SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
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CENPARK REALTY LLC,

Plaintiff,

-against- Index No. 152938/14

ALLEN APPLBAUM and BARBARA APPLBAUM,

Defendants.

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ELLEN M. COIN, J.

Motion sequence Nos. 003 and 004 are consolidated for disposition. In motion sequence No. 003, defendants Allen Applbaum and Barbara Applbaum move pursuant to CPLR 3212 (a) for summary judgment on their first through seventh counterclaims, and pursuant to CPLR 3211 (b) for an order dismissing plaintiff Cenpark Realty LLC's affirmative defenses to those counterclaims. In motion sequence No. 004, plaintiff moves for summary judgment dismissing defendants' counterclaims, or for an order determining that the statutory four-year look-back period applies to this action, and for an order permitting plaintiff to amend the DHCR registrations for defendants' apartment. Defendants have resided at all relevant times in apartment 9EF (Apartment) in the building located at 360 Central Park West, in Manhattan (Building). Plaintiff is the owner of the Building.

Plaintiff does not oppose that portion of defendants' motion which seeks dismissal of plaintiff's affirmative defenses. Accordingly, those defenses are dismissed. By order of this court dated October 5, 2016, the Apartment was declared to be rent stabilized.

This is one of the many cases that have followed upon the decision of the Court of Appeals in *Roberts v Tishman Speyer Props, L.P.* (13 NY3d 270 [2009]), in which the Court held that landlords may not take advantage of the luxury decontrol provisions of the Rent Stabilization Law (RSL) while simultaneously receiving tax benefits under New York City's J-51 program (now Administrative Code of City of New York § 11-243). At the time relevant to this action, the RSL provided that rents were no longer subject to regulation when, after a vacancy, they exceeded $2,000 per month. RSL § 26-504.2 (a). In *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [2011]), the Appellate Division, First Judicial Department, held that *Roberts* should be applied retroactively.

Before defendants moved into the Apartment, pursuant to a non-stabilized lease dated September 1, 2000, at a monthly rent of $6,500, the Apartment was rent controlled. Pursuant to RSL § 26-512 (b) (2), the initial regulated rent for an apartment that has been vacated by a rent controlled tenant is:

> "the rent agreed to by the landlord and the tenant and reserved in a lease or provided for in a rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to [the fair market rent appeal (FMRA) provisions of the RSL]. "

After the rent-controlled tenant vacated the Apartment in March 2000, plaintiff registered the Apartment as permanently exempt from rent regulation by virtue of "high rent, vacancy" (RSL § 26-504.2 [a]), and served a copy of "Owner's Report of Vacancy Decontrol" on defendants. Defendants did not file a Fair Market Rent Appeal with the Department of Housing and Community Renewal (DHCR). At that time, plaintiff was receiving J-51 tax benefits for the Building. Accordingly, it was barred from decontrolling the rent, as otherwise permitted by the

high rent decontrol provisions of the RSL.

CPLR § 213-a and RSL § 25-516 (a) provide that in any overcharge claim a court may not consider rents charged prior to the base date, that is, the date four years prior to the filing of the overcharge claim. That limitation may be disregarded, however, where the landlord has acted fraudulently and thereby made the rent charged on the base date unreliable as a measure of the legal rent at that time. *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 (2010). Here, the base date is November 5, 2010, four years before defendants interposed their counterclaims. Defendants argue that plaintiff acted fraudulently in setting their initial rent, inasmuch as plaintiff was receiving J-51 benefits at that time. That argument must be rejected, because in *Matter of Park v New York State Div. of Hous. & Community Renewal* (150 AD3d 105, 109 [1st Dept 2017], the Court held that where, as here, a landlord was receiving J-51 benefits during the tenancy of the first tenant, after the death of a rent-controlled tenant,

> "the landlord's belief that it could rely on the luxury decontrol laws to return the apartment to the free market was consistent with the DHCR's interpretation of the relevant laws and regulations at that time."

Courts have repeatedly held that at least until 2012, when the appeal from the First Department decision in *Gersten* was withdrawn, landlords could not be considered to have acted fraudulently when they relied upon the DHCR policy of the time. *See e.g. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 (2014); *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 101 (1st Dept 2017).

Here, plaintiff acted fraudulently from 2012 though the filing of its complaint in 2014. It failed to establish a rent-stabilized rent in 2012, once it became clear that it had acted improperly

in 2000. *See Taylor v 72A Realty Assoc., L.P.,* (151 AD3d at 101) (holding that as of March 2012, at which time the appeal of the decision in *Gersten* was withdrawn, owners "had an obligation to retroactively restore affected apartments to rent stabilization and register them"). Plaintiff designated the Apartment as decontrolled on October 29, 2015, when it filed with the Attorney General its offering plan to convert the Building to condominium ownership. Plaintiff's argument that to this date, the law is unclear as to whether *Roberts* applies to apartments following the vacature of a rent-controlled tenant, ignores the fact that the prohibition of luxury decontrol of rent-controlled apartments is identical to the prohibition pertaining to rent-stabilized apartments (*Dugan v London Terrace Gardens, L.P.*, 34 Misc 3d 1240[A], 2011 NY Slip Op 52501(U) [Sup Ct, New York County 2011], *affd* 101 AD3d 648 [1st Dept 2012]), and no court has held *Roberts* inapplicable in the circumstances of this case. However, these fraudulent acts and failures to act do not serve to extend the look-back period past the four-year period preceding the filing of defendants' counterclaims.

Defendants rely upon *Taylor* and *Altschuler v Jobman 478/480, LLC* (135 AD3d 439 [1st Dept 2016]). *Taylor* is inapplicable here, because in that case the subject apartment was rent stabilized prior to the plaintiff's tenancy, at which time it was improperly withdrawn from rent stabilization, whereas here, defendants' initial rent was properly set at market rate. *Altschuler* is also inapplicable, because the tenant in that case showed that the subject apartment had been unlawfully deregulated prior to the commencement of his tenancy.

Defendants' counterclaims seek the following relief: (1) a declaratory judgment that the apartment is rent stabilized; (2) application of the New York State Division of Housing and Community Renewal's (DHCR) default formula to set the rent as of the base date; (3) setting the

legal regulated rent for each month since the base date; (4) an injunction requiring plaintiffs to comply with the Rent Stabilization Law in relation to the Apartment; (5) recovery of rent overcharges since the base date; (6) a grant of attorneys' fees; and (7) damages pursuant to General Business Law (GBL) § 349.

The first counterclaim is moot in view of this court's order, referred to above. The second is denied, since the default method is used only when the legal rent on the base date cannot be determined. Here, because the four-year look back period governs, the rent on the base date cannot be modified. The third and the fifth counterclaims are granted. The fourth is moot, because plaintiff is currently complying with the RSL. The sixth is granted, as plaintiffs have prevailed in having the Apartment declared rent stabilized. The seventh counterclaim is dismissed since GBL § 349 applies only where the deceptive behavior affects the public at large, and not the residents of one building alone. *Sutton Apts. Corp.* v *Bradhurst 100 Dev. LLC*, 107 AD3d 646, 648 (1st Dept 2013).

Accordingly, it is hereby

ORDERED in motion sequence No. 003, that the motion of defendants Allen Applbaum and Barbara Applbaum is granted to the extent that: (1) the affirmative defenses raised by plaintiff Cenpark Realty LLC are dismissed; and (2) the third, fifth, and sixth counterclaims are granted, and the motion is otherwise denied; and it is further

ORDERED that the issue of the legal regulated rent for defendants' apartment on November 5, 2010, and thereafter, and the issue of the amount of defendants' reasonable attorneys' fees are referred to a Special Referee to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §

4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet (copies are available in room 119 at 60 Centre Street, and on the Court's website), upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED in motion sequence No. 004, that the motion of plaintiff Cenpark Realty LLC is granted to the extent that defendants' second, fourth, and seventh counterclaims are dismissed, and plaintiff is permitted to change the DHCR registrations for defendants' apartment consistent with this Order and the report of the Special Referee or designated referee, and the motion is otherwise denied.

Dated: December 18, 2017

ENTER:

Ellen M. Coin A.J.S.C.