2022-10-31

Silkes v. B-U Realty Corp.

Silkes v B-U Realty Corp.
2022 NY Slip Op 33712(U)
October 31, 2022
Supreme Court, New York County
Docket Number: Index No. 150052/2015
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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ELIZABETH SILKES,

Plaintiff,

- v -

B-U REALTY CORP., PAUL BOGONI, IRENE BOGONI

Defendants.

----------X

INDEX NO. 150052/2015

MOTION DATE 10/25/2019

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 208, 209, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 286, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309

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

In this residential landlord/tenant action, plaintiff Elizabeth Silkes (Silkes) moves for "summary judgment or partial summary judgment" on the complaint (motion sequence number 007). Her motion is granted to the extent set forth below.

BACKGROUND

Silkes is the tenant of record of apartment 5C in a residential apartment building located at 945 West End Avenue in the County, City and State of New York (the building). *See* notice of motion (motion sequence number 007), Howard affirmation, exhibit I (complaint), ¶ 4. Defendant B-U Realty Corp. (B-U) is the building's corporate owner. *Id.*, ¶ 5. B-U officers/principals Paul and Irene Bogoni (the Bogonis) were also originally named as defendants in this case; however, the court granted defendants' motion to dismiss the complaint as against them in a decision dated March 21, 2016. *See* NYSCEF document 91 (decision, motion sequence number 002).

Silkes commenced this action on January 5, 2015 by serving a summons and complaint with causes of action for: 1) a declaratory judgment; 2) rent overcharge; and 3) attorney's fees and court costs. *See* NYSCEF document 1 (complaint). B-U and the Bogonis initially answered on January 26, 2015 but shortly afterward filed an amended answer with affirmative defenses on February 10, 2015. *See* NYSCEF document 8 (amended answer). Substantial motion practice ensued, one result of which was – as noted - the complaint being dismissed as against the Bogonis.

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Pullman v Silverman*, 28 NY3d 1060, 1062 (2016), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." *Cabrera v Rodriguez*, 72 AD3d 553, 553-554 (1st Dept 2010).

Silkes' motion seeks "summary judgment or partial summary judgment" on the three causes of action in her complaint. As noted, her second cause of action alleges that B-U imposed a rent overcharge on her in violation of Rent Stabilization Law (RSL) § 26-516 ("Enforcement and procedures"). For reasons of clarity, this decision will examine that cause of action first.

Plaintiff's Second Cause of Action - Rent Overcharge

The current version of RSL § 26-516 was amended by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) as of the Act's effective date of June 14, 2019. However, the Court of Appeals held in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. &*

Community Renewal, that the HSTPA's amended rent overcharge provision cannot be retroactively applied to overcharges alleged to have occurred *before* the statute's enactment. 35 NY3d 332, 363 (2020). Silkes' complaint was filed on January 5, 2015 and alleges that B-U collected rent overcharges from her before that date, which was well before the HSTPA's effective date. *See* NYSCEF document 1 (complaint). Therefore, the pre-HSTPA version of RSL § 26-516 governs her rent overcharge claim.

That statute provided as follows:

> a. Subject to the conditions and limitations of this subdivision, *any owner of housing accommodations who, upon complaint of a tenant, or of the New York State Division of Housing & Community Renewal [DHCR], is found by the [DHCR], after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge*. In no event shall such treble damage penalty be assessed against an owner based solely on said owner's failure to file a timely or proper initial or annual rent registration statement. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the [DHCR] shall establish the penalty as the amount of the overcharge plus interest. (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, *the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four 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*. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. (ii) As to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date four years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than four years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments. Where the rent charged on the date four years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by the [DHCR].
>
> Where the rent charged on the date four years prior to the date of initial registration of the housing accommodation cannot be established, such rent shall be established by the [DHCR] provided that where a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most

recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

(1) The order of the [DHCR] shall apportion the owner's liability between or among two or more tenants found to have been overcharged by such owner during their particular tenancy of a unit.

(2) Except as provided under clauses (i) and (ii) of this paragraph, a complaint under this subdivision shall be filed with the [DHCR] within four years of the first overcharge alleged and *no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed*. (i) *No penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed* or upon an overcharge which occurred prior to April first, nineteen hundred eighty-four. (ii) Any complaint based upon overcharges occurring prior to the date of filing of the initial rent registration as provided in section 26-517 of this chapter shall be filed within ninety days of the mailing of notice to the tenant of such registration. *This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision*.

(3) Any affected tenant shall be notified of and given an opportunity to join in any complaint filed by an officer or employee of the [DHCR].

(4) *An owner found to have overcharged may be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules*.

(5) The order of the [DHCR] awarding penalties may, upon the expiration of the period in which the owner may institute a proceeding pursuant to article seventy-eight of the civil practice law and rules, be filed and enforced by a tenant in the same manner as a judgment or not in excess of twenty percent thereof per month may be offset against any rent thereafter due the owner.

"b. In addition to issuing the specific orders provided for by other provisions of this law, the [DHCR] shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate.

RSL § 26-516 (emphasis added).

A rent stabilized tenant's right to seek damages for a rent overcharge claim under RSL § 26-516 is a statutorily created cause of action, not the codification of a common-law claim. The statute designates awards of, *inter alia*, court costs, attorney's fees, judgments for money damages, treble damages and related declaratory and/or injunctive relief ("other orders as may be deemed appropriate") as items of damages that are to be assessed only after a landlord's liability

for "rent overcharge" has been established. RSL § 26-516 (a). Here, however, Silkes unnecessarily raised separate claims for declaratory relief and attorney's fees in her first and third causes of action. Nevertheless, RSL § 26-516 requires a reviewing court to determine a landlord's liability for rent overcharge before it may consider the appropriate measure of damages. As a result, this decision will address the branches of Silkes' motion that seek summary judgment on her first and third causes of action at the end, after resolving the issue of B-U's liability on her second cause of action.

Subparagraph (a) (2) of the pre-HSTPA version of RSL § 26-516 provides that "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than *four years before the complaint is filed*." The date on which a rent overcharge claim is filed is referred to as the "base date," and in Silkes' case is January 5, 2015. *See* NYSCEF document 1 (complaint). The date four years previous is January 5, 2011, and the permissible period for which Silkes can recover for any rent overcharges that B-U allegedly collected (the "overcharge claims period") runs from January 5, 2011 through the January 5, 2015 "base date." RSL § 26-516 (a) (2) (i) further provides that "[n]o penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed." Thus, the statute permits Silkes to seek treble damages in connection with her rent overcharge claim for the period of January 5, 2013 through the January 5, 2015 "base date" (the "treble damages period").

The pre-HSTPA version of RSL § 26-516 (a) defines a "rent overcharge" as a rental charge which is "above the rent authorized for a housing accommodation," which is, in turn, defined as "the rent indicated in the annual [DHCR] registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases

and adjustments." The statutory scheme thus requires the court to identify and compare three figures when considering a rent overcharge claim: 1) an apartment's "legal regulated rent" (i.e., the rental amount listed on the unit's most recent DHCR registration statement plus lawful increases and adjustments); 2) the amount that the landlord actually charged the tenant; and 3) the amount that the tenant actually paid to the landlord.

The second and third of the three foregoing figures may generally be determined by reference to documentary evidence such as leases and payment records. Here, Silkes has presented a copy of her initial, market-rate lease for apartment 5C which ran from June 15, 2014 through June 14, 2015 with a monthly rent of $5,495.00. *See* notice of motion (motion sequence number 007), Howard affirmation, exhibit A. It thus appears that Silkes only occupied her apartment for six and a half months of the overcharge claims period, and that her actual rent charges during that time amounted to approximately $35,717.50 (1/2 month @ $5,495.00 for June 2014 = $2,474.50, plus 6 months @ $5,495.00 for July-December 2014 = $32,970.00).[1] The apartment rent history that B-U submitted confirms that calculation. *See* Littman supplemental affirmation in opposition, ¶ 38, exhibit L. Silkes avers that she paid all of those rent charges, and B-U's principal, Paul Bogoni, confirms that she paid monthly rent of $5,495.00 through December 2014. *See* notice of motion (motion sequence number 007), Silkes aff, ¶ 9; Bogoni aff in opposition, ¶ 13; exhibit R. It therefore appears that Silkes' actual rent charges equaled her actual rent payments during the overcharge claims period and that both totaled $35,717.50. In light of the foregoing, this figure will be used for the purpose of reviewing Silkes' rent overcharge claim.

[1] This figure does not include pro-rated charges for the 5 days of January 2015 during which Silkes occupied apartment 5C.

The pre-HSTRA version of RSL § 26-516 (a) provides that the third overcharge factor – an apartment's "legal regulated rent" - is normally ascertained by simple reference to the amount recorded on the DHCR registration statement for the unit that was in effect four years before the rent overcharge claim was filed. However, the Court of Appeals has consistently recognized that the amount listed on the DHCR registration statement will *not* constitute an apartment's "legal regulated rent" in cases where a plaintiff/tenant establishes that a landlord had engaged in "a fraudulent scheme to deregulate" the unit. *See e.g.*, *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-356; *Conason v Megan Holding, LLC*, 25 NY3d 1 (2015); *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 (2010); *Thornton v Baron*, 5 NY3d 175 (2005). Instead, where a landlord has engaged in such a "fraudulent scheme to deregulate," the "default method" set forth in Rent Stabilization Code (RSC) § 2522.6 (b) (9 NYCRR § 2522.6 [b]) should be used to determine an apartment's "legal regulated rent." *Id.* Under the Rent Stabilization Code (RSC), the default formula is applied by substituting "the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." RSC § 2522.6 (b) (3) (i).

Here, Silkes asserts that B-U engaged in a "fraudulent scheme to deregulate" the entire building, including apartment 5C. *See* plaintiff's mem of law at 4-14. B-U opposes this argument and asserts alternative rationales for having improperly but innocently deregulated the unit. *See* Littman supplemental affirmation in opposition, ¶¶ 15-94. However, those assertions need not be considered at length. This is at least the fourth rent overcharge action commenced in this court by various tenants in the building who asserted that B-U and the Bogonis have perpetrated a "fraudulent scheme to deregulate" the entire premises. *See e.g.*, *Pascaud et al. v B-U Realty Corp.*,

2021 NY Slip Op 32362(U) (Sup Ct, NY County 2021); *Aras et al. v B-U Realty Corp.*, 2021 WL 3741619(Sup Ct, (NY County 2021); *Townsend et al. v B-U Realty Corp.*, 67 Misc 3d 1228(A), 2020 NY Slip Op 50662(U) (Sup Ct, NY County 2020); *Kreisler et al v B-U Realty Corp.*, 2017 NY Slip Op 32742(U) (Sup Ct, NY County 2017). The earliest of these decisions was appealed to the Appellate Division, First Department, which confirmed the trial court's determination and held as follows:

> The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014.
>
> "We reject defendants' asserted reliance on a "pre-*Roberts*" framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided. Moreover, and notwithstanding defendants' arguments to the contrary, we find the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate (*see e.g. Pascaud v B-U Realty Corp.*, 2017 NY Slip Op 31482[U] [Sup Ct, NY County 2017]).

Kreisler v B-U Realty Corp., 164 AD3d 1117, 1117-1118 (1st Dept 2018). Based on this holding, Silkes argues that "[B-U] is collaterally estopped from denying its fraudulent scheme to deregulate the building." *See* plaintiff's mem of law at 4-7. In the three most recent rent overcharge actions commenced against B-U, Justices of this court relied on the First Department's *Kreisler* holding for collateral estoppel effect. *See Pascaud et al. v B-U Realty Corp.*, 2021 NY Slip Op 32362(U), *2; *Aras et al. v B-U Realty Corp.*, 2021 WL 3741619 (NY Sup) 2; *Townsend et al. v B-U Realty Corp.*, 67 Misc 3d 1228(A), 2021 NY Slip Op 50662[U] *9. The court elects to do so in this case.

Counsel for B-U nevertheless makes the facile assertion that, in *Kreisler*, the First Department "did not specifically find that all apartments were fraudulently deregulated nor did [it] find that the subject apartment was fraudulently deregulated," and that "[t]herefore, this issue has

not been decided by the Court and the Defendant is not collaterally estopped" from challenging the existence of a "fraudulent scheme to deregulate" the building. *See* Littman supplemental affirmation in opposition, ¶ 9. This assertion ignores the portion of *Kreisler* which held that "*evidence of other litigations* by plaintiffs' co-tenants against defendants alleging the same or similar misconduct [is] relevant *and probative of a fraudulent scheme to deregulate.*" *Kreisler v B-U Realty Corp.*, 164 AD3d at 1118 (emphasis added). Once there is evidence of a landlord's fraudulent scheme to deregulate a building, there is no need for the tenants to demonstrate fraud with respect to their individual apartment units, and the landlord is collaterally estopped from denying that such fraud took place.

B-U's counsel also states that "this Court in this proceeding has already denied Plaintiff's prior Summary Judgment Motion seeking a determination that the Defendant undertook a fraudulent scheme to deregulate the subject apartment." *See* Littman supplemental affirmation in opposition, ¶ 10. This statement misrepresents the procedural history of this case. On March 21, 2016, the Judge to whom this case was originally assigned (Wright, J.) issued a six-line decision denying Silkes' order to show cause seeking summary judgment on her first and third causes of action (motion sequence number 002). *See* NYSCEF document 91. Although that decision did not involve Silkes' second cause of action for rent overcharge, it did deny so much of her order to show cause as sought a declaratory judgment that B-U had "acted in a fraudulent manner to circumvent rent stabilization laws." *Id.* Counsel fails to mention that Judge Wright issued a subsequent decision on November 9, 2016 which vacated that decision, granted Silkes' application for leave to reargue the issue and found that she had "successfully raised the issue of fraudulent conduct in the rental history of the apartment" (motion sequence number 004). *See* NYSCEF document 155. Counsel also fails to mention that the First Department issued its *Kreisler* decision

on September 13, 2018, during the pendency of this litigation. All of counsel's unfounded assertions are rejected and B-U is collaterally estopped from denying that it engaged in a "fraudulent scheme to deregulate" the building.[2]

Because B-U is collaterally estopped from denying that it engaged in a "fraudulent scheme to deregulate" the building, the "default formula" will be used to set apartment 5C's "legal regulated rent" for the purposes of evaluating Silkes' rent overcharge claim. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-356. As

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[2] In any event, there is ample evidence that B-U's "fraudulent scheme to deregulate" included apartment 5C. Documents show that B-U enrolled the building in the "J-51" real estate tax abatement program during the 2005-2006 tax year, that the program's benefits began as of May 2006 and that the building's term of enrollment was for 14 years. *See* Littman supplemental affirmation in opposition, exhibit E. The "J-51" program's enabling legislation and governing regulations mandate either 30 or 14-year terms of enrollment. Real Property Tax Law (RPTL) § 489; New York City Administrative Code (NYC Admin Code) § 11-243. Because the building's enrollment thus presumptively ended in May 2020, counsel's assertion that "[t]he J51 tax benefits expired on June 30, 2016" is evidently incorrect. *Id*., Littman supplemental affirmation in opposition, ¶ 39. Owners of buildings enrolled in the "J-51" program were not permitted to use the RSC's apartment deregulation procedures for the duration of the enrollment. *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 286-287. Apartment 5C's DHCR registration history shows that the unit was originally listed as rent controlled from 1984 through at least 2013 (while the building was enrolled in the "J-51" program). *See* notice of motion (motion sequence number 007), exhibit W. However, the registration history also shows that Paul Bogoni filed an amended registration statement on January 26, 2015 (after this case was commenced) that only listed the unit as rent controlled through 2005, as deregulated in 2006 by reason of "vacancy," and as rent stabilized thereafter. *Id*. This violated the *Roberts* holding. (The unit's 2006 legal regulated rent was recorded as $4,195.00 per month, and B-U's records show that apartment 5C's previous rent-controlled rent was $148.74 per month. *Id*.; Littman supplemental affirmation in opposition exhibits B, D.) Although Bogoni's January 26, 2015 amended DHCR registration listed apartment 5C as rent stabilized in 2006, all of the unit's leases since 2005 were market-rate leases with no mention of rent stabilization. *Id*., exhibits D, F, G, H, K; notice of motion (motion sequence number 007), Howard affirmation, exhibits A, X. It therefore appears that Bogoni filed the amended DHCR registration after this action was commenced in an attempt to obscure apartment 5C's true registration history by retroactively legitimizing the market rate rent which B-U unilaterally and improperly began collecting in 2006 as if it were the unit's proper rent stabilized "legal regulated rent." This is exactly the fraudulent scheme that the First Department recognized in both *Kreisler v B-U Realty Corp.* and more recently in *Montera v KMR Amsterdam LLC* (193 AD3d 102, 108-109 [1st Dept 2021]) and *Casey v Whitehouse Estates, Inc.* (197 AD3d 401, 404 [1st Dept 2021]).

noted, the default formula requires the substitution of "the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." RSC § 2522.6 (b) (3) (i). Here, apartment 5C's DHCR registration history indicates that it is a five-room unit in the building's "C" line. *See* Littman supplemental affirmation in opposition, exhibit M. A "comparable apartment" would ideally be a unit in the same line and/or with the same number of rooms whose rent on the date Silkes took possession of apartment 5C (i.e., June 15, 2014) could be easily determined. Here, Silkes has identified apartment 2B, a five-room unit in the building's "B" line as a "comparable apartment" whose rent from March 1, 2014 through February 28, 2016 was $1,398.97 per month. *See* notice of motion (motion sequence number 007), Howard affirmation, ¶ 98; exhibit CC. B-U does not address the "comparable apartment" issue in its opposition papers, but rather repeats its assertions that it is improper to use the "default formula" because Silkes has not established the existence of a "fraudulent scheme to deregulate" the building. *See* Littman supplemental affirmation in opposition, ¶¶ 80-94. However, as stated above, B-U's assertions are rejected and it is estopped from denying the existence of a "fraudulent scheme to deregulate." Since apartment 2B meets the criteria of a "comparable apartment" to unit 5C, and since B-U has failed to object to its use in the "default formula," apartment 2B is an acceptable "comparable apartment" and its June 2014 rent of $1,398.97 will be used in the "default formula" to establish apartment 5C's legal regulated rent.

Therefore, Silkes should have paid no more than $9,093.31 during the six and a half months that she occupied apartment 5C during the overcharge claims period (½ month @ 1398.97/month for June 2014 = $699.49, six months @ $1,398.97/month for July-December 2014). Since Silkes was actually charged and actually paid $35,717.50 during that period, B-U collected an overcharge from her in the amount of $24,624.19. As noted earlier, the pre-HSTPA version of RSL § 26-516

(a) accords Silkes the right to collect "a penalty equal to three times the amount of such overcharge" from B-U. Thus, Silkes is entitled to a judgment of $73,872.57 ($24,624.19 x 3) in connection with her rent overcharge claim. Accordingly, Silkes is granted summary judgment awarding her a money judgment on her second cause of action in the amount of $73,872.57 plus statutory interest.

Plaintiff's First Cause of Action – Declaratory Judgment

Silkes' motion seeks the following declaratory relief in connection with her first cause of action:

> 1) A declaration that Plaintiff's apartment, tenancy and lease are subject to the [RSL]; and
> 2) A declaration that, based on Defendant's fraudulent scheme to remove the subject building, including Plaintiff's apartment, from rent regulation, the legal regulated rent for Plaintiff's apartment should be calculated using the default formula set forth in 9 NYCRR § 2522.6 (b); and
> 3) A declaration that Plaintiff was overcharged, that such overcharge was willful and that Plaintiff is entitled to recover the amount of the overcharge, plus treble damages.

See NYSCEF document 209 (notice of motion) at 2-3 (pages not numbered). These requests differ slightly from the declaratory relief sought in Silkes' complaint, which seeks orders:

> (a) declaring that her apartment, tenancy and lease are subject to the RSL;
> (b) establishing the legal regulated rent for the apartment;
> (c) compelling defendants to offer [her] a rent stabilized lease on such terms as are lawful and equitable under the RSL; and
> (d) enjoining defendants from terminating or taking any steps to terminate [her] tenancy or bringing any action or proceeding to recover possession of the apartment, pending the outcome of this proceeding.

See NYSCEF document 1 (complaint), ¶¶ 31-38. The motion thus appears to set forth a request for partial summary judgment on the first cause of action, since it does not pursue either the second proposed declaration in the complaint or the two items of injunctive relief specified in its third and fourth proposed declarations. Silkes is entitled to the first proposed declaration. B-U admits that apartment 5C is a rent stabilized unit. *See* Bogoni aff in opposition, ¶ 6. The evidence at hand confirms this admission. Apartment 5C was rent stabilized as a matter of law

for the duration of the building's enrollment in the "J-51" real estate tax abatement program through May 2020. *See* Littman supplemental affirmation in opposition, exhibit E; *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d at 286-287. Further, it remained rent stabilized after the HSTPA's effective date of June 14, 2019 since that statute permanently repealed the RSC's apartment deregulation procedures. Finally, although B-U argued to the contrary, the court has determined that: 1) B-U is estopped from denying that it engaged in a "fraudulent scheme to deregulate" the building, 2) the "default formula" set forth in 9 NYCRR § 2522.6 (b) is the appropriate method by which to determine apartment 5C's "legal regulated rent"; 3) upon using that formula, it is clear that B-U improperly collected a rent overcharge from Silkes; and 4) RSL § 26-516 entitles Silkes to receive a money judgment composed of the amount of the overcharge, treble damages for B-U's presumed willfulness in imposing it, and statutory interest. Accordingly, so much of Silkes' motion as seeks partial summary judgment on her first cause of action and seeks the proposed declarations set forth therein is granted, but so much of Silkes' motion as pertains to the balance of her first cause of action is held abeyance. Silkes must notify the court of her intentions with respect to that portion of her cause of action.

Plaintiff's Third Cause of Action - Attorney's Fees and Court Costs

Silkes' third cause of action seeks awards of attorney's fees and court costs. *See* NYSCEF document 1 (complaint), ¶¶ 45-47. New York Law considers attorney's fees to be an "incident of litigation" which a prevailing party may only collect where an award is authorized by statute. *See Hooper Assoc. v AGS Computers*, 74 NY2d 487, 487 (1989); *Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 279 (1st Dept 2007). Here, the pre-HSTPA version of RSL § 26-516 (a) (4) authorizes such an award. CPLR 8101 also authorizes awards of court costs to prevailing parties. Since Silkes has prevailed on her rent overcharge claim, she is entitled to

awards of fees and costs. The issue of determining the exact amount of fees and costs that Silkes is entitled to will be referred to a Special Referee to hear and determine.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Elizabeth Silkes (motion sequence number 007) is granted with respect to the first cause of action in the complaint solely to the extent that it is

ADJUDGED and DECLARED that plaintiff is entitled to declarations that:

> 1. Apartment 5C in the building located at 945 West End Avenue in the County, City and State of New York is a rent stabilized unit;
> 2. Defendant B-U Realty Corp. engaged in a "fraudulent scheme to deregulate" the building located at 945 West End Avenue in the County, City and State of New York, including apartment 5C, with the result that apartment 5C's legal regulated rent should be determined via the default formula set forth in 9 NYCRR § 2522.6 (b); and
> 3. Defendant B-U Realty Corp. has willfully overcharged plaintiff in violation of RSL § 26-516, with the result that plaintiff is entitled to recover a money judgment against defendant that includes the amount of the overcharge, treble damages and statutory interest.

but is otherwise held in abeyance; and it is further

ORDERED that counsel are directed to contact the Part 47 clerk at SFC-Part47-Clerk@nycourts.gov within thirty (30) days of this decision to receive a conference date during which the remainder of plaintiff's first cause of action will be addressed; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Elizabeth Silkes (motion sequence number 007) is granted with respect to the second cause of action in the complaint and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $73,872.57, together with interest at the rate of 9% per annum from the date of January 1, 2015 until the date of this decision and order on this motion, and thereafter at the

statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Elizabeth Silkes (motion sequence number 007) is granted with respect to the third cause of action in the complaint solely to the extent of awarding plaintiff summary judgment against defendant on the issue of liability for said cause of action; and it is further

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

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

10/31/2022
DATE

PAUL A. GOETZ, 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	X	REFERENCE