ruled that the Court of Appeals' decision in Roberts v Tishman Speyer Props., L.P. is retroactively applied (See Gersten v 56 7th Ave. LLC, 88 AD3d 189 (NY App Div. 1st Dept 2011); Meyers v Four Thirty Realty, 127 AD3d 501 (NY App Div 1st Dept 2015).

Plaintiff's motion for summary judgment on its first cause of action for rent overcharge is denied as the Court cannot determine the "base rent" upon which to to calculate whether or not the Plaintiff incurred a rent overcharge.

Upon review of the submitted papers and relevant case law, this Court finds that the Plaintiff has failed to establish prima facie that she is entitled to partial summary judgment on her first cause of action for rent overcharge. Specifically, given the prevailing interpretation of the rent control laws prior to Roberts v Tishman Speyer Props., L.P., (13 N.Y.3d 270, 281-282 (NY 2009)), there is an issue of fact as to whether or not the prior owner and/or the Defendants fraudulently, willfully and/or intentionally deregulated of the rent on the Premises while receiving J-51 tax benefits.

There is no question that the Court of Appeals' decision in Roberts v Tishman Speyer Props., L.P., (13 N.Y.3d 270, 281-282 (NY 2009) applies to the underlying action and that the prior owner illegally deregulated the Premises in 2006 while still receiving tax benefits under the J-51 program. However, as previously stated, prior to Roberts v Tishman Speyer Props., L.P., the DHCR had issued a January 16, 1996 advisory opinion and February 2004 and January 2007 fact sheets all indicating that the J-51 program only precluded luxury decontrol where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation. The Court recognizes the Plaintiff's argument that the prior owner's lease with Biggs and Rudy did not indicate that they were advised that the prior owner received J-51 benefits for the building.

The Court further recognizes that the Defendants do not dispute the Plaintiff's argument that neither the prior owner nor the Defendants served the requisite RR-1, DC-1 and/or DC-2notices upon any of the tenants subsequent to the illegal deregulation of the Premises in 2006. Nor do the Defendants dispute the Plaintiff's argument that the prior owner failed to file a Report of Vacancy or Vacancy Decontrol with the DHCR. Further the Defendants admit that as of July 31, 2006, the prior owner registered the Premises with the DHCR as a "high rent vacancy" and "exempt" from legal regulated rent. However, said failures may be consistent with the Defendants' argument that the prior owner mistakenly but reasonably believed that it had legally decontrolled the Premise in 2006 based upon the prevailing view of the rent control law prior to Roberts v Tishman Speyer Props., L.P. (as indicated in the DHCR's January 16, 1996 advisory opinion and February 2004 and January 2007 fact sheets).

As such, there is an issue of fact as to whether said failures on the part of the prior owner were fraudulent willful and intentional, or if said failures were based upon the prior owner's reasonable reliance upon the DHCR's advisory opinion and fact sheets, which all indicated that that the J-51 program only precluded luxury decontrol where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation.

In the absence of any further proof by the Plaintiff, this Court finds that the Plaintiff has failed to establish as a matter of law that the prior owners and/or the Defendants fraudulently, willfully and/or intentionally deregulated the Premises so as to remove it from the protections of rent stabilization. As such, this Court cannot determine the proper "base rent" in order to determine the Plaintiff's first cause of action for rent overcharge (See 72A Realty Assoc. v Lucas, 101 AD3d 401, 401-402 (NY App Div 1st Dept 2012) see also Downing v First Lenox

Terrace Assoc., 107 AD3d 86, 88 (NY App Div 1st Dept 2013)).

Under all these circumstances, this Court finds that a determination of the proper "base rent" would be premature at this time and requires further inquiry for the purpose of determining whether the prior owner and/or the Defendants fraudulently, willfully and/or intentionally acted to deregulate the Premises so as to taint the reliability of the rent on the Base Rent Date of January 2010; or if said deregulation was based upon the Defendants' reasonable though mistaken reliance upon the DHCR's advisory opinion and fact sheets issued prior to Roberts v Tishman Speyer Props., L.P. Likewise, absent a further inquiry on these issues, it cannot be determined whether the Defendants' alleged overcharge was willful, entitling Plaintiff to treble damages under 9 NYCRR § 2526.1 (See Meyers v Four Thirty Realty, 127 AD3d 501 (NY App Div 1st Dept 2015) citing Conason v Megan Holding, LLC, 25 NY3d 1 (NY 2015); 72A Realty Assoc. v Lucas, 101 AD3d 401 (NY App Div. 1st Dept 2012)).

As such the Plaintiff's motion for partial summary judgment on the first cause of action is denied. Further, the Plaintiff's motion for partial summary judgment on her sixth cause of action is also denied as any determination as to attorneys' fees, costs and disbursements would be premature at this time.

The Plaintiff's first cause of action for rent overcharge should be determined by the DHCR.

This Court recognizes that it has concurrent jurisdiction with DHCR to entertain an action to recover rent overcharges. (See Downing v First Lenox Terrace Assoc., 107 A.D.3d 86, 91 (NY App Div 1st Dept 2013) citing Wolfisch v. Mailman, 196 AD2d 466 (NY App Div 1st Dept 1993) lv denied 82 NY2d 661 (NY 1993); Nezry v Haven Ave. Owner LLC, 28 Misc. 3d 1226(A) (NY Sup Ct NY Cnty 2010)). The Court further recognizes that the Plaintiff has chosen to bring the instant action before this Court as opposed to bringing it before the DHCR, which is the agency designated to address conflicts relating to rent control issues and overcharges. In point of fact, the Appellate Division First Department has specifically stated that "[e]ven assuming, arguendo, that the legislature did not place exclusive original subject matter jurisdiction in DHCR to decide luxury deregulation matters, it is reasonably inferred from the applicable provisions of the Rent Stabilization Law that the doctrine of primary jurisdiction enjoins courts sharing 'concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved'" (Katz 737 Corp. v Cohen, 104 A.D.3d 144, 150 (N.Y. App. Div. 1st Dept 2012) citing Sohn v. Calderon, 78 NY2d 755 (NY 1991)). As such, the First Department has specifically recognized that "luxury deregulation matters" such as the Plaintiff's first cause of action, fall withing the DHCR's "specialized experience and technical expertise".

Pursuant to the doctrine of primary jurisdiction, the instant matter should be determined by DHCR, given its expertise in rent regulation (See Olsen v Stellar W. 110, LLC, 96 A.D.3d 440 (NY App Div 1st Dept 2012) citing Sohn v. Calderon, 78 NY2d 755 (NY 1991); Davis v. Waterside Hous. Co., 274 AD2d 318 (NY App Div 1st Dept 2000) lv denied 95 NY2d 770 (NY 2000)). DHCR can investigate Plaintiff's fraud allegations, determine the regulatory status of the Premises, and, if warranted, apply the default formula adopted in Thornton to determine the base rate (Olsen v Stellar W. 110, LLC, 96 AD3d 440, 441-442 (NY App Div. 1st Dept 2012) citing Matter of Grimm v State of New York Div. of Hous. & Community Renewal Off. of Rent Admin., 15 NY3d 358 (NY. 2010)).

Conclusion

As the Court cannot determine at this time whether the prior owners fraudulently, willfully and/or intentionally deregulated the Premises in 2006 while still receiving J-51 tax benefits, the Plaintiff's motion for partial summary judgment on her first cause of action is hereby denied. Further, the Court is also denying the Plaintiff's motion for partial summary judgment on her sixth cause of action as any determination as to attorneys' fees, costs and disbursements would be premature at this time.

Finally, the Plaintiff's first cause of action for rent overcharge is hereby severed from the underlying action and dismissed without prejudice, and the Plaintiff is directed to file an appropriate claim with the DHCR for the alleged overcharge.

Accordingly, it is hereby

ORDERED the Plaintiff's motion for partial summary judgment on her first and sixth causes of action are denied. It is further

ORDERED that the Plaintiff's first cause of action is hereby severed from the underlying action and dismissed without prejudice and the Plaintiff is directed to file an appropriate claim with the DHCR for the alleged overcharge . It is further

ORDERED that the parties appear for a conference at 111 Centre Street, Room 1127A, on Oct 5, 2015 at 9:30 a.m.

The foregoing constitutes the Order and Decision of the Court.

Dated: Sept 1, 2015

ENTER:

J.S.C.

HON. ROBERT D. KALISH
J.S.C.