SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

----------X

MICHAEL GUZZO,

Plaintiff,

- v -

250 EAST HOUSTON STREET ASSOCIATES, L.P., 250 HOUSTON INVESTORS, L.P.

Defendant.

----------X

INDEX NO. 155684/2019

MOTION DATE 09/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this residential landlord/tenant action, defendant 250 Houston Investors, L.P. (250 Investors or landlord) moves for summary judgment to dismiss the complaint of plaintiff Michael Guzzo (Guzzo) and for summary judgment on its two counterclaims (motion sequence number 001). The motion is granted in part and denied in part to the extent set forth below.

BACKGROUND

Since June of 2017, Guzzo has been the tenant of record of apartment 12D in a residential apartment building (the building) located at 250 East Houston Street in the County, City and State of New York. *See* notice of motion, Hazan aff, ¶ 4. Previously, between February 1993 and June 2017, Guzzo was the tenant of record of apartment 8C in the building. *Id.*, ¶ 4; verified complaint, ¶ 12. Defendants 250 East Houston Street Associates, L.P. (250 Associates) and 250 Investors are, respectively, the building's prior and current owners. *Id.*, ¶ 1; verified complaint,

¶¶ 2-6. 250 Investors completed its purchase of the building from 250 Associates in October of 2016. *Id.*, ¶ 2; exhibits K, L. The building's rent regulatory status is at issue in this action.

Guzzo asserts that both apartments 8C and 12D are actually subject to the protection of the Rent Stabilization Law (RSL) by virtue of the building's ongoing participation in the "421-a" real estate tax abatement program, which is authorized by Real Property Tax Law (RPTL) § 421-a and overseen by the New York City Department of Housing Preservation and Development (HPD). *See* verified complaint, ¶¶ 8-11. RPTL § 421-a requires that owners of buildings that are enrolled in the "421-a" program must register their buildings' apartments as rent stabilized units with the New York State Division of Housing and Community Renewal (DHCR), and must abide by the rent protection rules set forth in the Rent Stabilization Code (RSC), in order to remain eligible to continue receiving the program's real estate tax abatement. Guzzo asserts that both 250 Associates and 250 Investors failed to abide by the RSC's rules despite the building's enrollment in the "421-a" program, and illicitly treated both apartments 8C and 12D as unregulated "market rate" units for which they charged him improperly high rents. *Id.*, ¶¶ 15-41. He further asserts that both landlords' actions constitute an actionable "fraudulent scheme to deregulate" both apartments. *Id.* Regarding his move from apartment 8C to apartment 12D in 2017, Guzzo asserts that this was a "forced vacatur" caused by 250 Investors' "fraudulent representations" that apartment 8C had been deregulated and that its rent was going to be raised to "market rate" that he would be unable to pay. *Id.*, ¶ 14, 18-19-23.

For its part, 250 Investors asserts that Guzzo was neither "removed" nor "forced to move" from unit 8C to unit 12D, but that he instead voluntarily relocated to the new unit after being informed that an ongoing building renovation program was going to include unit 8C and make it impossible for 250 Investors to renew that unit's lease in 2017. *See* notice of motion,

Keebler aff, ¶¶ 6-13. 250 Investors also asserts that apartment 8C was deregulated by a DHCR order dated April 2, 2009 which was never challenged by a timely petition for administrative review (PAR). *Id.*, Hazan affirmation, ¶¶ 6-14; exhibit B. 250 Investors further asserts that the DHCR's investigation into 250 Associates' 2008 apartment deregulation application found that the building's participation in the "421-a" real estate tax abatement program had expired on June 30, 1999. *Id.*, ¶ 18; exhibit G. As a result, 250 Investors argues that Guzzo's claims are all unsustainable because the documentary evidence demonstrates that neither apartment 8C nor apartment 12D was ever subject to rent stabilization protection. *Id.*, Samuel affirmation ¶¶ 1-44.

Guzzo commenced this action on June 6, 2019 by filing a summons and complaint that sets forth causes of action for: 1) declaratory judgment; 2) permanent injunction; 3) fraud; 4) rent overcharge; 5) wrongful eviction; 6) money damages; and 7) attorney's fees. *See* verified complaint. On July 17, 2019, 250 Investors filed an answer with affirmative defenses and counterclaims for: 1) ejectment; and 2) unpaid use and occupancy. *See* verified answer. The building's prior owner, 250 Associates, has not appeared in this action. On November 26, 2019, 250 Investors filed this motion for summary judgment to dismiss the complaint and for summary judgment on its counterclaims. *See* notice of motion. Although the Covid-19 national pandemic caused the court to suspend its operations during the original motion submission schedule, counsel diligently stipulated to all necessary extensions of time, and this matter is now fully submitted and ready for disposition (motion sequence number 001).

DISCUSSION

As previously mentioned, 250 Investors styles this motion as alternatively seeking summary judgment pursuant to CPLR 3212 and/or dismissal pursuant to provisions of CPLR 3211. *See* notice of motion. However, counsel's accompanying affirmation makes it clear that

250 Investors intended to raise the CPLR 3211 defenses as arguments in support its summary judgment application. *Id*., Samuel affirmation, ¶¶ 42-44. Accordingly, this decision treats 250 Investors' motion as one for summary judgment.

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). Here, 250 Investors raises individual arguments against each of Guzzo's causes of action as well as a blanket argument to dismiss the entire complaint. The court will examine each of them in turn. First, however, the court makes the following findings based on the parties' documentary submissions.

The parties do not dispute that Guzzo was the tenant of record in apartment 8C between February 1, 1997 and June 8, 2017, or that he thereafter vacated it and became the tenant of record of apartment 12D on June 9, 2017,and still occupies that unit as of the date of this decision. *See* verified complaint, ¶¶ 12-13; notice of motion, Hazan aff, ¶ 4; exhibits N, P-Q, V-X. None of Guzzo's renewal leases for apartment 8C between 2010 and 2017 has a "421-a" notice appended to them. *Id*., notice of motion, exhibits N, P, Q, V. However, on April 21, 2009, 250 Associates sent Guzzo a letter that stated that it would offer him the "right of first refusal" for a lease to apartment 8C at a "fair market rent" of $4,150.00 per month to take effect

on February 1, 2010, pursuant to the terms of the DHCR's deregulation order. *Id.*; Hazan aff, ¶ 7; exhibit O. 250 Associates and Guzzo ultimately executed a lease for apartment 8C for the period of February 1, 2010 through January 31, 2011 at $3,900.00 per month, which was $250.00 per month less than the amount offered in the "right of first refusal" letter. *Id.*; exhibit P. None of Guzzo's leases or renewal leases for apartment 12D has a "421-a" notice appended to it either. *Id.*; exhibits W, X.

During its review of 250 Associates' 2008 high income rent deregulation application for apartment 8C, the DHCR determined that the building's enrollment in the "421-a" real estate tax abatement program had expired on June 30, 1999. *See* notice of motion, Hazan aff, ¶ 18; exhibit G. On April 2, 2009, the DHCR issued an "order of high income rent deregulation" for apartment 8C which noted that the Guzzo had been notified of his right to oppose the landlord's application, but that Guzzo had failed to submit any timely opposition. *Id.*, ¶ 6; exhibit B. The DHCR's rent registration histories indicate that 250 Associates had: 1) registered apartment 8C as a rent stabilized unit until July 21, 2010, when it became "exempt" from the registration requirement by virtue of "high rent/high income"; and 2) registered apartment 12D as a rent stabilized unit until July 21, 2000, when it became "exempt" from the registration requirement because of "421-a expired." *Id.*; exhibits AA, BB.

The initial branch of 250 Investors' motion argues that Guzzo's first and second causes of action for declaratory and injunctive relief should be dismissed "as the parties are subject to an unchallenged DHCR order of deregulation for the original premises issued over 10 years ago and plaintiff failed to exhaust his administrative remedies after the order was issued." *See* notice of motion, Samuel affirmation, ¶¶ 45-49. 250 Investors specifically argues that these two causes of action are unsustainable, as a matter of law, because Guzzo failed to "exhaust his administrative

remedies" by filing a timely PAR of the DHCR's April 2, 2009 deregulation order. *Id.* Guzzo responds that 250 Investors' arguments are inapposite because his "claims are not administrative remedies." *See* Zekaria affirmation in opposition, ¶¶ 32-34. 250 Investors' reply papers observe that "plaintiff does not dispute his failure to exhaust administrative remedies as to the DHCR order of deregulation." *See* Samuel reply affirmation, ¶¶ 9-13. The court finds both arguments unpersuasive.

Guzzo's first cause of action seeks a declaratory judgment, which New York law defines as a discretionary remedy that may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g.*, *Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). Here, Guzzo specifically seeks declarations that apartments 8C and 12D are both "subject to rent stabilization," and that Guzzo is "the lawful rent stabilized tenant of the current premises, and/or the original premises," as well as declarations regarding the maximum legal rents for both units and whether the amounts of rent that 250 Associates and/or 250 Investors actually collected were "rent overcharges." *See* verified complaint, ¶¶ 42-46. However, neither the documentary evidence discussed above nor the applicable law supports the declarations that Guzzo requests.

With respect to apartment 8C, the documentary evidence shows that the building exited the "421-a" real estate tax abatement program on June 30, 1999 and that the DHCR issued a "high income rent deregulation" order on April 2, 2009. *See* notice of motion, Hazan aff, ¶¶ 6, 18; exhibits B, G. However, the Appellate Division, First Department, expressly holds that,

pursuant to RPTL § 421-a (2) (f) (ii), "units are deregulated upon expiration of the tax benefit, provided the requisite notices have been provided to the tenant, or else when the unit becomes vacant," and that where a landlord fails to provide the tenant with the requisite notice, "the apartment will not be subject to deregulation until the tenant vacates." *Matter of Tribeca Equity Partners, L.P. v New York State Div. of Hous. & Community Renewal*, 144 AD3d 554, 554 (1st Dept 2016) (emphasis added). Here, none of Guzzo's renewal leases for apartment 8C from 2010 through 2017 had a "421-a" notice annexed to it. *See* notice of motion, exhibits N, P, Q, V. 250 Investors has produced a copy of the "right of first refusal" letter that 250 Associates sent Guzzo on April 21, 2009, after the DHCR issued the deregulation order. *Id*., exhibit O. However, RPTL § 421-a (2) (f) (ii) specifies that a "421-a" notice must be:

> ". . . in at least twelve point type informing such tenant that the unit shall become subject to such decontrol upon the expiration of such tax benefit period as provided in the opening paragraph of this paragraph or applicable law or act and states the approximate date on which such tax benefit period as provided in the opening paragraph of this paragraph is scheduled to expire; or such unit becomes vacant as provided under subparagraph (i) of this paragraph."

RPTL § 421-a (2) (f) (ii). Here, 250 Associates' "right of first refusal" letter does not comply with these statutory requirements, so it cannot be considered to be a valid "421-a" notice. *See* notice of motion, exhibit O. Thus, 250 Investors argument that Guzzo had sufficient notice of apartment 8C's deregulation because he received copies of both the DHCR deregulation order

and 250 Associates' "right of first refusal" letter are unavailing. RPTL § 421-a (2) (f) (ii) plainly places the burden on a landlord to provide a tenant with a statutorily compliant "421-a"

notice. 250 Investors has not cited any precedent to support the argument that providing a tenant with alternative non-compliant documents is sufficient to relieve a landlord from that notice requirement (or shift it to the tenant). However, the parties do not dispute that Guzzo vacated apartment 8C on June 8, 2017. *See* verified complaint, ¶¶ 12-13; notice of motion, Hazan aff, ¶ 4; exhibits V, W. Pursuant to RPTL § 421-a (2) (f) (ii), Guzzo's act of vacatur on that date was sufficient to end the unit's rent stabilized status. *Matter of Tribeca Equity Partners, L.P. v New York State Div. of Hous. & Community Renewal*, 144 AD3d at 554. Because apartment 8C's rent stabilized status ended on June 8, 2017 and Guzzo thereafter moved into apartment 12D, Guzzo is not entitled to declarations that apartment 8C is a rent stabilized unit, or that he is its rent stabilized tenant.

With respect to apartment 12D, the documentary evidence discussed above shows that the building exited the "421-a" real estate tax abatement program on June 30, 1999, and that 250 Associated stopped registering apartment 12D as a rent stabilized unit as of July 21, 2000; instead, listing it as "exempt" from the DHCR's registration requirement with the explanation that "421-a expired." *See* notice of motion, Hazan aff, ¶ 18; exhibits G, BB. Guzzo has presented no evidence that the unit is currently rent stabilized. As a result, Guzzo is not entitled to a declaration that apartment 12D is a rent stabilized unit (although he is its current lawful occupant).

In light of the foregoing, the court concludes that Guzzo is not entitled to the declaratory judgments that he requests in his first cause of action, and consequently grants so much of 250 Associates' motion as seeks summary judgment to dismiss that cause of action.

Guzzo's second cause of action seeks an injunction:

> ". . . directing Defendants to restore Plaintiff to the original premises and to furnish Plaintiff with a proper rent stabilized lease agreement stating the proper, lawful maximum legal rent and to furnish proper rent stabilized lease renewal leases in the future, for the duration of Plaintiff's tenancy in the original premises or otherwise. Or, if no such order is granted; Plaintiff respectfully demands an order directing Defendants to furnish Plaintiff with a proper rent stabilized lease agreement stating the proper, lawful maximum legal rent and to furnish proper rent stabilized lease renewal leases in the future, for the duration of Plaintiff's tenancy in the current premises or otherwise."

See verified complaint, ¶ 48. Pursuant to CPLR 6301:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, *an act in violation of the plaintiff's rights respecting the subject of the action*, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

CPLR 6301 (emphasis added). The Court of Appeals has held that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing CPLR 6301. However, as was discussed in the preceding portion of this decision, 250 Investors is not performing "an act in violation of Guzzo's rights respecting" either of the subject apartments by refusing to

provide him with rent stabilized leases, because neither of the apartments is currently a rent stabilized unit. As a result, Guzzo cannot demonstrate "a probability of success on the merits" on his claim for injunctive relief. 250 Investors papers do not raise any specific legal arguments concerning Guzzo's injunction claim; instead, they only mention that claim in passing in the arguments directed against Guzzo's declaratory judgment claim. *See* notice of motion, Samuel affirmation, ¶¶ 45-49; Samuel reply affirmation, ¶¶ 9-13. Guzzo's opposition papers are similarly devoid of any specific legal arguments to support his claim for injunctive relief. *See* Zekaria affirmation in opposition, ¶¶ 6-49. Nevertheless, because Guzzo has failed to establish the "probability of success on the merits" element of his second cause of action, the court grants so much of 250 Investors' motion as seeks summary judgment dismissing that claim.

Guzzo's third cause of action alleges fraud; specifically that;

> "Defendants conspired and colluded to perpetrate a fraud upon the Plaintiff by illegally deregulating his residential units so that they could increase the monthly rents," and that ". . . the fraud consisted of Defendants filing erroneous and/or inaccurate documents with the DHCR, representing to Plaintiff that they had a legal right to deregulate, and further representing that both premises were deregulated."

See verified complaint, ¶¶ 51-52. The proponent of a fraud claim "must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). 250 Investors raises a number of arguments against Guzzo's fraud claim, including that it is barred by documentary evidence. *See* notice of motion, Samuel affirmation, ¶¶ 101-134. On that point, 250 Investors specifically asserts that it and 250 Associates "did not fraudulently conceal facts as evidenced by the documents annexed hereto related to . . . the DHCR luxury

deregulation proceeding." *Id*., ¶¶ 129-130. The only mention of Guzzo's fraud claim in his opposition papers are counsel's assertions that "[w]hether Defendants knowingly issued false statements to [Plaintiff] to lull him into not challenging the deregulation proceeding and causing him to give up his long term tenancy in the original apartment and move to an apartment with much higher rent is not an issue that should be determined on a pre-discovery summary judgment motion, and that "[o]nly after discovery/depositions will Plaintiff be in any position to accurately set forth what Defendants' knew at the time they rendered those statements." *See* Zekaria affirmation in opposition, ¶ 39. 250 Investors' replies that "Plaintiff is simply wrong and summary judgment should be granted as to this issue [i.e., fraud]," because "it is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in a case." *See* Samuel reply affirmation, ¶ 42. The court agrees, and reiterates its earlier determinations that: 1) the documentary evidence establishes that 250 Associates validly deregulated both apartments (8C on April 2, 2009, and 12D on July 21, 2000, respectively); but 2) apartment 8C's deregulation did not become effective until Guzzo vacated that unit on June 8, 2017, because 250 Associates (and later 250 Investors) failed to attach a "421-a" notice that complied with RPTL § 421-a (2) (f) (ii) to any of his renewal leases. *See* notice of motion, exhibits B, G, N, P-Q, V-X, AA-BB. Because that documentary evidence establishes that both apartments were validly deregulated, and because Guzzo has not established that any of those documents contained false statements or that they were concealed from him, the court concludes that he has also failed to establish the "misrepresentation or concealment of a material fact" element of his fraud claim. Accordingly, the court grants so much of 250 Investors' motion as seeks summary judgment to dismiss Guzzo's third cause of action.

Guzzo's fourth cause of action alleges rent overcharge. *See* verified complaint, ¶¶ 53-57. Neither parties' papers set forth any specific arguments about the legal sufficiency of this claim. Nevertheless, "rent overcharge" is a statutory claim that is governed by RSL § 26-516 which, as most recently amended by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), provides that:

> ". . . any owner of housing accommodations who, upon complaint of a tenant, . . . , is found . . ., to *have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter* [i.e., a rent stabilized apartment] shall be liable to the tenant for a penalty equal to three times the amount of such overcharge."

RSL § 26-516 (a) (emphasis added). The statute defines the "rent authorized for a housing accommodation" as its "legal regulated rent," which is calculated from:

> "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, . . . plus in each case any subsequent lawful increases and adjustments."

RSL § 26-516 (a). The statute also 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."

RSL § 26-516 (a). Finally, the statute provides that:

> "A complaint under this subdivision may be filed . . . in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint. A penalty of three times the overcharge shall be assessed

upon all overcharges willfully collected by the owner starting six years before the complaint is filed."

RSL § 26-516 (a) (2). The date "six years preceding the complaint" is referred to as the "base date." *See e.g.*, *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, _ NY3d _, 2020 NY Slip Op 02127, *4 (2020). Here, because Guzzo filed this complaint on June 6, 2019, the "base date" for his rent overcharge claim is June 6, 2013. The court has already determined that apartment 8C was rent stabilized by operation of law on that date because 250 Associates' failure to provide Guzzo with a statutorily compliant "421-a" notice had prevented the unit's 2009 deregulation order from taking effect. The court has also determined that apartment 8C's rent stabilized status ended when Guzzo vacated the unit on June 8, 2017. The court therefore concludes that, pursuant to RSL § 26-516 (a), 250 Associates and 250 Investors may be liable to Guzzo for rent overcharges from June 6, 2013 through June 8, 2017, provided that Guzzo can establish that he was actually overcharged during that period. However, the evidence before the court is too incomplete to allow it to make that determination now. The court notes that Guzzo's renewal leases for apartment 8C for 2013 through 2017 indicate that 250 Associates and/or 250 Investors charged him the following monthly rents for the period of June 6, 2013 through June 8, 2017: 1) $4,475.00 per month from June 6, 2013 through January 31, 2014; 2) $4,575.00 per month from February 1, 2014 through January 31, 2015; 3) $4,675.00 per month from February 1, 2015 through January 31, 2016; 4) $4,750.00 per month from February 1, 2016 through January 31, 2017; and 5) $4,750.00 per month from February 1, 2017 through June 9, 2017. *See* notice of motion, exhibits N, Q, U. This indicates that Guzzo was charged a total of $229,750.00 in rent by 250 Associates and/or 250 Owners during the operative period. However, Guzzo has not presented any evidence

of what amount of rent that he actually paid, or of what apartment 8C's "legal regulated rent" was during each of those lease renewal periods. Nevertheless, these amounts are capable of being ascertained. Although no DHCR registration statements were filed for apartment 8C after 2009 when the deregulation order was issued, 250 Investors has presented a copy of the unit's prior rent registration history from which it is possible to calculate the "legal regulated rent" during the period that it remained rent stabilized by operation of law due to landlords' failure to comply with RPTL § 421-a (2) (f) (ii). *Id.*, exhibit AA. As far as Guzzo's actual rent payments, it is incumbent on him to produce a payment history. The court believes that the most prudent course is to commit to a Special Referee the issues of calculating apartment 8C's legal regulated rent between June 6, 2013 and June 8, 2017, and of Guzzo's actual rent payments during that period, and of comparing the two amounts to ascertain whether or not Guzzo sustained a rent overcharge. The court directs the Special Referee to calculate what portion of such an overcharge (if any) was collected by 250 Associates and what portion was collected by 250 Investors, bearing in mind that 250 Investors completed its purchase of the building in October of 2016. *Id.*, exhibit K. The court further directs the Special Referee to provide one calculation of the rent overcharge amount (if any) alone, and a separate calculation of the overcharge amount (if any) with treble damages. Should the Special Referee's report find that Guzzo *did* sustain a rent overcharge, the court directs 250 Investors to include argument as to whether such overcharge was "willful" (and therefore subject to treble damages pursuant to § 26-516 [a]) in its' ensuing motion to confirm/deny the Special Referee's report. For now, the court holds in abeyance so much of 250 Investors' motion as seeks summary judgment to dismiss Guzzo's fourth cause of action until it has received the Special Referee's report.

Guzzo's fifth cause of action alleges wrongful eviction in violation of Real Property Actions and Proceedings Law (RPAPL) § 853, which provides that:

> "If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer."

RPAPL § 853; *see* verified complaint, ¶¶ 58-61. 250 Investors argues that Guzzo's claim should be dismissed both because it is belied by the documentary evidence and because it violates the statute of limitations. *See* notice of motion, Samuel affirmation, ¶¶ 135-138. Guzzo's opposition papers do not set forth any legal argument in support of his wrongful eviction claim, which indicates that he has conceded the point that it is unsustainable. For its part, the court reiterates that the documentary evidence shows that Guzzo voluntarily vacated apartment 8C on June 8, 2017 and thereafter took possession of apartment 12D on June 9, 2017 pursuant to the terms of a new two-year lease for which he had submitted an application while he was still living in apartment 8C pursuant to a five-month lease extension from January 31, 2017 through June 9, 2017. *See* notice of motion, Hazan aff, ¶ 4; exhibits U, V, W. This evidence indicates that Guzzo vacated apartment 8C voluntarily to take up residence in a new apartment in the same building, not that he was "ejected, or put out . . . in a forcible or unlawful manner." As a result, the court concludes that said evidence precludes Guzzo from establishing one of the component elements of his unlawful eviction claim. The court also notes that wrongful eviction claims are "governed by a one-year Statute of Limitations, which begins to run when 'it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return.'" *PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436-437 (1st Dept

2016); *quoting Gold v Schuster*, 264 AD2d 547, 549 (1st Dept 1999). Here, Guzzo vacated apartment 8C on June 8, 2017 and commenced this action on June 6, 2019, which is two years after the vacatur date. Because this clearly exceeds CPLR 215's one-year statute of limitations for intentional torts that is also applicable to wrongful evictions, it is clear that Guzzo's claim is time-barred. Accordingly, for the two foregoing reasons, the court grants so much of 250 Investors' motion as seeks summary judgment to dismiss Guzzo's fifth cause of action.

Guzzo's sixth cause of action seeks an award of money damages resulting from Guzzo's wrongful eviction claim. *See* verified complaint, ¶¶ 62-64. The court notes that neither party's papers raised any legal argument concerning this claim. The court also notes that it is distinct from the money damages that Guzzo seeks in his fourth cause of action for rent overcharge. However, because the court has already dismissed that claim, it also grants so much of 250 Investors' motion as seeks summary judgment to dismiss Guzzo's sixth cause of action.

Guzzo's seventh cause of action seeks an award of legal fees. *See* verified complaint, ¶¶ 65-66. Again, neither party's papers riaied any legal argument concerning this claim. New York law recognizes that "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989); see also *Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007). Relevant to this rule, RSL § 26-516 (a) (4) provides that a property owner found to have imposed a rent overcharge is also liable to the tenant for costs and attorney's fees. The court has already committed that issue to a Special Referee to hear and report on. Should that report indicate that Guzzo sustained a rent overcharge, then he will be entitled to an award of legal fees. As a result, the court now holds in abeyance so much of 250 Investors' motion as seeks

summary judgment to dismiss Guzzo's seventh cause of action for legal fees until after it has received the Special Referee's report. Again, the court grants 250 Investors with leave to include argument on this issue in its eventual motion to confirm/deny the Special Referee's report.

As was mentioned at the beginning of this decision, 250 Investors asserts a blanket argument that the entire complaint should be dismissed; specifically, "on the grounds of administrative finality, res judicata, and collateral estoppel based on an unchallenged DHCR order of deregulation against plaintiff issued over 10 years ago." *See* notice of motion, Samuel affirmation, ¶¶ 50-100. The gravamen of this lengthy argument is 250 Investors' contention that the court should accord the DHCR's April 2, 2009 deregulation order preclusive effect barring all of Guzzo's claims, because he failed to exhaust his available administrative remedies in 2009 by filing a timely PAR of that order. *Id*. Guzzo's opposition and 250 Investors' reply likewise devote a great deal of space to arguing over this contention. *See* Zekaria affirmation in opposition, ¶¶ 6-34; Samuel reply affirmation, ¶¶ 9-35. However, at the beginning of this decision the court acknowledged that the DHCR's order deregulating apartment 8C was valid, and that Guzzo failed to submit a timely challenge to it despite having been notified of his right to do so. What the parties fail to appreciate is that, pursuant to RPTL § 421-a (2) (f) (ii), the DHCR deregulation order did not take effect until after Guzzo vacated apartment 8C, because neither 250 Associates nor 250 Investors ever attached a statutorily compliant "421-a" notice to any of Guzzo's renewal leases berween 2010 and 2017. *Matter of Tribeca Equity Partners, L.P. v New York State Div. of Hous. & Community Renewal*, 144 AD3d at 554. During that time, apartment 8C remained rent stabilized solely by operation of law. RPTL § 421-a. As

a result, the parties' collateral estoppel arguments are inapposite, and the court need not consider them.

The balance of 250 Investors' motion seeks summary judgment on their counterclaims for ejectment and unpaid use and occupancy charges. *See* verified answer, ¶¶ 77-87. With respect to the former, the court notes that 250 Investors incorrectly describes ejectment as an equitable cause of action that is "governed by common-law principles." It is not. New York law long ago codified the common-law cause of action for "ejectment" in RPAPL § 601, which provides, in pertinent part, as follows:

> "In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims."

RPAPL § 601. The proponent of an ejectment claim can establish a prima facie case by demonstrating: 1) that it is the owner of the subject property; 2) with a present or immediate right to possession thereof; and 3) that the defendant is in possession of that property. *See City of New York v Anton*, 169 AD3d 999, 1001-1002 (2d Dept 2019). 250 Investors' motion asserts that the documentary evidence herein establishes all of these elements. *See* notice of motion, Samuel affirmation, ¶¶ 139-153. Counsel particularly notes that Guzzo's lease for apartment 12D expired on June 9, 2019, that he has not executed a renewal lease for the unit, and that he has attempted to unilaterally tender use and occupancy payments in amounts less than his last rent of $6,518.00 per month which 250 Investors has returned to him. *Id.*; exhibits W, X, Y, Z. Counsel also asserts arguments against the four affirmative defenses that Guzzo interposed

against 250 Investors' ejectment counterclaim. *Id*. Guzzo's opposition papers do not assert any arguments against the ejectment counterclaim, apart from a passing request for leave to amend and/or replead their reply to the counterclaim to assert the equitable doctrine of "unclean hands" an affirmative defense. *See* Zekaria affirmation in opposition, ¶ 49. 250 Investors' reply papers assert that Guzzo's failure to oppose its ejectment counterclaim entitles it to immediate possession of apartment 12D. *See* Samuel reply affirmation, ¶¶ 52-55. Normally, the court would be inclined to agree; however, the Covid-19 national pandemic is still in effect. The court must be mindful that simply granting 250 Investors' motion for summary judgment on its ejectment counterclaim would result in Guzzo being evicted, and that the pandemic has obliged New York's courts to adopt a no-eviction policy for the foreseeable future. On August 12, 2020, the Office of Court Administration extended its moratorium on residential evictions in New York City until October 1, 2020. On September 4, 2020, the Centers for Disease Control and Prevention - an agency of the U.S. Department of Health and Human Services - issued an additional moratorium on residential evictions through December 31, 2020 pursuant to a contemporaneous presidential executive order. 42 USC § 264; 42 CFR § 70.2. Given these directives, the court believes that the most prudent course is to hold in abeyance the portion of 250 Investors' motion that seeks summary judgment on its ejectment counterclaim at this juncture, with leave to renew the application as part of the parties' forthcoming motions to confirm and/or deny the Special Referee's report that the court has directed.

250 Investors' second counterclaim seeks unpaid use and occupancy from Guzzo for his failure to pay rent for apartment 12D. *See* verified answer, ¶¶ 84-87. 250 Investors asserts that Guzzo has made no use and occupancy payments since June of 2019, and repeats that it has

returned several of Guzzo's attempted unilateral tenders of checks for $2,491.72 on the ground that they were far less than his last lease rent of $6,518.00 per month. *See* notice of motion, Samuel affirmation, ¶¶ 154-158. 250 Investors' reply accurately notes that Guzzo's opposition papers did not assert any arguments against its use and occupancy counterclaim. *See* Samuel reply affirmation, ¶¶ 50-55. It appears to the court that Guzzo has conceded that he is liable to 250 Investors for unpaid rent for apartment 12D; however, the evidence at hand is not sufficient for the court to calculate an accurate money judgment for the amount currently due. As a result, the court directs the Special Referee to include in his/her report a calculation of the current amount of Guzzo's unpaid rent for apartment 12D, and holds in abeyance the portion of 250 Investors' motion that seeks summary judgment on its use and occupancy counterclaim until it has received the Special Referee's report. The court grants 250 Investors leave to renew its application for summary judgment in its counterclaim for use and occupancy in its eventual motion to confirm and/or deny the Special Referee's report.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3212 and 3211, of defendant 250 Houston Investors, L.P. (motion sequence number 001) is granted solely to the extent that the first, second, third, fifth and sixth causes of action in the verified complaint are dismissed; and it is further

ORDERED that defendant's motion is held in abeyance with respect to the fourth and seventh causes of action in the verified complaint and the first and second counterclaims in defendant's verified answer; and it is further

ORDERED that a Special Referee or Judicial Hearing Officer ("JHO") shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the Special Referee/JHO for such purpose:

(1) the issue of determining the "legal regulated rent" that would have been reflected on the rent stabilized renewal leases for apartment 8C in the building located at 250 West Houston Street, NY NY for the period of June 6, 2013 through June 8, 2017 (specifically, for the lease periods of June 6, 2013 through January 31, 2014, February 1, 2014 through January 31, 2015, February 1, 2015 through January 31, 2016, February 1, 2016 through January 31, 2017 and February 1, 2017 through June 9, 2017); and

(2) the issue of determining the amount of rent that plaintiff Michael Guzzo actually paid for apartment 8C during the period of June 6, 2013 through June 8, 2017; and

(3) the issue of determining the amount, if any, of rent that plaintiff paid in excess of the "legal regulated rent" between June 6, 2013 through June 8, 2017; and

(4) should the foregoing calculations indicate an overpayment by plaintiff, the issue of calculating the total amount of the "rent overcharge" award that plaintiff would be entitled to on the fourth cause of action in the verified complaint, both with and without treble damages, as well as the respective portions of such an award that defendants 250 East Houston Street Associates, L.P. and 250 Houston Investors, L.P. would be liable for, respectively; and

(5) the issue of determining the amount currently due of plaintiff's unpaid use and occupancy charges for apartment 12D in the subject building, including both a calculation of that amount by itself, and a calculation of that amount reduced by any rent overcharge award that plaintiff may be entitled to; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

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

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

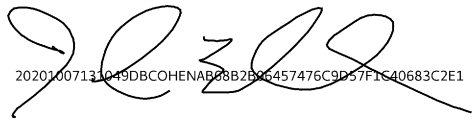
ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any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

ORDERED that, except as otherwise directed by the assigned Special Referee/JHO for good cause shown, the hearing of the issues specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned Special Referee/JHO in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

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

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the second paragraph hereof shall be held in abeyance pending submission of the Report of the Special Referee/JHO and the determination of this court thereon.



10/7/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE