SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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BERTON ROSE, MARIETTA HALE

Plaintiffs,

- v -

GAZIVODA 118 LLC,

Defendant.

INDEX NO. 152051/2020

MOTION DATE 05/20/2024

MOTION SEQ. NO. MS 003

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 109, 110, 111, 112, 113, 114

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

In this rent overcharge action, plaintiffs Berton Rose and Marietta Hale move pursuant to CPLR 2221 to renew and/or reargue their prior motion for summary judgment on the First and Second Causes of Action (MS 002). Defendants oppose the motion. For the following reasons, plaintiffs' motion to renew and reargue is granted in part to the extent it requests renewal, but upon renewal, the motion for summary judgment is denied.

Background

The following facts were set forth in the court's prior Order (NYSCEF 100).

Plaintiffs are tenants of apartment Unit 7D (the Apartment), located at 118 East 93rd Street, New York, NY 10126 (the Building) (NYSCEF # 44 – 202.8-g ¶¶ 6, 16, 24). Defendant Gazivoda 118 LLC (Gazivoda) is the current landlord and owner of the Building since 2020 (NYSCEF # 69 – Gazivoda aff ¶ 1).[1] Plaintiffs took possession of the Apartment in October 2009 (202.8-g ¶ 11). Specifically, Rose's initial lease commenced on October 1, 2009, and expired on September 30, 2011 (202.8-g ¶ 11; NYSCEF # 49).

Records from the New York State Division of Housing and Community Renewal (DHCR) indicate that, beginning in 2005, the Apartment was registered as

[1] The Building was owned by non-party Daka 93 LLC from September 2002 through July 2016 and by non-party UES 93rd Street, L.P., from July 2016 through February 2020 (Gazivoda aff ¶¶ 4-5; NYSCEF #s 71-72).

"permanently exempt" and designated as a "high rent vacancy" (*see* 202.8-g ¶ 8; NYSCEF # 57 at 4; NYSCEF # 95 – counterstatement ¶ 8; Gazivoda aff ¶¶ 7-8; NYSCEF # 73 at 2). It is undisputed that, at the time of this designation, the Building was receiving J-51 tax benefits (*see* 202.8-g ¶ 9; counterstatement ¶ 9; NYSCEF # 47). Despite this, the rent charged under plaintiffs' initial lease was $3,300 per month, and the lease was not designated as rent-stabilized (202.8-g ¶ 11; Rose aff ¶ 6; Gazivoda aff ¶ 9). Rather, the Apartment was designated by DHCR as an "EXEMPT APARTMENT – REG NOT REQUIRED" (*see* NYSCEF # 57 at 4). Thereafter, between 2011 and 2017, Rose executed four lease renewals for the Apartment for the rental periods of October 1, 2011 to September 30, 2013, October 1, 2013 to September 30, 2015, October 1, 2015 to September 30, 2017, and October 1, 2017 to September 30, 2018, respectively (202.8-g ¶¶ 12-15; Rose aff ¶¶ 10-13; Gazivoda aff ¶¶ 10-13; NYSCEF #s 50-53). The rent charged to Rose during these periods was $3,500 per month, $3,800 per month, $4,100 per month, and $4,100 per month, respectively, and none of the renewals indicated that the Apartment was rent-stabilized (*see* 202.8-g ¶¶ 12-15, 25-26; NYSCEF #s 50-53).

In 2018, Rose learned that the Apartment was improperly deregulated because the Building was receiving J-51 tax benefits (Rose aff ¶¶ 16-20). Two years prior, defendant's predecessor had responded to overcharge claims by another Unit in the Building by registering the apartment as rent stabilized, updating the regulated rent, and providing a refund (counterstatement ¶ 19; NYSCEF # 60 at 4-6). Consequently, on March 30, 2018, Rose filed a rent overcharge complaint with DHCR (202.8-g ¶ 20; NYSCEF # 59). Rose's DHCR complaint alleged that defendant's predecessor improperly deregulated the Apartment while receiving J-51 tax benefits, failed to register the Apartment as rent stabilized, and failed to offer Rose a rent-stabilized lease (202.8-g ¶ 20; NYSCEF # 59 at 1-3).

A few months later, on May 10, 2018, defendant's predecessor sent Rose a letter acknowledging the rent-stabilized status of the Apartment and enclosing a refund of $56,941 "representing any overpayments made over the past 4 years []as measured from the filing date of [the] rent overcharge complaint filed with DHCR, plus interest" (the Refund) (202.8-g ¶ 21; counterstatement ¶ 21; NYSCEF # 63). Although it is undisputed that Rose accepted the Refund (*see* Rose aff ¶ 22), the parties dispute whether the Refund resolved all of Rose's overcharge claims (*see* 202.8-g ¶ 22; counterstatement ¶ 22). In any event, according to DHCR's records, defendant's predecessor re-registered the Apartment with DHCR as rent stabilized on May 15, 2018 (202.8-g ¶ 21; NYSCEF # 58; *see also* Gazivoda aff ¶ 16). Eventually, on January 21, 2020, Rose withdrew the DHCR complaint and ten days later on January 31, 2020, DCHR issued an order terminating the proceeding (202.8-g ¶ 23; NYSCEF # 59 at 9).

After Rose filed the DHCR complaint and received the Refund, plaintiffs renewed their lease for the Apartment for a lease period commencing on October 1, 2018, and expiring September 30, 2020 (202.8-g ¶ 16; NYSCEF # 54). The rent

charged under this lease was $3,124.95 per month, and the lease renewal was designated as rent-stabilized (*see* 202.8-g ¶ 16; NYSCEF # 54). Plaintiffs thereafter renewed their lease two additional times for two-year periods commencing on October 1, 2020, and October 1, 2022, respectively (202.8-g ¶¶ 17-18; counterstatement ¶ 17-18; NYSCEF #s 55-56). Both renewals were for rent-stabilized leases, and the rent charged under these leases were $3,156.20 and $3,314.01 per month, respectively (202.8-g ¶¶ 17-18).

The Prior Order

Plaintiffs commenced this action on February 20, 2020, asserting causes of action for (1) a declaratory judgment (a) asserting the Apartment has at all times been covered by the Rent Stabilization Law (RSL) and the Rent Stabilization Code (RSC), (b) determining the amount of legal regulated rent, and (c) directing defendant and its successors to comply with the provisions of the RSL and RSC as to plaintiffs' tenancy; (2) damages related to rent overcharges incurred during the applicable recovery period; and (3) reimbursement of costs, fees, and expenses incurred in prosecuting this action (NYSCEF # 1 ¶¶ 53-61). On June 27, 2023, at the conclusion of discovery, plaintiffs moved for summary judgment on their first and second causes of action and partial summary judgment as to liability on their third cause of action.[2] Briefing on the motion then concluded on November 3, 2023.

On April 15, 2024, the court issued its Decision and Order denying summary judgment on plaintiffs' claims concluding that the record showed that plaintiffs' tenancy going back to the initial lease was subject to the RSL and RSC due to defendant's predecessor's failure to register the Apartment as rent stabilized until plaintiffs initiated proceedings before the DHCR in 2018 (NYSCEF # 100 – Prior Order at 5). But plaintiffs failed to establish their entitlement to summary judgment as a matter of law for two specific reasons.

At the outset, plaintiffs failed to establish that the applicable "Base Date" for their recovery period should be set at June 14, 2015, i.e., four years prior to the amendments to CPLR 213-a that were implemented in the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as opposed to four years from the date they filed their action under the prior look-back period set forth in former CPLR 213-a (Prior Order at 5-7). Prior to the HSPTA, CPLR 213-a provided for a "strict 'lookback period'" for overcharge claims, which was then amended by Part F of the HSPTA so that the recovery period for overcharge claims was extended to six years before an action is commenced (*id.* at 5). Despite this change, the Court of Appeals in *Matter of Regina Metro. Co., LLC v N.Y. State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]) clarified that these amendments "could not be 'applied retroactively to overcharges that occurred prior to [the HSTPA's]

[2] Plaintiffs also moved for summary judgment on two of defendant's counterclaims that are not at issue on this motion to renew (*see* NYSCEF # 40, Notice of Prior Motion).

enactment' in 2019" (Prior Order at 5, quoting *Regina*, 35 NY3d at 363, 388). Accordingly, the prior order stated that under *Regina*, "overcharge claims that had accrued prior to the enactment of the HSTPA would still be subject to former CPLR 213-a's four-year" look-back period (*id.* at 5-6). And because, all of the purported rent overcharges by defendant occurred between a period of 2009 and 2018, plaintiffs' claims all accrued prior to the enactment of the HSTPA and were therefore subject to the pre-HSTPA look-back period (*id.* at 6).

The prior order rejected plaintiffs' unsupported contention that they should be able to prospectively avail themselves to the HSTPA's six-year recovery period because the only way to "harmoniz[e]" CPLR 213-a and *Regina* is to allow tenants seeking to recover overcharges that were valid upon the HSPTA's enactment (*id.* at 6). As relevant to the present motion, insofar as plaintiffs attempted to rely on updated language in the RSC which provided that the "Base Date" in the RSC shall "[i]n no event . . . be prior to June 14, 2015" (22 NYCRR § 2526.7), this language must be read in the context of *Regina* given that it is part of a "Base Date" definition that largely tracks the HSTPA amendment to CPLR 213-a (*id.* at 6 n.3).

The second basis for denying summary judgment in the prior order is that regardless of the "Base Date" selected, plaintiffs failed to sufficiently establish that defendant engaged in a "fraudulent scheme" to deregulate by coming forward with a "colorable claim of fraud" and therefore had not established that they are entitled to review pre-"Base Date" rental history and apply a "default formula" to their overcharge calculations (Prior Order at 7). While plaintiff had sufficiently established that *some* of the elements of "fraud" were present, including a false representation of material fact," ultimately plaintiffs had failed to establish "at least one of [the] key elements" of fraud: scienter (*id.*).

As explained in the prior order, plaintiffs' claim was premised largely on defendant's failure to register the Apartment as rent stabilized in the wake of the Court of Appeals' 2009 decision in *Roberts v Tishman Speyer Props., L.P.*, which held which held that landlords could not take advantage of luxury deregulations provisions while receiving J-51 tax benefits (13 NY3d 270, 284-285 [2009]), and the First Department's 2011 decision in *Gersten v 56 7th Ave. LLC*, which held that the *Roberts* holding applies retroactively to tenants in occupancy at the time *Roberts* was decided (88 AD3d 189, 196-197 [1st Dept 2011]) (Prior Order at 7-8). However, "in order to establish the existence of a fraudulent scheme [to deregulate] and scienter as a matter of law, plaintiffs cannot solely rely on the fact that defendant and its predecessors deregulated the Apartment after *Roberts* and then failed to re-register the Apartment as rent stabilized for six years" (*id.* at 9). This fact may have been sufficient to withstand a motion to dismiss, but on a motion for summary judgment, a more robust showing was required (*id.*).

Discussion

CPLR 2221(e) provides that a party may move for leave to renew "a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). Change in law can be a "new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney's Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, citing Siegel & Connors, New York Practice § 449 [6th ed 2018]). Even if there were a change in the law, unless it alters the prior determination, it is of no moment (*see 515 Ave. I Corp. v 575 Ave. I Tenants Corp.*, 44 AD3d 707, 708 [2d Dept 2007] [denying motion to renew where change in law did not change "original determination of th[e] [original] motion"]). By contrast, motions for reargument based on a misapprehension of the law must show that the court misapplied a controlling principle of law or improperly presented arguments not previously advanced. (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 472 [1st Dept 1984]).

Here, plaintiffs advance two arguments in support of their motion to renew/reargue. *First*, plaintiffs maintain that reargument/renewal is warranted because the court misapprehended the law by determining that plaintiffs' rent overcharge claims are governed by the pre-HSTPA statute of limitations and because RSC § 2526.7 is a duly promulgated regulation that serves as controlling authority that the court must follow (NYSCEF # 104 – MOL at 14-18; NYSCEF # 114 – Reply at 1-2). *Second*, while its original motion was pending, a statutory change occurred in which the legislature clarified that, after finding a "colorable claim" of fraud and triggering the fraud exception to the pre-HSTPA look-back rule, courts do not need to establish a finding of all the elements of common law fraud to find fraud and apply the default rule (MOL at 4-13; Reply at 2). Instead, plaintiffs aver, the clarified standard is that courts must consider the totality of circumstances to establish whether a fraudulent scheme was knowingly committed (MOL at 4-12; Reply at 2). Under this clarified standard, plaintiffs posit that the court's denial of summary judgment for lack of scienter cannot stand, and that plaintiffs have made a prima facie showing that defendant knowingly engaged in a fraudulent scheme to deregulate (MOL at 12-13; Reply at 3-8).

Establishing June 14, 2015, as the Applicable Base Date

Plaintiffs first contend that the Court misapplied *Regina* as it relates to prospective application of CPLR 213-a and overlooked controlling law. On this point, plaintiffs assert that the court "conflate[d] retroactive application of the expanded statute of limitations under CPLR 213-a with the constitutionality of retroactively applying a new methodology to calculate overcharges" (MOL at 14). Plaintiffs contend that under *Regina,* CPLR 213-a had an improper retroactive effect "because it would permit overcharges for the two (2) years preceding the former four-year recover period" (i.e., it would revive claims that had accrued prior

to June 14, 2015), but those concerns are different here where none of the overcharges challenged by plaintiff would have been time-barred at the time the HSTPA was enacted (*id.* at 15).

This exact argument was considered and rejected in the prior order. In their original motion, plaintiffs argued "[t]he only base date that harmonizes the current iteration of CPLR 213-a with the Court of Appeals' holding in *Regina* is June 14, 2015 because it allows [p]laintiffs to avail themselves of the recovery period provided under the HSTPA without reviving time-barred pre-HSTPA claims" (NYSCEF # 43 – Original MOL at 8-9). Then, as they do here, plaintiffs summarized *Regina*'s holding, including its policy considerations, and distinguished those considerations with the facts of the present case (*id.* at 8-10). They then relied on those distinctions to assert, as they do again on their present motion, that *Regina* provided for a "clear, easily applied, bright-line rule – no tenant bringing an overcharge claim on or after June 14, 2019 can recover damages for any overcharge that occurred more than four (4) years before HSTPA was enacted" (*see id.* at 9-10 [noting that the *Regina* court held that "expansion of the limitations period from four to six years clearly has a retroactive effect because it permits recovery for nonfraudulent conduct occurring during an additional two years preceding the former recovery period"]).

Considering the relevant holding in *Regina* and subsequent First Department cases interpreting *Regina*, the conclusion is that the HSTPA "could not be 'applied retroactively to overcharges that occurred prior to [the HSTPA's] enactment' in 2019" and thus "overcharge claims that had accrued prior to the enactment of the HSTPA would still be subject to former CPLR 213-a's four-year statute of limitations" (Prior Order at 5-6, citing *Regina*, 35 NY3d at 363, 388; *Burrows v 75-25 153rd St. LLC*, 215 AD3d 105, 111-112 [1st Dept 2023]; *435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 509-510 [1st Dept 2020]). As all of the alleged overcharges claimed by plaintiff occurred prior to 2019, the pre-HSTPA statute of limitations applied (*see e.g. Burris v 100 John Mazal Spe Owner LLC*, 2022 WL 4790496, at *3 [Sup Ct, NY County, Oct. 3, 2022] [rejecting argument that "*Regina* should be interpreted so that the four-year lookback period is four years prior to the enactment of the HSTPA, which would make the base date June 14, 2015," because, under Court of Appeals and First Department precedent, "the proper base date is four years from the date the Complaint was filed, and not four years from enactment of the HSTPA" where "the alleged rent overcharges took place pre-HSTPA"]). While plaintiff may disagree with this interpretation of *Regina*, it cannot use a motion to reargue to "as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Accordingly, plaintiffs have failed to establish that the court's interpretation of *Regina* warrants reargument under CPLR 2221.

Plaintiffs separately maintain that the court erroneously concluded that there was an absence of controlling or persuasive authority suggesting that

plaintiffs can avail themselves of the expanded statute of limitations (MOL at 16). Specifically, plaintiffs claim that RSC § 2527.7—a regulation that court did, in fact, acknowledge in the Prior Order—is controlling authority that is consistent with *Regina*'s holding (*id.* at 16-17). Plaintiffs aver that, by declining to give Section 2527.7 legal effect, the court is, in essence, nullifying it (*id.* at 17). However, the prior order explicitly referenced plaintiffs' reliance on RSC § 2527.7 and concluded that the regulation had to be read in conjunction with *Regina*. Thus, contrary to plaintiffs' suggestion, the court explicitly acknowledged that Section 2527.7 was consistent with *Regina* (*cf. Bronx 1134 W. Farm Road LP v Arriaga*, 2024 WL 4243866, at *2 [Civ Ct, Bronx Cty, Sept. 17, 2024] [observing that, under *Regina* and the RSC, "or proceedings commenced on or after June 14, 2019, the base date is defined as either six years prior to when an overcharge claim is first raised or, if the registration from six years prior is 'unreliable,' back further to the last 'reliable' registration, unless the last reliable registration precedes June 14, 2015, in which case the base date rent becomes June 14, 2015"]). Again, plaintiffs may disagree with the court's interpretation of *Regina*. Such a disagreement, however, does not, as plaintiffs suggest, "nullify[] RSC § 2526.7 and drastically modify[] the effective date of CPLR 213-a, as amended" (*see* MOL at 17).

As a final point, plaintiffs claim in a footnote that it is "simply not accurate" that the Prior Order found "the entirety of [p]laintiffs alleged overcharges occurred between 2009 and 2018 when in reality,"[p]laintiffs are seeking to recover overcharges from June 14, 2015 to the present" (MOL at 15 n3). But as plaintiffs' Statement of Material Facts indicates, [plaintiffs'] sixth lease commenced on October 1, 2018 and expired on September 30, 2020[,] . . . is a rent-stabilized renewal lease[;] . . . [the] seventh lease commenced on October 1, 2020 and expired on September 30, 2022[,] . . . is a rent-stabilized renewal lease[;] . . . [and the] eighth lease commenced on October 1, 2020 [sic] [2022] and expired on September 30, 2022 [sic] [2024] . . .is a rent-stabilized lease (NYSCEF # 44 - 202.8-g ¶¶ 16-18 referencing NYSCEF # 53-55, the 3 leases in exhs J, K, L). Thus, plaintiffs had rent stabilized leases in 2018 to 2022.

By contrast, between October 1, 2009 and September 30, 2018, defendant had offered leases that were improperly categorized as not rent-stabilized (*id.* ¶¶ 11-15). The alleged error is not borne out by the evidence plaintiff submitted. As the Prior Order noted, the purported "overcharges" that plaintiffs are claiming for the leases issued between 2018 and 2023 would only kick in if plaintiffs establish that the "default rate" should apply (*see* Prior Order at 6 n2). Yet, also noted in the Prior Order was that case law suggests that the impact of the "default formula" on damages is a distinct consideration from when overcharge claims accrue (*id.*).

In short, plaintiffs' motion to reargue is denied with respect to the prior determination that plaintiffs failed to establish that the applicable Base Date for their rent overcharge claim is June 14, 2015.

Renewal due to Change in Standard for Determining Fraud exception

Plaintiffs next contend that intervening statutory amendments no longer require plaintiff to prove all common law elements of fraud to trigger the look-back rule's fraud exception, but instead require the court to look at the totality of the circumstances, a standard plaintiffs claim they meet.

As explained in the Prior Order, when analyzing overcharge claims, the pre-HSTPA statutory scheme only permits a "review of rental history outside the four-year lookback period . . . in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate" (*Regina*, 35 NY3d at 355). What was left out of the Prior Order is that "the focus of the inquiry is 'whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date'" (*Gassama v New York State Dept. of Hous. and Community Renewal*, 226 AD3d 589 [1st Dept 2024], quoting *Regina*, 35 NY3d at 355; *see also Gomes v Vermyck, LLC*, ___ AD3d ___, 228 NYS3d 208, 218 [2d Dept 2025] ["the rental history of apartment units beyond the four-year lookback rule (can) be examined 'for the limited purpose' of determining whether a fraudulent scheme to deregulate the apartment unit tainted the reliability of the rent on the base date"]).

In the absence of any evidence of a fraudulent scheme, "the base date rent [must be] the rent actually charged on the base date (four years prior to initiation of the claim)" and "overcharges [are] to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period" (*id.* at 355-356). It is only if a fraudulent scheme tainting reliability of the rent on the base date is established that a court may use the default formula to set the "Base Date Rent" (*Gassama*, 226 AD3d at 590; *435 Cent. Park W. Tenant Assn.*, 183 AD3d at 510).

To establish a "fraudulent scheme" for purposes of a rent overcharge claim, a plaintiff must come forward with evidence establishing a "colorable claim of fraud" (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]). Relying on a footnote in *Regina*, courts in this county previously interpreted "colorable claim of fraud" to require evidence of all common law elements of fraud—misrepresentation, falsity, scienter, reliance, and injury (Prior Order at 7; *see also Burrows v 75-25 153rd St., LLC*, 215 AD3d 105, 109 [1st Dept 2023] [granting motion to dismiss overcharge claim for failure to allege reasonable reliance on the fraud]).

However, on March 1, 2024, Governor Hochul signed into law Senate Bill 8011/Assembly Bill 8506 (the "Chapter Amendments"), which amended Section 2 of Part B of Chapter 760 of the Laws of 2023. The relevant portion of the Chapter Amendments states as follows:

> "2-a. When a colorable claim that an owner has engaged in a fraudulent scheme to deregulate a unit is properly raised as part of a proceeding before a court of competent jurisdiction or the state division of housing and community renewal [DHCR], a court of competent jurisdiction or the [DHCR] shall issue a determination as to whether the owner knowingly engaged in such fraudulent scheme *after a consideration of the totality of the circumstances*.
>
> "In making such determination, the court or the [DHCR] shall consider all of the relevant facts and all applicable statutory and regulatory law and controlling authorities, *provided that there need not be a finding that all of the elements of common law fraud, including evidence of a misrepresentation of material fact, falsity, scienter, reliance and injury, were satisfied in order to make a determination that a fraudulent scheme to deregulate a unit was committed if the totality of the circumstances nonetheless indicate that such fraudulent scheme to deregulate a unit was committed.*
>
> "[The Chapter Amendments] shall take effect immediately and shall apply to any action or proceeding in any court or any application, complaint or proceeding before an administrative agency on the effective date of this act."[3]

(L 2023 ch 760, Part B, § 2 (b), as amended by L 2024, ch 95, §§ 4, 5 [emphases added]).

The Chapter Amendments therefore overturned case law requiring plaintiffs to allege every element of common-law fraud. The law now requires only an examination of the "totality of the circumstances" to determine whether defendant "knowingly" engaged in a fraudulent scheme—the standard under pre-*Regina* case law including *Thornton v Baron* (5 NY3d 175 [2005]), *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358 [2010]), and *Conason v Megan Holding, LLC* (25 NY3d 1 [2015]).

Given this change of law, plaintiffs' motion for renewal is granted, and upon renewal, the motion for summary judgment is denied. Plaintiffs argue that looking at the totality of the circumstances, they have established defendant knowingly engaged a fraudulent scheme to deregulate the Apartment as a matter of law, and that the Prior Order's finding that there is no scienter is irrelevant (MOL at 12-13). Plaintiffs point to three specific circumstances that they claim together show fraud. First, defendant did not re-register the Apartment until 2018, nine years after *Roberts* and seven years after *Gersten* which overturned the exception that defendant's predecessors originally relied on to deregulate (MOL at 12). Second, "DHCR notified [defendant's predecessor] in 2016 that apartments which were improperly deregulated while receiving 'J-51' tax benefits needed to be restored to

[3] Defendants do not dispute that the Chapter Amendment applies to this case.

the RSL" (*id.*). Third and finally, defendant's predecessor re-registered another apartment in 2016 but did not reregister the Apartment at issue here (*id.* at 12-13).

As shown in both the case law and the record, none of these circumstances alone or together establish as a matter of law that defendant "knowingly" committed fraud. On plaintiffs' first point – that defendant did not re-register until nine years after *Roberts* and *Gersten*, – the Legislature did not intend to create any presumption of fraud for the mere failure to register. The Second Department in *Gomes v Vermyck, LLC* recounted certain relevant history of the Chapter Amendments (*see* 228 NYS3d 208 [2d Dept 2025]). Specifically, the Legislature in 2023 passed an act that *did* "create[] a presumption of fraud 'beginning October 1, 2011 [a month and a half after *Gersten*], [for] failing to register, as rent stabilized, any apartment in a building receiving J–51 or 421–a benefits" (*id.* at 228, quoting L 2023, ch 760, part B, § 2[b]). While this line would indeed have all but proven liability against defendant here, the Chapter Amendments "deleted the language that created that presumption [of fraud]" (*id.* at 228). The Second Department interpreted this change to mean that "the Legislature does *not* intend that the failure to register an apartment unit as rent stabilized after October 1, 2011, standing alone, should indicate a fraudulent scheme to deregulate an apartment unit" (*id.* [emphasis in original). Thus, defendant's failure to register the Apartment even years after the relevant cases is not inherently fraudulent.

As to plaintiffs' second point – that "DHCR notified [defendant's predecessor] in 2016 that apartments which were improperly deregulated" needed to be re-registered – plaintiffs cite nothing in the record to support this argument. While plaintiffs are likely correct that notice directly from DHCR would change the calculus (*see e.g. Hess v EDR Assets LLC*, 217 AD3d 542, 543 [1st Dept 2023] ["three notices from DHCR" helped create issue of fact for scienter]), no such notice has been shown and plaintiffs' statement appears to be a misstatement of fact.

Plaintiffs' third argument – that defendant's predecessor re-registered a different apartment two years earlier – is the only one that potentially holds water on its own, but this argument fails to establish a fraudulent scheme for the purpose of summary judgment. Re-registering at least one similarly situated apartment in the Building may indicate that defendant knew generally that apartments in the Building should be rent stabilized. It does not, however, establish that defendant knew plaintiffs' Apartment should be rent stabilized, or that defendant failed to re-register it as part of a fraudulent scheme. The Prior Order noted that even if these facts showed defendant was aware of "registration issues for other apartments in the Building," the facts did not "on their own (or together with the totality of evidence . . .) establish that defendant *knowingly* misrepresented the regulatory status of the Apartment" (Prior Order at 9 [underlines added, italics in original]). Similarly, the fact that defendants could have potentially been aware of the Apartment's status does not establish for the purposes of summary judgment that defendant knowingly engaged in a fraudulent scheme. Plaintiffs also do not cite to a

single case (pre- or post-*Regina*) in which merely knowing another apartment should be rent stabilized is enough on its own to find fraud as a matter of law.

In reply, plaintiffs argue that defendant and its predecessors are being willfully ignorant of the rules (NYSCEF # 114 – Reply at 3-4). Plaintiffs assert that defendant and their predecessors were sophisticated enough to de-register the Apartment pre-*Roberts* and thus know the rules "when they inured to their benefit" (*id.* at 3 [emphasis omitted]). Allowing them to "feign ignorance" when the law stops being in their favor gives defendant, in plaintiffs' view, an undeserved "absolute defense" that would not be acceptable in any other field of law (*id.* at 4-7).

However, while "[i]t is certainly true that ignorance of the law does not constitute a defense for failure to comply with legal obligations," the issue here is not defendant's liability but rather "how any damages for that conduct should be calculated" (*Gomes*, 228 NYS3d at 229). The Prior Order already found that "plaintiffs' tenancy has been, and continues to be, subject to the RSL and RSC" (Prior Order at 5). The question now is whether to measure the Base Date Rent (and thus the damages) using the rate actually paid or the default rate described under the statute (*see Gomes*, 228 NYS3d at 229-230 ["The primary issue is on this appeal is not where the defendant is liable for its improper conduct . . . but how any damages for that conduct should be calculated"]).

The default rate can only be used upon a showing of fraud (*see Regina,* 35 NY3d at 355 ["In fraud cases, this Court sanctioned use of the default formula to set the base date rent."]). And per the Chapter Amendments, that fraud must be "knowing." Thus, knowledge of the law—especially a change in law as dramatic as *Roberts* and *Gersten*—is relevant and perfectly reasonable to evaluate. That is why both the First and Second Departments agree that "the deregulation of apartment units prior to *Roberts* is insufficient to establish a fraudulent scheme to deregulate an apartment unit" (*Gomes*, 228 NYS3d at 226; *Park v New York State Div. of Hous. and Community Renewal*, 150 AD3d 105 [1st Dept 2017]). It is also why the Chapter Amendments do not create a presumption of fraud for failing to re-register apartment units after *Roberts* and *Gersten* (*Gomes*, 228 NYS3d at 228).

Even considering these above facts together, the totality of circumstances simply do not establish fraud for the purpose of summary judgment. Several pre-*Regina* cases provide useful examples. In *Thornton v Baron* (5 NY3d 175 [2005]), the building owner conspired with tenants to have them agree that an apartment unit was not being used as a primary residence so as to rent at market rate and then sublet at even higher rates, splitting the profits between owner and the conspiring tenants. In *Conasen v Megan Holding, LLC* (25 NY3d 1 [2015]), the owner made a fake tenant and a fake renovation to justify rent increases. These schemes clearly "tainted the reliability of the rent on the base date" because defendants took actions that inflated the price (*see Gassama*, 226 AD3d at 590).

In contrast, here, plaintiffs have at most established that defendant's predecessor knew of the *Roberts* and *Gersten* decisions as late as 2016, knew at least one other apartment in the Building needed to be re-registered, and was sophisticated enough in their understanding of J-51 and rent stabilization issues to de-register prior to *Roberts* and *Gersten*. These facts are nothing like *Thornton* or *Conasen* in that they do not clearly "taint the reliability of the rent on the base date" (*see Gassama*, 226 AD3d at 590). While these facts may be sufficient to survive a motion to dismiss, they do not establish as a matter of law a fraudulent scheme. There are too many innocent explanations for the failure to reregister including human or administrative errors. Whatever the likelihood of these explanations, the truth should come down to trier of fact and their credibility determinations and not a summary judgment motion.

Thus, the totality of the circumstances do not establish a fraudulent scheme.

Conclusion

In view of the above, it is hereby

ORDERED that plaintiffs' motion to renew and reargue their motion for summary judgment solely as to the First and Second Causes of Action is granted in part to the extent that renewal is granted and denied in part to the extent reargument is denied; and it is further

ORDERED that, upon renewal, the motion for summary judgment on the First and Second Causes of Action is denied.

5/19/2025
DATE

MARGARET A. CHAN, 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