SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

----------X

YEN CHANG et al.,

Plaintiffs,

- v -

BRONSTEIN PROPERTIES LLC et al.,

Defendants.

----------X

INDEX NO. 153031/2018

MOTION DATE 12/05/2018

MOTION SEQ. NO. 001, 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 109, 110, 111, 112, 126, 127, 144

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 101, 102, 103, 104, 105, 106, 107, 108, 113, 114, 115, 116, 117, 128, 129, 130, 140, 141, 142

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 118, 119, 120, 121, 122, 123, 124, 125, 131, 132, 133, 134, 135, 136, 137, 138, 143

were read on this motion to/for DISMISSAL.

Motions decided per the annexed memorandum decision and order.

3/21/2019
DATE

HON. ROBERT D. KALISH
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 29

----------X

YEN HSANG CHANG, KENNETH HICKS, RANDY GARCIA, TIFFANY LEE, STEPHEN BOTTA, TAILEEN JOA, SHIRLEY OVID MITCHELL, CYNTH1A LOWE, DANIEL LORIA, NICOLE COCCHIARO, ANN VOTAW, SALVATORE RUSSO, ELIZABETH BOUK, NETANIA BUDOFSKY, JESSICA GOLDHIRSH, JOSEPH OSTWALD, ANDREW O'BRIEN, LAURA PIRAINO, MELODY MERKER, GARY TOPP, KRISTINA BONHORST, KENT HAINA JR., ANDREW KELTZ, DARRYL WASHINGTON, MEGAN HAGAR, MARISSA KOELLER, GABRIELLA GARCIA, TIMOTHY BARKER, ADEOLA ROLE, CAROLINA BOTERO, JOSEPH CRACCO, DAVID WALKER, FLORENCE LAGAMMA, MARY LEVITT, RYAN BALAS, DEIRDRE BALAS, JONATHAN LEUNG, LUKE VAN DEE VEER, JOSEPH RICCARDI, ADRIENNE RICCARDI, HENRY NICPONSKI, KAREN CLAMAN, PETER CERNAUSKAS, RYAN CLAPP, CLEMENT CHAN, MATTHEW HAENSLY, DINA MANN, SCOTT CHAPMAN, MOHAMMAD ISLAM, STEPHANIE MOSHER, ALGERSON ANDRE, LUKASZ JANIK, YOLANDA NUNLEY, M.ICHAEL ALBERTSON, ADINA WOLF, JONATHAN O'GRADY, DAVID ISAACS, STEPHANIE MACIOCH, ISABELLA CARDONA, MICHAEL WILKE, SHUCHIN SHUKLA, MAMUA JEME, GLENN ENGLISH, ANA MARIE SANTOS, JEN WATSON, KERRY MCFATE, DESIREE GRENAY, JONATHAN GRENAY, TIMOTHY MORAN, LORNE HEILBRONN, J.L. DUFFY, PHYLLIS HIRSHORN, HANS KLUEFER, and KATHERINE KLUEFER, on behalf of themselves and all others similarly situated,

Index No. 153031/2018

Plaintiffs,

-against-

BRONSTEIN PROPERTIES LLC, WESTSIDE 309 LLC, THAYER 45 LLC, POST 118 LLC, SEAMAN 20 LLC, SEAMAN 30 LLC, SEAMAN 133 LLC, VERMILYEA 153 LLC, HEIGHTS 170 LLC, HEIGHTS 624 LLC, HEIGHTS 177 LLC, FT. GEORGE 617 LLC, INWOOD 213 LLC, PAYSON 55 LLC, CROWN ASSOCIATES LLC, GEBS REALTY LLC, ALJO REALTY LLC, ABIII LLC, SKILLMAN 47 LLC, QPI-XXXII LLC, PAGE REALTY LLC, SUNNYSIDE 45-42 LLC, SYLVEEN REALTY LLC, SUNNYSIDE 47-21 LLC, ROWDY MANAGEMENT, INC., MARGULES PROPERTIES, INC., SUNNYSIDE 42 LLC,

Defendants.

----------X

Robert D. Kalish, J.S.C.:

In this class action lawsuit brought by 75 tenants residing or formerly residing in 57 apartments located in 26 buildings owned and/or operated by defendants, plaintiffs assert claims of rent overcharge. Defendants make three pre-answer motions to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7), on the grounds that plaintiffs do not comprise a class, documentary evidence, and failure to state a cause of action. As is fully discussed herein, seq. 001 by the Bronstein defendants is granted in part and denied in part, seq. 002 by QPI is granted, and seq. 003 by the Margules defendants is granted in part and denied in part.

Factual and Procedural Background[1]

The plaintiffs, who reside or formerly resided in buildings owned and operated by the defendants (referred to in the complaint as the Bronstein Portfolio), commenced this class action

[1] All the facts presented herein are taken from the complaint and accepted as true (see CPLR 3211; *Children's Magical Garden, Inc. v Norfolk St. Dev., LLC*, 164 AD3d 73 [1st Dept 2018]).

on April 30, 2018.[2] In the complaint, plaintiffs allege that defendants perpetrated a fraudulent scheme to inflate rents over the amounts they are legally permitted to charge under the rent stabilization law (RSL). Plaintiffs allege that defendants improperly inflated rents in three ways. First, defendants claimed they performed "Individual Apartment Improvements" (IAIs) in particular apartments during a period of vacancy of that particular apartment, thereby permitting them to charge an increased rent. After the IAIs were performed, the rent would be increased dramatically, in some instances more than 100%.[3] Plaintiffs argue that, looking at the NYS Division of Housing and Community Renewal (DHCR) rent histories for the apartments owned or maintained by defendants, there is a pattern of performing IAIs, followed by dramatic rent increases. Plaintiffs contend that it appears that the IAIs were not done. Further, very few of the apartments undergoing the IAIs had a building permit issued for the work.

For example, plaintiff Yen Hsang Chang, who rents an apartment located at 309 W 57th Street, Manhattan, was charged a monthly rent of $2,500 when he entered into his lease in 2013. The previous tenant paid a monthly rent of $932.65. Thus, Chang's rent was increased by $1,567.35, from the prior tenant. Plaintiffs claim that in order to justify such a significant rent increase, based upon IAIs performed in the apartment, the landlord would have had to have performed $82,000 in IAIs. Plaintiffs claim that Chang's apartment does not appear as if $82,000

---

[2] Plaintiffs previously commenced a similar action *Chang v Bronstein Properties, LLC*, Index No. 156665/2017 (*Chang I*), which was dismissed by the court on March 19, 2018 (Hagler, J.) without prejudice to recommence (see Bailey affirmation, exhibit 1).

[3] Generally, when a landlord performs IAIs to a particular apartment it is entitled to an increase in the legal regulated rent of 1/40th (or 1/60th if the building contains 36 apartments or more) of the cost of an IAI, per month.

in improvements were made. Plaintiffs also note that no building permit was filed for the extensive IAI work supposedly performed on Chang's apartment. Based on these facts, plaintiffs allege that defendants fraudulently inflated the IAIs performed on Chang's apartment, then improperly increased the rent. Plaintiffs make similar allegations of IAIs not performed resulting in improper rent increases for 50 other tenant plaintiffs.

Second, Plaintiffs claim that defendants failed to file proper rent registrations. The complaint alleges that, with respect to five apartments, defendants failed to file the required registrations with the DHCR. Plaintiffs allege that those failures render the tenants' rent histories unreliable, and therefore, that there have been rent overcharges for those apartments.

Third, Plaintiffs claim that defendants set an inflated legal regulated rent. The complaint alleges that five of the subject apartments were converted from rent-controlled to rent-stabilized, and when defendants did so, they impermissibly set a legal regulated rent that was higher than the fair market rent. Plaintiffs claim that defendants covered this impropriety by giving the new tenants a preferential rent, an amount lower than the improperly inflated legal regulated rent, but which was approximately the fair market rent. All future rent increases were calculated based upon the inflated legal regulated rent, rather than the preferential rent. Thus, defendants overcharged these plaintiffs by impermissibly calculated rent increases based upon the inflated legal regulated rent.

Plaintiffs allege that they are entitled to sue as a class consisting of current and former tenants of the Bronstein Portfolio, between August 3, 2013 and the present, who reside or resided in rent stabilized or unlawfully deregulated apartments, and who pay or paid rent in excess of the legal limit based on the misrepresentations of defendants (the Class). Plaintiffs also claim that there is a subclass of plaintiffs (the Bronstein subclass) who currently reside in a rent stabilized

apartment or in an unlawfully deregulated apartment. Further, they claim that there is another subclass of plaintiffs who currently reside in a rent stabilized apartment or unlawfully deregulated apartment located at 43-35 42nd Street and 43-39 42nd Street, buildings owned by defendant Margules Properties, Inc. (the Rowdy subclass[4]).

In the first cause of action, brought on behalf of the Class against the Bronstein defendants, plaintiffs allege that the Bronstein defendants, either directly or indirectly, charged plaintiffs market rents, or other rents, at rates that were in excess of the legal regulated rent for their apartments, and seek a refund of the rent overcharges.

In the second cause of action, brought on behalf of the Bronstein subclass, plaintiffs claim that the Bronstein defendants falsely and illegally misrepresented to the Bronstein subclass the amount of rent the Bronstein defendants were legally entitled to collect. Therefore, the Bronstein subclass was entitled to reformation of their leases to provide that their units were, and are, rent stabilized.

In the third cause of action, brought on behalf of the Bronstein subclass, plaintiffs claim that, notwithstanding that they were entitled to rent controlled or rent stabilized leases, the Bronstein defendants removed their apartments from the protections of the RSL and charged them market rent. Therefore, the Bronstein subclass seeks a declaration that they are not required to pay any rent increases until legally permissible rent stabilized lease offers are made to them and accepted by them.

In the fourth cause of action, brought on behalf of the Rowdy subclass, plaintiffs seek

[4] Plaintiffs refer to defendants Rowdy Management, Inc., Margules Properties, Inc., and Sunnyside 42 LLC as the Rowdy defendants.

damages from the Rowdy defendants for the rent overcharges.

In the fifth cause of action, brought on behalf of the Rowdy subclass, plaintiffs seek reformation of the Rowdy subclass leases to provide that units were, and are, rent stabilized.

In the sixth cause of action, brought on behalf of the Rowdy subclass, plaintiffs seek a declaration that the Rowdy subclass is not required to pay the rent increases until legally permissible rent stabilized lease offers are made to them, and accepted by them.

The Bronstein defendants[5] now make a pre-answer motion to dismiss the complaint. First, the Bronstein defendants note that this is plaintiffs' second attempt to bring this action, noting that *Chang I* was dismissed, without prejudice to renew, by the court (Hon. Shlomo Hagler, J.)[6] on March 29, 2018. The Bronstein defendants argue that the allegations in this complaint are virtually identical to the complaint filed in *Chang I.* The only defendants named in *Chang I* were Bronstein Properties, LLC and Barry Rudofsky. The Bronstein defendants argue that, at oral argument in *Chang I*, Justice Hagler dismissed the action as against defendant Bronstein Properties, LLC and Barry Rudofsky because, as an agent for an owner of the apartments, they could not be liable for rent overcharges (see Sosnowski affirmation, exhibit D page 21-23). Nevertheless, in the present action, plaintiffs make the same allegations against defendant Bronstein Properties, LLC. Accordingly, they argue, all claims against Bronstein Properties, LLC must be dismissed.

---

[5] The Bronstein defendants are Bronstein Properties, LLC, Westside 309 LLC, Thayer 45 LLC, Post 118 LLC, Seaman 20 LLC, Seaman 30 LLC, Seaman 133, LLC, Vermilyea 153 LLC, Heights 170 LLC, Heights 624 OOC, Heights 177, LLC, Ft. George 617 LLC, Inwood 213 LLC, Payson 55 LLC, Crown Associates, LLC, Gebs Realty LLC, Aljo Realty LLC, ABIII LLC, Skillman 47 LLC, Page Realty LLC, Sunnyside 45-42 LLC, Sylveen Realty LLC, and Sunnyside 47-21 LLC.

[6] In dismissing the complaint, Justice Hagler dismissed with prejudice plaintiff's claims brought pursuant to General Business Law § 349 and for breach of contract.

The Bronstein defendants also argue that the first, second, and third causes of action must be dismissed as time-barred due to the four-year statute of limitations for asserting a rent overcharge claim. The Bronstein defendants argue that, as the complaint was filed on April 3, 2018, any overcharges that occurred before April 3, 2014, are not recoverable. The Bronstein defendants acknowledge that a tenant can seek damages for a rent overcharge that occurred more than four years ago, if she can establish that there are substantial indicia of fraud. According to the Bronstein defendants, there are no indicia of fraud alleged in the complaint. The Bronstein defendants argue that plaintiffs merely allege substantial rent increases and that this does not constitute indicia of fraud. The Bronstein defendants further argue that certain plaintiffs' statements, with respect to the IAIs, that they "believe" their apartments were not improved commensurate with the rent increase, are self-serving, conclusory, and not indicia of fraud.

The Bronstein defendants also argue that the fact that there are only a few building permits for the work performed on the apartments does not suggest fraud because extensive repair and rehabilitation can be done to an apartment without the need for a building permit. The Bronstein defendants argue that such work performed without a building permit can include only new cabinets and appliances yet still cost tens of thousands of dollars.

Specifically, with respect to the second cause of action brought on behalf of the Bronstein subclass, the Bronstein defendants argue that the remedy of reformation is unavailable as a matter of law in a rent overcharge case. The Bronstein defendants note that during oral argument in *Chang I*, Judge Hagler expressly dismissed that cause of action, stating, "[W]hat do you mean reform the contract? If it is subject to rent stabilization, that would be the lawful rent. That's the end of it. What is reformation? I would issue an order declaring that the rent is such. What is there to reform?

. . . I have never seen a reformation on a rent overcharge claim. The reason it cannot be [is] because of the statutory nature and the law that provides that the rent would be 'X' versus 'Y' and I would declare that rent to be – the rent" (Sosnowski affirmation, exhibit D page 16-17).[7]

The Bronstein defendants also argue that the first, second, and third causes of action must be dismissed in that plaintiffs cannot maintain a class action both because plaintiffs have not exhausted their administrative remedies and because there are no common issues of fact and law among putative class members that predominate over any individual plaintiff's claim.

In opposition to the Bronstein defendants' motion, plaintiffs argue that nearly all their claims (for 52 of 57 subject apartments) arise out of defendants' failing to perform IAIs worth a dollar amount justifying the rent that defendants are charging plaintiffs. Further, the rent histories for 31 of the 57 subject apartments indicate that there were rent overcharges that took place prior to the four-year statute of limitations. Pursuant to RSL § 2506.1 (a) (2) (iv), plaintiffs are not limited to the four-year statute of limitations if they can demonstrate that there was a fraudulent scheme to destabilize the units. Plaintiffs argue that they sufficiently allege a colorable claim of fraud because: (1) the landlord falsely claims that hundreds of thousands of dollars of IAIs were performed on their units for which no building permits exist; (2) there were significant and sizable rent spikes, many in excess of 100%; (3) defendants failed to register apartments as required by rent stabilization laws; (4) defendants failed to properly calculate legal regulated rents following decontrol; and (5) sufficient IAIs do not appear to have been performed on otherwise deregulated apartments. Plaintiffs argue that, as such, they are not bound by the four-year statute of limitations

[7] At oral argument, counsel for the Bronstein defendants acknowledged that the contract reformation claim asserted in *Chang I,* and dismissed by Justice Hagler, was not asserted in this action (see December 5, 2018 Transcript at 7).

for those 31 apartments.

As an example, plaintiffs cite the Kluefer apartment. Plaintiffs argue that, between 2007 and 2009, Kluefer's rent went from $1,033.90 to $2,391.00, a 131% increase. For such an increase to be based on IAIs, $46,000.00 of IAIs would have to have been performed on the unit. Kluefer claims that the unit does not appear to have had such improvements (see complaint, ¶¶ 423, 426). Further, no building permits were filed as to work on the Kluefer apartment (*id.* at ¶ 426). Plaintiffs note that they make similar allegations for 30 other apartments. Therefore, according to plaintiffs, viewing the 31 units collectively, it appears that defendants engaged in fraud with respect to performing the IAIs, and plaintiffs' claims are not restricted to a four-year look-back period.

Plaintiffs further argue that, aside from the IAI issues, four plaintiffs, Riccardi, Mosher, Andre and LaGamma, live in apartments that were converted from rent controlled to rent stabilized. When that occurs, the landlord and tenant are then supposed to negotiate a fair market rent. Plaintiffs argue that, for these tenants, defendants established a legal regulated rent that was higher than the fair market rent, and then improperly masked this effort by affording those tenants a "preferential rent," an amount lower than the legal regulated rent, but which was actually the fair market rent. Subsequent tenants were then charged rent increases based upon the higher legal regulated rent rather than the proper fair market rent. Plaintiffs argue that these are also indicia of fraud.

Plaintiffs further argue that they do not have to plead fraud with particularity because this is not a fraud cause of action, but rather is a rent overcharge case. Plaintiffs also argue that wrongful deregulation claims can be brought at any time, and therefore, their claims are not barred by the statute of limitations. Plaintiffs also argue that, contrary to the Bronstein defendants' argument,

they are not seeking contract reformation, rather they are seeking reformed rent stabilized leases. Finally, plaintiffs contend that they have properly alleged a class action suit.

The Margules Defendants[8] also move to dismiss the complaint. The Margules defendants note that only three plaintiffs have apartments in their properties: Mann, Chapman, and Islam. The Margules defendants note that the Mann apartment is rent stabilized, and the Chapman and Islam apartments have been deregulated.

The Margules defendants argue that the only allegation in the complaint regarding the Mann apartment is that they failed to file the legally required registrations for that apartment. The Margules defendants argue the Mann apartment was subject to rent control from 1972 through September 27, 2011, when it was occupied by tenant Robert Flynn. When Flynn vacated the apartment, he was paying a rent of $182.97, plus fuel of $43.65 and a "Major Capital Improvement" (MCI) of $29.97 (see Novotny aff, exhibit C). On June 28, 2012, Dina Mann executed a lease for the apartment which contained a rider in which she acknowledged that she was the first rent stabilized tenant in the apartment, and that she could be charged a first rent (a fair market rent) of $1,400.00 (see Novotny aff, exhibit D). Therefore, according to the Margules defendants, if Mann wanted to challenge her rent, she had four years (until July 1, 2016), to seek a fair market rent appeal (FMRA). The Margules defendants argue that Mann did not challenge her rent and that the statute of limitations has expired. Further, contrary to plaintiffs' contentions, Mann's apartment was properly registered with DHCR for every year of Mann's tenancy. The Margules defendants argue that, accordingly, Mann's rent overcharge claim must be dismissed.

---

[8] The Margules defendants are Sunnyside 42 LLC, Rowdy Management, LLC, and Margules Properties, Inc. In the complaint, plaintiffs refer to these three defendants as the Rowdy defendants.

With respect to Chapman's apartment, the Margules defendants argue the apartment was occupied by tenants Sultana and Chowdhury from 2006 to 2012 (see Novotny aff, exhibit J). The Margules defendants further argue that, in July 2012, $28,163.96 of IAIs were performed on the apartment (see Novotny aff, exhibit K). To support this contention, the Margules defendants submit an invoice from New York Logic, Inc. (NY Logic) for $28,163.96 worth of work performed on the apartment and two checks issued to NY Logic: one in the amount of $14,054.23; and another in the amount of $15,154.31 (see Novotny aff, exhibit K).

The Margules defendants then argue that Chapman's apartment was then leased to Marissa Yasgur from September 2012 through August 2015. On September 1, 2012, Yasgur signed a lease for the apartment at a regulated rent of $2,143.42 and a preferential rent of $1,500 (see Novotny aff, exhibit H). The rent prior to Yasgur's tenancy was a regulated rent of $1,236.69, to which was added a vacancy increase of $204.05, and an IAI increase of $702.72. The Margules defendants argue that the apartment became deregulated on March 1, 2015, when Chapman entered into occupancy. At the time Chapman entered into his lease, the regulated rent was $2,534.09, which exceeded the high rent deregulation threshold of $2,500. The Margules defendants argue that, accordingly, Chapman's rent overcharge claim must be dismissed as they have established that the rent is proper.

As to Islam's apartment, the Margules defendants argue that the apartment was deregulated on May 25, 2007 by virtue of the high rent regulation, because the rent for that apartment exceeded $2,000. The Margules defendants argue that, until December 2006, the apartment was occupied by tenant Chowdhury who paid a monthly rent of $1,035.85. The Margules defendants further argue that, in April 2007, V-Tech Construction Services, LLC (V-Tech) performed $25,600.00 of

improvements to the apartment (see Novotny aff, exhibit P). In support of this contention, the Margules defendants submit an invoice from V-Tech in that amount, a check issued to V-Tech on May 23, 2007 in the amount of $256,900.00, and various subcontractor invoices and payments. The Margules defendants further argue that, in May 2007, Ivette Mestre became a tenant in the apartment and, with the vacancy increase, longevity increase, and IAI increase, she was charged a monthly rent of $2,501.72, which exceeded the $2,000 deregulation threshold in effect at the time. Mestre was charged a preferential rent of $2,000 (see Novotny aff, exhibit O). On August 22, 2008, Islam entered into a deregulated lease for the apartment for a base rent of $2,000. Accordingly, the Margules defendants argue that Islam's rent overcharge claims must be dismissed because he is being charged the proper rent.

The Margules defendants also argue that the claims against defendants Rowdy Management, Inc. and Margules Properties, LLC, must be dismissed because a manager of a limited liability company is not individually liable for the action of that entity. Notably, according to the Margules defendants, the only allegations with respect to Rowdy Management, Inc. is that it is the property manager for some of the subject buildings. Further, with respect to Margules Properties, LLC the only allegation against it is that it is a "shareholder, member and/or partner of Sunnyside 42 LLC" (Sosnowski affirmation, exhibit E ¶ 511). The Margules defendants argue that, accordingly, neither Rowdy Management, Inc. nor Margules Properties, LLC can be considered an owner for rent overcharge purposes.

In opposition, plaintiff argues that, with respect to the Mann apartment, without discovery to verify the Margules defendants' claims, the Mann claim should not be dismissed. (*See* tr at 54.) With respect to the Chapman and Islam apartments, plaintiffs argue that these apartments were

illegally deregulated as part of a fraudulent scheme throughout the Bronstein Portfolio. Plaintiffs also argue that the documentation submitted by the Margules defendants does not support the IAIs because they do not numerically add up to the amount of the rent increases. Further, plaintiffs argue that it appears that the Margules defendants are taking credit for repairs that are not IAIs and that they charged for the same repairs twice. The plaintiffs also argue that the charges incurred for the IAIs are suspect because Islam's apartment was managed by Vantage Management Services, LLC (Vantage) while the worked performed on the apartment was done by V-Tech. Both Vantage and V-Tech have offices at 750 Lexington Avenue in Manhattan, and the head of V-Tech is Rey Camacho, who is also Vantage's Director of Property Management. Plaintiffs argue that this "incestuous" type of relationship between Vantage and V-Tech is inherently suspicious and an indicia of fraud. The plaintiffs note that, with respect to Chapman's apartment, the IAIs are also suspect because the work was performed by NY Logic, and NY Logic also had offices at 750 Lexington Avenue.

Plaintiffs further argue that, pursuant to RSC § 2520.6 (i), an "owner" for rent overcharge purposes includes "any other person or entity receiving or entitled to receive rent for the use or occupancy of any housing accommodation, or an agent of any of the foregoing." Plaintiffs argue that, as Rowdy Management, Inc. is an agent of Sunnyside 42 LLC, and Margules Properties, LLC is a single purpose entity that is a mere pass-through entity for the owner Sunnyside 42 LLC, the Margules defendants cannot escape liability.

In reply, the Margules defendants argue that the complaint alleges that plaintiffs brought this action to end the "illegal and fraudulent practices employed by the Bronstein defendants over the course of their ownership and operation of [25 apartment buildings]" (see Sosnowsky

affirmation, exhibit E). Further, in plaintiffs' memorandum of law in opposition to the Margules defendants' motion, plaintiffs argue that Chapman and Islam have been cheated, and were illegally deregulated by the Bronstein defendants. The Margules defendants argue that, based upon plaintiffs' own admission, there is no allegation of fraud asserted against the Margules defendants, but rather, any fraud is attributable to the Bronstein defendants, only. The Margules defendants argue that, in the absence of any allegations of fraud against them, any claims against them for rent overcharge should be dismissed without prejudice to renewal before the DHCR.

The defendant QPI-XXXII LLC (QPI) moves to dismiss the complaint on the ground that it is the former owner of two buildings at issue, 43-35 42nd Street and 43-39 42nd Street in Queens, New York. QPI argues that those buildings were transferred to Sunnyside 42 LLC (one of the Margules defendants) on July 26, 2017, prior to the commencement of this action on April 3, 2018. QPI further argues that, as a former owner, it is exempt from rent overcharge liability pursuant to the RSL, and the complaint must be dismissed as against it.

In opposition to QPI's motion, plaintiffs argue that QPI cannot escape liability from their rent overcharge claims merely because it sold the buildings in question. Rather, QPI's proper remedy is to assert a cross claim against Sunnyside 42 LLC.

Discussion

Class Action

As this court noted at oral argument on these motions, the Bronstein defendants' and the Margules defendants' motions to dismiss the complaint on the ground plaintiffs cannot maintain their claims as a class action is denied as premature (see December 5, 2018 Transcript, at 5-7). In making this decision this court relied on the legal precedent set forth in *Maddicks v Big City*

Properties, LLC, (163 AD3d 501 [1st Dept 2018]), which states that "a detailed analysis of class certification status is inappropriate at the pleading stage." Therefore, "[i]t simply is premature, before discovery and before a class certification motion has been made, to rule out the class claims in their entirety" (*id.* at 503-504). The *Maddicks* court noted that when defendants have not answered, it is not known what documents they have, if any, to justify the increases or what explanations they have for the purported failures to register the apartments. Moreover, it is not known whether defendants' defenses are the same for many of the units. If so, then the scheme alleged by plaintiffs may have relevance, and the potential members of the class should not, as a matter of law, be precluded from raising these claims as a group (*id* at 503-504).

Motions to Dismiss

When considering a CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, the motion may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Leon v Martinez*, 84 NY2d 82, 88 [1994]). The documents submitted must be explicit and unambiguous (*see Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]). In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences (*see Leon*, 84 NY2d at 87-88). While the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence (*see Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

On a motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a

cause of action, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Wilson v Dantas*, 29 NY3d 1051, 1056–57 [2017] quoting *Leon*, 84 NY2d at 87–88; see CPLR 3211 [a] [7]).

Bronstein Defendants' Motion

The Bronstein defendants argue that the vast majority of plaintiffs' individual claims must be dismissed because they are barred by the four-year statute of limitations for rent overcharges (see CPLR 213-a; RSL § 26-516 [a] [2]).[9] Further, according to the Bronstein defendants, the exception to this rule, which permits tenants to look back further than four years if there is substantial indicia of fraud, does not apply here (see *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]).

In *Grimm*, the Court of Appeals affirmed the Appellate Division's affirmance of the motion court's vacatur of a DHCR decision due to, among other things, the DHCR's failure to consider the petitioner's fraud claims. The *Grimm* court held that looking back past the four-year statute of limitations is permissible whenever fraud is alleged in connection with a rent overcharge (*id.* at 366–367). The court held that there were a number of factors which could constitute indicia of fraud. The court also stated, though, that neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements will suffice to establish indicia of fraud (*id.* at 367–68; *see also Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018]; *Breen v 330 E. 50th Partners, L.P.*, 154 AD3d 583 [1st Dept 2017]).

[9] The Bronstein defendants are not seeking to dismiss the rent overcharge claims that are timely.

In considering the Bronstein defendants' arguments, the Court notes that the cases upon which they rely are all cases decided on a motion for summary judgment (*see Butterworth v St. Nicholas Partners, LLC,* 160 AD3d 434 [1st Dept 2018]; *Breen v 330 50th Partners, L.P.*, 154 AD3d at 584; *Taylor v 72A Realty Assoc. LP*, 151 AD3d 95, 104 [1st Dept 2017]), or an article 78 proceeding to annul a DHCR factual determination (*see Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014] *revg* 110 AD3d 594 [1st Dept 2013], *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal*, 15 NY3d 358 [2010]). Here, we are presented with a pre-answer motion to dismiss. The Court, upon reviewing the cases cited and considering the facts here, finds while these cases are instructive, they are ultimately not persuasive.

A case with a procedural posture similar to the instant matter is *Bogatin v Windermere Owners LLC* (98 AD3d 896 [1st Dept 2012]). In *Bogatin*, the Appellate Division, First Department affirmed the motion court's denial of a pre-answer motion to dismiss on statute of limitations grounds. The court held that the motion court had properly looked beyond the four-year period prior to the filing of the rent overcharge complaint because, in opposition to the motion to dismiss, plaintiff had presented enough evidence that defendants had engaged in a fraudulent scheme to remove the subject apartment from rent regulation. The *Bogatin* plaintiff's allegation that defendants falsely claimed to have undertaken substantial improvements prior to his tenancy were supported by, among other things, plaintiff's affidavit and a contractor's estimate. The court noted that, at this pre-answer stage of the litigation, defendant's motion was properly denied, affording plaintiff the opportunity to engage in discovery on the issue of the alleged fraudulent deregulation.

Here, plaintiffs have similarly alleged that, with respect to 31 of the apartments owned by the defendants, there is a pattern of significant rent increases after IAIs have been performed, but

for which no building permit was filed, and that the alleged improvements appear not to have taken place. The Court finds that these allegations sufficiently set forth adequate indicia of fraud for the purpose of surviving a pre-answer motion to dismiss, pursuant to CPLR 3211 (a) (7), as to those claims that require a look-back longer than the four-year statute of limitations (*see Bogatin v Windermere Owners LLC*, 98 AD3d at 896). Considering that there has been no discovery, as in *Bogatin*, plaintiffs should be afforded the opportunity to engage in the relevant discovery. (*See also* CPLR 3211 [d].) As such, the Bronstein defendants' motion to dismiss on the ground that plaintiffs' have failed to state a cause of action is denied.

With respect to the Bronstein defendants' argument that the complaint must be dismissed pursuant to CPLR 3211 (a) (1), documentary evidence, the Court finds *Dixon v 105 W. 75th St. LLC* persuasive (148 AD3d 623 [1st Dept 2017]). In *Dixon*, the Appellate Division, First Department held that, on a pre-answer motion to dismiss, the landlord satisfied its burden of demonstrating that it made the necessary improvements to qualify for first rent because it established that it substantially altered the character of the apartment in that it connected it to the new penthouse. The landlord also submitted documentary evidence such as the approved plans for the addition, the work permit for the project, the certificates of occupancy from before and after the work, and the contractors' invoices and proofs of payment. The court noted that these documents refuted the plaintiff's claims and that the plaintiff failed to raise an issue of fact precluding dismissal of his claim.

Here, the Bronstein defendants rely on DHCR Apartment Registration Reports and Vacancy Decontrol Reports in an attempt to establish that, for 45 plaintiffs (out of 75 plaintiffs[10]),

[10] Of the remaining 30 plaintiffs, 3 assert claims against the Margules defendants and

representing 36 of the apartments (out of 57 apartments) in question, the allegations of rent overcharges occurred prior to April 3, 2014, and are, therefore, time barred. Nevertheless, as the Court has already found that plaintiffs have sufficiently alleged indicia of fraud, this documentary evidence does not utterly refute plaintiffs' claims. Moreover, the proof submitted falls far short of what was deemed adequate in *Dixon*, and in fact, proof regarding any specific IAIs is nonexistent.

"A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff[s'] claim" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2nd Dept 2006]). "Moreover, a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff[s], the complaint states in some recognizable form any cause of action known to our law" (*id.* at 38). Whether the plaintiffs can ultimately establish their allegations "is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Based on the foregoing, the Bronstein defendants' motion to dismiss plaintiffs' claims which accrued prior to April 3, 2014 is denied. With respect to defendant Bronstein Properties LLC, the property manager, the claims asserted against it must be dismissed because plaintiff has not disputed that it was acting as an agent for a disclosed principal (*see Paganuzzi v Primrose Mgt. Co.*, 268 AD2d 213, 214 [1st Dept 2000]; *Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 [1st

---

QPI. the remaining 27 plaintiff's claims accrued within four years of the filing of this action. The Bronstein defendants seek to dismiss the claims of these 27 plaintiffs on the ground that this is action is not suitable for a class action. As discussed above, that portion of the Bronstein defendants' motion has been denied as premature.

Dept 1998]; *see also* tr at 30–32).

The Court has considered the Bronstein defendants' other arguments and finds them unavailing.

Margules Defendants' Motion

The Margules defendants argue that they have submitted sufficient documentary evidence to refute plaintiffs' rent overcharge claims with respect to plaintiffs Mann, Chapman and Islam.

With respect to the Mann apartment, plaintiffs only claim was that the Margules defendants failed to file the legally required registrations for that apartment. The Margules defendants have submitted documentary evidence which shows that the Mann apartment was properly registered with DHCR for every year of Mann's tenancy. Plaintiff offered nothing to refute this evidence. Accordingly, Mann's rent overcharge claim is dismissed.

With respect to the Chapman and Islam apartments, the Margules defendants submitted documentary evidence which they claim supports the rent increases for these apartments. In opposition, plaintiffs argue that the documentary evidence submitted does not provide conclusive support for the rent increases. With respect to the Chapman apartment, the Margules defendants submit a July 2012 invoice from NY Logic for $28,163.96 worth of work performed on the apartment and two checks issued to NY Logic; one in the amount of $14,054.23, and another in the amount of $15,154. 31 (see Novotny aff, exhibit K). With respect to Islam's apartment, 2A, the Margules defendants submit an invoice from V-Tech for the performance of $25,600.00 of work performed on the apartment and a check issued to V-Tech on May 23, 2007 in the amount of $256,900.00, and various subcontractor invoices and payments.

While these documents may ultimately serve to rebut in whole or in part plaintiffs' claims

of rent overcharge, they do not utterly refute plaintiffs' claims for the purposes of a CPLR 3211 (a) (1) motion to dismiss because the documents themselves introduce ambiguities regarding the type, scope, and, critically, cost of work performed on the Chapman and Islam apartments. Notably, the IAI sums and the rent increases do not match the documents submitted by the Margules defendants. Further, there is an issue regarding what, if any, connection existed between the property manager for the Chapman and Islam apartments and the contractors V-Tech and NY Logic who allegedly performed the IAIs on those apartments (see DHCR Policy Statement 90-10, Sosnowski affirmation, exhibit K). Accordingly, the Margules defendants' motion to dismiss the rent overcharge claims of Chapman and Islam is denied.

The claims against defendant Rowdy Management, Inc., a property manager, must be dismissed because it was acting as an agent for a disclosed principal, Sunnyside 42 LLC (*see Paganuzzi v Primrose Mgt. Co.*, 268 AD2d at 214; *Crimmins v Handler & Co.*, 249 AD2d at 91-92). Likewise, the Court agrees with the Margules defendants that all the claims against Margules Properties, LLC must be dismissed because it is not an "owner" for rent overcharge purposes (*see* RSC 2520.6 [1]).

The Court has considered the Margules defendants' other arguments and finds them unavailing.

QPI's Motion to Dismiss

Pursuant to 9 NYCRR § 2526.1 (f) (1) and (2), current building owners are liable for a prior building owner's overcharge. There is no dispute that QPI transferred ownership of 43-35 42nd Street and 43-39 42nd Street to Sunnyside 42 LLC on July 26, 2017, prior to the commencement of this action. Thus, any and all rent overcharges as to those buildings that might

have been the responsibility of QPI prior to the transfer have become the responsibility of Sunnyside 42 LLC (*see Matter of Gains v New York State Div. of Hous. & Community Renewal,* 90 NY2d 545, 547 [1997]). Plaintiffs have not alleged any facts or circumstances, such as a FMRA or that the current owner was a buyer at a judicial sale, which would render this statute inapplicable. Accordingly, QPI's motion to dismiss is granted.

(THIS SPACE IS INTENTIONALLY LEFT BLANK.)

Conclusion

Accordingly, it is

ORDERED that the Bronstein defendants' motion to dismiss the complaint is granted to the extent of dismissing all claims against Bronstein Properties, LLC, and the motion is otherwise denied; and it is further

ORDERED that the Margules defendants' motion to dismiss the complaint is granted to the extent of dismissing Mann's claims in their entirety, and all claims against Margules Properties, LLC and Rowdy Management, Inc., and the motion is otherwise denied; and it further

ORDERED that QPI-XXXII LLC's motion to dismiss the complaint is granted; and its further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, within 20 days of the date of the decision and order on this motion, all parties shall serve a copy of this order with notice of entry on all other parties, and QPI shall serve a copy of the order with notice of entry on the clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, April 23, 2019, at 9:30 a.m.

DATED:

ENTER:

March 21, 2019

HON. ROBERT D. KALISH
J.S.C.

23