435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC
2019 NY Slip Op 33267(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 452296/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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435 CENTRAL PARK WEST TENANT ASSOCIATION, YASUTO TAGA, LYDIA BAEZ, CESAR PENA, JORGE MARTINEZ, MARTHA ARIF, JOY HARRIS, ALTON SWIFT, JENNIE MORTON-GARCIA, MARTHA ADAMS, ALLADDIN WALTERS, VICTORIA FRAZIER, JOSE REGALADO, JUAN HUNTT, CHRISTINE BARROW, GEORGE PARKER, BORG JEAN-PIERRE, MARIA CRUZ and HIRAM CHAPMAN,

Plaintiffs,

Index No.: 452296/16
DECISION/ORDER

-against-

PARK FRONT APARTMENTS, LLC,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

In this residential landlord/tenant action, defendant Park Front Apartments, LLC (owner) moves for summary judgment to dismiss the complaint, and the plaintiff tenants and tenant association (plaintiffs) cross-move for partial summary judgment on the complaint (together, motion sequence number 002). For the following reasons, the motion and the cross motion are both denied.

BACKGROUND

The court discussed the facts of this case extensively in its July 24, 2017 decision that disposed of the parties' previous summary judgment requests (motion sequence number 001). For the purposes of these motions, it is relevant to note that plaintiffs' complaint raised causes of action for: 1) a declaratory judgment regarding the applicability of the Rent Stabilization Law

(RSL); 2) rent overcharge; 3) violation of General Business Law (GBL) § 349 (h); and 4) "failure to comply with HUD [U.S. Department of Housing and Urban Development] manuals and procedures." *See* notice of motion, exhibit B. Owner's answer included a counterclaim for a contrary declaratory judgment regarding the applicability of the RSL. *Id.*, exhibit C. The court's July 24, 2017 decision granted plaintiffs summary judgment on their first cause of action for declaratory relief, denied owner's request for summary judgment to dismiss the first and second causes of action, and granted owner's request for summary judgment to dismiss the third and fourth causes of action. *Id.*, exhibits D, E, F. On August 2, 2018, the Appellate Division, First Department, modified and affirmed this court's earlier decision in an order that held, in pertinent part, as follows:

> "While we find that the RSL was preempted as to the subject building through April 11, 2011, defendant owner is not entitled to a declaration that the RSL is preempted for the duration of the Use Agreement. Owner fails to demonstrate how HUD had the authority to extend preemption of the RSL beyond April 11, 2011, to 2016 and again to 2026. *Accordingly, we limit the declaration in defendant owner's favor to April 11, 2011, and declare in plaintiffs' favor that the building was subject to the Rent Stabilization Law as of April 12, 2011.* As long as the building was a project financed by a HUD mortgage, it was subject to the HUD Handbook, based on that loan and the terms of the related Regulatory Agreement. However, once the loan was paid off and the Regulatory Agreement terminated, the building ceased to be such a project. Plaintiffs failed to identify any continuing basis for applying the HUD Handbook to a building that had since been regulated pursuant to the terms of the Use Agreement requiring the preservation of low-income housing."

435 Cent. Park W. Tenant Assn. v Park Front Acts., LLC, 164 AD3d 411, 414-415 (1st Dept 2018) (emphasis added).

After the First Department issued its order, discovery in this case continued, and the owner eventually filed its second motion for summary judgment to dismiss on June 21, 2019.

Plaintiffs responded on August 5, 2019 with a cross motion for partial summary judgment on their second cause of action for rent overcharge (together, motion sequence number 002). Both motions are now fully submitted.

DISCUSSION

To briefly recount this action's procedural history, the initial pleadings contained plaintiffs' four causes of action and owner's single counterclaim. The first cause of action and the counterclaim, both of which sought a declaratory judgment concerning the building's rent regulated status, were disposed of by the First Department's August 2, 2018 decision that awarded plaintiffs a declaration "that the building was subject to the [RSL] as of April 12, 2011." *435 Cent. Park W. Tenant Assn. v Park Front Acts., LLC*, 164 AD3d at 414. This court's earlier July 24, 2017 decision had awarded owner partial summary judgment dismissing plaintiffs' third and fourth causes of action, but not the second, and this ruling was not disturbed on appeal. What now remains to be litigated is plaintiffs' second cause of action for rent overcharge, and the current motion and cross motion seek opposing requests for summary judgment regarding that claim. For reasons of legal clarity, this decision addresses the motions in reverse order.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City*

Tr. Auth., 304 AD2d 340, 342 (1st Dept 2003).

Plaintiffs' Cross Motion

Plaintiffs' cross motion seeks partial summary judgment for a rent freeze on their second cause of action for rent overcharge. Plaintiffs argue that defendant did not satisfy its obligation under RSL to charge proper rents and did not register the building with DHCR, therefore defendant was not entitled to any rent increases from the base date forward; here, plaintiffs are referring to Rent Guidelines Board increases that would normally be granted with each rent stabilized renewal lease.

RSL § 26-516 is the statute that governs rent overcharge claims, and it provides, in pertinent part, as follows:

> ". . . [A]ny owner of housing accommodations who, upon complaint of a tenant, . . . is found . . ., after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the [court] shall establish the penalty as the amount of the overcharge plus interest. . . . (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. . . . [A] court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determinations"

(RSL § 26-516 [a]).

Plaintiffs' raise two arguments as to why owner should be held liable for imposing rent overcharges in violation of the statute: 1) first, that "owner has engaged in a fraudulent scheme to

charge the tenants 7.5% annual rent increases since 2001"; and 2) second, that "owner [has] willfully violated rent stabilization laws in the past," so "the [plaintiffs' apartments'] initial regulated rents should be set at the last legal and reliable rents set forth in the . . . 'Initial Rents' attachment . . . [to] the Use Agreement." *See* plaintiffs' mem of law at 10. After considering the evidence, the court finds that neither of these arguments is persuasive.

Regarding plaintiffs' first argument, subparagraph 3 (d) of the "Use Agreement"[1] provides, in part, as follows:

> "Notwithstanding any other limitation of this Use Agreement, [owner] may implement annual rent increases of seven and one-half percent (7.5%) for any Current tenant or New Tenant who: (a) refuses to provide a recertification of income as required by this Use Agreement or such tenant's lease; (b) has income exceeding one hundred and ten percent (110%) of ninety-five percent (95%) of Area Median Income; (c) is paying the 'BMIR Market Rent' (110% of the BMIR Contract Rent) on the date of this Use Agreement; or (d) otherwise would be ineligible to pay the BMIR Contract Rent."

(*See* notice of cross motion, exhibit G).

This contractual language plainly permitted owner to increase any apartment unit's rent by 7.5% per year under certain circumstances. Plaintiffs nevertheless allege that owner's principal, Sinclair Haberman (Haberman), systematically manipulated the income recertification process described in the Use Agreement. They specifically claim that: 1) by denying plaintiffs access to the recertification forms, Haberman prevented them from submitting accurate information about their income (which, in many cases, would have entitled them to rent reductions under Section 8 rules); and 2) Haberman instead pressured them into signing

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[1] The Use Agreement between owner and HUD governed owner's management of the building under HUD's "Section 8" low income housing program until April 12, 2011, when the building became subject to the RSL.

recertification forms that he himself had filled out which were untimely and/or contained false entries showing higher income (which created grounds to raise an apartment's rent by 7.5% annually). *See* plaintiffs' mem of law at 10-16. Owner replies that "in both 2001 and 2010, HUD investigated claims that [Haberman] had deprived tenants of the opportunity to recertify, and . . . each time, HUD found no irregularities." *See* defendant's reply mem at 10. As proof, owner only provides Haberman's affidavit disputing plaintiffs' assertions, along with some of Haberman's correspondence with HUD. *See* notice of motion, Haberman reply aff, ¶¶ 6-82; exhibits C, D. Owner notably does *not* present any documentary proof that HUD ever made any determinations about tenant recertification complaints in either 2001 or 2010. For their part, plaintiffs' proofs also consist only of affidavits from individual tenants detailing the purported recertification scheme, and copies of their correspondence with Haberman. *See* notice of cross motion, Taga aff; Walters aff; Huntt aff; Cruz aff; exhibits K, N; Chapman reply aff, exhibits A, B, C, D. Plaintiffs, too, fail to present any evidence that HUD investigated or ruled on their recertification complaints. None of this material objectively proves or disproves the existence of owner's purported scheme to impose rent overcharges via improper 7.5% yearly rent increases. Accordingly, the court finds that the substantial open question of fact regarding this alleged "fraudulent scheme" that precludes either a grant or a denial of summary judgment on the issue of liability for rent overcharge.

Plaintiffs' second argument is that owner's ongoing violation of the RSL mandates that the legal regulated rent for each of their apartment units should be set by referring to the "Initial Rents" attachment to the Use Agreement. *See* plaintiffs' mem of law at 10; notice of cross motion, exhibit G. The court notes that the opposition papers only mention this argument once

without discussing it, and that neither parties reply papers mention it at all. This could warrant the inference that plaintiffs have abandoned the argument, and justify the court in disregarding it. The court declines to do so, however, since it presents a novel issue of statutory analysis.

RSL § 26-526 (a) requires the fact finder (i.e., the court or the DHCR) to determine whether an landlord has "collected an overcharge above the rent authorized for a housing accommodation subject to this chapter" by determining whether the amount of rent that the landlord actually collected exceeded "the legal regulated rent for purposes of determining an overcharge." The fact finder can ascertain the "legal regulated rent" in four ways. First, it may refer to:

> "the rent indicated in the most recent reliable annual registration statement filed [with the DHCR] and served upon the tenant six or more years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments."

Second:

> "[a]s to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date six years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than six years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments."

Third: "[w]here the rent charged on the date six years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by [the DHCR]." Last:

> "[w]here the prior rent charged for the housing accommodation cannot be established, such rent shall be established by [the DHCR] provided that where a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter, less any

appropriate penalties."

(RSL § 26-516 [a]).

The first and second of the foregoing methods for ascertaining an apartment's "legal regulated rent" presume that a landlord has filed an "initial registration statement" with the DHCR which sets forth the unit's first rent-stabilized rent. Here, however, owner still has not filed such "initial registration statements" with the DHCR. In their absence, there is nothing for the court to refer to in order to complete the process of determining a plaintiff's apartment's "legal regulated rent." Therefore, the court cannot use either of these methods.

The third and fourth methods require the DHCR, rather than the court, to determine an apartments' "legal regulated rent." The first instance where the DHCR is mandated to do this is "where the rent charged on the date six years prior to the date of the initial registration of the accommodation cannot be established." However, as mentioned, owner herein has never filed any "initial registration statements" for the building's apartments. It therefore appears that the third method of ascertaining "legal regulated rent" is inapplicable to the facts of this case.[2] The final method provides a different option.

The other instance in which the DHCR is required to fix an apartment's legal regulated rent is simply "where the prior rent charged for the housing accommodation cannot be established." Here, the court has already determined that there is an unresolved question of fact as to whether the rents that owner charged while the building was subject to HUD's Section 8

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[2] The court notes that this provision *could* be interpreted to govern in a factual scenario such as the one presented by this action, since it is certainly impossible to determine "rent charged on the date six years prior to the date of the initial registration of the accommodation" if the building owner has never filed an initial registration statement. However, as discussed above, the court believes that the statute's final provision is more applicable.

program rules were proper. This equates to a finding that "the prior rent[s] charged for the housing accommodation[s] cannot be established." In such situations, the final sentence of RSL § 26-516 (a), as currently amended, specifically requires "the agency" (i.e., the DHCR) to establish "the legal regulated rent for purposes of determining an overcharge." The court finds this statutory language to be significant. In drafting RSL § 26-516, the Legislature clearly took pains to use conjunctive language whenever it wished to grant "the state division of housing and community renewal" and "a court of competent jurisdiction" joint authority over the resolution of some aspect of a rent overcharge claim, and to use exclusive language whenever it wished to commit other matters to the sole purview of "the agency" or "the commissioner." The court finds that setting an apartment's "legal regulated rent" in cases "where the prior rent charged for the housing accommodation cannot be established" is a matter committed to the DHCR in the first instance. Accordingly, based on the above analysis, the DHCR would likely be the appropriate entity to determine the "legal regulated rent" for the plaintiffs' apartments, the court must deny plaintiffs' cross motion for the reasons noted above. That does not end the inquiry, however.

Defendant's Motion

Pursuant to the review mandated by RSL § 26-516, it is only after an apartment's "legal regulated rent" is established that the question of whether or not owner collected rent overcharges can be addressed. Here, owner's motion disregards this two-part statutory inquiry and simply seeks summary judgment to dismiss plaintiffs' rent overcharge claim on other legal grounds. However, when analyzing owner's four dismissal arguments, it is apparent that none of them actually addresses the issue of owner's rent overcharge *liability*, and that they instead concern

issues regarding what types of *damages* owner might face for imposing rent overcharges. This approach "puts the cart before the horse," because there is no need for a court to rule on issues of damages in the absence of a finding of liability. As a result, the court finds that owner's summary judgment request is legally deficient because owner's supporting arguments are inapposite. However, as will be explained, the court believes that it is provident to thoroughly review owner's arguments in this decision instead of simply denying owner's motion.

Owner's first dismissal argument is that "there was no willful overcharge, accordingly, treble damages should not be assessed." *See* defendant's mem of law at 4-8. Owner bases the argument primarily on a dicta statement in the Court of Appeals' decision in *Borden v 400 E. 55th St. Assoc., L.P.* (24 NY3d 382, 389 [2014]) that "a finding of willfulness is generally not applicable to cases arising in the aftermath of [*Roberts v Tishman Speyer Props, L.P.*, 13 NY3d 270 (2009)]," because many landlords who improperly deregulated apartments in buildings that were receiving "J-51" real estate tax exemption benefits did so in reliance on the New York State Division of Housing and Community Renewal's (DHCR) erroneous opinion that this practice was permissible. 24 NY3d at 398. Owner asserts that it similarly relied on opinions from HUD and the DHCR that federal Section 8 law preempted the building from being subject to rent regulation under New York State law, and concludes that, as a matter of law, it, too, cannot therefore be deemed to have acted "willfully" for the purposes of assessing treble damages. *See* defendant's mem of law at 4-8. The heart of owner's argument is an assertion of "justifiable reliance" on the aforementioned agency opinions.

However, neither *Borden v 400 E. 55th St. Assoc., L.P.*, nor any of the other precedent that owner cites, supports the position that a landlord's professed reliance on an agency opinion

overrides the presumption of willfulness set forth in RSL § 26-516 (a). In *Borden*, the Court of Appeals itself noted that the DHCR's guidance regarding "J-51" apartment deregulations became invalid after the *Roberts* decision was issued. 24 NY3d at 398. More importantly, in last year's decision in *Nolte v Bridgestone Assoc. LLC* (167 AD3d 498 [1st Dept 2018]), a case which owner's papers did *not* address, the First Department rejected a landlord's assertion that it had not acted "willfully" in connection with the "J-51" deregulation that was the subject of that action because the landlord had "failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of *Roberts v Tishman Speyer Props., L.P.* . . . was clear." 167 AD3d at 498-499. In this case, the First Department found "that the building was subject to the Rent Stabilization Law as of April 12, 2011." *435 Cent. Park W. Tenant Assn. v Park Front Acts., LLC*, 164 AD3d at 414. This court initially issued a declaration to that effect on July 24, 2017 and the First Department issued its modification to that declaration on August 2, 2018. Nevertheless, as of the end of 2019, the owner has still failed to register the building's apartments as rent stabilized with the DHCR.

The court finds that this failure negates owner's "willfulness" argument for the same reason that the First Department rejected the similar argument in *Nolte v Bridgestone Assoc. LLC*. Specifically, owner's failure to promptly register the building's apartments as rent stabilized, despite being fully aware of its legal obligation to do so for a substantial period of time, nullifies its assertion that it has not acted "willfully." Indeed, this failure to comply with the RSL's registration requirement is *evidence* of owner's "willfulness." Therefore, the court rejects owner's first dismissal argument.

Next, owner argues that "because there was no fraudulent scheme to deregulate, the

four-year look-back period should not be breached." *See* defendant's mem of law at 9-11. However, the "four-year no look-back" rule that owner refers to was a provision contained in an earlier version of RSL § 26-516 (a). The current version of RSL § 26-516 (a), which went into effect on June 14, 2019 as part of the "Housing Stability and Tenant Protection Act," discarded that rule, and instead provides that "a court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determinations" with no "look-back" constraints. RSL § 26-516 (a). In its decision last month in *Dugan v London Terrace Gardens, L.P.* (177 AD3d 1, 2019 WL 4439346, *3 [1st Dept 2019]), the First Department specifically held that the state Legislature intended that the amended version of RSL § 26-516 (a) should be applied to "any claims pending or filed on or after" the effective date of the amendments (i.e., June 14, 2019). Here, plaintiffs' overcharge claim is indisputably "pending" because it was first filed on November 23, 2016 and is still unresolved as of the date of this decision. Therefore, the current version of RSL § 26-516 (a) governs that claim. Because that statute does not contain a "four-year look-back" limitation, as did its previous version, owner's argument based on that limitation is now inapposite. As a result, the court rejects owner's argument, finds that the "four-year no look-back" rule does not govern in connection with plaintiffs' rent overcharge claim, and rejects the owner's second basis for dismissal.

Next, owner argues that "there should be no rent freeze based on failure to register." *See* defendant's mem of law at 12-13. RSL § 26-517 (e), which contains the rent freeze provision, provides, in pertinent part, as follows:

> "*The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from*

> *applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement* . . .. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee."

(RSL § 26-517 [e] [emphasis added]).

Owner simply contends that the rent freeze provision "does not apply herein." *See* defendant's mem of law at 12-13. This argument too is indirectly related to the issue of rent overcharge liability rather that rent overcharge damages. Nevertheless, the court rejects it as unsupported. Owner cites *Matter of Park v New York State Div. of Hous. & Community Renewal* (150 AD3d 105 [1st Dept 2017]) for the proposition that "where an owner fails to register an apartment as stabilized based on the advice of the expert administrative agency, a rent freeze is unwarranted." *See* defendant's mem of law at 12. However, the First Department specifically rejected this proposition in *Matter of 215 W 88th St. Holdings LLC v New York State Div. of Hous. & Community Renewal* (143 AD3d 652 [1st Dept 2016]) wherein it specifically stated that "*the statute [i.e., RSL § 26-517 (e)] makes no allowance for circumstances such as a successor owner's good faith or reliance on agency determinations in its favor that are later rescinded.*" 143 AD3d at 653 (emphasis added). Nothing in the *Park* holding modifies this holding. Further, that case involved a completely different factual situation from the one at bar.

In *Park*, the landlord's failure to register the subject apartment occurred before the Court of Appeals had rendered its decision in *Roberts v Tishman Speyer* (13 NY3d 270, *supra*), so

there was no way that the landlord could reasonably have suspected that it had improperly deregulated the subject apartment therein, or that it should have registered the apartment instead. Here, by contrast, *Roberts* was decided in 2009, and the First Department ruled that the instant building became rent stabilized as of 2011. Also, as was previously noted, the First Department ruled in 2018 that the subject building had become subject to rent stabilization as of 2011. Given the time frames involved, owner cannot claim to be in the same position as the landlord in *Park*. Therefore, the court rejects owner's argument that RSL § 26-517 (e) does not apply herein, and finds that the rent freeze provision of RSL § 26-517 is *applicable* in connection with plaintiffs' rent overcharge claim. However, as the overcharge claim must be determined before issues of rent freeze and/or damages are decided, the motion for rent freeze is inappropriate at this time.

Owner's final argument is composed of several disjointed assertions. First, owner avers that it "is entitled to all lawful rent increases subsequent to April 12, 2011," and that "once the base rents are established, those rents must thereafter be increased by 'any subsequent lawful increases and adjustments.'" *See* defendant's mem of law at 14-15. Here, owner specifically refers to the percentages by which rent-stabilized renewal lease may be increased annually or bi-annually which are periodically promulgated in Rent Guidelines Board Orders (RGBOs). *Id.* at 14. Owner's assertion correctly summarizes the current state of the law. RSL § 26-516 acknowledges that a rent-stabilized apartment's rent may be lawfully raised by certain "subsequent lawful increases and adjustments," and plaintiffs acknowledge that RGBOs are among the permissible "lawful increases and adjustments." *See* plaintiffs' mem of law at 26-27. However, owner's assertion does not affect its liability for plaintiffs' rent overcharge claim.

Owner also asserts that "the base date herein is April 12, 2011." *See* defendant's mem of law at 14. Owner is again correct. Although the current version of RSL § 26-516 (a) provides that an apartment's base date falls on the day six years before the tenant files an overcharge complaint (which was November 23, 2016 in this case), the First Department's August 2, 2018 ruling found that the building became subject to rent stabilization on April 12, 2011. 164 AD3d at 414-415. Because that date falls within the six-year period provided for in RSL § 26-516, the facts of this case dictate that it is the earliest available date which may be designated as the base date from which to calculate the building's apartments' legal regulated rent. Plaintiffs concede this point as well. *See* plaintiffs' mem of law at 26. However, it does not affect owner's liability for plaintiffs' rent overcharge claims either.

Owner's two final assertions are incorrect. Its statement that "the issue of whether the look-back period can be breached is moot" is immaterial, because the "four-year no look-back" rule was removed from the RSL § 26-516 by the June 2019 amendments. *See* defendant's mem of law at 14. Its statement that "there is no lawful basis for freezing the rent charged on the base date" is incorrect for the reasons discussed above; i.e., that RSL § 26-527 mandates a rent freeze whenever a landlord fails to timely register a rent stabilized apartment unit with the DHCR, and owner has not demonstrated that it is exempt from the statutory registration requirement. *Id.*

In conclusion, the court accepts the accuracy of owner's first two assertions but discounts the third and fourth. Consequently, the court finds that RGBO increases may be included, and that a base date of April 12, 2011 must be used, when establishing the "legal regulated rent" for each of plaintiffs' apartments.

However, as was discussed earlier, all of owner's four dismissal arguments are inapposite

to the question of owner's liability for rent overcharge, since they are addressed to the secondary issue of calculating overcharge damages. Therefore, the court finds that owner has failed to meet its burden of proving that it is entitled to a summary judgment dismissing plaintiffs' overcharge claim, and denies owner's motion.

CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Park Front Apartments, LLC (motion sequence number 003) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of plaintiffs 435 Central Park West Tenant Association, Yasuto Taga, Lydia Baez, Cesar Pena, Jorge Martinez, Martha Arif, Joy Harris, Alton Swift, Jennie Morton-Garcia, Martha Adams, Alladdin Walters, Victoria Frazier, Jose Regalado, Juan Huntt, Christine Barrow, George Parker, Borg Jean-Pierre, Maria Cruz and Hiram Chapman (motion sequence number 003) is denied; and it is further

ORDERED that both motions are premature and unable to be determined at this juncture; and it is further

ORDERED that counsel for defendant to provide a copy of this decision and order, along with notice of entry, to all parties within 10 days of entry.

Dated: New York, New York
October 31, 2019

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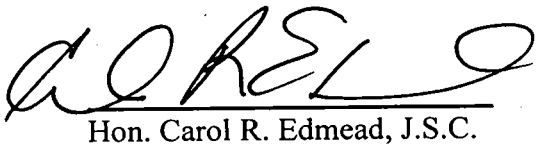

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.