SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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BERTON ROSE and MARIETTA HALE,

Plaintiffs,

- v –

GAZIVODA 118 LLC,

Defendant.

INDEX NO. 152051/2020

MOTION DATE 11/14/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 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, 98, 99 were read on this motion to/for JUDGMENT - SUMMARY.

In this rent overcharge action, plaintiffs Berton Rose (Rose) and Marietta Hale (Hale) (together, plaintiffs) move pursuant to CPLR 3212 for an order (1) granting summary judgment in favor of plaintiffs on their first and second causes of action alleged in their complaint, (2) granting summary judgment dismissing defendant Gazivoda 118 LLC's (defendant) first and second counterclaims, and (3) granting partial summary judgment on plaintiffs' third cause of action on the issue of liability. Defendant opposes plaintiffs' motion. For the following reasons, plaintiffs' motion is granted in part and denied in part.

Background

The following facts are drawn from the parties' Rule 202.8-g statements and counterstatements, as well as accompanying exhibits and affidavits. These facts are undisputed unless otherwise noted.

Rose is the tenant of record of residential apartment Unit 7D (the Apartment), located at 118 East 93rd Street, New York, NY 10126 (the Building) (NYSCEF # 44 – 202.8-g ¶ 6; NYSCEF # 41 – Rose aff ¶¶ 1-4; NYSCEF #s 49-56). At all relevant times, Rose has resided in the Apartment with his wife, Hale, who was added as a co-tenant to the Apartment's lease in 2018 (202.8-g ¶¶ 16, 24; Rose

aff ¶ 5; NYSCEF # 54). As of 2020, defendant is the current landlord and owner of the Building (NYSCEF # 69 – Gazivoda aff ¶ 1).[1]

The Apartment was first registered with the New York State Division of Housing and Community Renewal (DHCR) in 1984 (202.8-g ¶ 7; NYSCEF # 57 at 2). DHCR's records indicate that, beginning in 2005, the Apartment was registered as "permanently exempt" and designated as a "high rent vacancy" (*see* 202.8-g ¶ 8; NYSCEF # 57 at 4; NYSCEF # 95 – counterstatement ¶ 8; Gazivoda aff ¶¶ 7-8; NYSCEF # 73 at 2). It is undisputed that, at the time of this designation, the Building was receiving J-51 tax benefits (*see* 202.8-g ¶ 9; counterstatement ¶ 9; NYSCEF # 47).

Plaintiffs took possession of the Apartment in October 2009 (202.8-g ¶ 11; Rose aff ¶ 3, 5). Specifically, Rose's initial lease commenced on October 1, 2009, and expired on September 30, 2011 (202.8-g ¶ 11; NYSCEF # 49). The rent charged under this initial lease was $3,300 per month, and the lease was not rent-stabilized (202.8-g ¶ 11; Rose aff ¶ 6; Gazivoda aff ¶ 9). At the time, the Apartment was designated by DHCR as an "EXEMPT APARTMENT – REG NOT REQUIRED" (*see* NYSCEF # 57 at 4). Thereafter, between 2011 and 2017, Rose executed four lease renewals for the Apartment for the rental periods of October 1, 2011, to September 30, 2013; October 1, 2013, to September 30, 2015; October 1, 2015, to September 30, 2017; and October 1, 2017, to September 30, 2018, respectively (202.8-g ¶¶ 12-15; Rose aff ¶¶ 10-13; Gazivoda aff ¶¶ 10-13; NYSCEF #s 50-53). The rent charged to Rose during these periods was $3,500 per month, $3,800 per month, $4,100 per month, and $4,100 per month, respectively, and none of the renewals indicated that the Apartment was rent-stabilized (*see* 202.8-g ¶¶ 12-15, 25-26; NYSCEF #s 50-53).

Meanwhile, on or about August 31, 2016, another set of tenants in the Building (residing in Unit 6C), through counsel, sent a letter to defendant's predecessor, UES 93rd Street, L.P., indicating that Unit 6C was improperly deregulated for high rent vacancy while the Building was receiving J-51 tax benefits, and as a result they had been overcharged and were entitled to a refund (*see* 202.8-g ¶ 19; NYSCEF # 60). Defendant's predecessor responded on October 7, 2016, explaining that it had registered the apartment as rent stabilized, updated the tenants' legal regulated rent to be $3,663.50, and provided a refund for any excess amount paid, with interest (counterstatement ¶ 19; NYSCEF # 60 at 4-6).

Rose affirms that, two years later, in or around 2018, he learned that the Apartment was improperly deregulated because the Building was receiving J-51 tax benefits (*see* Rose aff ¶¶ 16-20). Consequently, on or about March 30, 2018, Rose filed a rent overcharge complaint with DHCR (202.8-g ¶ 20; NYSCEF # 59). Rose's DHCR complaint alleged that defendant's predecessor improperly deregulated the

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

Apartment while receiving J-51 tax benefits, failed to register the Apartment as rent stabilized, and failed to offer Rose a rent-stabilized lease (202.8-g ¶ 20; NYSCEF # 59 at 1-3). A few months later, on May 10, 2018, defendant's predecessor sent Rose a letter acknowledging the rent-stabilized status of the Apartment and enclosing a refund of $56,941 "representing any overpayments made over the past 4 years []as measured from the filing date of [the] rent overcharge complaint filed with DHCR, plus interest" (the Refund) (202.8-g ¶ 21; counterstatement ¶ 21; NYSCEF # 63). Although it is undisputed that Rose accepted the Refund (*see* Rose aff ¶ 22), the parties dispute whether the Refund resolved all of Rose's overcharge claims (*see* 202.8-g ¶ 22; counterstatement ¶ 22). In any event, according to DHCR's records, defendant's predecessor re-registered the Apartment with DHCR as rent stabilized on May 15, 2018 (202.8-g ¶ 21; NYSCEF # 58; *see also* Gazivoda aff ¶ 16). Eventually, on January 21, 2020, Rose withdrew the DHCR complaint and on January 31, 2020, DCHR issued an order terminating the proceeding (202.8-g ¶ 23; NYSCEF # 59 at 9).

After Rose filed the DHCR complaint and received the Refund, plaintiffs renewed their lease for the Apartment for a lease period commencing on October 1, 2018, and expiring September 30, 2020 (202.8-g ¶ 16; NYSCEF # 54). The rent charged under this lease was $3,124.95 per month, and the lease renewal was, unlike prior leases, designated as rent-stabilized (*see* 202.8-g ¶ 16; NYSCEF # 54). Plaintiffs thereafter renewed their lease two additional times for two-year periods commencing on October 1, 2020, and October 1, 2022, respectively (202.8-g ¶¶ 17-18; counterstatement ¶ 17-18; NYSCEF #s 55-56). Both renewals were for rent-stabilized leases, and the rent charged under these leases were $3,156.20 and $3,314.01 per month, respectively (202.8-g ¶¶ 17-18).

On February 25, 2020, plaintiffs commenced this action, asserting causes of action for (1) a declaratory judgment (a) asserting the Apartment has at all times been covered by the Rent Stabilization Law (RSL) and the Rent Stabilization Code (RSC), (b) determining the amount of legal regulated rent, and (c) directing defendant and its successors to comply with the provisions of the RSL and RSC as to plaintiffs' tenancy; (2) damages related to rent overcharges incurred during the applicable recovery period; and (3) reimbursement of costs, fees, and expenses incurred in prosecuting this action (NYSCEF # 1 ¶¶ 53-61). On December 22, 2020, defendant filed its answer with counterclaims seeking sanctions against plaintiffs for filing of an allegedly frivolous litigation, as well as attorneys' fees pursuant to the parties' leases (NYSCEF # 15 ¶¶ 24-28). Plaintiffs filed their response to defendant's counterclaims on December 31, 2020 (NYSCEF # 16). A Note of Issue certifying that discovery was complete was filed on April 28, 2023 (NYSCEF # 39)

Legal Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). Failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Only once a prima facie showing is made does the burden shift 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 of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party *(see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012]). Although summary judgment is "considered a drastic remedy," "when there is no genuine issue to be resolved at trial, the case should be summarily decided" (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]).

Discussion

I. Plaintiffs' Causes of Action

Plaintiffs seek summary judgment in their favor as to their first and second causes of action, and summary judgment as to liability on their third cause of action (*see* NYSCEF # 43 – MOL at 2-5; NYSCEF # 98 – Reply at 1-12). A further relief plaintiffs seek is a declaration that the Apartment has been covered by 1the RSL and RSC during their tenancy (MOL at 7; Reply at 1) and a declaration of the amount of legal regulated rent to which they are entitled, damages for defendants' alleged rent overcharges, and an injunction directing defendant to comply with the RSL and RSC by registering the correct legal regulated rent (MOL at 7-8).

Addressing the issue of legal regulated rent and rent overcharges, plaintiffs aver that, pursuant to the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and the Court of Appeals' subsequent ruling in *Matter of Regina Metro. Co., LLC v N.Y. State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020] [hereinafter *Regina*]), the relevant "Base Date" for calculating plaintiffs' legal regulated rent is June 14, 2015 (MOL at 8-11). Plaintiffs then argue that, for purposes of calculating the "Base Date Rent" for their overcharge claim, the court should review pre-Base Date rental history and apply the "default formula" to ascertain the proper "Base Date Rent" for the Apartment (*id.* at 11-21; Reply at 4-10). That is because, in plaintiffs' view, the record supports a colorable claim of a fraudulent scheme to deregulate the Apartment (MOL at 11-12; Reply 4-10). Plaintiffs relatedly contend that, given this purported scheme, the record establishes that they are entitled to treble damages (MOL at 21-22; Reply at 10-12).

In opposition, defendant first contends that plaintiffs' first cause of action should be dismissed as moot because it has already acknowledged that the Apartment is subject to rent stabilization (NYSCEF # 96 – Opp at 6-7). Defendant separately disputes plaintiffs' purported calculation of rent overcharge, averring that the "Base Date" for any rent overcharge calculation must be four years prior to

the filing of plaintiffs' action and that plaintiffs have failed to make a prima facie showing of fraud that would warrant looking beyond the "Base Date" for purposes of calculating any rent overcharge and treble damages (*id.* at 8-22).

The court notes at the outset that, although defendant's predecessor registered the apartment as "permanently exempt" with DHCR and designated it as a "high rent vacancy" as early as 2005 (*see* 202.8-g ¶ 8; NYSCEF # 95 – counterstatement ¶ 8), it was receiving J-51 benefits and continued to do so at the start of plaintiffs' tenancy (*see* 202.8-g ¶ 9; counterstatement ¶ 9; NYSCEF # 47). Yet, despite receiving these benefits, defendant never provided notice of its J-51 benefits in either the initial lease or subsequent renewal leases, or otherwise re-registered the Apartment as rent stabilized (*see* 202.8-g ¶¶ 11-15, 25-26; NYSCEF #s 49-53). Instead, it was only after plaintiffs initiated a proceeding before DHCR that defendant's predecessor re-registered the Apartment as rent stabilized and offered plaintiffs a rent-stabilized renewal lease (202.8-g ¶ 23; NYSCEF # 59 at 9; 202.8-g ¶ 16; NYSCEF # 54). Based on these undisputed facts, the record supports a conclusion that, since the initial lease in 2009, plaintiffs' tenancy has been, and continues to be, subject to the RSL and RSC (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 280-286 [2009]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 194 [1st Dept 2011] ["If the lease does not contain the requisite notice, occupied units remain subject to rent stabilization until a vacancy occurs after the expiration of the J-51 benefits"]). However, as explained below, plaintiffs have ultimately failed to make a prima facie showing of their entitlement to summary judgment as a matter of law with respect to their first and second causes of action.

To start, plaintiffs failed to establish that the "Base Date" for their recovery period should be set at June 14, 2015, i.e., four years prior to the enactment of the HSTPA. As relevant here, before it was amended by the HSTPA, CPLR 213-a provided for a "strict 'lookback' period" for overcharge claims, only "permitting recovery of rent overcharges four years prior to the filing of a tenant's complaint" (*see Aras v B-U Realty Corp.*, 221 AD3d 5, 8 [1st Dept 2023]; former CPLR 213-a ["[a]n action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged"]). Part F of the HSTPA subsequently amended CPLR 213-a so that the recovery period for overcharge claims was extended to "six years before [an] action is commenced or complaint is filed" (CPLR 213-a). But, despite these comprehensive changes under the HSTPA, the Court of Appeals in *Matter of Regina* nevertheless clarified the next year that these amendments could not be "applied retroactively to overcharges that occurred prior to [the HSTPA's] enactment" in 2019 (*Regina*, 35 NY3d at 363, 388; *accord 435 Cent. Park W. Tenant Assn v Park Front Apts., LLC*, 183 AD3d 509, 509-510 [1st Dept 2020]). Thus, overcharge claims that had accrued prior to the enactment of the HSTPA would still be subject to former CPLR 213-a's four-year statute of limitations (*see Burrows v 75-25 153rd St. LLC*, 215 AD3d 105, 111-112 [1st Dept 2023] ["since plaintiffs' claims are based upon inflated figures for legal regulated rents that were registered

far more than four years before the commencement of this action in 2020, their claims are time-barred"])

Here, the entirety of plaintiffs' alleged overcharges occurred between 2009 and 2018, at which point defendant's predecessor re-registered the Apartment with DHCR and offered plaintiffs a rent-stabilized lease renewal (*see* 202.8-g ¶¶ 11-18, 21, 25-26; *see also* MOL at 11 [characterizing their overcharge claims as "pre-HSTPA overcharge claims"]). Accordingly, on this record, plaintiffs' claims appear to be regulated by the pre-HSTPA statute of limitations (*see Burrows*, 215 AD3d at 111-112; *Wise v 1614 Madison Partners, LLC*, 214 AD3d 550, 550-551 [1st Dept 2023] [concluding that "class period should commence on May 27, 2018, rather than May 27, 2016" because plaintiffs' rent overcharge claims "accrued prior to the enactment of the [HSTPA]"]).

To avoid this outcome, plaintiffs contend that they should be able to prospectively avail themselves to HSTPA's six-year recovery period because "[t]enants seeking to recover overcharges pursuant to a complaint made prior to June 14, 2021 are [] entitled to recovery on any overcharge claim that was valid upon HSTPA's enactment" (MOL at 11). Plaintiffs, however, cite no support for this novel "harmoniz[ation]" of CPLR 213-a and the *Regina* holding (*see id.* at 8-9). To the contrary, courts addressing analogous situations have repeatedly applied the pre-HSTPA four-year statute of limitations even when an action has been filed after the enactment of the HSTPA (*see e.g. Burrow*, 215 AD3d at 111-112; *Crest I LP v Ventura*, 81 Misc 3d 1, 2 [App Term, 1st Dept 2023] [concluding that "tenant's overcharge claim and defense, interposed in 2020, are based solely upon a large and unexplained increase in rent that occurred prior to the commencement of tenant's first lease in 2010"]; *525-527 W. 135 LLC v Morales*, 80 Misc 3d 922, 924 [Civ Ct, NY County, 2023] [observing that because "some of the alleged overcharges occurred prior to the commencement of the HSTPA," the law in effect prior to the HSTPA applied]).[2] Absent any controlling or persuasive authority suggesting that plaintiffs can avail themselves to the HSTPA's six-year statute of limitations (or some variation thereof), plaintiffs have failed to establish that anything but the pre-HSTPA statute of limitations applies to their claims.[3]

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[2] To the extent that plaintiffs contend that defendant's purported overcharges may post-date the HSTPA's enactment because the court should be applying the "default formula" for calculating the "Base Date Rent" (*see* NYSCEF # 63), case law suggests that the impact of the "default formula" on damages is a distinct consideration from when overcharge claims accrue (*see Woodson v Convent 1 LLC*, 216 AD3d 585, 586 [1st Dept 2023] ["That lookback period, however, did not preclude a court from awarding damages for rent overcharges that accrued after the action was commenced"]).

[3] Plaintiffs' citation to *Austin v 25 Grove St. LLC* (202 AD3d 429 [1st Dept 2022]) does not suggest otherwise. Indeed, the claims in *Austin* purportedly accrued prior the HSTPA, and the parties had agreed that the lookback period was four years prior to the filing of plaintiffs' lawsuit (*id.* at 429-431). Similarly, although plaintiffs point to the recently updated language in the RSC, which provides that the "Base Date" under the RSC shall "[i]n no event . . . be prior to June 14, 2015" (22

In any event, regardless of what "Base Date" is selected, plaintiffs' motion for summary judgment also fails because plaintiffs have not established that, for purposes of calculating the "Base Date Rent," they may review pre-"Base Date" rental history and apply a "default formula" to their overcharge calculations rather than using the rent that was charged and paid on the Base Date. As relevant here, when analyzing overcharge claims, the pre-HSTPA statutory scheme only permits a "review of rental history outside the four-year lookback period . . . in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate" (*Regina*, 35 NY3d at 355). In the absence of any evidence of a fraudulent scheme, "the base date rent [must be] the rent actually charged on the base date (four years prior to initiation of the claim)" and "overcharges [are] to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period" (*Regina*, 35 NY3d at 355-356).[4] It is only if a fraudulent scheme is established that a court may use the default formula to set the "Base Date Rent" (*435 Cent. Park W. Tenant Assn.*, 183 AD3d at 510).

To establish a "fraudulent scheme" for purposes of a rent overcharge claim, a plaintiff must come forward with evidence establishing a "colorable claim of fraud" (*see Matter of Grimm v State of N.Y. Div. of Housing and Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]). The Court of Appeals in *Regina* observed that a colorable claim of fraud can consist of "evidence [of] a representation of material fact, falsity, scienter, reliance and injury" (*Regina*, 35 NY3d at 356 n7). Notably, however, "an increase in the rent alone will not suffice as indicia to establish a colorable claim of fraud" (*Chang v Westside 309 LLC*, 222 AD3d 550, 550 [1st Dept 2023]). Nor will a "a tenant's personal observations regarding the condition of their apartment or quality or extent of improvements" or "allegations of registration failures" (*id.*).

Here, plaintiff has sufficiently established that at least some of the elements of "fraud" are present in the record. For example, plaintiffs' evidence indicates that there was a false representation of material fact because, despite receiving J-51 benefits, defendant's predecessor represented in the initial lease, as well as subsequent renewal, that the Apartment was not subject to rent regulation (*see* 202.8-g ¶¶ 11-15, 25-26; NYSCEF #s 49-53). That said, as detailed below, plaintiffs ultimately fail to establish a colorable claim of fraud because they have not made a prima facie showing of at least one of its key elements: scienter.

Plaintiffs' claim of fraud is largely premised on defendant's failure to register the Apartment as rent stabilized in the wake of the Court of Appeals' decision in *Roberts v Tishman Speyer Props., L.P.*, which held that landlords could not take advantage of luxury deregulations provisions while receiving J-51 tax benefits (13

NYCRR § 2526.7), this language must be read in the context of *Regina* given that it is part of a "Base Date" definition that largely tracks the HSTPA amendment to CPLR 213-a.

[4] If a tenant's overcharge was proven as "willful," then a landlord must pay "treble damages 'equal to three times the amount of [an] overcharge'" (*Aras*, 221 AD3d at 9 [alterations in original]).

NY3d at 284-285), and the First Department's decision in *Gersten v 56 7th Ave. LLC*, which held that the *Roberts* holding applies retroactively to tenants in occupancy at the time *Roberts* was decided (88 AD3d at 196-197) (*see* MOL at 13-17; Reply at 5-9). Specifically, plaintiffs aver that this failure to re-register the Apartment after *Roberts* and *Gersten* sufficiently establishes scienter in the context of their rent overcharge claim (MOL at 14). And to make this argument, plaintiffs chiefly rely on the First Department's decision in *Montera v KMR Amsterdam LLC* (193 AD3d 102 [1st Dept 2021]) (*see* MOL at 13-16). This reliance, however, is misplaced.

In *Montera*, the First Department addressed the issue of whether a defendant's illegal scheme to deregulate an apartment after *Roberts* and *Gersten* were decided, and its continued failure to register that apartment following these decisions, constituted sufficient indicia of fraud to warrant review of the apartment's history beyond former CPLR 213-a's four-year lookback period (193 AD3d at 103). Plaintiff in *Montera* had alleged that defendant's predecessor applied for J-51 tax benefits in 2003, but when he became a tenant, it was pursuant to a non-regulated lease in March 2010 (after *Roberts* was decided) (*id.* at 104, 107-108). Plaintiff further alleged that defendant then continued to offer free-market lease extensions for a six-year period until it finally re-registered the apartment in 2018 (*id.* at 108). The First Department concluded that, based on these facts, plaintiff "sufficiently alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building" that warranted review of the apartment's history beyond the lookback period to assess whether fraud had occurred (*id.* 108-109). In so holding, as plaintiffs note, the *Montera* court rejected the idea that defendant's conduct amounted to a "mere lack of registration" and, in turn, observed that a building owner cannot "willfully disregard the law[] by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme is uncovered" (*id.* at 107-108).

The First Department's recent decision in *Aras v B-U Realty Corp.*, however, establishes that *Montera*'s holding is of limited value in the context of post-discovery summary judgment motions (221 AD3d 5). In *Aras*, plaintiffs moved for partial summary judgment after the completion of discovery, arguing that the record established a building-wide scheme requiring the default formula in calculating damages (*id.* at 6). Certain plaintiffs, in arguing that the evidence established a fraudulent scheme, relied solely on the fact that their apartments were all deregulated after *Roberts* (*id.* at 14). Based on these facts, and relying on *Montera*, the trial court agreed that a finding of fraud was warranted (*id.*). The First Department, however, reversed, explaining that the trial court's reliance on *Montera* was "misplaced" because *Montera* involved a "pre-discovery summary judgment motion" (*id.*). The First Department further explained that, because it was defendant who was moving for summary judgment prior to the start of discovery, the *Montera* plaintiff's allegations of "post-*Roberts* deregulation and the

late filing of amended registrations" sufficiently supported an indicia of fraud that permitted discovery into "the rental history outside the four-year lookback period was appropriate." Therefore, the First Department concluded that denial of defendant's motion in *Montera* was warranted (*id.*; *see also Montera*, 193 AD3d at 109 [observing that it was significant that "defendant moved for summary judgment on a pre-discovery record" because "plaintiff was unable to obtain documents that had been requested before the motion for summary judgment"]). By contrast, the *Aras* court held, where a plaintiff is moving for summary judgment after having had the benefit of discovery, the mere failure to re-register an apartment that was deregulated after *Roberts* was not "sufficient to establish fraud as a matter of law" (*see Aras*, 221 AD3d at 14-15 []; *see also Chang*, 222 AD3d at 551).

Based on the above, it is evident that, in order to establish the existence of a fraudulent scheme and scienter as a matter of law, plaintiffs cannot solely rely on the fact that defendant and its predecessors deregulated the Apartment after *Roberts* and then failed to re-register the Apartment as rent stabilized for six years. Indeed, although these facts may have been sufficient to withstand a motion to dismiss and/or to allow plaintiffs to take discovery beyond the four-year lookback period, under *Aras*, plaintiffs must come forward with more robust evidence of fraud to, in turn, render the "Base Date" as unreliable for purpose of calculating the "Base Date Rent" (*see Aras*, 221 AD3d at 15 ["To reiterate, the filing of late or incorrect registrations does not support fraud as a matter of law"]). Plaintiffs have failed to make that requisite showing here.

That defendant only re-registered the Apartment after commencement of the DHCR proceedings does not alter this conclusion (*see* 202.8-g ¶ 21). Notably, the defendant in *Aras* only re-registered Apartments after being directed by DHCR to do so, and yet the First Department still determined that plaintiffs had failed to establish fraud as a matter of law (*see Aras*, 221 AD3d at 7, 15). Nor is it of any consequence that defendant re-registered another apartment in the Building two years prior to plaintiffs' DCHR complaint (counterstatement ¶ 19). Even assuming these facts indicated defendant's or its predecessor's awareness of registration issues for other apartments in the Building, they do not, on their own (or together with the totality of evidence offered by plaintiffs on their motion) establish that defendant *knowingly* misrepresented the regulatory status of the Apartment.

In short, given that plaintiffs seek to apply a "Base Date" beyond the four-year period prescribed by former CPLR 213-a, request application of default formula to set the "Base Date Rent," and seek treble damages based on defendant's purported willful conduct, plaintiffs' proffered evidence, at this juncture, fails to make a prima facie showing of their entitlement to the relief they seek through the first and second causes of action. And given this determination, there is no basis to

grant summary judgment in plaintiffs' favor as to their third cause of action. Plaintiffs' motion for summary judgment on their claims is therefore denied.[5]

Defendant's Counterclaims

In addition to seeking summary judgment on their claims, plaintiffs also seek summary judgment dismissing of defendant's counterclaims, arguing that their complaint is not frivolous and that none of the leases provide either party with a right to repayment of fees incurred to enforce rights under the lease (MOL at 4-5, 22-23; Reply at 12). Dismissal of both counterclaims is warranted. To start, although the court has denied plaintiffs' motion for summary judgment in their favor on their first and second causes of action, the pleadings themselves would have been enough to survive a motion to dismiss given that defendant conceded that plaintiffs were overcharged rent, and plaintiffs sufficiently alleged certain indicia of fraud by virtue of defendant's failure to re-register the Apartment as rent stabilized after the *Roberts* decision (*see Montera*, 193 AD3d at 108).[6] Given these facts, there is simply no basis to conclude that plaintiffs' claims were completely without merit or intended to harass or maliciously injure defendant. In opposing plaintiffs' motion, defendant fails to adduce any facts to the contrary or that would otherwise create a question of fact as to the frivolous nature of plaintiffs' lawsuit.

As for defendant's counterclaim for attorneys' fees, it appears that the sole basis for this claim is that "upon information and belief," the lease between plaintiffs and defendant's predecessor contains a clause for an award of attorneys' fees. This counterclaim, however, is directly contradicted by the initial lease offered to Rose, which states that "[i]n the event either Owner or Renter incurs legal fees and/or court costs in the enforcement of any of Owner's or Renter's rights under this lease or pursuant to law, neither party shall be entitled to the repayment of such legal fees and/or court costs" (NYSCEF # 49 at 2). Defendant fails to identify any evidence rebutting this evidentiary showing by plaintiffs.[7]

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[5] The court does not, at this time, reach defendant's contention that principles of accord and satisfaction preclude plaintiffs' overcharge claims given that plaintiffs accepted a refund check for rent overcharges in May 2018 (Opp at 7-8).

[6] Although plaintiffs' reliance on *Montera* was misplaced because more evidence was required to establish fraud as a matter of law, the legal principles espoused in *Montera* seemingly supported plaintiffs' initial filing of their complaint and may have resulted in a different outcome prior to *Aras* (*see e.g. Alekna v 207-17 W. 110 Portfolio Owner LLC*, 2021 WL 6097451, at *11 [Sup Ct, NY County, Dec. 23, 2021] [relying on *Montera* to hold that, if plaintiffs alleged that an apartment was "*Roberts* deregulated," courts may "consider evidence from before the four-year lookback date" to determine whether fraud was involved in setting a unit's "legal regulated rent").

[7] Defendant also claims that "[p]laintiffs cannot be entitled to fees under the parties' lease, and then [d]efendant not be entitled to fees, if it is determined to be the successful party by the Court" (Opp at 25). But plaintiffs, unlike defendant, are seeking attorneys' fees pursuant a statutory scheme (*see* compl ¶ 61 & Prayer for Relief).

In sum, plaintiffs' motion for summary judgment dismissing defendants' counterclaims is granted and defendant's counterclaims are dismissed.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied insofar as plaintiffs seek judgment in their favor on the first, second, and third causes of the complaint, and it is granted insofar dismissing defendant's counterclaims; and it is further

ORDERED that plaintiffs are to serve a copy of this order together with a notice of entry upon defendant and the Clerk of the Court within 10 days of this order.

04/12/2024
DATE

MARGARET A. CHAN, J.S.C.

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