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Brookes v. 157th St. Assoc., LLC

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Brookes v 157th St. Assoc., LLC
2023 NY Slip Op 31257(U)
April 18, 2023
Supreme Court, New York County
Docket Number: Index No. 160664/2020
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

---X

COLIN BROOKES, CELIA HATTON, RAVENNA LIPCHIK, KAREN POLESHUCK, MAX JACOB, ISAAC HAYWARD

Plaintiff,

- v -

157TH STREET ASSOCIATES, LLC,

Defendant.

---X

INDEX NO. 160664/2020

MOTION DATE 08/05/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, and after oral argument, which took place on January 17, 2023, where Diane Jarvis, Esq. appeared for the Plaintiffs Colin Brookes ("Brookes"), Celia Hatton ("Hatton"), Ravenna Lipchik ("Lipchik"), Karen Poleshuck ("Poleshuck"), Max Jacob ("Jacob"), and Isaac Hayward ("Hayward") (collectively "Plaintiffs"), and Vladimir Favilukis, Esq. appeared for Defendant 157th Street Associates, LLC ("Defendant" or "Landlord"), Defendant's motion and Plaintiffs' cross motion are decided as set forth below.

I. Background

Plaintiffs initiated this action on December 9, 2020 (NYSCEF Doc. 1). Plaintiffs are all tenants of Defendant and live at the premises located at 602 West 157th Street (the "Building"). Plaintiffs alleged that Defendant illegally deregulated Plaintiffs' apartments and misled them to pay overcharged rents (*id.* at ¶ 1).

Brookes lived in Apartment 2AA and alleges that splitting Apartment 2AA from 2A should not count as an "improvement" for purposes of deregulating his apartment (*id.* at ¶ 11). Lipchik and Hatton live in Apartment 3AA and, like Brookes, allege that their apartment was illegally deregulated. Lipchick and Hatton allege that they have not been able to locate any permits with the Department of Buildings related to the third floor of the premises which would reflect the improvements required to reach a high rent vacancy threshold in 2008 (*id.* at ¶¶ 24-26).

Poleschuck resided in Apartment 4A and alleges that her apartment was illegally deregulated based on "substantial rehabilitation" (*id.* at ¶ 31). Jacob resides in apartment 5E which was declared exempt due to "substantial rehabilitation" (*id.* at ¶ 38). However, Jacob was allegedly unable to find any permits related to Apartment 5E (*id.* at ¶ 39). Hayward resides in Apartment 6EE, however his apartment is allegedly still listed as "rent controlled" (*id.* at ¶ 45).

Plaintiffs allege that each of their rent histories contains untrue statements (*id.* at ¶ 52). Plaintiffs request the Court to order Defendant to issue each Plaintiff a rent-stabilized renewal lease at the correct legal rent, a money judgment for overcharges, and attorneys' fees (*id.* at ¶¶ 62-71). Defendant filed its Answer on February 26, 2021 (NYSCEF Doc. 4). Defendant counterclaimed for attorneys' fees (*id.* at ¶¶ 65-76). After some exchange of discovery, issuance of a subpoena to DHCR, and a preliminary conference, Defendant filed the instant motion on July 26, 2022 (NYSCEF Doc. 67). In support of its motion, Defendant provided the affidavit of Konstantinos Kapelonis ("Kapelonis"), Defendant's managing member (NYSCEF Doc. 69 at ¶ 1).

According to Kapelonis, Brookes' apartment became exempt from rent stabilization fourteen year prior to Brookes moving into the apartment in accordance with RSC § 2520.11(r)(12) (*id.* at ¶ 8). Kapelonis provided the DOB permit allowing Apartment 2A and 2AA to be subdivided (*id.* at ¶ 9; *see also* NYSCEF Doc. 71). Kapelonis provided the lease, which was dated November

1, 2005, and set the monthly rent at $2,050.00 (*id.* at ¶ 10; *see also* NYSCEF Doc. 72). Kapelonis argues, therefore, that Brookes' apartment was properly deregulated.

Kapelonis provided testimony and documents regarding Lipchik and Hatton's apartment. Kapelonis states that Lipchik and Hatton's apartment was exempt from rent stabilization eight years prior to Lipchick and Hatton moving into the apartment pursuant to RSC §2520.11(r)(1) (*id.* at ¶ 18). Kapelonis testified that a prior tenant, Ms. Rosa Villacis, had resided in the apartment for more than thirty years, and after Ms. Villacis vacated in 2007, Defendant spent at least $63,517.46 to renovate the apartment (*id.* at ¶¶ 19-20; *see also* NYSCEF Doc. 75). Kapelonis testified that the next tenants to occupy the apartment were Ms. Sinneck and Mr. Mustards, whose lease contained two riders outlining the renovation work and explaining how the new legal regulated rent was calculated to be greater than $2,000.00, thereby deregulating Apartment 3AA (*id.* at ¶ 21; *see also* NYSCEF Doc. 76).

Regarding Poleshuck's apartment, Kapelonis testified it became exempt from rent stabilization pursuant to RSC § 2520.11(r)(10). Kapelonis stated that a prior tenant, Ms. Rosalba Torres, occupied the apartment from 1984 to 2007 (*id.* at ¶ 31). Kapelonis testified that after Ms. Torres vacated, the apartment was fully renovated at a cost of $75,987.50 (*id.*; *see also* NYSCEF Doc. 79). After Ms. Torres vacated and the renovations were complete, Kapelonis testified that Ms. Tiffany Novinger leased the apartment from June 1, 2007 through May 31, 2008 (*id.* at ¶ 33). Ms. Novinger's lease contained a rider explaining how the new legal regulated rent was calculated to be greater than $2,000.00, thereby deregulating the apartment (*id.*; *see also* NYSCEF Doc. 80). Kapelonis testified that rather than checking off the reason as "high rent vacancy", Kapelonis testified he mistakenly checked off "substantial rehabilitation" which was a clerical mistake due to the proximity of the boxes on the annual apartment registration form (*id.*).

As for Jacob's apartment, Kapelonis testified this apartment became exempt from rent stabilization pursuant to RSC § 2520.11(r) several years before Jacob moved in (*id.* at ¶ 39). Kapelonis testified that in 2006, after Mr. Jose Flores vacated the apartment, the legal regulated rent was increased to greater than $2,000.000 which led to the apartment being deregulated. This is reflected in a lease which contained a rider explaining how the legal regulated rent had reached the deregulation threshold (*id.*; *see also* NYSCEF Doc. 84). Kapelonis testified that although the legal regulated rent was increased by an additional $31.20 by mistake as a "longevity" increase, even without this increase the legal regulated rent still reached $2,000.00 and was therefore properly deregulated seven years before Jacob moved in (*id.* at ¶ 40). Kapelonis testified that this apartment too mistakenly was registered as deregulated due to substantial rehabilitation instead of high rent vacancy, which was a clerical error – not an attempt to defraud.

Regarding Hayward, Kapelonis testified that his apartment was deregulated following vacancy of a rent control apartment, and that any challenge to the way it was deregulated must be done through a fair market rent appeal (*id.* at ¶ 43). Kapelonis testified that the rent-controlled tenant, Hoilda Hernandez, was evicted, along with her son Juan Hernandez and subtenant Judith Zevack due to the sale of illegal narcotics out of the apartment (*id.* at ¶ 44). A warrant of eviction was obtained in connection with a civil court proceeding bearing L&T Index No. 719646/2016.

After the eviction, the apartment was renovated, and then leased to Alfonso Peduto from April 1, 2018 through March 31, 2019 (*id.* at ¶ 44; *see also* NYSCEF Doc. 85). Kapelonis testified that the rent for Mr. Peduto's tenancy was established pursuant to RSC § 2521.1(a) and DHCR Fact Sheet #6 which states that following a rent-controlled tenant's vacancy, the initial rent shall be the rent agreed to by the owner and the new tenant, subject to a tenant's right to a fair market rent appeal (*id.* at ¶ 45). Mr. Peduto's Lease shows he was provided with DHCR Form RR-1 which

advised him of his right to file a fair market rent appeal, and his lease contained a rider titled "notice of apartment deregulation pursuant to high rent vacancy" (*id.*). Mr. Peduto vacated the apartment soon after moving in, on May 31, 2018, and Defendant thereafter filed a report of vacancy decontrol (*id.* at ¶ 47). Hayward then moved into the apartment on July 1, 2018 (*id.* at ¶ 48). Hayward's initial rent of $2,200.00 was far lower than Mr. Peduto's, at $3,050.00, even though Hayward executed his lease just a few months after Peduto vacated. Hayward refused to execute a lease renewal on June 30, 2020 (*id.* at ¶ 49). Hayward was not given notice of a right to a fair market appeal.

Kapelonis testifies that it is his belief that Hayward vacated the apartment during the Covid-19 pandemic and is illegally subleasing the apartment to two individuals who have been paying rent directly to Hayward (*id.* at ¶ 50). Kapelonis states that he refused to accept Haward's emergency rent assistance program ("ERAP") because he misrepresented the total household income by omitting his subtenants from the application (*id.*). Hayward has not paid any rent since April of 2021 (*id.* at ¶ 51).

In its memorandum of law, Defendant argues that the rent overcharge claims are impermissibly based on events that occurred four years ago, which, absent indicia of fraud, are barred by the statute of limitations (NYSCEF Doc. 91). Defendant argues that a colorable claim of fraud will not arise from a rent increase alone. Defendant also argues that insufficiency of pre-"base date" renovation records does not constitute indicia of fraud, as landlords are not required to maintain records of individual apartment improvements for longer than four years. Defendant further asserts that a clerical error, such as checking the wrong box, does not constitute sufficient indicia of fraud to pierce the four year look back.

Defendant argues that regardless of whether Plaintiffs have met its burden of showing indicia of fraud, Defendant has submitted evidence demonstrating that the apartments were properly deregulated. Defendant argues that to the extent Hayward refutes the regulatory status of his apartment, he has failed to exhaust his administrative remedies. Defendant argues that in the alternative, this matter should be referred to DHCR to determine whether the apartments were lawfully deregulated and, if not, whether there is any rent overcharge. Finally, Defendant seeks use and occupancy.

On August 15, Plaintiffs filed their opposition and cross-motion (NYSCEF Doc. 99). Plaintiffs seek to file an amended complaint alleging source of income discrimination arising out of Defendant's refusal to accept ERAP assistance, and also request use and occupancy to be set at a level that they can afford. Plaintiffs argue that summary judgment and dismissal before discovery is complete and before they had an opportunity to depose Mr. Kapelonis is improper (NYSCEF Doc. 108 at ¶ 2). Plaintiffs argue that Defendant has never produced any documents or scheduled any depositions in response to the preliminary conference order (*id.* at ¶ 25; *see also* NYSCEF Doc. 12). Plaintiffs further argue that for each apartment, there appears to be a series of "buffer leases" where the apartment was deregulated upon a tenant moving in and staying in the apartment for one year or less (*id.* at ¶ 37). Plaintiffs argue they require further discovery to explore whether these buffer tenants were part of a fraudulent scheme to deregulate the subject apartments. Plaintiffs argue that Defendant's repeated mistake in checking off deregulation based on "substantial rehabilitation" requires exploration through discovery to flush out whether it was truly a mistake or part of a fraudulent scheme. Plaintiffs also argue that Defendant's request to certify a question to DHCR must be denied, as under the HSTPA, and pursuant to the Court of Appeals, the Plaintiffs' choice of forum prevails (*Collazo v Netherland Prop. Asset LLC*, 35 NY3d 987 [2020]).

In reply, Defendant argues leave to amend should not be granted because it would not be capable of surviving a motion to dismiss (NYSCEF Doc. 117 at ¶ 6). Defendant also argues that while *Collazo* prohibited dismissing an action on the basis that it should be brought before DHCR, *Collazo* did not prohibit a trial court from seeking the opinion of DHCR in a rent stabilization dispute. Defendants also argue that the subdivision of one apartment into two is expressly the kind of alteration of an apartment that may take it out of rent stabilization. Further, Defendant argues that the fact that a certificate of occupancy was not issued until 2015 does not make the rents from prior years void.

II. Discussion

A. Plaintiffs' Cross Motion to Amend

Plaintiffs' cross-motion to amend is denied. Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinksy v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical Center*, 203 AD3d 462 [1st Dept 2022]).

Plaintiffs seek leave to amend its Complaint to allege source of income discrimination in violation of New York State Executive Law § 296 (the "NYSHRL") and New York City Human Rights Law § 8-107(5)(a) (the "NYCHRL"). Plaintiffs allege that Defendant's refusal to accept Hayward's ERAP funds is an act of discrimination based on source of income discrimination. Hayward, in his affidavit, admits that he lived in Australia during the Covid pandemic (NYSCEF Doc. 102 at ¶ 7). He further admits that he let a friend stay in his apartment while he was in

Australia (*id.*). He does not state when he returned to the apartment. Defendant alleges "upon information and belief" that he is illegally subletting his apartment. Moreover, Defendant alleges that participation in the ERAP program is voluntary, and that if a landlord refuses ERAP funds, that is a defense to eviction based on non-payment of rent rather than an independent cause of action for source of income discrimination.

Here, Plaintiffs' proposed allegations are insufficient as a matter of law and must therefore be denied. The NYSHRL and NYCHRL provide that it is an unlawful discriminatory practice for the owner of a housing accommodation to refuse to sell, rent, lease, or deny housing to someone based on lawful source of income. However, by Plaintiffs' own allegations, Hayward's tenancy was allegedly terminated prior to proffering ERAP funds to cover rental arrears. Based on Hayward's own affidavit, he was notified that his month-to-month lease was terminated in August of 2021 (NYSCEF Doc. 101 at ¶ 9). He then goes on to state that in September 2021, he received notice that ERAP would cover his rent from May 2021 through September 2021 (*id.* at ¶ 10). Hayward states Defendant refused to accept ERAP payment in October 2021 (*id.* at ¶ 11).

Therefore, Hayward has not alleged a discrimination in violation of the NYSHRL or NYCHRL, as the refusal to rent or lease to Hayward came before proffering any ERAP payment. Moreover, this Court has found no case law in support of the proposition that a denial of ERAP funds constitutes unlawful source of income discrimination, nor have Plaintiffs cited any case law. New York City's own website regarding ERAP payments explicitly states that landlords have the option to refuse ERAP funds (NYSCEF Doc. 118). The Court is aware that there is a holdover action against Hayward in Housing Court (*see 157 Street Associates, LLC v Isaac Hayward, Michelle Elizabeth Blauman, and Cortney Key Taylor*, Index No: L&T 308334-21). The refusal to accept ERAP funds is more appropriately addressed as a defense to the holdover action.

B. Defendant's Motion for Summary Judgment

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.,* 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.,* 1 NY3d 381 [2004]).

Defendant is correct that in a rent overcharge case alleging rent overcharges prior to the enactment of the 2019 Housing Stability and Tenant Protection Act, the applicable look back period to determine the base date is four years from commencement of the action. (*Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal*, 135 NY3d 332 [2020]; *Wise v 1614 Madison Partners, LLC*, 2023 N.Y. Slip Op. 01495 [1st Dept 2023]). As recently reiterated by the Court of Appeals, "review of rental history outside the four-year lookback period [i]s permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate, and, even then, solely to ascertain whether fraud occurred – not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations" (*Casey v Whitehouse Estates, Inc.*, 2023 N.Y. Slip. Op. 01351 [2023] quoting *Regina, supra*). In fraud cases, because the reliability of the base

date rent has been tainted, the default formula applies to set the base date rent (*Matter of Grimm v State Div. of Hous. And Community Renewal Off. Of Rent Admin.*, 15 NY3d 358, 367 [2010]).

Defendant is also correct that the purported insufficiency of individual apartment improvements ("IAIs") does not constitute indicia of fraud (*Haskin v New York State Div. of Hous. & Community Renewal*, 203 AD3d 603 [1st Dept 2022] citing *Matter of Boyd v New York State Div. of Hous. & Community Renewal,* 110 AD3d 594, 598 [2014]). This is, in large part, because before June 14, 2019, "the law required the landlord to maintain records of individual apartment improvements for only four years." (*Haskin supra* at 604).

Defendant also correctly points out that where an apartment is "reconfigured" and "obliterated" so as to erase that apartment's particular identity, DHCR allows a landlord to seek a "first rent" (*Dixon v 105 West 75th Street LLC*, 148 AD3d 623 [1st Dept 2017]; *Devlin v New York State Div. of Hous. & Community Renewal*, 309 AD2d 191 [1st Dept 2003]). The subdivision of a single, multiple bedroom apartment into two smaller apartments has explicitly been held to constitute the kind of reconfiguration and obliteration which allows for a "first rent" (*see Devlin, supra* at 194 ["The illustrations we offered...were the conversion of a single two-bedroom apartment into two studio apartments, or, conversely, the consolidation of two smaller units into a single larger unit, so that the prior abodes were essentially unidentifiable within the new configurations."]).

Likewise, although Plaintiffs point to large increases in the rent for some of their apartments more than ten years prior to filing this action, it is well established that an increase in rent alone is insufficient to establish indicia of fraud (*see Grimm v State Div. of Housing and Community Renewal Office of Rent Admin.*, 15 NY3d 358, 367 [2010]; *Ampim v 160 East 48th*

Street Owner II LLC, 2022 NY Slip Op. 05263 at *1 [1st Dept 2022]; *see also Fuentes v Kwik Realty LLC*, 186 AD3d 435 [1st Dept 2020).

Based on the evidence submitted by Defendant, it has established a *prima facie* entitlement to summary judgment. Regarding Apartment 2AA, Defendant has shown it became exempt upon its subdivision from the former Apartment 2A, which was completed under a Department of Buildings permit. The first rent for Apartment 2AA in 2005 was $2,050.00, which exempted it from rent stabilization.

With respect to Apartment 3AA, $63,517.46 in improvements were made to the apartment upon the prior long-term tenant's vacancy in 2007. The legal regulated rent, after IAIs took place, was $2,359.52, which caused the apartment to become exempt from regulation. These improvements were also memorialized in a lease.

With respect to Apartment 4A, the apartment was fully renovated at a cost of $75,987.50. These renovations occurred in 2007 after the vacancy of the previous tenant who had resided in the apartment since 1984. The legal regulated rent, after the IAIs, longevity increase, and vacancy increase, became $2,824.54 which took the apartment out of regulation. There is a lease and rider memorializing these increases and the legal regulated rent. The lease is dated May 23, 2007.

With respect to Apartment 5E, in 2006, after Mr. Jose Flores, a rent stabilized tenant vacated the apartment, there was a 17.25% vacancy increase from a legal regulated rent of $1,733.60. This brought the legal regulated rent to greater than $2,000.00 which brought the unit out of regulation.

With respect to Apartment 6EE, Defendant claims that after the eviction of rent stabilized tenants it entered a lease with Alfonso Peduto for $3,050.00 from April 1, 2018 to March 31, 2019. Peduto vacated on May 31, 2018. Hayward moved in on July 1, 2018.

Defendant is granted summary judgment on Plaintiff Brookes' claims regarding apartment 2AA. There is undisputed evidence to show that the apartment was taken out of regulation after being subdivided from apartment 2A, and the first rent charged after that subdivision was greater than the deregulation threshold (*see 300 West 49th Street Associates v New York State Div. of Hous. & Community Renewal*, 212 AD2d 250 [1st Dept 1995]). Plaintiff has failed to raise a material issue of fact to rebut Defendant's showing that Apartment 2AA was deregulated upon its subdivision from Apartment 2A and the charging of $2,050.00 for rent.

However, summary judgment against Plaintiffs Hatton, Lipchik, Poleshuck, and Jacob, and their respective apartments (3AA, 4A, and 5E) is denied, as these apartments were deregulated on a different basis. Defendants argue as to these plaintiffs that the apartments became deregulated pursuant to high rent vacancy increases after IAIs. Plaintiffs argue that they should be entitled to depose Mr. Kapelonis, who has submitted a lengthy affidavit regarding the apartments at issue, prior to entry of summary judgment. In particular, Plaintiffs argue that the repeated misstatements on DHCR rent registrations (namely, taking the apartments out of regulation based on substantial rehabilitation instead of high rent vacancy), its failure to amend its errors, and the issue of "buffer tenants" who appear to live in the deregulated apartments for only a year or less following deregulation, should be explored through discovery.

Viewing the facts in the light most favorable to the non-moving parties, and given Mr. Kapelonis has not been deposed, the note of issue has not been filed, and discovery does not appear to be complete, the Court denies summary judgment at this juncture. It still remains a question of fact whether or not there was a fraudulent scheme to deregulate as to the remaining apartments. While a mere spike in rent alone is insufficient to show indicia of fraud, here there is more than just a mere spike in rent. Rather, there is a large increase in rent, repeated identical erroneous

DHCR filings, and what seems to be a pattern of tenants moving into newly deregulated apartments and staying for only one year or less. While each of these facts, if viewed on their own, may not comprise sufficient indicia of fraud, when looked at collectively, viewed in the light most favorable to the non-moving parties, and because no representative of Defendant has been deposed, the Court finds there is still an issue of fact regarding the existence of indicia of fraud.[1]

The Court also denies Defendant's motion for summary judgment dismissing Hayward's claims. Out of all Plaintiffs, the circumstances surrounding the deregulation of Hayward's apartment most strongly shows indicia of fraud. Notably, after the eviction of the prior rent stabilized tenants, an individual named Alfonso Peduto leased the apartment at $3,050.00 for a mere few months. This deregulated the apartment, and Hayward then received a lease for an unregulated apartment at the rate of $2,200.00. There is no explanation for why Peduto's lease was so short, and why Hayward's lease, executed mere months later, was substantially cheaper than Peduto's lease. Second, the Court finds Defendant's argument regarding Hayward's failure to file a fair market appeal unavailing. This is especially the case where Defendant never put Hayward on notice of his right to file a fair market appeal as a result of alleged fraud perpetrated by Defendant.

C. Certification of a Question to DHCR

The Court agrees that it is appropriate to certify a question regarding the regulatory status of the remaining apartments to DHCR; however, it will only do so after discovery is complete. While Plaintiffs argue that *Collazo v Netherland Prop. Asset LLC*, 35 NY3d 987 (2020) bars certifying a question to DHCR, the Court disagrees. While *Collazo* held that tenants may choose

[1] The Court notes that upon a more fully developed record, and in accordance with the precedent cited herein, summary judgment may be granted to Defendant after discovery. Indeed, a more fully developed record may eliminate the issue of whether or not the tenants were "illusory" tenants, or that the misstatements on DHCR filings were merely clerical errors rather than an attempt to deceive tenants.

the forum to bring their rent stabilization claims, this Court is not denying Plaintiffs of this forum. This Court is merely referring a question to DHCR to get its opinion as to the regulatory status of the remaining apartments. Moreover, this Court will allow Plaintiffs to complete discovery in this Court prior to certifying a question to DHCR. Therefore, the motion to certify a question to DHCR is denied as premature. However, after completion of discovery, this Court will entertain certifying the question of the remaining Plaintiff's apartment's regulatory status to DHCR.

D. Use and Occupancy

Defendant's motion seeking use and occupancy is granted. A court has broad discretion in awarding use and occupancy (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]). "The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties' in affording necessary and fair protection to both." (*MMB Assocs. v Dayan*, 169 AD2d 422 [1st Dept 1991]). The award of use and occupancy is proper where it would be manifestly unfair for a party to remain in possession of the subject premises without paying rent (*10E53 Owner LLC v Bruderman Asset Management*, 202 AD3d 609 [1st Dept 2022]). Use and occupancy may be awarded retroactively and prospectively (*East 4th St. Garage v Estate of Berkowitz*, 265 AD2d 249 [1st Dept 1999]). In determining the reasonable value of use and occupancy due, the rent reserved under the lease is probative (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]). Indeed, where the amount sought is the monthly rent under the last lease between the parties, that may be considered the reasonable value of use and occupancy due (*Marbru Associates v White*, 114 AD3d 554 [1st Dept 2014]).

Although Plaintiffs request that use and occupancy be set at a rate that "they can afford" they have failed to proffer any documentary evidence regarding their income for the Court to make this determination. While multiple Plaintiffs testify they are musicians and were impacted by

Covid-19, they fail to provide any reason why they have failed to pay any rent since Covid-19 restrictions ended many months, if not years ago. In the absence of documentary evidence regarding the Plaintiffs' income, the Court will set the use and occupancy upon at the rate set at their last lease. As the Court is aware that the amount owed in use and occupancy may have increased since Defendant first moved for use and occupancy in July of 2022, and that certain tenants have vacated the premises, the Court will provide Defendant with an opportunity to file a supplemental request for use and occupancy to reflect the amount owed by each tenant and to inform the Court which tenants are still in possession of their apartments.

Accordingly, it is hereby,

ORDERED that Defendant's motion to quash the subpoena issued to DHCR is withdrawn as moot as stated on the record; and it is further

ORDERED that Plaintiffs' cross-motion to amend the Complaint is denied; and it is further

ORDERED that Defendant is granted summary judgment dismissing the claims of Plaintiff Colin Brookes, and that Defendants' motion for summary judgment is otherwise denied, with leave to renew upon completion of discovery; and it is further

ORDERED that Defendant's motion seeking the certification of a question to DHCR regarding the regulatory status of the Plaintiffs' apartments is denied without prejudice, with leave to renew upon completion of discovery; and it is further

ORDERED that Defendant's motion seeking use and occupancy is granted, and use and occupancy for each Plaintiff that owes use and occupancy will be set at the monthly rent under the last lease. Defendant is directed to file on NYSCEF and send via e-mail to SFC-Part33-Clerk@nycourts.gov an updated ledger regarding the use and occupancy owed by each Plaintiff as of the date of this decision so that the Court may enter a supplemental order reflecting same.

Defendant should also inform the Court which tenants have vacated and which tenants are still in possession; and it is further

ORDERED that the parties are directed to appear for an in-person status conference with the Court on May 10, 2023 at 9:30 a.m. in 60 Centre Street, Room 442, to outline the remainder of outstanding discovery and the deadline by which to file the note of issue. In the alternative, if the parties agree to a stipulated to discovery schedule prior to May 10, 2023, they may e-mail it to SFC-Part33-Clerk@nycourts.gov so it may be so-ordered; and it is further

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order with notice of entry on Plaintiffs.

This constitutes the Decision and Order of the Court.

4/18/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, 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	