Alekna v 207-217 W. 110 Portfolio Owner LLC
2022 NY Slip Op 31887(U)
June 15, 2022
Supreme Court, New York County
Docket Number: Index No. 156847/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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INDEX NO. 156847/2016

MARIANA DIMITROVA ALEKNA, BEATRIZ DA COSTA, SAMUEL GILCHRIST, RACHEL OLSON, JOSE SANTAMARIA, LAURA MAHLER, KELLY HOLLAND, MAX HOLLAND, MICHAEL TIVE, JOHN COLE, MARY ELLEN COLE, KRISTIN MANNONI, JOSEPH DEBART, WILLIAM DEBART, ALEX BERRICK, ASHAN SINGH, LAMAR SMALL, RACHEL PERKINS, SARA MUSE, KYUNG CHAN ZOH, JIHOE KOO

MOTION DATE 05/24/2022, 05/24/2022

MOTION SEQ. NO. 008 009

Plaintiff,

- v -

DECISION + ORDER ON MOTION

207-217 WEST 110 PORTFOLIO OWNER LLC,207 REALTY ASSOCIATES L.L.C., MANN REALTY ASSOCIATES, GFB MANAGEMENT LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 389, 391, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 426, 427, 428, 429

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 284, 285, 286, 287, 288, 289, 290, 291, 390, 392, 393, 394, 395, 396, 397, 424, 425

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 2221, of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC (motion sequence number 008) is denied; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 2221, of plaintiffs Mariana Dimitrova Alekna, Beatriz Da Costa, Samuel I. Gilchrist, Rachel Olson, Jose

Santamaria, Laura Mahler, Kelly C. Holland, Max A. Holland, Michael G. Tive, John C. Cole, Mary Ellen Cole, Kristin Mannoni, Joseph Richard Debart, III, William Blair Debart, Alex Berrick, Ashan Singh, Lamar Small, Rachel L. Perkins, Sara Muse, Kyung Chan Zoh and Jihoe Koo (motion sequence number 009) is denied; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order along with notice of entry on counsel for defendants within ten (10) days; and it is further

ORDERED that counsel are thereafter directed to appear for a Microsoft Teams Conference on June 28, 2022 at 12:00pm; and it is further

ORDERED that plaintiffs' counsel is directed to submit the supplemental materials described herein within thirty (30) days following the Teams Conference, and defendants' counsel is directed to file a response within thirty (30) days after receipt of said supplemental submissions.

In this residential landlord/tenant action, the remaining two buyer defendant/landlords request leave to renew/reargue their prior motion for summary judgment (motion sequence number 008), and the plaintiff/tenants move separately for the same relief (motion sequence number 009). For the following reasons, both motions are denied.

BACKGROUND

Defendant 207-217 West 110 Portfolio Owner LLC (207 W 110) is the current owner of a residential apartment building located at 207 Central Park North in the City, County and State of New York (the building). *See* NYSCEF document 136 (amended verified complaint), ¶ 1. Co-defendant GFB Management LLC is the building's current managing agent (GFB; together, the "buyer defendants"). *Id.*, ¶ 2. Co-defendant 207 Realty Associates LLC (207 Realty) was the building's prior owner, and co-defendant Mann Realty associates was the building's prior managing agent (Mann; together, the "seller defendants"). *Id.*, ¶¶ 4-5. The buyer defendants acquired the building from the seller defendants on April 20, 2016 via a Purchase and Sale Agreement that was recorded in the Office of the City Register of the City of New York on May 4, 2016 along with the building's deed of sale (the PSA). *Id.*, ¶ 4. The individually named plaintiffs are all current or former tenants of the building who claim that the buyer and the seller defendants both imposed rent overcharges on them in violation of the Rent Stabilization Law (RSL) and Code (RSC). *Id.*, ¶¶ 6-8.

Plaintiffs initially commenced this action on August 16, 2016 via a summons and verified complaint, to which the buyer defendants and the seller defendants each filed separate, timely verified answers. *See* NYSCEF documents 1, 8, 10. On September 6, 2019, plaintiffs filed a motion for leave to interpose an amended complaint, which the court granted in a decision dated October 31, 2019 (motion sequence number 003). Plaintiffs' amended verified complaint sets

forth causes of action for: 1) violation of RSL § 26-512; 2) a declaratory judgment (that the buyer and seller defendants violated RSL § 26-512); 3) a declaratory judgment (that all of the tenants' apartments are rent stabilized, and that the buyer defendants are required to issue them rent stabilized leases that reflect each apartment's "legal regulated rent"); 4) a permanent injunction (preventing the buyer defendants from commencing eviction proceedings against any of the tenants, and ordering the buyer defendants to issue each tenant a rent stabilized lease that reflects his/her/their apartment's correct "legal regulated rent"); 5) breach of the covenant of good faith and fair dealing (by the buyer defendants); and 6) attorney's fees. *See* NYSCEF document 136 (amended verified complaint).

The buyer defendants filed an initial answer with cross claims on November 20, 2016. *See* NYSCEF documents 7, 8. On January 23, 2020, they filed a second amended answer with 29 affirmative defenses, a counterclaim for attorney's fees and four cross claims against the seller defendants. *See* NYSCEF document 145. The seller defendants filed their initial answer with cross claims on October 28, 2016. *See* NYSCEF document 10. Plaintiffs eventually discontinued their claims against the seller defendants pursuant to the terms of a stipulation of settlement dated August 29, 2019. *See* NYSCEF document 118. The seller defendants subsequently filed a motion to dismiss the buyer defendants' cross claims against them as well (motion sequence number 005), and the court partially granted that request in a decision dated March 2, 2021. *See* NYSCEF document 192. In a later decision dated December 23, 2021 (motion sequence numbers 005, 006 & 007), the court also dismissed the balance of the buyer defendants' cross claims against the seller defendants. *See* NYSCEF document 273 (and 274, 275 & 276). The seller defendants are now only part of this litigation pursuant to the terms of the August 29, 2019 stipulation.

The aforementioned December 23, 2021 decision made factual findings in connection with the rent overcharge claims of tenants of 13 of the building's apartments. *See* NYSCEF document 273. However, the court held in abeyance plaintiffs' request for summary judgment on their first cause of action, as well as the parties' competing requests for summary judgment on plaintiffs' remaining causes of action and the buyer defendants' affirmative defenses and counterclaim. *See* NYSCEF document 273. The December 23, 2021 decision specifically directed the parties to file supplemental submissions containing certain evidentiary material necessary for the court to complete its summary judgment deliberations within 60 days after the decision's entry. *Id*. The parties did not do so. Instead, they both submitted the instant motions for leave to renew and/or reargue on March 21, 2022 (motion sequence numbers 008 & 009). The below decision disposes of both of those motions and restates the court's directive regarding supplemental submissions.

DISCUSSION

The portions of CPLR 2221 ("Motion affecting prior order") that are relevant to the instant motions provide as follows:

> "(d) A motion for leave to reargue:
> "1. shall be identified specifically as such;
> "2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
> "3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.
> "(e) A motion for leave to renew:
> "1. shall be identified specifically as such;
> "2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> "3. shall contain reasonable justification for the failure to present such facts on the prior motion.
> "(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a

> combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination."

1. The Buyer Defendants' Motion (motion sequence number 008)

The buyer defendants' motion is timely since it was submitted on March 21, 2022, within 30 days after the court rendered the challenged decision on December 23, 2021. CPLR 2221 (d) (3). They permissibly designate it as a combined motion "for renewal and reargument." *See* notice of motion (motion sequence number 008), Ansell affirmation, ¶ 1; CPLR 2221 (f). The majority of their motion requests renewal:

> "Because it was undisputed that the apartments were removed from rent stabilization during Mann Defendants' receipt of J-51 benefits, Plaintiffs did not argue that the pre-*Roberts* deregulations were, themselves, fraudulent or inconsistent with DHCR policy. Had Current Owner Defendants known that the Court would review the pre-base date record history, they would have presented evidence showing that that the pre-*Roberts* deregulations were not fraudulent."

See defendants' mem of law (motion sequence number 008) at 6. The balance of the buyer defendants' motion seeks leave to reargue on the ground that "these key 'matters of fact' would have impacted the Court's decision." *Id*. at 6. As the statute mandates, the court will consider these requests separately.

The Appellate Division, First Department, holds that a motion for leave to renew may only be granted based on evidence of "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." *See Matter of Beiny*, 132 AD2d 190, 209-210 (1st Dept 1987), citing *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979). The court also cautions that "renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." *Chelsea Piers Management v Forest Elec. Corp.*, 281 AD2d 252, 252 (1st Dept 2001), citing *Rubinstein v Goldman*, 225 AD2d 328 (1st Dept 1996).

Here, the "new facts" and/or previously unavailable evidence with which the buyer defendants support their renewal request consist of 42 documents annexed as exhibits to an "apartment-by-apartment analysis" provided by 207 W 110 managing member Scott Katz (Katz). *See* notice of motion (motion sequence number 008), Katz aff ¶ 5; exhibits F1-F42. The buyer defendants assert that these documents demonstrate that the seller defendants had justifiable rationales for deregulating the 13 apartments discussed in the court's December 23, 2021, and that the court should therefore have treated those deregulations as non-fraudulent "pre-*Roberts*" deregulations. *See* defendants' mem of law (motion sequence number 008) at 6-22. They specifically assert that: (a) the rents of nine of the subject apartments surpassed the deregulation threshold when those units exited rent control, and (b) the rents of the remaining four subject apartments surpassed the deregulation threshold via increases permitted by a combination of Rent Guidelines Board Orders (RGBOs), individual apartment increase (IAI) expenditures, vacancy and/or longevity increases. *Id.* However, the buyer defendants' arguments and evidence fail.

With respect to the nine units that were purportedly deregulated upon their exit from rent control (i.e., apartments 4, 7, 10, 18, 20, 23, 27, 30, 31), it is plain that most of the buyer defendants' new submissions do not constitute "new facts." Careful review of the documents annexed to Katz's "apartment-by-apartment analysis" reveals that the majority of them comprise the same leases, renewal leases, building-wide DHCR rent rolls, individual apartment DHCR registration histories, correspondence and pleadings that were annexed to the prior motion and cross motion for summary judgment. *See* notice of motion (motion sequence number 006), Sachar affirmation, exhibits 1-83; notice of cross motion (motion sequence number 006), Katz aff, exhibits A-T; notice of motion (motion sequence number 008), Katz aff, exhibits F1-F42.

The court already reviewed those documents in the December 23, 2021 decision, and by resubmitting them now the buyer defendants are not presenting any "new facts not offered on the prior motion." *See e.g.*, *JW 70th St. LLC v Simon*, 179 AD3d 408, 409 (1st Dept 2020). That failure alone is a ground for denying leave to reargue with respect to the 13 subject apartments. *See e.g.*, *Omansky v 160 Chambers St. Owners, Inc.*, 155 AD3d 460, 462 (1st Dept 2017).

In addition, however, after reviewing the totality of the buyer defendants' new submissions, the court also finds that they would *not* have "change[d] the prior determination" with respect to apartments 4, 7, 10, 18, 20, 23, 27, 30 or 31. CPLR 2221 (e) (2). The December 23, 2021 decision found that both sets of defendants had committed fraud by willful omissions and/or alterations to the units' DHCR registrations in order to obscure/conceal the legality of the units' purported deregulations. *See* NYSCEF document 273 at 38-64. The decision particularly noted that the DHCR records listed the subject units first as rent controlled, then as rent stabilized, then as deregulated, and then as rent stabilized again (by virtue of amended registration statements which retroactively re-regulated them). *Id*. In their current motion, the buyer defendants assert that the seller defendants acted inadvertently when they registered the subject apartments as rent stabilized, and that they should have simply registered them as deregulated when they exited rent control. *See* defendants' mem of law (motion sequence number 008) at 8-18. However, in the case of five of the units (apartments 7, 10, 18, 23 and 30), the buyer defendants offer no new evidence at all to support their self-serving claim. Nor do the buyer defendants offer any proof of the accuracy of the dates on which they claim the deregulations occurred. For example, they claim that apartment 4 exited rent control in 2001, while the December 23, 2021 decision noted that the unit's DHCR registration history stated that the unit was rent controlled until 1994 and rent stabilized as of 1994. *See* NYSCEF document

273 at 56. The documentary evidence that the court reviewed contradicts defendants' allegation that the deregulation took place in 2001 - a date which they appear to have chosen unilaterally to legitimize the unit's subsequent 2002 non-rent-stabilized lease. The combination of (a) no "new facts" to establish that apartments 7, 10, 18, 23 and 30 were deregulated upon their exit from rent control, and (b) unsupported, self-serving claims about the alleged deregulations (which are belied by the evidence) means that there is no rationale for the court to change its prior determination that there was fraud in connection with those units' purported deregulation. As a result, the court denies the buyer defendants' motion for leave to renew with respect to apartments 7, 10, 18, 23 and 30.

The buyer defendants' application similarly fails with respect to the remaining four units purportedly deregulated upon their exit from rent control (i.e., apartments 4, 20, 27 and 31). In their case, the buyer defendants *did* produce new documents; specifically, leases which they claim were the units' "first post rent control leases." *See* notice of motion (motion sequence number 008), Katz aff, exhibits F8, F19, F24, F28. The buyer defendants assert that apartments 4, 20, 27 and 31 never became rent stabilized because the rents set forth on those leases exceeded the then-applicable deregulation threshold. *See* defendants' mem of law (motion sequence number 008) at 11, 15, 16, 18. However, the December 23, 2021 decision found that the DHCR records stated that each of those units had been registered as rent stabilized - *not* rent controlled - for years before any of those leases were executed. *See* NYSCEF document 273 at 45-46, 50-58. The mere fact that the buyer defendants were able to produce unregulated leases does not conclusively establish the respective dates of the subject apartments' deregulations (if any). Nor does it explain the contrary information contained in the DHCR records. Therefore, the court concludes that there is no rationale to "change [its] prior determination" with respect to

apartments 4, 20, 27 and 31 because the buyer defendants' evidence is deficient. Accordingly, the court denies their motion for leave to renew with respect to those units.

Another deficiency involves the evidence pertaining to the four units whose rents the seller defendants claim to have raised above the deregulation by a combination of RGBOs, IAIs, vacancy and/or longevity increases (i.e., apartments 14, 17, 22 and 28). With respect to one of those units (apartment 14), the buyer defendants present no new evidence at all, and simply resubmit the same DHCR rent roll, lease and renewal leases that the court reviewed in the December 23, 2021 decision. *See* notice of motion (motion sequence number 008), Katz aff, exhibits F1, F31, F32. The buyer defendants' assertion that the unit's post-1999 RGBO and vacancy rent increases permissibly raised its rent above the deregulation threshold does not address the court's finding that the seller defendants committed fraud in connection with the unit's pre-1999 legal regulated rent. *See* NYSCEF document 273 at 64-67. Therefore, the court rejects it and finds that the buyer defendants have failed to support their request for leave to reargue with any "new facts" pertaining to apartment 14. Accordingly, the court denies so much of their motion as seeks leave to renew with respect to that unit.

As regards apartments 17, 22 and 28, the buyer defendants now present records of payments for alleged IAI work in the units that they did not offer in connection with the prior summary judgment motions. *See* notice of motion (motion sequence number 008), Katz aff, exhibits F33, F36, F39 and F42. The buyer defendants explain their failure to present that material as the result of (a) the court's "incorrect conclusion" that such records "did not exist," and (b) plaintiffs' failure to argue that "the [units'] deregulations were improper for reasons other than the J-51 benefits," and their own consequent decision "not [to] address these arguments in their papers." *See* defendants' mem of law (motion sequence number 008) at 2-3. The buyer

defendants' assertion regarding the court is spurious. The conclusion that the IAI evidence did not exist cannot be deemed "incorrect," since the buyer defendants did *not* present proof of any such work in their summary judgment motion. The December 23, 2021 decision noted that the buyer defendants' only evidence of the alleged IAI work was the deposition testimony of Mann leasing agent Henry Novoa (Novoa) which was unsupported by any documentation, and therefore insufficient. *See* NYSCEF document 273 at 25, n8.

The buyer defendants are also incorrect to assert that plaintiffs failed to argue that the subject "deregulations were improper for reasons other than the J-51 benefits." Plaintiffs' memoranda of law in support of their summary judgment motion contained *extensive* arguments that both the seller defendants and the buyer defendants engaged in ongoing acts of deception and concealment to support their continuing "fraudulent scheme to deregulate the building." *See* NYSCEF document 210 (plaintiffs' mem of law - motion sequence number 006) at 20, 23-27, 33-39; NYSCEF document 256 (plaintiffs' reply mem - motion sequence number 006) at 5-9, 12-14. Counsel's supporting affirmation asserted that at least one deregulation (apartment 16) involved the fraudulent imposition of suspicious, unsupported IAI increases on the unit's rent. *See* NYSCEF document 200 (Sachar affirmation - motion sequence number 006), ¶¶ 45-48. It also noted the existence of emails from the buyer defendants' attorney to certain Mann employees which requested "construciton [sic] documents pertaining to units 1, 2, 9, 12, 17, 19, 22, 23, 24 in [the] building." *Id.*, ¶ 163, exhibits 79, 80. These pleadings belie the buyer defendants' assertions that they were unaware of plaintiffs' arguments that: (a) all of the subject apartments' deregulations were fraudulent *as well as* improper (by virtue of the building's enrollment in the J-51 program), and (b) the IAI increases to a number of the deregulated apartments' rents were fraudulent because there was no evidence to justify them. As a result, the

buyer defendants have failed to meet the requirement of CPLR 2221 (e) (3) that they provide a "reasonable justification for the failure to present such [new] facts on the prior motion." The failure to provide such a "reasonable justification" is a ground for denying a request for leave to renew. *See e.g.*, *S &Y Grace Corp. v Boston Post Food Corp.*, 189 AD3d 720, 721 (1st Dept 2020); *Parkside Group v Leader*, 58 Misc 3d 160(A), 2018 NY Slip Op 50269(U) (App Term, 1st Dept 2018). Therefore, there is no basis for the court to accept the buyer defendants' new submissions concerning IAI work in apartments 17, 22 and 28.

However, even if the court were to consider that material, it would still deny their request for leave to renew because that material would not have "change[d] the prior determination." CPLR 2221 (e) (2). As noted earlier, the December 23, 2021 decision determined that the buyer defendants had presented insufficient evidence to support their claim that they performed IAI work in the building. *See* NYSCEF document 273 at 25, n8. As plaintiffs now note, most of the buyer defendants' new submissions appear to document repair work in apartments 17, 22 and 28 rather than qualifying IAI work, and some of the invoices and proofs of payment do not specifically name those units. *See* plaintiffs' mem of law in opposition (motion sequence number 008) at 11-12, 14-25, 16-17; notice of motion (motion sequence number 008), Katz aff, exhibits F1, F31, F32. Therefore, those submissions do not conclusively establish that the IAI-related increases to those units' rent were justified. As a result, the court adheres to its prior determination that the buyer defendants' evidence of the purported IAI work is insufficient. A movant's failure to demonstrate that the "new facts" it offers would have "changed the prior decision" is also a ground for denying a request for leave to renew. *See e.g.*, *Sotheby's, Inc. v Chowaiki*, 202 AD3d 523 (1st Dept 2022); *Bianchi v Mason*, 179 AD3d 567 (1st Dept 2020).

Therefore, pursuant to CPLR 2221 (e), the court denies so much of the buyer defendants' motion as seeks leave to renew with respect to apartments 17, 22 and 28.

As noted, the balance of the buyer defendants' motion seeks leave to reargue pursuant to CPLR 2221 (d). Settled appellate precedent holds that such relief may only be granted upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). The Appellate Division, Second Department, cautions that "a motion for leave to reargue 'is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.'" *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept 2011); quoting *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999). Here, the buyer defendants assert that "[r]eargument is . . . warranted as these key 'matters of fact' [i.e., the 42 documents submitted with the'apartment-by-apartment analysis'] would have impacted the Court's decision." *See* defendants' mem of law (motion sequence number 008) at 6. However, as discussed above, most of those documents are duplicative of evidence the parties submitted earlier in this litigation, and none of them set forth facts that would "change the prior determination." In the context of the buyer defendants' reargument request, the court similarly finds that the new submissions do not demonstrate that it "overlooked or misapprehended the facts or the law." The buyer defendants raise no specific legal argument to support their request for leave to reargue. Therefore, the court denies their motion for that relief because it fails to satisfy the requirements of CPLR 2221 (d).

The court also adheres to its prior decision rejecting the buyer defendants' disingenuous assertion that they "complied with the safe-harbor rule" by submitting amended DHCR apartment registrations when they purchased the building. *See* defendants' mem of law (motion sequence number 008) at 22. As noted in the December 23, 2021 decision, those amended registrations contained false information intended to continue the seller defendants' illicit "fraudulent scheme to deregulate the building"

As a final matter, the court notes that the buyer defendants' argument that the seller defendants did not act improperly in connection with the subject 13 apartment deregulations could be viewed as a collateral attack on the portion of the December 23, 2021 decision pertaining to the seller defendants' renewal/reargument motion (motion sequence number 007) in which the court found that they *did* act improperly. The seller defendants never appealed or otherwise challenged that finding. As a result, the buyer defendants' current argument would be barred by the doctrine of collateral estoppel in the context of a renewal/reargument motion. *See e.g.*, *Arnold v 4-6 Bleecker St. LLC*, 165 AD3d 493 (1st Dept 2018). The court finally notes the just released First Department decision restating New York's longstanding recognition that subsequent purchasing landlords are subject to "carryover liability" for rent overcharges imposed by prior building owners (which fall within an overcharge recovery claims period). *Le Bihan v 27 Washington Sq. North Owner LLC*, _ AD3d_, 2022 NY Slip Op 03447 (1st Dept 2022).

Accordingly, for all of the foregoing reasons, the court denies the buyer defendants' motion in full.

2. Plaintiffs' Motion (motion sequence number 009)

Plaintiffs also properly identify their motion as a combined request for leave to renew and/or reargue. CPLR 2221 (f). In its latter capacity, plaintiffs' motion is timely because they submitted it on March 21, 2022, within 30 days after the court rendered the challenged decision on December 23, 2021. CPLR 2221 (d) (3).

Plaintiffs' motion requests leave to renew/reargue with respect to "three minor, but important, issues" which they assert the court misapprehended in the December 23, 2021 decision. *See* notice of motion (motion sequence number 009), Sachar affirmation, ¶ 8.

First, plaintiffs assert that the court improperly limited the rent overcharge recovery period from August 16, 2012 to August 16, 2016 (the date this action was commenced), and contend that it should instead perform damage calculations from August 16, 2012 to the present in view of the ongoing nature of the instant rent overcharges. *See* notice of motion (motion sequence number 009), Sachar affirmation, ¶ 9. Plaintiffs do not cite any authority to support this request in either their moving or reply papers, and the buyer defendants do not even address it in their opposition papers. *Id*., Sachar affirmation, ¶¶ 9-13; Sachar reply affirmation, ¶ 5; defendants' mem of law in opposition (motion sequence number 009) at 7-17. That is probably because such authority does not appear to exist. On the other hand, longstanding appellate precedent recognizes that the four-year limitations period set forth in the pre-HSTPA version of RSL § 26-516 (a) (2) "is not a mere statute of limitations but is a substantive limit on the overcharges for which recovery can be had." *Myers v Frankel*, 184 Misc 2d 608, 612 (App Term, 2d Dept 2000), *affd as mod* 292 AD2d 575 (2d Dept 2002). Therefore, the court concludes that it did not "misapprehend" the relevant law in ruling that the plaintiffs' rent overcharge recovery period in this action extends from August 2012 to August 2016.

Accordingly, the court denies plaintiffs request for leave to renew/reargue with respect to the first issue.

Next, plaintiffs observe that "the Court appears to have utilized the individual [apartment DHCR] rent histories to determine the room counts" in the portions of the December 23, 2021 decision that discussed "comparable apartments" whose "base date rents" might be in "default formula" calculations. *See* notice of motion (motion sequence number 009), Sachar affirmation, ¶ 14. Plaintiffs argue that the court should instead utilize the "more reliable" room counts that are set forth in an MCI application that the seller defendants submitted to the DHCR 2010 for the purposes of deciding whether an apartment is comparable. *Id.*, ¶¶ 14-19. However, plaintiffs' counsel also notes that "the Court's room count listings are dicta at this juncture (since the parties have not submitted the additional information the order requests)." *Id.*, ¶ 15. The court considers counsel's statement to be an acknowledgement that there was no ruling on the issue of the sufficiency of evidence regarding "room counts" in the December 23, 2021 decision. Because there was no such ruling, there are no grounds for plaintiffs to seek leave to renew or reargue it at this juncture. Therefore, the court denies so much of plaintiffs' motion as pertains to this request as premature.

Finally, plaintiffs request leave to renew/reargue the portion of the December 23, 2021 decision that held that plaintiff Jose Santamaria could not assert a rent overcharge claim with respect to his tenancy in apartment 11 because the only lease plaintiffs presented for that unit had a term of August 15, 2009 through August 31, 2010, which fell outside the August 2012-August 2016 recovery period. *See* notice of motion (motion sequence number 009), Sachar affirmation, ¶ 20. Plaintiffs base this request on newly presented renewal leases which establish that Santamaria actually occupied apartment 11 through 2014, which was inside of the overcharge

claims recovery period. *Id.*, ¶¶ 20-22; exhibit F. However, plaintiffs' request fails as a matter of law whether it is considered a motion for leave to reargue or a motion to renew. In connection with the latter, CPLR 2221 (d) (2) provides that a request for leave to reargue "shall not include any matters of fact not offered on the prior motion." Here, plaintiffs did not submit the aforementioned apartment 11 renewal lease along with their summary judgment motion. In the context of a motion to renew, CPLR 2221 (e) (3) requires the moving party to present a "reasonable justification for the failure to present such facts on the prior motion." Here, plaintiffs failed to advance any such justification in their motion. As noted, such a failure is a ground for denying such a motion. *S & Y Grace Corp. v Boston Post Food Corp.*, 189 AD3d at 721. Therefore, the court rejects so much of plaintiffs' motion as pertains to their third request, and denies that motion in full.

3. Supplemental Submissions (motion sequence number 006)

The December 23, 2021 decision expressly directed counsel to submit certain supplemental material that is necessary for the court to complete the calculations required to determine whether or not plaintiffs are entitled to summary judgment on their individual rent overcharge claims. *See* NYSCEF document 273. Despite the clear order language in the decision, and the instructions to comply with it that chambers staff conveyed at a video conference, counsel failed to submit that material.[1] To that end, the court again directs counsel to appear at a Microsoft Teams Conference on June 28, 2022 at 12:00pm, at which plaintiff's counsel must identify which of the individual plaintiffs are participating in the instant summary

[1] On March 25, 2022, plaintiffs' counsel submitted a copy of the room count for each of the building's units, and defendants' counsel submitted rental ledgers for the plaintiffs' payment histories (*See* NYSCEF documents 387, 388). However, these materials are not sufficient for the court to complete the necessary calculations. Therefore, the court now orders the materials delineated herein.

judgment request, which are not, and whether or not the claims of the latter group are therefore to be deemed abandoned. After that conference has been concluded, plaintiffs' counsel is directed to make a supplemental submission within 30 days that includes the following information:

1) for every moving plaintiff, a calculation of their "actual rent charges" drawn from the leases that were in effect for their respective apartments during the August 2012-August 2016 rent overcharge claims period (including a specific recitation of each lease's term and monthly rental charge);
2) for every moving plaintiff, a calculation of their "actual rent payments" during the August 2012-August 2016 rent overcharge claims period drawn from each individual plaintiff's rent payment history (along with proof of such payments, if any);
3) for those moving plaintiffs whose apartments were found *not* to have been fraudulently deregulated, identify each apartment's "legal regulated rent" by reference to the "base date rent" that was in effect for each subject unit in August 2012 (with that latter figure to be drawn from the DHCR registration statement in effect for each unit in August 2012), and calculate each unit's total "legal regulated rent" charges over the course of the August 2012-August 2016 rent overcharge claims period;
4) for that same group of plaintiffs, a calculation of the total rent overcharge each plaintiff sustained (if any) which is to be arrived at by comparing their respective total "actual rent payments" with their total "legal regulated rent" payments over the course of the August 2012-August 2016 rent overcharge claims period;
5) for those members of that same group of plaintiffs who did sustain a rent overcharge, a calculation of treble damages for each such overcharge that is restricted to the final two years of the rent overcharge claims period (i.e., from August 2014-August 2016);
6) for those moving plaintiffs whose apartments *were* found to have been fraudulently deregulated, identify each apartment's "legal regulated rent" by reference to the rent of a "comparable apartment" that was in effect in April 2011, and calculate each unit's total "legal regulated rent" charges over the course of the August 2012-August 2016 rent overcharge claims period;
7) for that same group of plaintiffs, a calculation of the total rent overcharge each plaintiff sustained (if any) which is to be arrived at by comparing their respective total "actual rent payments" with their total "legal regulated rent" payments over the course of the August 2012-August 2016 rent overcharge claims period; and
8) for those members of that same group of plaintiffs who did sustain a rent overcharge, a calculation of treble damages for each such overcharge that is restricted to the final two years of the rent overcharge claims period (i.e., from August 2014-August 2016).

Defendants' counsel is directed to serve a response to the foregoing supplemental submission within 30 days after receiving a copy of the same. The failure of either counsel to comply with

the foregoing submission requirements shall authorize opposing counsel to submit a motion to dismiss the complaint and/or strike the answer as a result of such non-compliance.

The court adheres to its prior ruling holding the balance of plaintiffs' summary judgment motion (and defendants' cross motion) in abeyance pending its final ruling on plaintiffs' rent overcharge claims, inasmuch as plaintiffs' other causes of action are all dependent on said overcharge claims (together, motion sequence number 006). Should plaintiffs' counsel wish to withdraw any of the other causes of action in the amended complaint, it should notify the court of the intention to do so at the upcoming Teams conference.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 2221, of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC (motion sequence number 008) is denied; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 2221, of plaintiffs Mariana Dimitrova Alekna, Beatriz Da Costa, Samuel I. Gilchrist, Rachel Olson, Jose Santamaria, Laura Mahler, Kelly C. Holland, Max A. Holland, Michael G. Tive, John C. Cole, Mary Ellen Cole, Kristin Mannoni, Joseph Richard Debart, III, William Blair Debart, Alex Berrick, Ashan Singh, Lamar Small, Rachel L. Perkins, Sara Muse, Kyung Chan Zoh and Jihoe Koo (motion sequence number 009) is denied; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order along with notice of entry on counsel for defendants within ten (10) days; and it is further

ORDERED that counsel are thereafter directed to appear for a Microsoft Teams Conference on June 28, 2022 at 12:00pm; and it is further

ORDERED that plaintiffs' counsel is directed to submit the supplemental materials described herein within thirty (30) days following the Teams Conference, and defendants' counsel is directed to file a response within thirty (30) days after receipt of said supplemental submissions.

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6/15/2022
DATE

CAROL EDMEAD, J.S.C.

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