SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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STELLA QUINATOA AND ANA CABRERA, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED

Plaintiff,

- v -

HEWLETT ASSOCIATES, LP,

Defendant.

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INDEX NO. 151132/2018

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 178, 182, 183, 184, 185, 186, 187

were read on this motion to/for RENEWAL.

Currently, the court considers a motion to renew this court's order dated May 3, 2020, in which, as is relevant here, the court denied Defendant Hewlett Associates, LP's motion to dismiss the proposed class action complaint as against it. The facts and general background of this action is set forth in detail in the court's order (NYSCEF Doc. No. 84). The court incorporates the prior order by reference but provides a short summary below.

Background

Plaintiffs Stella Quinatoa and Ana Cabrera have sued on behalf of themselves and the other residents of the Trafalgar Building (Trafalgar) in Flushing, Queens. Defendant Hewlett Associates, LP (Hewlett) is the owner and landlord of Trafalgar (NYSCEF Doc. No. 12 [complaint], ¶ 10). The complaint asserts that defendant violated the New York Rent Stabilization Laws (N.Y. Unconsol. Law §§ 8621-8634), Administrative Code § 11-243 (J-51), and Administrative Code § 26-509 (SCRIE). Defendant received J-51 benefits starting in 2008. Although this legally subjected all apartments in the building to rent regulation, defendant did not register "***nearly a hundred units*** at

the Trafalgar Apartments" (NYSCEF Doc. No. 12, ¶ 42 [bold and italics in original]). Further, as the complaint points out, defendant "failed to provide tenants with legally required notice, whether in the initial leases or in subsequent lease renewals, that the Trafalgar Apartments are subject to the Rent Stabilization Laws and that any deregulation is not permitted to occur until the expiration of the last lease entered . . . during the applicable tax benefit period" (*id.*, ¶ 43).[1]

"Worse yet," the complaint asserts, defendant and its employees "affirmatively ***deceived*** tenants at the Trafalgar Apartments concerning the building's rent-regulated status," telling the tenants "that the Trafalgar Apartments were deregulated, an assertion they knew to be false" (*id.*, ¶ 44 [bold and italics in original]). Moreover, the complaint states that because SCRIE – which exempts eligible senior citizens from any rent increases as of their eligibility date – "is restricted to senior citizens who meet certain income requirements and who live in rent-stabilized apartments" (*id.*, ¶ 45), the senior citizens in the building were unaware of their potential eligibility to apply for SCRIE benefits. The complaint asserts that both named plaintiffs would have been eligible for a rent increase exemption under SCRIE (*id.*, ¶ 60).

In August 2017, defendant notified Trafalgar's tenants that they should have received leases for stabilized rents. The Landlords had not provided notice of the apartments' statuses in the tenants' prior leases. The complaint states that defendant sent checks which only provided partial reimbursement, but defendant told the tenants that the checks provided them with full reimbursement for any past overcharges (*id.*, ¶¶ 49-53). The complaint suggests that this, too, was an affirmative misrepresentation.

Plaintiffs' summons and complaint is dated and was filed on February 6, 2018. In response, defendant and then-defendant Kaled Management Corporation (collectively, the Landlords) initiated their pre-answer motion, sequence number 002. In their motion, the Landlords sought to dismiss this

[1] This notice is statutorily required under J-51. Absent such notification, an apartment otherwise subject to deregulation remains rent stabilized.

action under CPLR §§ 3211 (a) (2) and (7). Among other things, the Landlords contended that plaintiffs' case was moot because they had written to the tenants in 2017, informed them of the Landlords' earlier failure to treat them as rent-stabilized, and issued refunds which completely covered the past overcharges. Moreover, the Landlords stated that plaintiffs did not allege mutual mistake or mistake coupled with fraud. In their reply papers, they contended that adjudicating this as a class action is not preferable to the tenants because by doing so, they forego the chance to obtain treble damages (NYSCEF Doc. No. 40, p 8 [citing *Quinn v Parkoff Operating Corp.*, 59 Misc 3d 1202 [A], *7, 2018 NY Slip Op 50349 [U] [Sup Ct, NY County 2018], *rev'd*, 178 AD3d 450 [1st Dept 2019]).

Among other grounds, plaintiff argued that the motion was premature. They noted that courts generally do not evaluate the class action status of a case until the plaintiffs move for class certification (NYSCEF Doc. No. 35, p 13 [citing *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 92 (1st Dept 2013), *affd sub nom. Borden v 400 E. 55th St. Assoc.*, 24 NY3d 382 (2014)]). Prior to class certification, courts deny motions to dismiss class actions unless there is no legal basis for class relief. Plaintiffs also argued that a question existed as to whether the Landlord's wrongful actions were part of a pattern and policy of misrepresentation.

The court denied the motion as it related to Hewlett. Among other things, it noted that "CPLR 901 (b) permits otherwise qualified plaintiffs to utilize the class action mechanism to recover compensatory overcharges . . . even though the Rent Stabilization Law of 1969 . . . does not specifically authorize class action recovery" (*Borden*, 24 NY3d at 389-90). Further, the court noted that because a consideration of class certification triggers a factual analysis, it usually is premature to dismiss a class action before pre-certification discovery has occurred (*Downing*, 107 AD3d at 91; *see Maddicks v Big City Props., LLC*, 34 NY3d 116 [2019]).

The Current Motion

On April 2, 2020, the Court of Appeals decided *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020] [*Regina*]). *Regina* noted that in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), the Court had ruled that the Rent Stabilization Law required that the amount a landlord owes due to rent overcharges is calculated using the rent in effect four years before the date the tenant filed his or her complaint (*Regina*, 35 NY3d at 348). Additionally, in *Gersten v 56 7th Ave., LLC* (88 AD3d 189, [1st Dept 2011]), the First Department ruled that *Roberts* applied retroactively to landlords accepting J-51 benefits. This did not alter the lookback period of four years, however. As *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358 [2010]) explained, the full rental history could be examined only if there was an issue as to whether the landlord had engaged in a fraudulent scheme to remove an apartment from rent stabilization (*see Regina*, 35 NY3d at 357).

In 2019, the laws governing rent regulation were amended. The Housing Stability and Tenant Protection Act of 2019 (HSTPA) "extend[ed] the statute of limitations, alter[ed] the method for determining legal regulated rent for overcharge purposes and substantially expand[ed] the nature and scope of owner liability in rent overcharge cases" (*Regina*, 35 NY3d at 349). Specifically, among other things, it extended the lookback period from four years to six years. As is relevant here, the *Regina* Court held that the six-year lookback rule does not apply retroactively. Therefore, tenants who filed claims before the enactment of HSTPA are limited to the four-year lookback period; and, in all cases, the lookback period can only be extended if the tenants allege fraud. Further, it found that overcharges should be calculated using "the standard method, accepting the rent charged on the base date as the base date rent and adding legal increases" (*id.* at 362). As such, the Court rejected the idea that landlords should use the last rent regulated rent, even if it occurred prior to the four-year lookback period and there was no fraud (*see id.* at 358-360). The Court also opined that because of

the confusion surrounding the interpretation of J-15 and *Roberts*, most J-51 overcharge cases did not trigger the fraud lookback exception (*id.* at 356 [quoting *Borden*, 29 NY3d at 398]).

Defendant filed its answer to plaintiffs' complaint on May 15, 2020 (NYSCEF Doc. No. 127). Two of its affirmative defenses allegedly are related to its interpretation of *Regina*. As its first affirmative defense, defendant asserts that plaintiffs lack standing to bring the complaint because defendant has reimbursed them completely (*id.*, ¶¶ 128-130) – and, for this reason as well, the eleventh affirmative defense states plaintiffs lack standing to bring a class action (*id.*, ¶¶ 158-160). In its current motion to renew, defendant argues that *Regina* constitutes new law that vitiates plaintiffs' standing and requires the dismissal of this lawsuit. According to defendants, *Regina* proves as a matter of law that defendant not only paid but overpaid the two named plaintiffs. Specifically, defendant asserts that it used 2008 as the lookback date when it calculated the legal rent, but *Regina* clarifies that it should have gone back only four years instead, to 2014. Defendant provides its computations supporting its position that, using the correct formula, it overpaid rather than underpaid the named plaintiffs. Therefore, defendants argue, the named plaintiffs have no claim against it and that, absent such standing, they neither can bring a case on their own behalf or sue as representatives of the proposed class.

Plaintiffs argue that because the complaint alleges that defendant engaged in fraud and *Regina* did not change the law as it relates to fraud (citing *435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 509-510 [1st Dept 2020] [*Park*]), defendant's motion lacks merit. In support of its allegation of fraud, plaintiffs note that the Court of Appeals issued its decision in *Roberts* in 2009, putting defendant on notice that it was required to provide its tenants with stabilized leases. Further, since the First Department's 2011 decision in *Gersten*, defendant should have been aware that the rule is retroactive. Thus, defendant cannot claim a good faith attempt to comply with the existing law. Plaintiffs emphasize that defendant did not comply with this law until 2017, only

after the State announced it would issue warning letters to and potentially impose financial penalties on those landlords who were out of compliance (*see* NYSCEF Doc. No. 157 [State's press release]). In addition, plaintiffs assert that, through their research, they have learned that the building improperly removed apartments from rent-stabilized or rent-controlled status in the 1980s, even before luxury decontrol was permissible (*see* NYSCEF Doc. No. 12, ¶ 41; NYSCEF Doc. No. 154 [rent roll]). They note that the complaint asserts that defendant misrepresented the stabilization status and the proper rent in its communications with the named plaintiffs and other members of the proposed class (*see, e.g.*, NYSCEF Doc. No. 12, ¶ 44).

As plaintiffs additionally state, in cases of fraud, Rent Stab. Law § 2526.1 (g) provides alternative ways to compute the proper rent and states that the rent should be set using the method that yields the lowest rent. The base rent can be determined by 1) the lowest registered rent for a comparable apartment in the same building, set on the date that the tenant moved into the apartment; 2) the tenant's initial rent, adjusted as authorized by the Rent Stabilization Code; 3) the prior tenant's last registered rent, if the registration was within the four-year review period; or 4) by the Division of Housing and Community Renewal (DHCR)'s sampling methods, using DHCR data. As plaintiffs note, nothing in *Regina* alters this provision. Plaintiffs apply this formula and, "for purposes of opposing [the motion], they "estimated Plaintiffs' damages under the default formula at this early state of the proceedings" (NYSCEF Doc. No. 151 [Atty Aff in Opp], ¶ 21). They conclude that defendant did not fully compensate the two named plaintiffs under this approach. Because of this, and because of the allegations in the complaint that defendant engaged in a fraudulent scheme to overcharge the tenants in the building, plaintiffs add that discovery is necessary and, as such, the motion is premature (citing, inter alia, *People v Sprint Nextel Corp.*, 26 NY3d 98, 113 [2015]).

In reply, defendant submits a reply memorandum which states that plaintiffs' allegation of fraud constitutes a "sharp[] pivot" in which they try to "shoehorn their claims into the narrow fraud

exception that *Regina* recognizes as the only way to avoid its effect" (NYSCEF Doc. No. 178, at *5). Defendant notes that plaintiffs do not use the word "fraud" in their complaint, and it rejects plaintiffs' position that cases such as *Roberts* and *Gersten* should have alerted defendant to its obligation to give the building's tenants stabilized status. Defendant reiterates that *Regina* and *Grimm* provide that a greater lookback period is allowable only in cases in which there is a colorable claim of fraud, and it contends that plaintiffs have not shown a colorable claim.

For the sake of this decision, the court accepts defendant's argument that *Regina* constitutes new law on the issue of precisely how to recompute a tenant's rent when the landlord wrongfully denied the tenant's rent stabilization status. The court denies the motion, however, because defendant's computation still would be incorrect if plaintiffs can show fraud. Defendant is simply wrong that plaintiffs' complaint does not allege fraud. Although it does not use the word "fraud," the complaint repeatedly alludes to it. The court has noted several instances in which the complaint implies that defendant committed fraud. Among other things, the complaint asserts that defendant improperly deregulated apartments in the 1980s, years before the events in question here (NYSCEF Doc. No. 12, ¶ 41). Indeed, the complaint also alleges that defendant and its employees "affirmatively ***deceived*** tenants" when it told them "that the Trafalgar Apartments were deregulated, an assertion they knew to be false" (NYSCEF Doc. No. 12, ¶ 44 [bold and italics in original]). In addition, the complaint accuses defendant of systematically "flout[ing] . . . their obligations under the Rent Stabilization laws" for decades (*id.*, ¶ 54). Plaintiffs also have submitted their attorney's affidavit, which he supports with documentary evidence, to support plaintiffs' claim of fraud (*see Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016] [courts may consider supporting affidavits when reviewing a CPLR § 3211 motion]). Together, the complaint and supporting

materials raise an "indicia of fraud" (*see Stafford v A&E Real Estate Holdings, LLC*, 188 AD3d 583, 584 [1st Dept 2020]).[2]

The complaint also makes clear that defendant did not comply with *Roberts* and *Gerstein* for several years. Plaintiffs have shown, through counsel's affidavit coupled with documentary support, that defendant did not comply until the State announced tougher enforcement measures, including the possible imposition of penalties. This, too, is a sufficient basis to deny the motion. "*Regina* does not grant[] an owner carte blanche in post-*Roberts*/*Gersten* cases to 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" (*Montera v. KMR Amsterdam LLC*, _ AD3d _, 2021 NY Slip Op 00805, *3 [1st Dept 2021]).

In several cases upon which defendant relies, the courts at issue did not consider motions to dismiss under CPLR § 3211. For this reason, defendant's reliance on the cases the Court of Appeals reviewed in *Regina* is misplaced. In *Raden v W7879, LLC* (164 AD3d 440 [1st Dept 2018]), *affd sub nom Regina*, 35 NY3d 332 [2020]), the First Department upheld the determination of a referee who determined there was no fraud only after holding an evidentiary hearing. Similarly, *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017], *affd as modified sub nom Regina*, 35 NY3d 332 [2020]), the First Department's finding that there was no fraud – which the Court of Appeals affirmed – was the result of the defendant's submission of evidence on a summary judgment motion. In *Reich v Belnord Partners LLC* (168 AD3d 482 [1st Dept 2019], *affd as modified sub nom Regina*, 35 NY3d 332 [2020]), the First Department affirmed a decision that there was no fraud where the landlord had promptly informed the tenants of the *Roberts* decision and corrected the rent. The trial

[2] As noted, defendant's papers supporting motion sequence number 002 stated that, in proceeding by class action, plaintiffs relinquished their chance for treble damages (*see* NYSCEF Doc. No. 40, p 8). As treble damages are only available if the overcharge is deliberate, defendant implicitly acknowledged that plaintiffs had suggested defendant had committed fraud.

and appellate courts in *Regina* also considered a matter which already had been considered on the facts – in this case, before the DHCR. Here, on the other hand, defendant asks this court to reject plaintiff's argument as a matter of law. Defendant's comparison of this case to those in which the fraud involved collusions between landlords and tenants also fails. In a recent decision, the First Department "reject[ed] [a] landlord's argument that the fraudulent exception to the four-year look back period applies only to a fraudulent-scheme-to-deregulate case" (*435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 510 [1st Dept 2020]).

In addition, for all the reasons this court set forth in its earlier order, courts generally are disinclined to dismiss a proposed class action prior to discovery (*see Downing*, 107 AD3d at 91). Here, the motion is also premature because of the factual issues surrounding plaintiffs' allegation of fraud. Indeed, defendant's challenges often rely on its recitation of the facts. All other arguments by the defendant have been considered and deemed unavailing. Therefore, it is

ORDERED that motion sequence number 004 is denied.

3/24/2021

DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

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