2023-05-31

Schaer v. Park Terrace Realty, LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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CLAUDIA SCHAER, VANESSA CRUZ,

Plaintiff,

- v -

PARK TERRACE REALTY, LLC,METROPOLITAN PROPERTY SERVICES, MATTHEW WEINSTEIN, DOMINICK GUARNA

Defendant.

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INDEX NO. 161268/2018

MOTION DATE 05/12/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 102

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

In this residential landlord/tenant action, defendants Park Terrace Realty, LLC (Park Terrace), Metropolitan Property Services (MPS), Matthew Weinstein (Weinstein) and Dominick Guarna (Guarna; together, defendants) move pursuant to CPLR § 3212 for summary judgment dismissing the complaint, and plaintiffs Claudia Schaer (Schaer) and Vanessa Cruz (Cruz; together, plaintiffs) cross-move for partial summary judgment on the complaint.

BACKGROUND

Defendant Park Terrace is the corporate owner of a residential apartment building located at 221 Seaman Ave. in the County, City and State of New York [the building] (*see* notice of motion, exhibit A [verified complaint], ¶ 4 [NYSCEF document 45]). Co-defendant MPS is the building's managing agent, and individual co-defendants Weinstein and Guarna are, respectively, the principal officers of Park Terrace and MPS (*id.*, ¶¶ 5-7). Schaer is the tenant of

record for apartment F14 and Cruz is the tenant of record for apartment C4 in the building (*id.*, ¶¶ 2-3).

This action arose out of the parties' dispute over the rent-regulatory status of plaintiffs' apartments. On January 7, 2019, plaintiffs served a summons and verified complaint that set forth causes of action for: 1) a declaratory judgment that the subject apartments are subject to the Rent Stabilization Law and Code (RSL and RSC); 2) a declaratory judgment setting forth the subject apartments' legal regulated rents; 3) a declaratory judgment that defendants have collected unlawful rent overcharges from plaintiffs; 4) an injunction pursuant to General Business Law (GBL) § 349; 5) money damages pursuant to GBL § 349; 6) a second injunction pursuant to GBL § 349; and 7) attorney's fees and court costs (*see* verified complaint; affs of service [NYSCEF documents 1, 3-6]). Defendants initially filed a verified answer with affirmative defenses on January 16, 2019 (*see* verified answer [NYSCEF document 7]). By decision dated January 14, 2022, defendants' motion for leave to file an amended verified answer was granted (motion sequence number 001; [NYSCEF document 38]). The amended answer sets forth the affirmative defenses that: 1) the subject apartments are not rent-stabilized and the plaintiffs have not been overcharged; 2) plaintiffs have waived their claims; 3) defendant have refunded any rent overcharges with interest; 4) plaintiffs' request for money damages seeks an unlawful windfall; 5) plaintiffs' claims are barred by the statute of limitations; 6) plaintiffs' claims are barred by the doctrine of res judicata; 7) plaintiffs' claims are barred by the doctrine of collateral estoppel; 8) plaintiffs are not entitled to attorney's fees or court costs pursuant to either statute or contract; and 9) the complaint fails to state any causes of action (*see* amended verified answer [NYSCEF document 19]).

The January 14, 2022 decision also provides, in pertinent part, as follows:

> The documentary evidence submitted in connection with defendants' motion (i.e., the units' leases and DHCR registration history) is potentially sufficient to support either party's legal argument when it is read in light of the controlling Court of Appeals jurisprudence. However, since this case is still in the pre-answer stage, it would not be appropriate at this juncture to determine which legal argument should prevail. *After the close of discovery, either party may wish to submit additional evidence to further support its' legal argument concerning the efficacy (or not) of defendants' purported deregulation of apartments F14 and C4. They should have the opportunity to do so*. In addition, the First Department has recently recognized that, where an allegedly deregulated apartment's DHCR history shows that the landlord left it unregistered until well after *Roberts* was decided in 2009, the landlord's neglect may constitute fraud sufficient to warrant disregarding the four- or six-year "lookback" limitation period of RSL § 26-516. *See Montera v KMR Amsterdam LLC*, 193 AD3d 102 (1st Dept 2021). Here, apartment F14's and C4's respective DHCR histories both show that defendants filed amended registration statements on January 14, 2019, after having evidently left both units unregistered for a decade after *Roberts* was decided. *See* notice of motion, Dessner aff, exhibits 3, 4. This might support an inquiry into whether fraud was involved in deregulating the units prior to the commencement of plaintiffs' respective tenancies. However, the parties' papers do not discuss the fraud issue. *They should have the opportunity to litigate this issue after the close of discovery as well*.

(see NYSCEF document 38 [emphasis provided]). Despite the court's admonition, counsel for the parties opted not to complete discovery and have not yet filed a note of issue. Instead, on May 27, 2022, counsel entered into a stipulation that provided, in pertinent part, as follows:

> 5. Plaintiffs agree that (a) they will not seek to oppose the Motion on the basis that further discovery is necessary before judgment as a matter of law may be made, and (b) they will not seek any discovery-related relief in their cross-motion.
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> * * *
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> 7. For the avoidance of doubt, the parties stipulate that the buildings in which Plaintiffs' apartments are situated formerly received J-51 benefits, and that such J-51 benefits expired on June 30, 2009.

(*see* NYSCEF document 61).

Thereafter, defendants filed a motion on May 12, 2022 that requests: 1) summary judgment on their first affirmative defense to the extent of dismissing plaintiffs' first cause of action and granting defendants declaratory judgments that the subject apartments are not rent-stabilized and that plaintiffs have not been overcharged; 2) summary judgment on their ninth affirmative defense to the extent of dismissing the balance of plaintiffs' complaint for failure to

state claims; and 3) in the alternative, summary judgment dismissing the complaint as against co-defendants Weinstein and Guarna only on the ground that they are agents to a disclosed principal (*see* notice of motion [motion sequence number 002]; [NYSCEF documents 42-60]). On June 30, 2022, plaintiffs filed a cross-motion for partial summary judgment of their first cause of action only (*see* notice of cross-motion [motion sequence number 002]; [NYSCEF documents 64-89]). Counsel subsequently filed their respective reply papers (*see* defendants' reply; plaintiffs' reply [NYSCEF documents 90, 92-95, 96-99]). Although the record in this matter is not yet fully developed, these two instant motions are fully submitted (motion sequence number 002).

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]).

Here, the parties' motions primarily seek summary judgment on their competing requests for declaratory relief. Pursuant to CPLR § 3001, a declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (*see e.g.*, *Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 [1st Dept 1999]). New York has long recognized the rule that, in an action for declaratory judgment, the court may properly

determine the respective rights of all of the affected parties under a lease (*see e.g.*, *Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 [1926]).

Plaintiffs' first cause of action requests a declaration that "their apartments have been rent-stabilized since the commencement of their tenancies and remain so to the present date" (*see* verified complaint, ¶ 55 [NYSCEF document 1]). Defendants' first affirmative defense requests a declaration that "[t]he subject apartments are not rent-stabilized and therefore Plaintiffs have not been overcharged" (*see* notice of motion [motion sequence number 001], exhibit A-C [amended verified answer], ¶ 81 [NYSCEF document 19]). Pursuant to the May 27, 2022 stipulation, both parties agree that the building was subject to rent stabilization by operation of law until June 30, 2009 as a result of its enrollment in the "J-51" real estate tax abatement program (*see* NYSCEF document 61). However, they dispute the rent-regulated status of plaintiffs' respective apartments after that date.

Schaer Apartment F14

The records produced in connection with this motion show that Schaer: 1) executed her first non-rent-stabilized lease for apartment F14 for a term that ran from December 1, 2008 - November 30, 2009 with a monthly rent of $2,000.00; 2) thereafter executed six non-rent-stabilized "lease extensions" that respectively ran from (a) December 1, 2009 - November 30, 2010 with a monthly rent of $2,000.00, (b) December 1, 2010 - November 30, 2011 (though she produced no lease for this term), (c) December 1, 2011 - November 30, 2012 with a monthly rent of $2,085.00, (d) December 1, 2012 - November 30, 2013 with a monthly rent of $2,115.00, (e) December 1, 2013 - November 30, 2014 with a monthly rent of $2,115.00, (f) December 1, 2014 - November 30, 2015 with a monthly rent of $2,275.00, and (g) December 1, 2015 - November 30, 2016 with a monthly rent of $2,300.00; and 3) subsequently executed three rent-stabilized

renewal leases for the periods of (a) December 1, 2016 - November 30, 2017 with a monthly rent of $2,300.00, (b) December 1, 2017 - November 30, 2018 with a monthly rent of $2,328.75, and (c) December 1, 2018 - November 30, 2019 with a monthly rent of $2,363.68 (*see* NYSCEF documents 50 [notice of motion, exhibit F], 75 [notice of cross motion, exhibit G]). Although Schaer's three rent-stabilized renewal leases all included a "rent stabilization rider" mandated by Rent Stabilization Law (RSL) § 26-511 (d), they did not contain the "J-51 Rider" required by RSL § 26-504 [c] (*id.*). Schaer remains in occupancy of apartment F14 (*see* NYSCEF document 66 [notice of cross motion, Schaer aff.]).

The original DHCR registration history for apartment F14 records that defendants: 1) registered the unit as "RS" (i.e., rent stabilized) during the years 1984 - 2009; 2) recorded it as "PE" (i.e., permanently exempt) from rent regulation as of August 3, 2009 by reason of "high rent vacancy"; 3) registered the unit as "PE" during the years 2010 - 2015; and 4) re-registered it as "RS" during the years 2016 and 2017 (*see* NYSCEF document 76 [notice of motion, exhibit H]). Subsequent DHCR filings show that defendants: 1) submitted an amended registration statement on January 14, 2019 which retroactively changed the unit's designation from "PE" to "RS" for the years 2009-2015, and included the amounts set forth on Schaer's leases as its "legal regulated rent" for those years; and 2) later also registered it as rent stabilized during the years 2018 and 2019 (*see* NYSCEF documents 57 [notice of motion, exhibit M], 77 [notice of cross motion, exhibit I]).

As previously noted, the parties have stipulated that the building was enrolled in the "J-51" real estate tax abatement program until June 30, 2009 (*see* NYSCEF document 61). As a result, apartment F14 was subject to the RSL by operation of law until that date (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332,

350 [(2020]). Apartment F14's lease history shows that Schaer took possession of the unit on December 1, 2008 while the building was still enrolled in the "J-51" program, that she still occupies the unit today, and that defendants never attached a "J-51" rider to any of her renewal leases (*see* NYSCEF documents 50, 66, 75). However, these facts are not dispositive of the unit's rent regulated status.

"[I]n buildings affected by *Roberts*, all of which were subject to the RSL regardless of J-51 benefits, apartments revert to their original rent-stabilized status after expiration of J-51 benefits" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 361). This case presents such a scenario. Under Real Property Tax Law (RPTL) § 489, enrollments in the "J-51" program endure for periods of either 14 or 34 years. Since the parties stipulated that the building exited the "J-51" program on June 30, 2009, its minimum period of enrollment would have commenced 14 years earlier; i.e., in 1995. Apartment F14's DHCR registration history shows that defendants recorded the unit as "RS" (rent stabilized) in 1995 with a "legal regulated rent" of $345.70 per month (*see* NYSCEF documents 57, 76, 77). Under the *Regina* holding, the unit merely resumed its original rent stabilized status when the building exited the "J-51" program in 2009.

Also under the *Regina* holding, no apartment deregulations were permitted until after a building exited the "J-51" program (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 350, citing *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285-287 [2009]). Once that happened, there were two possible paths toward lawful deregulation.[1] The first applies to apartments which were rent stabilized by operation of law

[1] The use of the past tense here is intentional. When the Housing Stability and Tenant Protection Act of 2019 (HSTPA) became effective on June 14, 2019, it repealed the deregulation

solely as a result of their buildings being enrolled in the "J-51" program and is governed by RSL § 26-504, the pertinent paragraph of which provides as follows:

> Upon the expiration or termination . . . of [J-51] benefits . . . any such dwelling unit shall be subject to this chapter *until* the occurrence of the *first vacancy* of such unit after such benefits are no longer being received *or* if *each lease and renewal* thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period *has included a notice* in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire, such dwelling unit shall be deregulated as of the end of the tax benefit period; . . .

(RSL § 26-504 [c] [emphasis supplied]).

> . . . [A]n apartment that becomes rent-stabilized upon the building owner's receipt of J-51 benefits remains stabilized upon the expiration of those benefits, except in two distinct instances: where the stabilized tenant vacates, or where the stabilized tenant had been consistently and properly notified in his leases that the apartment would become deregulated upon expiration of the tax benefits.

(*Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d 524, 527 [1st Dept 2012]; *see also Matter of Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569, 570 [1st Dept 2020]).

The second permissible path toward deregulation applied to apartments which were originally rent stabilized and resumed that status after their buildings exited the "J-51" program and was governed by the portion of the Rent Regulation Reform Act of 1993 (RRRA)[2] that permitted deregulation whenever a rent stabilized apartment became vacant with a "legal regulated rent" of at least $2,000 per month (*see e.g., Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 195 [1st Dept 2011]). This is the scenario which applies to apartment F14.

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procedures that had previously been permitted by the RSL and RSC. As a result, rent stabilized apartments could no longer be lawfully deregulated after that date.

[2] Now repealed (*see* fn 1).

As previously noted, apartment F14's lease history shows that Schaer took possession of it in 2008 while the building was enrolled in the "J-51" program and the unit was rent stabilized by operation of law (*see* NYSCEF documents 50, 74, 75). When the building exited the program in 2009, apartment F14 resumed its original rent stabilized status (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 361). Although Schaer's rent at that time was above the $2,000.00 per month deregulation threshold (as were all of her renewal rents), she never vacated apartment F14 (*see* NYSCEF document 66, ¶ 2). Because no vacancy has ever taken place, the unit has retained its rent stabilized status (*Gersten v 56 7th Ave. LLC*, 88 AD3d at 195). The RSL's deregulation procedures were repealed by the HSTPA as of June 14, 2019 (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 362). As a result, apartment F14 remains rent stabilized today. It is no moment that defendants originally registered the unit as "PE" (permanently exempt from rent regulation) between 2009 and 2015, or that they retroactively re-registered it as "RS" (rent stabilized) for those years in their 2019 amended filing.[3] It is well settled that parties may not contract to confer or remove an apartment's rent stabilized status and that they are not the arbiters of whether an apartment is or is not subject to rent stabilization (*see e.g.*, *Kattan v 119 Christopher LLC*, 204 AD3d 470 [1st Dept 2022]; *Reichenbach v Jacin Invs. Corp., N.V.*, 190 AD3d 437 [1st Dept 2021]; *Gersten v 56 7th Ave. LLC*, 88 AD3d at 199; *Drucker v Mauro*, 30 AD3d 37 [1st Dept 2006]).

Defendants nevertheless argue that "Schaer's Apartment was subject to rent stabilization solely as a result of the [building's] receipt of J-51 benefits," and that their "failure to issue [Schaer] a J-51 rider cannot serve to extend rent stabilization rights indefinitely beyond the

[3] Or that they initially gave Schaer a non-rent-stabilized lease.

expiration of the J-51 benefits" (*see* NYSCEF document 59 [defendants' mem of law at 13-15]). Defendants' first point is incorrect. As noted, apartment F14 was rent stabilized when the building entered the "J-51" program, and it resumed that status when the building exited the program. Defendants' second point is inapposite. Service of "J-51" notices is a criterion specified in RSL § 26-504 (c), which only applies to apartments that were rent stabilized by operation of law because their buildings were enrolled in the "J-51" program. Consequently, both of defendants' arguments are rejected.

For their part, plaintiffs respond that "the legal rent for apartment F14 never exceeded the HRVD [i.e., high rent vacancy decontrol] threshold prior to Schaer's tenancy," and that "if the rent for apartment F14 had exceeded the HRVD threshold prior to Schaer's occupancy, the apartment would remain rent stabilized until the next vacancy as it is undisputed that Schaer did not receive the statutory notice required for earlier deregulation" (*see* NYSCEF document 90 [plaintiffs' mem of law at 13-19]). Plaintiffs' arguments miss the mark. It is irrelevant whether or not apartment F14's legal regulated rent ever exceeded the deregulation (HRVD) threshold since Schaer entered the unit while it was rent stabilized and she has never vacated it. Without a vacancy, Schaer's tenancy in the unit remains subject to the RSL (*Gersten v 56 7th Ave. LLC*, 88 AD3d at 195). Plaintiffs' arguments relating to service of a "J-51" notice are misplaced for the reason discussed above (i.e., RSL § 26-504 [c] does not apply to apartment F14). Thus, plaintiffs' arguments are rejected as well.

Accordingly, for the reasons set forth above, plaintiffs are entitled to partial summary judgment on the portion of their first cause of action that seeks a declaration that apartment F14 has been rent-stabilized since the commencement of Schaer's tenancy and remains so today and

defendants' motion for summary judgment on the portion of their first affirmative defense that sought a contrary declaration will be denied.

Cruz Apartment C4

The documentary evidence shows that: 1) Cruz initially took possession of apartment C4 pursuant to a rent stabilized lease that ran from September 1, 2013-August 31, 2014 with a monthly rent of $1,425.00;[4] and that she thereafter signed; 2) a one-year "renewal lease" that ran from September 1, 2014-August 31, 2015 with a monthly rent of $1,475.00; 3) a two-year "renewal lease" that ran from September 1, 2015-August 31, 2017 with a monthly rent of $1,675.00; 4) a one-year "renewal lease" that ran from September 1, 2017-August 31, 2018 with a monthly rent of $1,700.00; and 5) a one-year "renewal lease" that ran from September 1, 2018-August 31, 2019 with a monthly rent of $1,800.00 (*see* NYSCEF documents 51, 79 [notice of motion, exhibit G; notice of cross-motion, exhibit K]). Cruz's initial lease contained a "rent stabilization rider"; however, none of her renewal leases contained either a "rent stabilization rider" or a "J-51 rider" (*id.*). Cruz's initial lease also contained a "preferential rent rider" that stated that the $1,425.00 monthly figure was a "preferential rent," but that apartment C4's actual "legal regulated rent" was $2,085.57 per month (*see* NYSCEF documents 79 [notice of cross motion, exhibit K], 67 [notice of cross-motion, Cruz aff, ¶ 10]). None of Cruz's "renewal leases" contains a "preferential rent rider" (*id.* NYSCEF document 79 [notice of cross-motion, exhibit K]). Cruz states that she vacated apartment C4 after her final renewal period expired on August 31, 2019 (*id.*, NYSCEF document 67 [notice of cross-motion, Cruz aff, ¶ 2]).

[4] Cruz notes that, although she was not the tenant of record on apartment C4's initial lease, she was listed as the roommate of her sister, Renee Cruz, on that document, and that she was designated as the tenant of record on the four subsequent "lease renewals" (*see* NYSCEF document 67 [notice of cross-motion, Cruz aff, ¶ 8]).

The documentary evidence also shows that defendants leased apartment C4 to several other tenants between the time the building exited the "J-51" program in 2009 and Cruz took possession of the unit in 2013. These included non-parties: 1) Matt Thayer (Thayer), pursuant to a non-rent-stabilized lease that ran from June 1, 2009-May 31, 2010 with a monthly rent of $1,325.00 and a non-rent-stabilized "lease extension agreement" that ran from June 1, 2010-May 31, 2011 with a monthly rent of $1,295.00; 2) Banu Kushkimbayeva (Kushkimbayeva), pursuant to a non-rent-stabilized lease that ran from July 1, 2011-June 30, 2012 with a monthly rent of $1,275.00; and 3) Katherine Tarlov (Tarlov), pursuant to a non-rent-stabilized lease that ran from September 1, 2012-August 31, 2013 with a monthly rent of $1,325.00 (*see* NYSCEF documents 54-56, 83-85 [notice of motion, exhibits J-L; notice of cross-motion, exhibits O-Q]). None of their leases contained a "rent stabilization rider," a "J-51 rider" or a "preferential rent rider" (*id.*).

Apartment C4's original DHCR registration history recorded that: 1) defendants had registered the unit as "RS" (i.e., rent stabilized) on the registration statements filed between 1984 and 2008; 2) as "VA" (i.e., vacant) on the 2009 registration statement with a "legal regulated rent" of $1,818.78 per month; 3) as "PE" (i.e., permanently exempt) from rent regulation on the 2010 registration statement by reason of "high rent vacancy"; 4) as "VA" again on the 2011 registration statement with a "legal regulated rent" of $1,295.00 per month; and 5) that no registrations were filed for the unit for the years 2012-2016 (*see* NYSCEF documents 58, 80 [notice of motion, exhibit N; notice of cross-motion, exhibit L]).

Apartment C4's amended DHCR registration history further shows that: 1) defendants filed an amended DHCR registration statement on January 14, 2019 which retroactively designated apartment C4 as "RS" for the years 2011-2018; and 2) subsequently also filed a registration statement on July 31, 2019 designating the unit as "RS" for the year 2019 (*see*

NYSCEF document 81 [notice of cross-motion, exhibit M]). The amended DCHR history listed the rents in the Kushkimbayeva and Tarlov leases as apartment C4's "legal regulated rents" for 2012 and 2013 (respectively), but it did not list the rent in Thayer's 2009 or 2010 leases (*id.*). The amended history also records that the "legal regulated rent" for Cruz's initial 2013 lease was $2,085.57 per month, but that she paid a "preferential rent" of $1,425.00 per month (*id.*). This is the only instance where a "preferential rent" was listed on either of the unit's DHCR registration histories. Both DHCR histories recorded slight variances between the "actual rents paid" by apartment C4's tenants in the years 2005 through 2008 and its "legal regulated rents" for those years, but defendants did not list those variances as "preferential rents" on either rent history (*id.*). Further, the 2014 "legal regulated rent" set forth in the amended registration history ($2,085.57) is unexplainedly larger than both the preceding 2013 legal regulated rent ($1,325.00) and the subsequent 2015 legal regulated rent ($1,475.00), and neither the 2013 nor the 2015 rent was listed as a "preferential rent" (*id.*). These inconsistencies cast doubt on the accuracy of defendants' DHCR registration practices.

Like apartment F14, apartment C4 was rent stabilized when the building was first enrolled in the "J-51" program in 1995. The DHCR registration history shows that defendants had listed the unit as "RS" (rent stabilized) that year with a legal regulated rent of $525.68 per month (*see* NYSCEF documents 58, 80, 81). Thus, under the *Regina* holding, apartment C4 resumed its original status as a rent stabilized unit when the building exited the "J-51" program (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 361).

Unlike apartment F14, three vacancies took place in apartment C4 after the building exited the "J-51" program. The unit's lease history shows that defendants rented it to

Kushkimbayeva in 2011, to Tarlov in 2012 and to Cruz in 2013 (*see* NYSCEF documents 51, 55, 56, 79, 84, 85). Any of those vacancies would have provided a ground for deregulating apartment C4 had its legal regulated rent exceeded $2,000.00 when they occurred (*Gersten v 56 7th Ave. LLC*, 88 AD3d at 195). That was not the case during the first two vacancies, however. Apartment C4's lease history shows that Kushkimbayeva's 2011-2012 rent was $1,275.00 per month and that Tarlov's 2012-2013 rent was $1,325.00 per month (*id*., NYSCEF documents 55-56. 84-85). Neither of those rents exceeded the $2,000.00 per month deregulation threshold. Thus, the unit remained subject to rent stabilization during those two tenancies. However, when Cruz took possession of apartment C4, the actual rent listed on her 2013-2014 lease was $2,085.57 per month, even though that lease also specified that she pay a $1,425.00 monthly "preferential rent" (*id*., NYSCEF documents 51, 79). The former amount did exceed the deregulation threshold. Thus, it appears that apartment C4 became deregulated when Cruz took possession of it.

The arguments in defendants' memorandum overlook this fact and focus on irrelevant ones instead. Defendants assert that "[t]he last registered rent stabilized tenant was Jack Deboe, with a legal rent of $1,567.91 and a preferential rent of $1,350.00 for a term from November 1, 2007 through October 31, 2008" (*see* NYSCEF document 59 [defendants' mem of law at 15]). This is inaccurate. As discussed above, apartment C4 was rent stabilized by operation of law until the building exited the "J-51" program on June 30, 2009, and thereafter resumed its rent stabilized status (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 361). Thayer's lease took effect on June 1, 2009 while apartment C4 was still rent stabilized by operation of law, which also made him a "registered rent stabilized tenant" (*id.*, NYSCEF documents 54, 83). Defendants also assert that the

vacancies which occurred in the unit in 2010 and 2011 were sufficient to deregulate it (*id.,* NYSCEF document 59 [defendants' mem of law at 15-17]). This is incorrect. The 2010 vacancy was not a "vacancy" at all, but rather the occasion on which Thayer signed his renewal lease for the unit, and the monthly rent on that lease was $1,295.00; i.e., below the $2,000.00 deregulation threshold (*see* NYSCEF documents 54, 83). The 2011 vacancy that preceded Kushkimbayeva's tenancy was likewise not a basis for deregulating the unit because her lease specified a monthly rent of $1,275.00, which was also below the deregulation threshold (*id.*, NYSCEF documents 55, 84). Therefore, both of defendants' arguments miss the mark.

For their part, plaintiffs argue that "the legal rent for apartment C4 never exceeded the HRVD threshold prior to the expiration of J-51 benefits" (*see* NYSCEF document 90 [plaintiffs' mem of law at 19-20]). They particularly complain that the vacancy increases that defendants imposed on the unit before June 30, 2009 were neither credible nor justified (*id.*). This argument is misplaced. It challenges defendants' calculation of apartment C4's legal regulated rent in an attempt to establish that they imposed a rent overcharge. That is plaintiffs' second cause of action. However, their cross-motion only concerns the first cause of action for a declaration regarding the unit's regulatory status.

Plaintiffs also argue that "the legal rent for apartment C4 never exceeded the HRVD threshold after expiration of J-51 benefits due to application of the DHCR waiver rule" (*see* NYSCEF document 90 [plaintiffs' mem of law at 20-24]). This argument is also misplaced. The "waiver rule" applies in Article 78 proceedings where a trial court reviews a DHCR determination that disallowed rent increases which a landlord claimed it was entitled to under the RSC (e.g., vacancy increases, longevity increases, major capital improvement or individual apartment improvement increases). The "rule" is that the trial court will uphold, as rationally

based, a DHCR determination that the landlord waived its right to collect such increases by failing to timely apply them to the tenant's lease (*see e.g.*, *Matter of 81st Realty Corp. v New York State Div. of Hous. & Community Renewal*; 213 AD3d 610 [1st Dept 2023]; *Matter of Apar Realty Co. v State of New York Div. of Hous. & Community Renewal*, 286 AD2d 274 [1st Dept 2001]; *Matter of North Carolina Leasing Corp. v New York State Div. of Hous. & Community Renewal*, 156 AD2d 452 [2d Dept 1989]). That rule does not appear to apply in this action since this is not an Article 78 proceeding and there is no DHCR determination at issue here. Further, while plaintiffs correctly note that defendants failed to record vacancy increases on the non-rent-stabilized leases that they provided to Thayer, Kushkimbayeva and Tarlov, the documents submitted in connection with these motions show that defendants *did* record an 18% vacancy increase[5] on the "rent stabilization rider" to the rent stabilized lease that they provided to Cruz (*see* NYSCEF documents 51, 54-56, 79, 83-85). Thus, the record – undeveloped as it is – appears to support the conclusion that defendants did *not* waive their right to collect a vacancy increase at the commencement of Cruz's tenancy. Therefore, plaintiffs' "waiver rule" argument is unpersuasive.

Instead, it is worth reiterating that the 2011 vacancy in apartment C4 that preceded Cruz's tenancy, coupled with the vacancy increase on her initial lease which raised the unit's legal regulated rent above the RRRA's deregulation threshold, was sufficient to end the apartment's rent stabilized status at that time. As a result, plaintiffs are *not* entitled to a declaration that apartment C4 has been rent-stabilized since the commencement of Cruz's

[5] This was the permissible percentage increase that was specified on New York City Rent Guidelines Board Order (RGBO) # 44, which was in effect for one-year rent stabilized leases entered into between October 1, 2012 and September 30, 2013. Cruz's lease for apartment C4 commenced on September 1, 2013 (*see* NYSCEF documents 51, 79).

tenancy and remains so today, and that defendants are entitled to a contrary declaration. Accordingly, that portion of plaintiffs' cross motion that seeks partial summary judgment on their first cause of action with respect to Cruz will be denied, and defendants' motion seeking partial summary judgment on their first affirmative defense with respect to apartment C4 will be granted.

The second branch of defendants' motion seeks summary judgment on their ninth affirmative defense to the extent of dismissing the complaint. At the outset, that portion of defendants' motion seeking dismissal of plaintiffs' fourth, fifth and sixth causes of action which seek relief pursuant to pursuant to GBL § 349, will also be granted. This is primarily a rent overcharge action, and a party may not pursue relief for an alleged rent overcharge under GBL § 349 (*Haygood v Prince Holdings 2012 LLC*, 186 AD3d 1157 [1st Dept 2020]).

Also, that branch of defendants' motion seeking summary judgment dismissing the second, third and seventh causes of action with respect to Cruz will be granted. All of those claims hinge upon a finding that apartment C4 was subject to the RSL during Cruz's tenancy, and it has been determined that it was not. As a result, Cruz's dependent claims must fail.

That branch of defendants' motion as pertains to Schaer, however will be denied. Having determined that apartment F14 is a rent stabilized unit, it is possible that Schaer may prevail on her dependent rent overcharge claims once discovery is complete in this action and it is placed on the trial calendar. Defendants may renew their application for summary judgment at that time.

The final branch of defendants' motion seeks summary judgment dismissing the complaint as against Weinstein and Guarna on the ground that they are agents to a disclosed principal. It is true that, as a general rule, "an agent for a disclosed principal will not be

personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" (*News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 [1st Dept 2005] [internal quotation marks and citation omitted]; *see also Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459, 461–462 [1st Dept 2010]). An exception to that rule exists whereunder such an agent may still be held liable for his or her own affirmative wrongful acts (*see e.g.*, *Christie v Scheiner*, 125 AD3d 478, 479 [1st Dept 2015]). Therefore, summary judgment should generally not be granted in connection with a "disclosed principal" in cases where discovery has not been completed (*Elango Med. PLLC v Trump Palace Condominium*, 194 AD3d 543 [1st Dept 2021]) and as previously noted, discovery is not yet complete in this action. Accordingly, that branch of defendants' motion seeking partial summary judgment with respect to the claims against Weinstein and Guarna will be denied with leave to renew the application once discovery is complete in this action and it is placed on the trial calendar.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR § 3212, of defendants Park Terrace Realty, LLC, Metropolitan Property Services, Matthew Weinstein and Dominick Guarna (motion sequence number 002) is granted solely to the extent of granting partial summary judgment dismissing the fourth, fifth and sixth causes of action in the complaint in their entirety, and dismissing so much of the first, second, third and seventh causes of action as are asserted on behalf of co-plaintiff Vanessa Cruz, but is otherwise denied; and it is further

ORDERED that the cross-motion, pursuant to CPLR § 3212, of plaintiffs Claudia Schaer and Vanessa Cruz (motion sequence number 002) for summary judgment on the first cause of

action in the verified complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted with respect to Schaer but denied with respect to Cruz; and it is further

ADJUDGED and DECLARED that apartment F14 in the building located at 221 Seaman Ave. in the County, City and State of New York has been a rent-stabilized unit since the commencement of Schaer's tenancy and remains so today; and it is further

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

ORDERED that the parties shall appear for an in-person status conference in Pt 47 on July 6, 2023 at 9:30 a.m.

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5/31/2023
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	REFERENCE