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435 CENTRAL PARK WEST TENANT ASSOCIATION v. PARK FRONT APARTMENTS, LLC

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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435 CENTRAL PARK WEST TENANT ASSOCIATION, YASUTO TAGA, LYDIA BAEZ, CESAR PENA, JORGE MARTINEZ, MARTHA ARIF, JOY HARRIS, ALTON SWIFT, JENNIE MORTON-GARCIA, MARTHA ADAMS, ALLADIN WALTERS, VICTORIA FRASIER, JOSE REGALADO, JUAN HUNTT, CHRISTINE BARROW, GEORGE PARKER, BJORG JEAN-PIERRE, MARIA CRUZ, HIRAM CHAPMAN

Plaintiff,

- v -

PARK FRONT APARTMENTS, LLC,

Defendant.

----------X

INDEX NO. 452296/2016

MOTION DATE 04/20/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 232, 235, 236 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, and after oral argument, which took place on January 10, 2023, where Charles Alvarez, Esq. appeared on behalf of all Plaintiffs and Adam Lindenbaum, Esq. and Jeffrey Turkel, appeared on behalf of Defendant Park Front Apartments, LLC ("Defendant"), Defendant's motion for partial summary judgment pursuant to CPLR § 3212 against Plaintiffs Jorge Martinez, Martha Arif, Joy Harris, Jennie Morton-Garcia, Martha Adams, Alladin Walters, Juan Huntt, George Parker, Bjorg Jean-Pierre, Maria Cruz, and Hiram Chapman (collectively "Subject Tenants") is granted.

I. Procedural and Factual Background

As this case has a nearly seven-year long history, involving multiple trial and appellate level decisions which this Court is bound to follow, the Court will briefly provide the context leading up to this Decision and Order.

This action was commenced on November 23, 2016 by Plaintiffs (NYSCEF Doc. 1). Plaintiffs sought declaratory judgment that the building located at 435 Central Park West (the "Building") has been subject to the Rent Stabilization Law and N.Y.C. Admin Code §§ 26-501 (the "RSL") since at least November 2000. Plaintiffs also allege that Defendant failed to comply with the RSL (*id.*).

In 1969, the Building was financed by a mortgage that was insured and subsidized by the U.S. Secretary of Housing and Urban Development ("HUD"). The mortgage was paid off ahead of schedule in November of 2000. Thereafter, HUD and Defendant entered into a Use Agreement. For the duration of the Use Agreement, HUD and Defendant agreed to a new rent and regulatory regime for the Building. The Plaintiffs alleged they were never given notice that the mortgage was satisfied early, nor did they know that HUD and Defendant entered into a new Use Agreement. Plaintiffs allege that after execution of the Use Agreement, Defendant executed new leases with each of the Plaintiffs, used coercive tactics to deny them of their benefits under the Use Agreement, and began charging an annual rent increase of 7.5%. Plaintiffs alleged that the Building should have been subject to the RSL since November 2000, when the HUD mortgage was satisfied, and allege they were overcharged their rent pursuant to the RSL.

On January 13, 2017, Defendant filed its Answer and counterclaimed seeking declaratory judgment that the Building was always subject to HUD preemption, making the RSL inapplicable, and that the HUD Handbook does not apply to the Building, only the Use Agreement entered by

Defendant and HUD (NYSCEF Doc. 5). On the same day, Defendant moved for summary judgment on its counterclaim (NYSCEF Doc. 6).

On February 23, 2017, Plaintiffs cross-moved for partial summary judgment on their declaratory judgment cause of action seeking a declaration that the Building has been subject to the RSL since at least January 2001 (NYSCEF Doc. 26). By Decision and Order dated July 24, 2017, Hon. Carol R. Edmead denied Defendant's motion for summary judgment and granted Plaintiff's motion for partial summary judgment, finding that the Building was subject to the RSL as of December 29, 2000 (NYSCEF Doc. 60). Both parties appealed that decision and order (NYSCEF Docs. 62 and 64). Discovery continued while the appeals were pending.

On August 22, 2018, the First Department issued a decision and modified Justice Edmead's decision and order (NYSCEF Doc. 72). The First Department held that the Building did not become subject to the RSL until April 12, 2011, and that the HUD Handbook ceased to apply to the building as of December 29, 2000, when the HUD mortgage was satisfied (*id.*). The First Department found that the provision of the Use Agreement wherein Defendant agreed to apply HUD affordability restrictions to the Building until April 2011 preempted the RSL, but upon expiration of those restrictions on April 12, 2011, the Building became subject to the RSL (*see 435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 164 AD3d 411 [1st Dept 2018]).

After remittitur, discovery continued, and the note of issue was filed Plaintiffs on June 14, 2019 (NYSCEF Doc. 76). On June 21, 2019, Defendant moved for summary judgment again seeking dismissal of Plaintiffs' Complaint (NYSCEF Doc. 78). On August 5, 2019, Plaintiffs cross-moved for partial summary judgment on their cause of action for rent overcharge (NYSCEF Doc. 107). On October 31, 2019, the Hon. Carol R. Edmead issued a Decision and Order denying both Defendant's and Plaintiffs' motions for summary judgment (NYSCEF Doc. 159). On

November 7, 2019, Defendant appealed Justice Edmead's decision (NYSCEF Doc. 160). This denial was affirmed by the First Department on May 28, 2020 (NYSCEF Doc. 164). The First Department agreed that the Plaintiffs had raised an issue of fact as to whether Defendant tampered with a recertification process provided for under the Use Agreement and pressured and misled tenants for the purpose of improperly raising rents (*id.*). However, the First Department did not find that Plaintiffs had, as a matter of law, shown fraud to justify piercing the four-year lookback period in pre-HSTPA rent overcharge cases (*435 Cent. Park. W. Tenant Assn. v Park Front Apts LLC*, 183 AD3d 509 [1st Dept 2020]). The First Department also noted that "plaintiffs' overcharge claims fail unless they can prove fraud because, as indicated, the RSL imposed a four-year statute of limitations lookback period on overcharge claims." (*id.*)

On March 19, 2021, Defendant moved to engage in limited post-note of issue discovery or to vacate the note of issue in light of the First Department's May 28, 2020 decision (NYSCEF Doc. 165). In particular, Defendant sought discovery related to whether or not Plaintiffs would have qualified for recertification based on occupancy and income criteria had they actually recertified (NYSCEF Doc. 168). By Decision and Order dated June 24, 2021, Hon. Carol R. Edmead allowed the post-note of issue discovery to go forward as the information sought was critical to Plaintiffs' burden of proof in showing they were harmed or injured by Defendant's alleged fraud (NYSCEF Doc. 173). This was the only decision on the docket not appealed, and Justice Edmead's ruling that Plaintiff's need to show injury in order to prove fraud to pierce the four-year lookback period remains the law of the case.

On April 24, 2022, Defendant made the instant motion (NYSCEF Doc. 177). Defendant seeks leave to move for summary judgment despite the time to move for summary judgment having expired, and if leave is granted, seeks partial summary judgment based on newly discovered

evidence declaring that Defendant committed no fraud upon the Subject Tenants and the rent paid on the November 23, 2012, base date was valid (NYSCEF Doc. 177).

II. The Parties' Arguments

Defendant argues it is within the Court's discretion to allow the filing of a late summary judgment motion if good cause exists as to why the motion was not made sooner. Defendant cites to First Department precedent finding that where Court ordered discovery occurs post note of issue, and a motion for summary judgment is made due to newly uncovered evidence from the post note of issue discovery, leave to file a late summary judgment motion should be granted (*Quizhpi v Lochinvar Corp.*, 12 AD3d 252 [1st Dept 2004]).

Defendant argues that its prior motion for summary judgment should not bar the instant motion for summary judgment as this motion is based on facts that could not have been raised on the first motion for summary judgment (*Boston Concessions Group, Inc. v Criterion Ctr. Corp.*, 250 AD2d 435 [1st Dept 1998]). Defendant asserts it should be granted leave to file a late summary judgment motion for reasons of judicial economy, as it may potentially help narrow the issues to be heard at trial. In opposition, Plaintiffs argues, in conclusory fashion, and without citing any precedent, that Defendant has not stated sufficient good cause to allow for an untimely motion for summary judgment.

Defendant argues if it is granted leave to file a late summary judgment motion, it should be granted partial summary judgment on the Subject Tenants' cause of action for rent overcharge, as Subject Tenants cannot show that Defendant committed fraud as a matter of law. Defendant argues that the Court of Appeals' 2020 decision in *Regina Metro Co. LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020) established that fraud does not exist in rent overcharge cases unless the alleged fraud caused actual injury to the tenant. Defendant argues that

the First Department's decision in *Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569 [1st Dept 2020] held that a tenant's failure to prove actual reliance on alleged fraudulent conduct barred a colorable claim of fraud in a rent overcharge case. Defendant asserts that based on evidence uncovered in post-note of issue discovery, the Subject Tenants cannot prove injury as a result of any purported fraud, as even if they did recertify for HUD benefits subject to the Use Agreement, they would not qualify based on their income or occupancy requirements.

In opposition, Plaintiffs argue that they do not need to show actual injury. Plaintiffs argue that *Regina's* reference to the common law fraud elements was limited to a single footnote, and that the Court of Appeals would not create new requirements for rent overcharge cases in a footnote. Plaintiffs argue that subsequent First Department precedent has cast doubt on Defendant's interpretation of *Regina*, as the First Department has held that the *Regina* Court's recitation of common law fraud was non-binding dicta (*Montera v KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021]). Plaintiffs also argue that *Kostic* does not support Defendant's position because in *Kostic* there was not a single reference to an "injury" element or standard for fraudulent rent overcharge schemes.

Plaintiffs argue that even if they were required to show actual injury, such injury does exist. Plaintiffs argue that Defendant failed to comply with provisions of the HUD Handbook which requires a landlord to send a second and third notice for recertification if a tenant does not recertify in time. Further, Plaintiffs argue that Defendant failed to provide notice of non-compliance with HUD's Occupancy Requirements. Plaintiffs argue that Defendant was required to analyze the household composition and apartment size of each tenant and to offer a smaller apartment if the household size did not match the apartment size. As Defendants did not comply with these

procedures, but still increased the Subject Tenants' rents, Plaintiffs argue that Defendants alleged fraud injured the Subject Tenants.

In reply, Defendant argues that the law of the case doctrine bars Plaintiffs legal arguments regarding whether actual injury must be shown. Defendant argues that Justice Edmead's June 2021 Decision and Order allowing post note of issue discovery, an order Plaintiffs never appealed, constitutes the law of the case. Defendant asserts that in the Decision and Order, the Court held that reliance and injury are both necessary and required *prima facie* elements of a rent overcharge case. Further, Defendant argues that the First Department has already ruled that the Use Agreement exclusively governed the Building to the exclusion of the HUD Handbook, and therefore Plaintiff's arguments in opposition, to the extent they are based on the HUD Handbook, are contrary to the law of the case.

Defendant argues that Plaintiffs' arguments regarding recertification are inapplicable, as the prepayment of the HUD mortgage converted the Building from a HUD Subsidized Project governed by the HUD Handbook to a HUD Regulated Project governed by the Use Agreement (*435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 164 AD3d 411 [1st Dept 2018]). Defendant asserts, therefore, that the safeguards in the HUD Handbook cited by Plaintiffs in opposition to the motion are not applicable. Defendant also argues that Plaintiffs have not submitted any evidence or counterstatement of undisputed material facts in opposition to the instant motion for summary judgment, and therefore the Subject Tenants should be deemed to have admitted to underutilizing their apartments or to being over-income.

After oral argument, the Court requested supplemental briefing regarding the issue of whether or not a showing of injury is required in order to prove fraud for the purposes of a rent overcharge case. Plaintiffs assert that the First Department's recent decisions have found that there

has been no change of law with regards to rent overcharge actions that allege fraud (*see Stella Quinatoa, et al. v Hewlett Associates, LP*, 205 AD3d 654 [1st Dept 2022]; *see also Davis v Graham Ct. Owners Corp.*, 211 AD3d 629 [1st Dept 2022]). In its brief, Defendant argues that *Quinatoa* and *Davis* do not apply as broadly as Plaintiffs assert. Rather, Defendant highlights that the First Department in *Quinatoa* actually analyzed fraud under the common law elements laid out in *Regina* where it stated "Here, the complaint sufficiently sets forth the elements of "representation of material fact, falsity, scienter, reliance and injury" (*Quinatoa*, 205 AD3d at 655). Defendant also argues that *Davis* does not stand for the proposition that injury must not be proven, since in that case the Landlord made fraudulent individual apartment improvements, therefore the base date rent was inherently unreliable making the Tenant's injury obvious.

III. Discussion

A. Leave to File a Late Summary Judgment Motion

As a preliminary matter, the Court finds there exists sufficient good cause to grant leave for Defendant's untimely summary judgment motion. Failure to secure necessary discovery prior to the filing of note of issue has constituted good cause in explaining the delay in filing a timely motion for summary judgment (*Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403 [1st Dept 2005]). This is especially true in a case such as this, where the court issued multiple orders directing discovery subsequent to the filing of the note of issue (*Quizhpi v Lochinvar Corp.*, 12 AD3d 252 [1st Dept 2004]). As the prior judge assigned to this case issued multiple orders directing the parties to engage in post-note of issue discovery, which she deemed necessary given new developments in the law, this Court finds good cause exists to allow this untimely motion for summary judgment.

B. Defendant's Motion for Summary Judgment

i. Standard

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]).

ii. Plaintiffs' Requirement to Show Injury to Prove Fraud

Although Plaintiffs argue to the contrary, both binding precedent and the law of the case requires Plaintiffs to show an actual injury to pierce the four-year look-back period for pre-HSTPA cases (*see generally Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 356 n. 7 [2020] [stating "fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury"]). Indeed, the First Department, Second Department, and trial courts have all frequently analyzed a showing of fraud according to the common law elements laid out by the Court of Appeals in *Regina*. (*See Austin v 25 Grove Street LLC*, 202 AD3d 429 [1st Dept 2022] [question of fact regarding scienter precluded summary judgment on tenants' claim alleging fraud in rent overcharge case]; *Gridley v Turnbury Village,*

LLC, 196 AD3d 95 [2d Dept 2021]; *Montera v KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021] [denying motion for summary judgment as there remained a triable issue of fact regarding Tenant's justifiable reliance on alleged fraud]; *Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569, 570 [1st Dept 2020] [stating that reasonable reliance is an element of fraud for purposes of evading the four-year lookback restriction for pre-HSTPA overcharge claims]; 601 *West Realty, LLC v Algarin*, 76 Misc.3d 1228[A] [Civ Ct. New York City 2022]).

Plaintiff's reliance on *Quinatoa v Hewlett Associates, LP*, 205 AD3d 654 (1st Dept 2022) is inapposite to the case at bar, as that decision dealt with the pleading requirements for a motion to dismiss rather than an evidentiary burden on a motion for summary judgment. Indeed, the First Department in *Quinatoa* simply reaffirmed that if fraud has successfully been alleged, the tenant's recourse is the default formula to set the base date rent (*id.* at 654). However, *Quinatoa* does not contradict other First Department precedent that looks to the common law elements of fraud to determine if the four-year lookback period may be pierced. Rather, the First Department in *Quinatoa* held the opposite and utilized the common law elements of fraud in its analysis, stating "the complaint sufficiently sets forth the elements of 'representation of material fact, falsity, scienter, reliance and injury'" (*id.* quoting *Regina*, 35 NY3d at 356 n. 7 [2020]).

Plaintiff's reliance on *Davis v Graham Court Owners Corp*, 211 AD3d 629 (1st Dept 2022) is similarly unpersuasive, as the First Department in that case did not explicitly contradict or overrule the plethora of other First Department precedent which applied the elements of fraud listed in *Regina.* Rather, the First Department merely affirmed the trial judge's finding of fraud after a trial (*id.*).

In any event, the law of the case doctrine prevents this Court from finding that Plaintiff need not show any injury to prove fraud. Pursuant to the law of the case doctrine, parties or their

privies are barred from relitigating an issue decided in the ongoing action where there was a full and fair opportunity to address the issue (*Carmona v Mathisson*, 92 AD3d 492, 493 [1st Dept 2012]). In her June 2021 order allowing post-note of issue discovery, Justice Edmead found that "[i]nclusive in the universe of essential elements for Plaintiffs' burden of proof, to wit: harm, injury, and reliance, is the information sought by Defendant's discovery demand." In coming to her Decision and Order, Justice Edmead analyzed both *Regina* and the First Department's decision applying *Regina*, *In Re Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569 [1st Dept 2020]. Justice Edmead's Decision and Order came after a fully briefed motion sequence (*see generally* Motion Sequence #003). Crucially, Justice Edmead's Decision and Order was never appealed, reversed, or modified; and therefore, is the law of the case. The Court cannot simply disregard Justice Edmead's prior ruling, as well as the plethora of binding precedent. Therefore, the Court cannot accept Plaintiffs' argument that it does not need to prove an injury to prove fraud sufficient to pierce the four-year lookback period.

iii. Defendant's Burden for Summary Judgment

As previously stated, and promulgated by the Court of Appeals, to pierce the four-year look back period in pre-HSTPA rent overcharge cases, Plaintiff must show evidence of fraud (*Regina Metropolitan Co., LLC v New York State Div. of Hous. And Community Renewal*, 35 NY.3d 759, 768-769 [2020]). Further, fraud, for purposes of piercing the four-year look back period, requires "evidence [of] a representation of material fact, falsity, scienter, reliance and injury" (*id.* at 769 n. 7 quoting *Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]). To prevail on its motion for partial summary judgment, Defendant must show, as a matter of law, that the Subject Tenants cannot, as a matter of law, show fraud. Defendant argues that it has done so by asserting that even if Defendant did tamper with the recertification process pursuant to the Use

Agreement, the Subject Tenants cannot show they were injured by that allegedly fraudulent tampering because they could not have recertified anyway, and therefore they have no injury to satisfy the required elements of fraud.

The Use Agreement which governed the Building at the time of the Subject Tenants' recertification states in section 3 that "[t]he 120 housing units in the Project shall be used solely as rental housing for Lower and Moderate Income Families except that no Current Tenant shall be required to relocate on the basis of his or her income." (NYSCEF Doc. 182 at § 3).

Section 3(d) of the Use Agreement provides that:

> "If, as of the date of recordation of this Use Agreement, a Current Tenant is paying the "BMIR market rent" because the Current Tenant has failed or refused to recertify his or her income, the Housing Owner shall notify each such Current Tenant in writing that he or she shall have twenty-one (21) days after the provision of such notice in which to provide a signed recertification of income. The Housing Owner shall make a reasonable effort to verify the accuracy of any such income certifications and the Housing Owner shall have no further obligations to obtain income certifications from such Current Tenants who do not provide income certifications…
>
> Notwithstanding any other limitation of this Use Agreement, the Housing Owner may implement annual rent increases of seven and one-half percent (7.5%) for any Current Tenant…who: (a) refuses to provide a recertification of income as required by this Use Agreement or such tenant's lease, or (b) has an income exceeding one hundred and ten percent (110%) of ninety five percent (95%) of Area Median Income, or (c) is paying the "BMIR market rent" (110% of the BMIR Contract Rent) on the date of this Use Agreement or (d) otherwise would be ineligible to pay the BMIR Contract Rent."

Thus, pursuant to the plain terms of the Use Agreement, merely recertifying would not grant the Subject Tenants the HUD benefits under the Use Agreement. Rather, the Subject Tenant had to be eligible to pay the BMIR Contract Rent based on income and occupancy. The discovery produced by the Subject Tenants establishes *prima facie* that even if Defendant did tamper with the recertification process as alleged, these Subject Tenants would not have met the income or occupancy criteria required for HUD benefits under the Use Agreement.

Each of the Subject Tenants disclosed in post-note of issue discovery documents and affidavits pertaining to their income and occupancy of their apartments in 2001 when they would have been eligible for recertification under the Use Agreement (NYSCEF Docs. 186-197; 201; 214-216). In further support of their motion, Defendant provided an affirmation of Scott Ahroni, Esq., ("Ahroni") an attorney who specializes in performing forensic analyses of taxpayer records (NYSCEF Doc. 202-203). In reviewing the tax documents produced by the Subject Tenants, Ahroni provided sworn testimony that the Tenants Jorge Martinez, Joy Harris, Martha Adams, Juan Huntt, and Maria Cruz all provided evidence that their adjusted gross income was higher than the applicable BMIR Income Limit and therefore would not qualify for recertification in 2001. Each of the subject tenants also provided an affidavit stating who they were residing with in their apartments on the date they could recertify. Tenants Jorge Martinez, Martha Arif, Alladin Walters, George Parker, Bjorg Jean-Pierre, and Hiram Chapman all admitted that they occupied two-bedroom apartments as single member households or as a couple, and therefore were underutilizing their apartments. Thus, at the time the Subject Tenants were each eligible for recertification, they would not have qualified for HUD benefits and would have been required to pay the market rent.

Defendant has met its *prima facie* burden on this motion for summary judgment. Even assuming arguendo the Subject Tenants can satisfy their burden in proving misrepresentation of material fact, falsity, scienter, reliance, they cannot show they suffered an injury as they were never entitled to HUD benefits at the time of the allegedly fraudulent behavior (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 [2017] [Court of Appeals affirms dismissal of Complaint where Plaintiff failed to assert compensable damages resulting from alleged fraud]).

iv. The Subject Tenants Fail to Raise a Triable Issue of Fact

A party opposing a motion for summary judgment must "assemble, lay bare, and reveal his [or her] proofs in order to show his defenses are real and capable of being established on trial...and it is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Minteral* Products, 194 AD2d 482, 483 [1st Dept 1993] quoting *Tobron Office Furniture Corp. v King World Productions, Inc.,* 161 AD2d 355, 357 [1st Dept 1990]). In opposition to Defendant's motion for partial summary judgment, the Subject Tenants submit an affirmation of counsel as well as a portion of the HUD Handbook. There were no affidavits or other documentation provided which would create a triable issue of fact regarding whether Subject Tenants could have qualified for the BMIR Contract Rent in 2001. While the Subject Tenants argue that the Defendant did not provide the Subject Tenants the adequate notice or household analysis pursuant to Chapter 5 of the HUD Handbook, Defendant correctly points out that the First Department already has held that the Use Agreement and not the HUD Handbook regulated the building at the time of the Subject Tenants' recertification after the HUD financed mortgage was paid off in 2000.

Specifically, in *435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 164 AD3d 411, 415 (1st Dept 2018), the First Department held:

> "As long as the building was a project financed by a HUD mortgage, it was subject to the HUD Handbook.... However, once the loan was paid off and the Regulatory Agreement terminated, the building ceased to be such a project. Plaintiffs failed to identify any continuing basis for applying the Hud Handbook to a building that had since been regulated pursuant to the terms of the Use Agreement requiring the preservation of low-income housing.".

The recertification at issue was pursuant to the Use Agreement. Therefore, the notice requirements which the Plaintiffs argue Defendant did not comply with, which are contained in the HUD Handbook, and which contravene the expressly provided for notice requirements in the Use Agreement, are insufficient to defeat summary judgment. The dearth of any factual evidence

from any of the Subject Tenants proffered in opposition to Defendant's motion prevents this Court from denying Defendant's motion for partial summary judgment. Likewise, Plaintiffs point to nowhere in the Use Agreement where there is a requirement for Defendant to offer tenants who were underutilizing their apartments smaller apartments so that they may qualify for a BMIR Contract Rent.

Indeed, it appears from the text of the Use Agreement that it was put in place to balance multiple interests and objectives of the parties. Defendant, by satisfying the HUD mortgage early, received a less onerous regulatory scheme to govern the building. HUD still maintained some regulation over the building through the Use Agreement and provided guidelines so that many apartments would still be reserved for lower to moderate income families as originally envisioned when the HUD mortgage was first issued. Tenants were given one last opportunity to recertify, but if they did not qualify for a BMIR Contract Rent, they would not be forced to leave their apartments, and therefore their interests were protected. Finally, the interests of HUD's mission to provide quality housing to low and moderate income individuals were protected by the provisions that allowed annual rent increases of 7.5% for individuals who remained in their apartments but did not qualify for BMIR Contract Rent – this provided an incentive that, gradually, individuals who did not need HUD benefits would vacate their apartments so that those who did qualify for HUD benefits could rent a regulated apartment. The purpose of the Use Agreement, therefore, was not to make the entirety of the HUD Handbook and its more onerous regulations apply to the Building as Plaintiffs argue in opposition to this motion for summary judgment. It is for the aforementioned reasons that the First Department found that the HUD Handbook ceased regulating the Building as of December 29, 2000 after the HUD mortgage was paid off (*435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 164 AD3d 411, 415 (1st Dept 2018).

The Court of Appeals, and multiple Appellate and Trial Courts have held that to successfully prove fraud, Tenants must prove misrepresentation of material fact, falsity, scienter, reliance, and injury (*see* NYSCEF Doc. 173; *see also Regina Metropolitan Co., LLC v New York State Div. of Hous. And Community Renewal*, 35 NY.3d 759, 768-769 [2020]) *Austin v 25 Grove Street LLC*, 202 AD3d 429 [1st Dept 2022]; *Quinatoa v Hewlett Associates, LP*, 205 AD3d 654 [1st Dept 2022]; *Gridley v Turnbury Village,* LLC, 196 AD3d 95 [2d Dept 2021]; *Montera v KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021]; *Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569, 570 [1st Dept 2020]; *601 West Realty, LLC v Algarin*, 76 Misc.3d 1228[A] [Civ Ct. New York City 2022]). As Defendant has conclusively established via the Subject Tenant's tax documents and affidavits disclosed during discovery, the affidavit of Sinclair Haberman, and through the sworn testimony of Mr. Ahroni, an attorney who specializes in forensic accounting, that the Subject Tenant's would not have qualified for BMIR Contract Rent under the Use Agreement in 2001, the Subject Tenants, as a matter of law, cannot satisfy the injury element necessary to prove fraud. Indeed, even if Defendant did impermissibly tamper with the recertification process, as these Subject Tenants would not have qualified for BMIR Contract Rent even if Defendant carried out the recertification process flawlessly, they cannot, as a matter of law, assert injury as a material element of fraud.

The Court of Appeals has held that for a false representation to give rise, under any circumstances, to a cause of action based on fraud, either in law or equity, reliance on the false representation must result in injury, and if the fraud causes no loss, then the plaintiff has suffered no damages (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 [2017]). Nor are nominal damages available where to prove fraud an actual injury must be alleged (*id.* at 144; *see also generally, Regina Metropolitan Co., LLC v New York State Div. of Hous. And Community*

Renewal, 35 NY.3d 759, 768-769 [2020]) The Subject Tenants have failed to raise a material issue of fact related to their lack of any pecuniary injury. Therefore, Defendant's motion for partial summary judgment against the Subject Tenants on their second cause of action relating to rent overcharge is granted.

Accordingly, it is hereby,

ORDERED that Defendant Park Front Apartments, LLC's motion for partial summary judgment against the Subject Tenants is granted to the extent that the Subject Tenants are unable to prove fraud as a matter of law, and that the rent actually paid by each of the Subject Tenants on the November 23, 2012 base date was valid; and it is further

ORDERED that at the time of trial, the only remaining issues to be determined with respect to the Subject Tenants on their Second Cause of Action alleging rent overcharge are the amount of the overcharge in excess of the base date rent, if any, and whether any such overcharge was willful; and it is further

ORDERED that within ten days of entry, counsel for Defendant Park Front Apartments, LLC shall serve a copy of this Decision and Order with notice of entry on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

3/17/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE