At an IAS Term, Part 81, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of July, 2022.

PRESENT:
CARL J. LANDICINO,
Justice.

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ANDREA LLOYD,

Plaintiff,

-against-

THOMAS MALLOY,

Defendant.

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Index No. 509847/2020

DECISION AND ORDER

Motion Sequence #2, #3

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	63, 78-80
Opposing Affidavits (Affirmations)	79, 88
Affidavits/ Affirmations in Reply	88, 91
Other Papers: Affidavits/Affirmations in support	65-66

Upon the foregoing papers, defendant Thomas Malloy moves for an order, pursuant to CPLR 3211 (a) (5) and (a) (7), dismissing the complaint of plaintiff Andrea Lloyd. Plaintiff cross-moves for an order, pursuant to CPLR 601, consolidating this action with *Goldberg v Malloy* (Kings County index No. 508691/20) (Goldberg action), and with *Thacker v Malloy* (Kings County index No. 510025/17) (Thacker action) for all purposes.

Plaintiff commenced this action on June 11, 2020 to recover rent overcharges and other damages, alleging that her apartment in defendant's building was fraudulently

represented to be exempt from the Rent Stabilization Law (RSL) and Code (RSC) due to high rent vacancy deregulation. In her complaint, plaintiff alleges that she moved into apartment #2 in defendant's building at 407 Humboldt Street in Brooklyn pursuant to a one-year lease beginning in March 2015. Plaintiff states that she took occupancy in response to an advertisement for an apartment posted by defendant, representing that the apartment was deregulated with a free market rent of $2,500 per month. Plaintiff alleges that her lease lacked any information in the form of a rider or other document specifying how defendant arrived at this rent, any information concerning previous rents or renovations, or how the apartment came to be deregulated. Plaintiff asserts that the previous tenant of her apartment, Kris Thorgeirsson, was a rent stabilized tenant who had paid a monthly rent of $1,153.38, the last duly registered legal rent for apartment # 2 at the property, and that defendant would have needed to spend at least $45,000 in individual apartment improvements (IAIs) in order to be entitled to deregulation of plaintiff's apartment due to a high rent vacancy. Plaintiff maintains that her apartment was largely unrenovated when she took occupancy, with little or no improvements made, and that any work done consisted of routine maintenance and repair such as floor refinishing and painting. Plaintiff alleges that she believed defendant's representations that the apartment was lawfully deregulated. The Plaintiff also alleges that she relied upon defendant's representation to her detriment by renting her the apartment at a substantial overcharge and in complete ignorance of any rights as a rent stabilized tenant. Plaintiff contends that she was injured as a result of Defendant's actions.

Plaintiff alleges that after purchasing the building in 2014, defendant immediately embarked upon a harassment campaign to compel the rent stabilized tenants to vacate their apartments in order to illegally deregulate the units and, thereafter, defendant ceased to register all apartments in the building with the Division of Housing and Community Renewal (DHCR) from 2014 forward. Plaintiff states that defendant advertised all apartments, including plaintiff's apartment, as legally deregulated and represented to the public that all apartments in the building had been legally deregulated, omitting any disclosures concerning the calculation of the rent or the deregulation of the apartments. Plaintiff alleges that defendant failed to serve any tenants who signed leases after their apartments were purportedly deregulated, including Plaintiff, with exit registration forms pursuant to RSC 2520.11 (u). Plaintiff contends that Defendant's purported failure deprived those tenants of a statement of calculations for all claimed deregulations and specific notice of the tenants' right to contest the deregulation. Plaintiff alleges that defendant failed to file with the DHCR and serve upon any new tenants, including plaintiff, any other forms required by the DHCR to indicate the itemized amounts claimed for IAIs and provide specific notice to tenants of their right to contest the amount of the claimed rent increase, including any information pursuant to RSL 26-504.2 (b) and RSC 2522.5 (c).

In her complaint, plaintiff sets forth causes of action for rent overcharge and injunction, treble damages for willful overcharge, violation of General Business Law [GBL] § 349 and attorneys' fees.[1]

In his motion to dismiss, defendant argues that the subject apartment was lawfully deregulated in 2014 due to a high rent vacancy, six years prior to the filing of the complaint, and thus plaintiff's rent overcharge claims are barred by the four-year statute of limitations and fail to state a cause of action for fraudulent deregulation. Defendant likewise argues that plaintiff's GBL 349 claims are barred by the applicable three-year statute of limitations as the alleged deceptions by defendant as to the subject apartment's regulatory status occurred before plaintiff began occupancy in 2015.

"In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, the moving defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (*Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788, 789 [2d Dept 2017]; *see Stewart v GDC Tower at Greystone*, 138 AD3d 729, 729 730 [2d Dept 2016]). In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of

[1] On November 6, 2020, plaintiff filed an amended complaint adding causes of action for harassment and retaliation.

action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory (*see Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2d Dept 2000]). The court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Detmer v Acampora*, 207 AD2d 477 [2d Dept 1994]; *see Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). "Although inartfully pleaded, a claim should not be dismissed when the facts stated are sufficient to make out a cause of action" (*Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662, 664 [2d Dept 2021]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Before the enactment of the Housing Stability and Tenant Protection Act (HSTPA) (L 2019, ch 36), which made substantial changes to the RSL, overcharge claims were subject to a four-year statute of limitations (former RSL § 26–516 [a] [2]; former CPLR 213-a; *see Conason v Megan Holding LLC*, 25 NY3d 1 [2015]) and courts were generally prohibited from considering an apartment's rental history beyond the four-year period preceding the date that the plaintiff/petitioner files the complaint (*see Thornton v Baron*, 5 NY3d 175, 180 [2005]). However, the rental history prior to the four-year period "may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (*Matter of Grimm*, 15 NY3d at 367). While overcharges could not be

calculated based on rental history beyond the lookback period, where the reliability of the base date rent is tainted by fraud, the legal regulated rent on the base date may be established using the default method as set forth in RSC 2522.6.

On June 14, 2019, the HSTPA went into effect. Part F of the HSTPA pertains to the examination of rent history, determination of legal regulated rent, calculation of overcharge awards and the assessment of treble damages. Among the changes implemented by Part F, § 4 of the HSTPA was the amendment of RSL 26-516 to define the legal regulated rent for purposes of determining an overcharge as 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. Part F, § 7 of the HSTPA provides that "[t]his act shall take effect immediately [June 14, 2019] and shall apply to any claims pending or filed on and after such date."

In April 2020, the Court of Appeals decided *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020])(*Regina*), which held that "the overcharge calculation amendments [in the HSTPA] cannot be applied retroactively to overcharges that occurred prior to their enactment [on June 14, 2019]" (*Regina*, 35 NY3d at 363). The Court reiterated the principle that only where the tenant produces evidence of a fraudulent scheme to deregulate an apartment, the rental history preceding the four-year base date may be reviewed for the limited purpose of ascertaining whether fraud has occurred (*Regina*, 35 NY3d at 355; citing *Matter of*

Grimm, 15 NY3d at 366-367). "Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury'" (*Regina*, 35 NY3d at 356 n 7, quoting *Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]). The elements of fraud must be pleaded, and each element must be set forth in detail (*see* CPLR 3016 [b]; *Gridley v Turnbury Vil., LLC*, 196 AD3d 95, 101 [2d Dept 2021).

In the complaint, plaintiff alludes to the sharp increase of rent from $1,153.38 per month charged to the prior tenant to her monthly rent of $2,500. Plaintiff alleges that defendant engaged in fraud by registering the apartment as exempt from regulation based on fictitious improvement costs and deceiving plaintiff through provision of market rate leases without deregulation disclosures. Plaintiff maintains that she relied on the representation that the apartment was deregulated and was injured through payment of rent in excess of what could legally be charged. Affording plaintiff a liberal construction of her complaint, as well as every favorable inference, the court finds plaintiff has adequately pleaded a fraudulent scheme by defendant to deregulate the subject apartment, thus precluding dismissal of her rent overcharge claims on statute of limitations or CPLR 3211 (a) (7) grounds (*see Quinatoa v Hewlett Assoc., LP.*, 205 AD3d 654 [1st Dept 2022]; *see also Similis Mgt. LLC v Dzganiya*, 71 Misc 3d 129[A], 2021 NY Slip Op 50245[U], *2 [App Term, 1st Dept 2021] ["landlord failed to provide tenant and his predecessors with lease riders indicating how the legal rent was computed, which, in view of the other indica of fraud, 'may well be viewed as an attempt to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold'"] [citation omitted]; *Epoch Corp. v Doe*, 70 Misc3d 1202[A], 2020 NY Slip

Op 51533[U], *7 [Civ Ct, Kings County 2020] ["The willful filing of documents falsely asserting the substantial rehabilitation of a building, resulting in an improper exemption from rent stabilization, meets the definition of fraud").

Moreover, courts may always examine an apartment's rental history beyond four years from the commencement of the proceeding to determine whether the apartment is regulated (*see Regina*, 35 NY3d at 351 n 4; *Matter of Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569, 569 [1st Dept 2020]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199 [1st Dept 2011], *app withdrawn* 18 NY3d 954 [2012]; *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166 [1st Dept 2005]). "*Regina* does not restrict examination of an apartment's rent history to four years prior to the commencement of the action or proceeding where the issue is the apartment's status" (*Matter of AEJ 534 E. 88th, LLC v New York State Div. of Hous. & Community Renewal*, 194 AD3d 464, 469 [1st Dept 2021]). Thus, at the very least, plaintiff's claim for injunctive relief directing that defendants provide her with a rent stabilized lease and the other non-overcharge claims grounded in the RSL and RSC are timely.

Accordingly, defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (a) (7) is denied with respect to plaintiff's rent stabilization based first, second, fourth, fifth and sixth causes of action.

However, that part of defendant's motion to dismiss plaintiff's third cause of action for violation of GBL 349 pursuant to CPLR 3211 (a) (5) is granted. GBL 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce

or in the furnishing of any service" (GBL 349 [a]), and affords a right of action to "any person who has been injured by reason of any violation of this section" (General Business Law § 349 [h]). Thus, accrual of a GBL 349 (h) private right of action claim accrues when the plaintiff has been injured by a deceptive act or practice violating GBL 349 (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]). The statute of limitations for a violation of GBL 349 is three years (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 209–210 [2001]). Plaintiff alleges that the deceptive acts underlying her GBL 349 claim involved defendant's advertising all apartments for rent without disclosing that all apartments should have been rent stabilized. Plaintiff alleges she was misled as to her rights and was damaged by being overcharged and by being required to surrender rights to which she was entitled by the alleged deception regarding the apartments. Insofar as the purported injury occurred upon plaintiff's rental of the apartment in 2015, more than three years prior to the commencement of this action, her GBL 349 claim is time-barred.

A motion to consolidate or join for trial two or more actions "rests within the sound discretion of the trial court" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 [2d Dept 2012]; *see* CPLR 602; *Matter of Long Is. Indus. Group v Board of Assessors*, 72 AD3d 1090, 1091 [2d Dept 2010]; *North Side Sav. Bank v Nyack Waterfront Assoc.*, 203 AD2d 439 [2d Dept 1994]). Where common questions of law or fact exist, consolidation or a joint trial is warranted, "unless the opposing party demonstrates prejudice to a substantial right" (*American Home Mtge. Servicing, Inc.*, 92 AD3d at 622; *see Alizio v Perpignano*, 78 AD3d 1087, 1088 [2d Dept 2010]; *Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 855, 856 [2d Dept 2009]; *Glussi v Fortune Brands*,

276 AD2d 586 [2d Dept 2000]). Additionally, consolidation or a joint trial is appropriate "where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts" (*Viafax Corp. v Citicorp Leasing, Inc.*, 54 AD3d 846, 850 [2d Dept 2008]; *see Best Price Jewelers.Com, Inc. v Internet Data Stor. & Sys., Inc.*, 51 AD3d 839, 839 [2d Dept 2008]).

This action and the Goldberg action involve common questions of law and fact regarding an alleged fraudulent scheme by defendant to deregulate the apartments in defendant's building which are or were occupied by the respective plaintiffs, and whether they are entitled to rent overcharges, damages and attorneys' fees as a result. Further, defendant has not demonstrated any prejudice would result by consolidating this action with the Goldberg action.

Accordingly, that part of plaintiff's cross motion to consolidate is granted to the extent that this action is consolidated with the Goldberg action. However, because the Thacker action does not involve the common questions regarding rent stabilization, but rather the alleged wrongful possession and/or conversion of personal property, that part of plaintiff's motion to consolidate the Thacker action is denied.

Plaintiff shall settle a consolidation order in accordance with this Decision and Order within sixty days of entry of this Decision and Order.

The foregoing constitutes the decision and order of the court.

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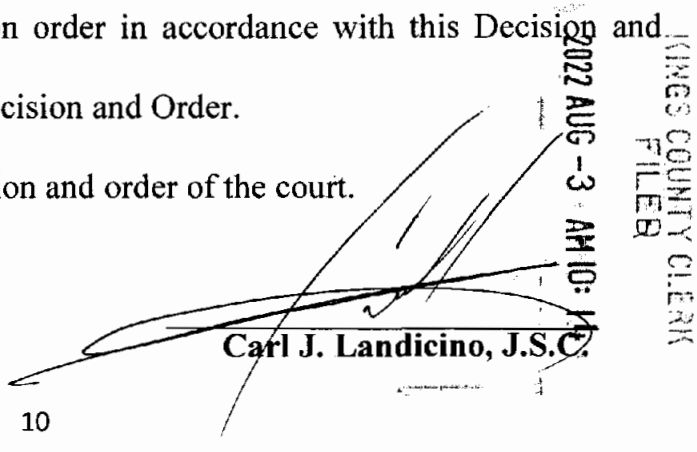

Carl J. Landicino, J.S.C.