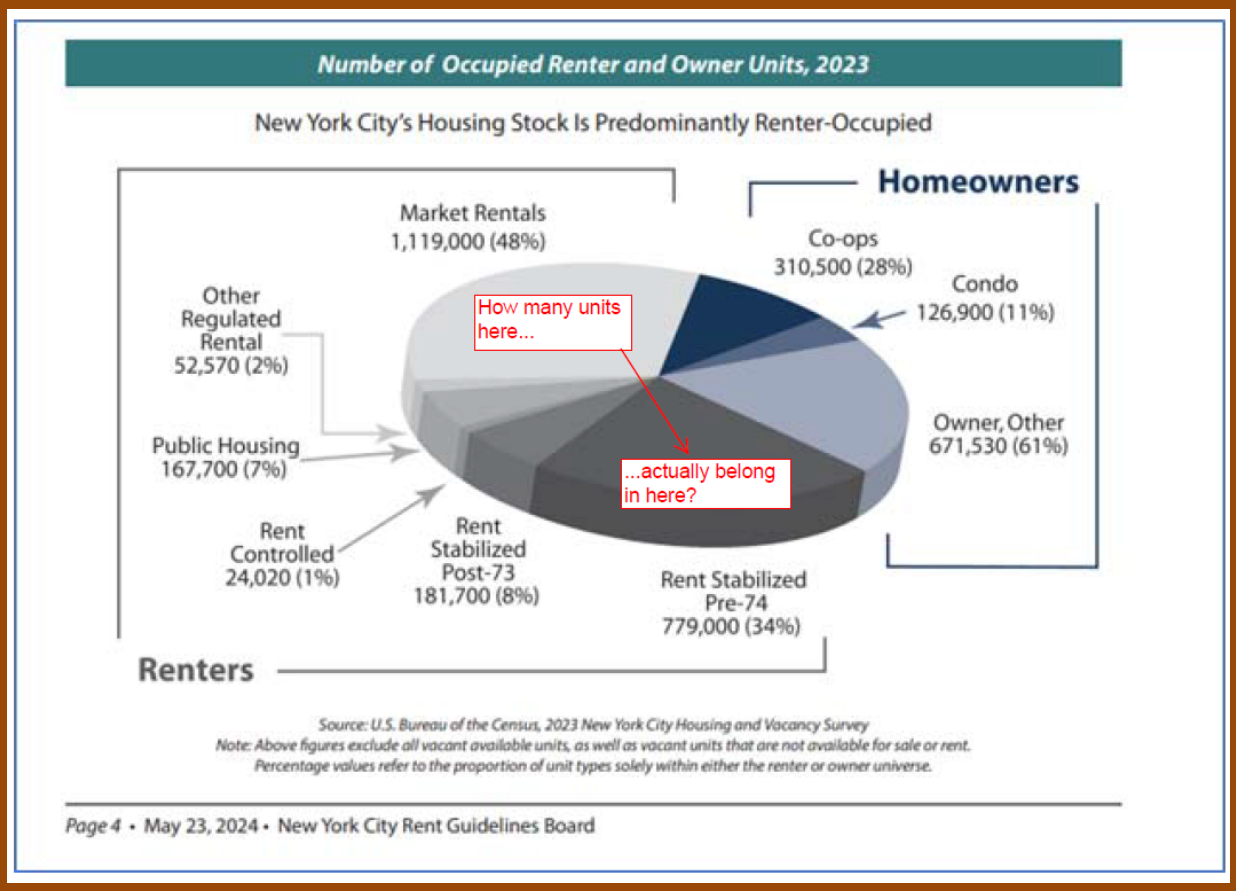
RENT STABILIZATION FRAUD



A PRESENTATION PREPARED FOR LAWLINE

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Rent Stabilization Master Class

A Presentation Prepared for Lawline

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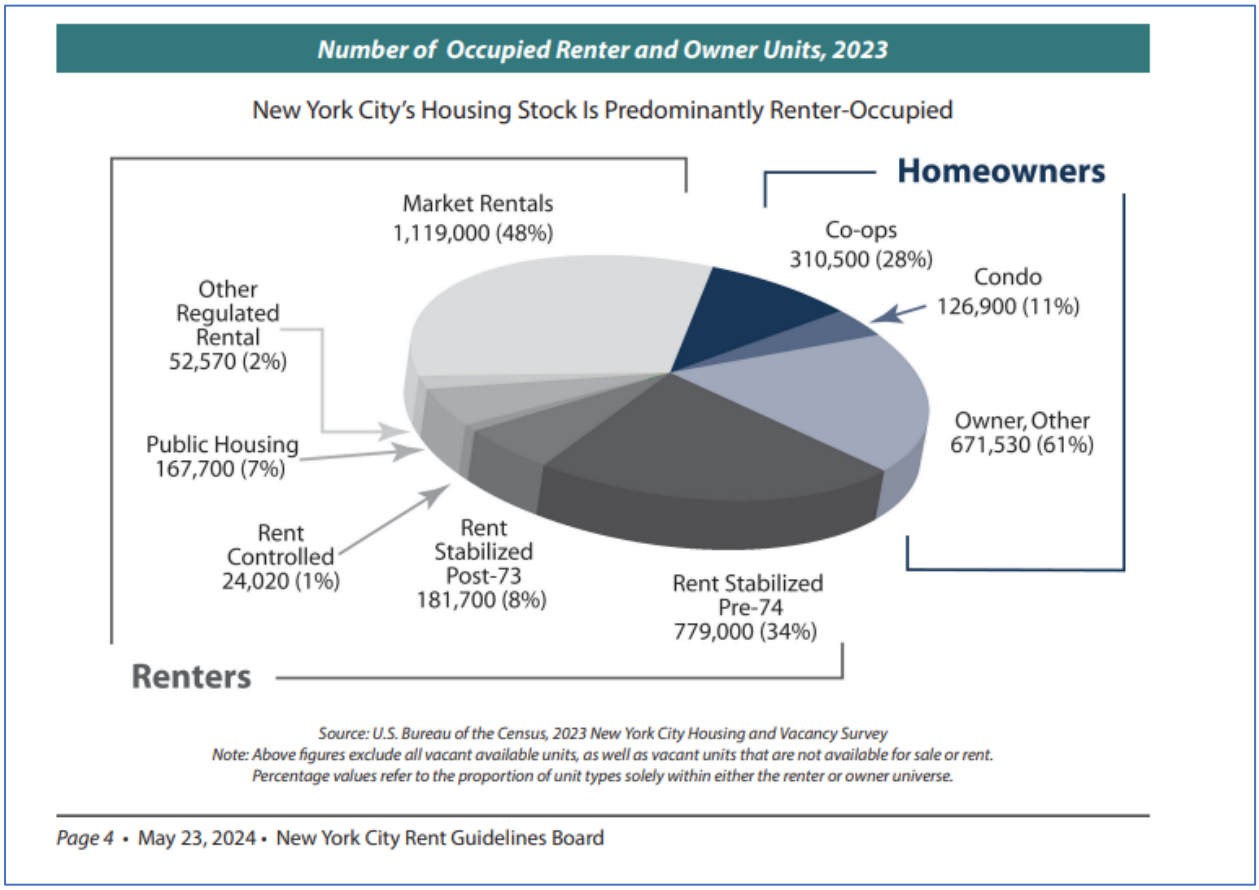
I. Introduction – What this Class is All About

A. What Rent Stabilization Means to Landlords and Tenants

Rent Stabilization applies to about one million tenancies in New York City and many more around New York State.[1]



Rent Stabilization limits the rent an owner may charge for an apartment, restricts the right of an owner to evict tenants for no cause, and imposes other requirements on landlords and tenants.

Rent Stabilization is overseen by the New York State Division of Housing and Community Renewal **("DHCR")**. McKinney's Uncons Laws of NY § 26-516 [Rent Stabilization Law **("RSL")**].

Rent increases for Rent Stabilized tenants are controlled by the New York City Rent Guidelines Board **("RGB")**, which sets maximum rates for rent increases once a year, which are effective for leases beginning on or after October 1st.[2]

[1] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2024/05/2024-HSR.pdf.

[2] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2023/07/2023-Apartment-Chart.pdf

Rent Stabilized tenants are entitled to leases and lease renewals. Even if landlord fails to renew a Rent Stabilized tenant's lease, all tenant's rights remain intact. Rent Stabilization Code **("RSC")** § 2523.5. If a Rent Stabilized lease is not properly renewed, a landlord cannot sue tenant for the rent. *Paid Enters. v Gonzalez*, 173 Misc.2d 681, 682 [App Term 2d Dept 9th & 10th Jud Dists 1997] ("Rent [S]tabilization is a lease-based regulatory scheme. As such, a tenant's obligation to pay the stabilized rent is dependent on the tenant's agreement to pay it.").

Under Rent Stabilization, landlord is required to follow a very specific procedure for lease renewals. *Matter of AEJ 534 E. 88th, LLC v. DHCR,* 194 AD3d 464, 471 [1st Dept 2021] (requirements of a Rent Stabilized lease are "rigorous" and merely using "certain jargon" does not suffice); RSC 2522.5[c][3] states that, "where a tenant...is not furnished...with a copy of the lease rider...the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease unless the owner can establish that the rent collected was otherwise legal". Leases must be entered into and renewed for one- or two-year terms, at the tenant's choice. RSC § 2522.5. Landlord must send the lease renewal offer between 150 and 90 days before the expiration of the current lease. RSC § 2523.5. A Rent Stabilized lease renewal offer must be on the same terms and conditions as the expired lease. RSC § 2522.5.

Owners are required to register all Rent Stabilized apartments initially and then annually with the DHCR and to provide tenants with a copy of the annual registration. Owners must be very careful when filing DHCR registrations because once they are filed, they cannot be amended without initiating a DHCR proceeding and explaining the reason for the amendment, which is time consuming and costly. RSC§ 2528.3. Furthermore, such amendments will only be granted for ministerial, as opposed to substantive, changes. *Selkirk 308 West 82nd St LLC*, LVT No. 30571 [DHCR Adm. Rev. Docket No. FW410026RO 11/27/19]. Furthermore, RSC § 2528.4(a) states that, "The failure to properly and timely comply, on or after the base date, with the rent registration requirements of this Part shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register."

Family members of a Rent Stabilized tenant residing in a Rent Stabilized apartment often have succession rights to the tenancy. RSC § 2523.5(b)(1); RSC § 2520.6(o). It is not unusual to find two and three generations of a family associated with the same Rent Stabilized apartment.

Rent overcharges travel with the land. *East 163rd Street LLC v. DHCR*, 4 Misc.3d 169 [Supreme Court, New York County, 2004] ("Nor does this Court find any basis in fact or the law to support petitioner's claim that its reliance on the amount of rent charged by the prior landlord should shield the new owner from damages for rent overcharges including treble damages. The Rent Stabilization Code explicitly permits carryover liability for treble damages. When in 1987 DHCR implemented the amended Rent Stabilization Code, 9 NYCRR § 2520 et seq., it set forth its 'carryover' policy at section 2526.1(f), which deals with responsibility for overcharges.

B. How do you know if a tenancy is Rent Stabilized?

Look back up at the Rent Guidelines Board chart in the previous section. For the pre-1974 type of Rent Stabilization (which accounts for almost 800,000 apartments), **there is no official list somewhere that definitively tells the world which apartments are subject to Rent Stabilization, and which are not.** The DHCR has jurisdiction over matters relating to Rent Stabilization and the DHCR maintains some records. But the registration records the DHCR maintains contain information that is largely self-reported by landlords and that is often not controlling regarding an apartment's Rent Stabilization status. *LL 410 East 78th Street LLC v. DHCR,* 213 AD3d 558 [1st Dept 2023] ("DHCR notes that it oversees nearly one million apartments subject to rent stabilization, each of which must be registered annually, and thus it relies on unilaterally filed, unverified registrations by apartment owners.") Therefore, year after year, a landlord can report to the DHCR that an apartment is "permanently exempt", but that does not make it so. *Connors v Kushner Companies LLC*, 2021 WL 3468142 [Supreme Court, Kings County, 2021].

Moreover, a current or former tenant may have signed a document acknowledging that an apartment is not subject to Rent Stabilization. But this, also, does not make it so. Parties may not contract out of Rent Stabilization coverage. See RSC § 2520.13 (Waiver of benefit void); *Thornton v Baron*, 5 NY3d 175 [2005] ("A lease provision purporting to exempt an apartment from rent regulation in exchange for an agreement not to use the apartment as a primary residence is against public policy and void.") *Drucker v Mauro*, 30 AD3d 37 [1st Dept 2006] ("It is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law.") *Kattan v. 119 Christopher LLC*, 204 AD3d 470 [1st Dept 2022] ("...an agreement to circumvent the Rent Stabilization Law is void and…parties are not the arbiters of whether an apartment is subject to rent stabilization…").

It works the other way as well; landlords and tenants cannot contract *in* to Rent Stabilization. *Heller v Middagh Street Associates*, 4 AD3d 332 [2nd Dept 2004] (Landlord did not contractually agree to subject tenants' apartments to Rent Stabilization Law by attaching Rent Stabilization riders to certain leases and by tendering rent renewal leases using Rent Stabilization forms.); *Ruiz v Chwatt Associates*, 247 AD2d 308 [1st Dept 1998] ("Rent stabilization coverage is matter of statutory right and cannot be created by waiver or estoppel.")

In general, if a building was built before 1974 and contains six or more dwelling units, then the apartments therein are Rent Stabilized unless certain exceptions apply. RSL 26-505(b).

Also, various real estate tax benefit programs, enacted to spur new construction or rehabilitation of residential housing (i.e., Real Property Tax Law **("RPTL")** §§ 421-a or g; RPTL § 489 **("J-51")**) are contingent on the building being subject to Rent Stabilization for a period of years. In some cases (*not all*), however, the Rent Stabilization status lasts only while the tax benefit is in place. If a unit was subject to Rent Stabilization in the absence of tax benefits, upon the termination of those benefits, the unit continues to be regulated. *72A Realty Associates v Lucas*, 101 AD3d 401 [1st Dept 2012] (J-51).

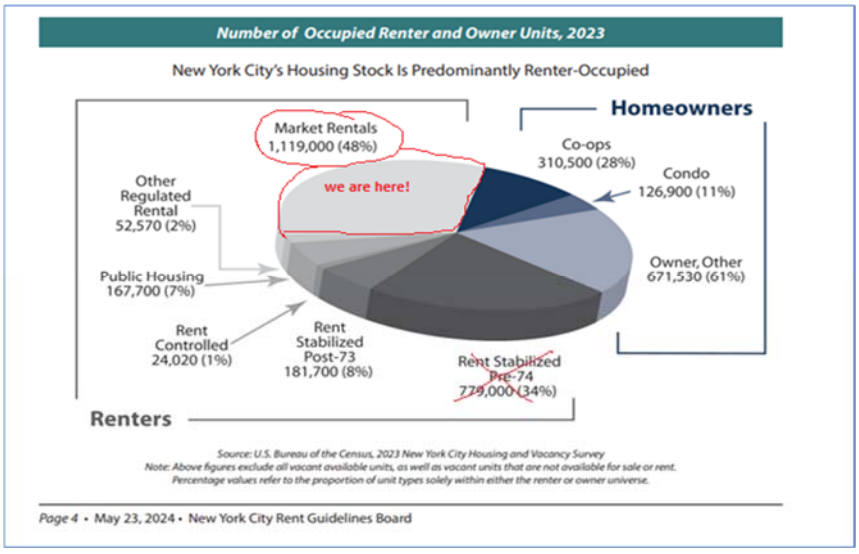
How do you ever get a definitive answer on an apartment's Rent Stabilization status? With some exceptions, the last word on whether an apartment is Rent Stabilized is in the hands of the courts or the DHCR. Until a judge is satisfied that an apartment is not Rent Stabilized (and the time to appeal that order has expired), the matter is always, in some measure, unsettled.

It is very important to keep in mind that a court or DHCR can look back in time endlessly to determine whether an apartment is subject to Rent Stabilization. *Gersten v 56 7th Avenue LLC,* 88 AD3d 189 [1st Dept 2013], *appeal withdrawn* 18 NY3d 954 [2012]. Upon such a challenge, "consideration of events beyond the four-year [damage determination] period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated" *East W. Renovating Co. v DHCR,* 16 AD3d 166, 167 [1st Dept 2005]; *150 E. Third St. LLC v Ryan*, 201 AD3d 582 [1st Dept 2022]. *See also* Rent Stabilization Code **("RSC")** § 26-516(h) (applicable after June 14, 2019), which allows a court or DHCR, "in investigating complaints of overcharge and in determining legal regulated rents, [to] consider all available rent history which is reasonably necessary to make such determinations…"

The burden is on the owner to show that an apartment is properly deregulated. *Matter of Kostic v DHCR*, 188 AD3d 569, 569 [1st Dept 2020] (It is landlord's burden to prove High Rent Vacancy Deregulation.); *Connors v Kushner Companies LLC*, 2021 WL 3468142 [Supreme Court, Kings County 2021]; *341 West 19th Street Partners 2 LLC v DHCR*, 2022 WL 1266402 [Supreme Court, New York County, 2022]; *Ahmad,* LVT No. 26921 [DHCR PAR Docket No. DO210037RO 2/5/2016] (It is landlord's burden to prove Substantial Rehabilitation deregulation.)

C. <u>Ironically, this class is less about the 800,000 pre-1974 Rent Stabilized units and more about the 1,100,000 free market apartments, many of which were wrongly deregulated and may still be Rent Stabilized.</u>

Ironically, this "Master Class" about Rent Stabilization is less about the 800,000 Rent Stabilized units out there, and more about the 1,100,000 free market apartments, many of which were wrongly deregulated and may still be Rent Stabilized. Let us look back at the chart again:



One of the few exceptions that would take an apartment out of Pre-1974 Rent Stabilization is High Rent Vacancy Deregulation. Therefore, most fights about wrongful deregulation from Rent Stabilization are about whether a unit has been High Rent Vacancy Deregulated.

High Rent Vacancy Deregulation occurred when an apartment's *legal* regulated rent had, upon the apartment becoming vacant (see *Altman v 285 West Fourth LLC*, 31 NY3d 178 [2018]), reached a prescribed deregulation threshold. Rent Stabilization Law **("RSL")** § 26-504.2(a). The High Rent Vacancy Deregulation Thresholds in New York City were as follows[3]:

4/1/1997 – 6/23/2011	$2,000
6/24/2011 – 6/14/2015	$2,500
6/15/2015 – 12/31/2017	$2,700
1/1/2018 – 12/31/2018	$2,733.75
1/1/2019 – 6/13/2019	$2,774.76
6/14/2019 - present	No HRVD

On June 14, 2019, High Rent Vacancy Deregulation was abolished by the Housing Stability and Tenant Projection Act of 2019 **("HSTPA").** Although High Rent Vacancy Deregulation was abolished, as per the HSTPA, past deregulations are still valid. RSL § 26-504.2.

[3] https://hcr.ny.gov/system/files/documents/2024/08/fact-sheet-36-08-2024.pdf.

So, for 22 years, landlords were allowed to High Rent Vacancy Deregulate apartments. It is almost impossible to find any real numbers about how many Rent Stabilized units were lost to High Rent Vacancy Deregulation. This next chart is from a New York City Rent Guidelines Board 2003 publication.[4] The chart notes that it is only counting the units that were voluntarily reported by landlords as having been deregulated. Thus, in the first five years of High Rent Vacancy Deregulation, at least 25,000 apartments were High Rent Vacancy Deregulated according to this chart. The number was probably much higher.

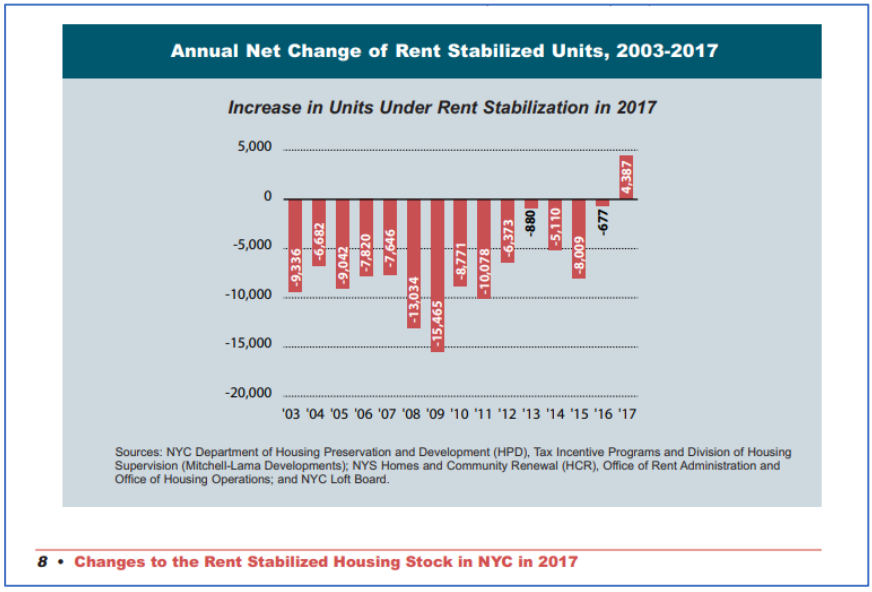
Subtractions from the Stabilized Housing Stock due to High Rent/Vacancy Decontrol, 1994-2002

Calendar Year	Number of Units					
	Bronx	Brooklyn	Manhattan	Queens	Staten Island	Total
1994	3	9	544	9	0	565*
1995	1	111	927	8	0	1,047*
1996	10	106	1,203	6	0	1,325*
1997	6	77	1,121	0	0	1,204*
1998	7	116	2,247	14	0	2,384*
1999	11	151	3,586	37	0	3,785*
2000	7	279	2,586	62	0	2,934*
2001	53	294	4,490	145	0	4,982
2002	64	391	5,431	251	7	6,144
Total	162	1,534	22,135	532	7	24,370*

*Note:Registration of deregulated units with DHCR was voluntary and not required from 1994-2000.These totals represent a 'floor' or *minimum* count of the actual number of deregulated units in these years. The NYC City Council required proof of registration with DHCR of the unit as exempt to be sent to the tenant beginning in March 2000. The numbers for 2001 and 2002 can be viewed as more authoritative counts of the actual number of deregulated units (see Endnote 5).

Source: NYS Division of Housing and Community Renewal annual registration data.

This next chart is from a New York City Rent Guidelines Board 2017 publication.[5] It estimates that from 2003 to 2017 another 108,000 Rent Stabilized apartments disappeared.



[4] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2003-Changes.pdf.

[5] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2018-Changes.pdf.

By June 2019, when High Rent Vacancy Deregulation was finally eliminated, many of us in this field estimate that 250,000 apartments were deregulated, some of them wrongly.[6]

Obviously, whether a unit is Rent Stabilized has huge repercussions for both a landlord and a tenant. For a tenant, having your presumed-free-market apartment converted by an adjudication into a Rent Stabilized apartment is a life-changing occurrence. Imagine being told your rent is much lower than you thought it was, you can almost never be evicted as long as you pay the rent, and that the landlord owes you money! For a landlord who gets such news, the damage is devastating and goes beyond that single apartment because such a finding lowers the rent roll of the building, which is what the value of the asset is based on. This will have repercussions for investment in and lending on the building for decades to come.

Thus, landlords and tenants have been arguing for a few decades over whether High Rent Vacancy Deregulations were wrongful. You may, at this point, ask, *"why wouldn't every single free market tenant challenge their regulatory status?"* Here are the answers. Such challenges are expensive. Very few lawyers understand this area of law. If a tenant loses such a challenge, she could be saddled with paying her landlord's legal fees. Many tenants do not have the time or emotional energy to take on their landlord. And perhaps most importantly, for many tenants it only makes sense to push an apartment back into Rent Stabilization if doing so results in a much lower rent. It is another proclivity of this area that the "legal rent" may not be set so much lower than the free market rent the tenant was paying.

A few days before we were set to teach the class that accompanies these materials, a sweep of Westlaw for new cases came up with the following case, which demonstrates the point made in this paragraph perfectly. In *Nadler v. Carmine Limited*, 218 NYS3d 59 [1st Dept 2024], the tenant lived to fight another day on their fraudulent deregulation claim but lost all hope of being awarded an overcharge. For some tenants, winning a Rent Stabilized unit is reward enough at the end of one of these battles. For many tenants, however, if the rent is not set lower, the fight and the risk are not worth it. *Nadler v. Carmine Limited*, 218 NYS3d 59 [1st Dept 2024] holds:

> As to plaintiff's first cause of action, which seeks a declaratory judgment that her apartment located in defendant's building is subject to rent stabilization, defendant failed to meet its prima facie burden establishing that the apartment was legally deregulated in 2003 [citations omitted throughout]. The Division of Housing and Community Renewal rent registration history report for the apartment did not establish the lawful rent for the apartment.

[6] Author Michelle Itkowitz bases her assumption on the following. The 2003 chart indicates 25,000 deregulations. The 2017 chart indicates 108,000 (or, on average, 7,000 per year) leaving Rent Stabilization (and the most ubiquitous exit from Rent Stabilization is via High rent Vacancy Deregulation). The additional Rent Stabilized units on the 2017 chart for 2017 are likely attributable to 421-a. Assuming, however, that there were 14,000 more units lost to High Rent Vacancy Deregulation from 2017 through 2018, that adds up to 147,000 units ([25k (pre 2003) + 108k (2003 – 2016) + 14k (2017 – 2018) = 147k] x 2 = 294k). Based on her anecdotal experience in this field, Michelle doubles that number and rounds down to 250,000 apartments High Rent Vacancy Deregulated, some of them (or many of them, depending on your perspective) wrongly. One wonders why nobody in a position to marshal the real data ever does this math. But I digress…

> Notably, the report stated that it "merely report[ed] the statements made by the owner" and "d[id] not attest to the truthfulness" of those statements. Meanwhile, the leases defendant submitted showed only what the apartment's former tenants actually paid, not what they should have paid. Nor do the New York City Rent Guidelines Board (RGB) orders aid defendant. Although RGB Order 23 explains the jump in rent from $895.52 in 1992 to $998.50 in 1993, as the order allowed defendant's predecessor owner to increase the rent by the annual renewal adjustment, the RGB orders do not explain the monthly rent jump from $998.50 in 1993 to $1,663.91 in 1994, which the DHCR report states were based in part on improvements to the Apartment. Defendant furnished no evidence concerning these improvements. Defendant's argument that it was not required to furnish evidence from 1993 and 1994 supporting the apartment's regulated status is unavailing…
>
> **However, plaintiff's third claim for rent overcharges was properly dismissed. Plaintiff filed this action in 2022, 16 years after she claims she was first overcharged**…**Plaintiff could not use discovery to establish her overcharge claim, as the 1993 rent bump occurred 10 years before the apartment was deregulated and nearly three decades before she filed her complaint**…
>
> [Emphasis supplied.]

This is what we in the Rent Stabilization space have been fighting about, up and down from DHCR and the New York City Civil Court all the way to the Court of Appeals and back again, for two decades. These materials and the seminar they accompany are a window into our world.

II. <u>The method of setting the base rent is dependent on the *type* of improper deregulation case. There are THREE (3) types of improper deregulation cases.</u>

Fifteen years after *Roberts*[7], five years after the HSTPA[8], and four years after *Regina*[9], it is fair to say that decision makers and litigants do not have full clarity on how to set the base rent and, therefore, on how to calculate overcharge damages, in improper deregulation cases. This is so because there is a lot of case law on the topic, covering a wide variety of fact patterns. Reading any case in isolation creates confusion. Therefore, this piece synthesizes the major First Department (and some Second Department) case law on this topic since *Regina* (and many

[7] *Roberts v. Tishman Speyer Properties, L.P.*, 62 AD3d 71 [1st Dept 2009], *affirmed* 13 NY3d 270.

[8] New York State Housing Stability and Tenant Protection Act of 2019 [L 2019, ch 36].

[9] *Regina Metropolitan Co., LLC v. DHCR*, 35 NY3d 332 [2020].

relevant cases from before *Regina*) and attempts to extract a consistent rule on how to set the base rent and calculate overcharge damages in improper deregulation cases.

The method of setting the base rent is dependent on the *type* of improper deregulation case. There are THREE (3) types of improper deregulation cases:

(1) Cases where there was fraud.

(2) Cases where there was no fraud and there is a reliable rent.

(3) Cases where there was no fraud, but there is no reliable legal rent.

Some important caveats on this analysis:

- These three categories exist not only for pre-HSTPA cases, but for post-HSTPA cases as well.

- This framework applies beyond J51 improper deregulation cases to all types of deregulation cases. Moreover, J51 cases can still manifest as fraud cases, but not before 2012 (or 2016). It has been repeatedly held that the retroactivity of *Roberts* was not settled until March 2012. *Matter of Park v. DHCR,* 150 AD3d 105, 110, [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]; *Gersten v. 56 7th Ave. LLC,* 88 AD3d 189, 198 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954, 944 [2012]; *Goldfeder v. Cenpark Realty LLC*, 187 AD3d 572 [1st Dept 2020]. Although some people suggest landlords can use the *Roberts* excuse until 2016, when DHCR told J-51 owners to re-register. *See Gridley v. Turnbury Village, LLC*, 196 AD3d 95 [2d Dept 2021], *lv denied,* 2021 WL 5898137 [2021].

III. <u>If there was fraud, then the decision maker can look back beyond the applicable statutory look-back period, without limitation, when setting the base rent and, if the decision maker can find no reliable rents, can resort to the DHCR default method (RSC § 2522.6(b)) for setting the base rent.</u>

A. <u>Fraud</u>

It is well supported that, if there is fraud, the decision maker can look back beyond the applicable statutory look-back period, without limitation, when setting the base rent and, if the decision maker can find no reliable rents, can resort to the DHCR default method for setting the base rent. The case survey below, presented in chronological order, provides examples (most of them recent) of where a decision maker finds fraud.

Fraud has been found where there was no proof of recent apartment improvements that were alleged to lead to rent increases (*Bogatin v Windermere Owners LLC*, 98 AD3d 896 [1st Dept 2012]), where there were illusory prime tenancies (*Conason v Megan Holding*, LLC, 25 NY3d 1 [2015]), and where landlord included in its leases a provision that the tenants would not use the apartments as primary residences (*Thornton v. Baron*, 5 NY3d 175 [2005]).

In *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439 [1st Dept 2016], *lv denied* 29 NY3d 903 [2017], the court held:

> Plaintiff claimed that defendant engaged in a "fraudulent scheme" to deregulate the apartment by increasing the 1995 rent of $422.04 to over $2,000 in subsequent years, executing market rent leases during a time it was receiving J–51 tax benefits, failing to provide him with a lease rider, and failing to file the required annual registrations with DHCR during his tenancy. Defendant failed to refute these allegations of fraud. Its argument that the apartment was deregulated because it was renovated in 1995 is unavailing, as it fails to support it with sufficient evidence. The affidavit of its lease administrator, stating that at least $6,296.14 of individual apartment capital improvements were performed prior to plaintiff's first lease, is insufficient, as it was unsupported by "bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the [claimed improvements]" [citation omitted].
>
> Because plaintiff established a colorable claim of fraud, Supreme Court properly disregarded the rent charged four years prior to the filing of the rent overcharge claim, and properly examined the entire rent history to determine the legality of the base rent [*Grimm*[10]]. Further, the application of DHCR's default formula was warranted, given the unreliability of the rental history since 1995, due to defendant's failure to file a number of the annual rent registrations prior to the commencement of this action...

Butterworth v. 281 St. Nicholas Partners, LLC, 160 AD3d 434 [2d Dept 2018]:

> The court properly looked back beyond the four-year limitations period for plaintiffs' rent-overcharge claim [citations omitted throughout] to establish the proper base rent, in that sufficient indicia of fraud existed...While neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud…, here at the same time that the predecessor landlord increased the rent from $949.34 to $1,600 in plaintiffs' initial lease, it also ceased filing annual registration statements for 2007 through 2012. Moreover, plaintiffs' initial lease contained a "Deregulation Rider for First Unregulated Rent," which left blank spaces which would have indicated either that the last legal regulated rent or the new legal rent exceeded the $2,000 threshold for deregulation, and may well be viewed as an attempt

[10] Cited and examined within. Most cases cited within the quoted material are dealt with separately herein.

> to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold.

Kreisler v B-U Realty Corp., 164 AD3d 1117 [1st Dept 2018]:

> Where, as here, a landlord has engaged in fraud in initially setting the rent or removing an apartment from rent regulation, the court may examine the rental history for an apartment [citation omitted] and, moreover, may do so beyond the statutory period allowed by CPLR 213-a [citation omitted]…
>
> The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated [*Roberts*], came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014.
>
> We reject defendants' asserted reliance on a "pre-*Roberts*" framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided. Moreover, and notwithstanding defendants' arguments to the contrary, we find the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate [citation omitted].
>
> In turn, we find defendants have not shown that Supreme Court erred in directing the Special Referee to use the default formula of 9 NYCRR 2522.6 (b) (2) to determine plaintiffs' base rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment.

Nolte v. Bridgestone Assoc. LLC, 167 AD3d 498 [1st Dept 2018]:

> The court properly examined the rental history of the subject apartment beyond the four-year statutory limitations period (CPLR 213-a) upon finding that defendant was engaged in a fraudulent scheme to deregulate apartments [citation omitted]. The record shows that defendant failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of [*Roberts*] was clear [citation omitted].

> Moreover, defendant failed to raise an issue of fact as to whether the rent was improperly increased between 1999 and 2000 based on false claims of individual apartment improvements. While defendant was not the owner at that time, it submitted no evidence that controverted plaintiff's expert's affidavit stating that there was no evidence of such improvements.

Davis v. Graham Court Owners Corp, 211 AD3d 629 [1st Dept 2022]:

> The court's finding that defendant engaged in a fraudulent scheme to deregulate the subject apartment by claiming fictional individual apartment improvements (IAIs), which rested largely on credibility determinations, was based on a fair interpretation of the evidence [citation omitted]. At trial, [tenant] testified that the apartment was uninhabitable at the time he took possession. This testimony was corroborated by three witnesses. While defendant's witness testified that he spent $60,000 on IAIs, his credibility was called into question, and defendant failed to produce other admissible proof showing that the improvements were made. Although the court erroneously found that plaintiff entered into the lease in November 2002, as opposed to May 2003, such error was immaterial in view of the evidence establishing that the apartment was uninhabitable at the time plaintiff took possession.
>
> Because the court found that there was fraud, it properly applied the default formula in determining the legal rent.

B. <u>Fraud Cases That Do Not Use the Word "Fraud"</u>

At the same time that *Roberts* was setting the wheels of almost all of the above in motion, there was an independent line of appellate Rent Stabilization cases doing much the same thing, but for different reasons. I refer to this as the *Jazilek*/*Bradbury* line of cases, and they *may* still recognized as good law.

Rent Stabilization Code § 2528.4 (Penalty for failure to register) states:

> (a) The failure to properly and timely comply with the rent registration requirements of this Part shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register. Such a bar includes but is not limited to rent adjustments pursuant to section 2522.8 of this Title [vacancy increases]. **The late filing of a registration shall result in the elimination, prospectively, of such penalty**, and for proceedings commenced on or after July 1, 1991, **provided that increases in the legal regulated rent were**

> **lawful except for the failure to file a timely registration, an owner, upon the service and filing of a late registration, shall not be found to have collected a rent in excess of the legal regulated rent at any time prior to the filing of the late registration.**
>
> [Emphasis supplied.]

Without ever mentioning the words "fraud" or "lookback", *Jazilek v. Abart Holdings, LLC*, 72 AD3d 529 [1st Dept 2010], holds:

> In calculating the amount of the rent overcharges, the motion court correctly declined to apply any periodic or other rent increases, other than a vacancy increase of 20% (*see* RSC [9 NYCRR] § 2522.8[a][1]), which the parties agreed applied. A landlord's failure to file a "proper and timely" annual rent registration statement results in the rent being frozen at the level of the "legal regulated rent in effect on the date of the last preceding registration statement" (RSL § 26–517[e]; *see* RSC [9 NYCRR] § 2528.4 [a]). The rent registration filed by the landlord in February 2004 was false, as it continued to list the prior tenant as tenant of record, and listed the prior rent of $812.34, instead of the actual paid "preferential" rent of $1,800. The rent registration filed in June 2004 was also defective, as it listed a legal rent of $2,200, vastly in excess of $974.81, the highest possible legal rent at that time. As such, both the February and the June 2004 rent registration statements were nullities (*Thornton v. Baron,* 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 [2005]), and no further registration statements were filed.

Then came *Bradbury v. 342 West 30th Street Corp.*, 84 AD3d 681 [1st Dept 2011], holding:

> The matter went to trial, and in a decision dated November 29, 2007, the court determined that the apartment was subject to the Rent Stabilization Law. **The court found that the testimony of defendant's principal, Anthony Argento, was "unbelievable in all material matters" and "unworthy of belief." The court also rejected most of the other defense witnesses' testimony, finding that two of them had lied on the stand. The court concluded that bills and invoices were fabricated for the litigation and that at least one forged document was submitted to the court. In sum, the court stated that defendant's case was "a sham, filled with perjury, forgery, [and] fabrications all designed not only to raise the rent of the apartment ... to an unlawful level, but to mislead the plaintiff, counsel and the Court." The court**

rejected defendant's claimed renovation costs of $90,000 and found instead that defendant had spent no more than $34,000. The court also found that plaintiff's unlawful $2,000 rent was imposed willfully and intentionally.

By order and judgment entered May 12, 2009, the court declared that the last lawful rent was $402.43 in 2001. The court then calculated that defendant was entitled to an $80.49 vacancy increase, a $57.95 longevity increase and a renovations increase of $850 (1/40 of the $34,000 renovations cost) and that therefore the legal monthly rent chargeable to plaintiff at the start of his tenancy in January 2002 was $1,390.87. The court found that, since this amount did not exceed $2,000, the apartment was still subject to rent stabilization. The court concluded that defendant had overcharged plaintiff by $609.13 per month (the difference between $1,390.87, the rent found by the court, and $2,000, the rent plaintiff had paid) for a total overcharge of $20,101.29. The court also concluded that the overcharge was willful and intentional, entitling plaintiff to treble damages, for a total of $58,476.48. Both parties appeal from the May 12, 2009 order and judgment.

Defendant failed to meet its burden of proving the cost of the renovations made to the apartment to justify the rent it charged plaintiff (*see Matter of Graham Ct. Owners Corp. v. Division of Hous. and Community Renewal,* 71 A.D.3d 515, 899 N.Y.S.2d 7 [2010]). The trial court's determination that defendant spent no more than $34,000 in renovations is supported by a fair interpretation of the evidence. Defendant's witnesses and documents presented credibility issues, and the record sufficiently supports the trial court's resolution of those issues in plaintiff's favor. Defendant also failed to establish that the rent overcharges were not willful so as to avoid tremble damages (9 NYCRR 2526.1[a][1]; *Matter of Riverside Equities, LLC v. New York State Div. of Hous. & Community Renewal,* 58 A.D.3d 534, 871 N.Y.S.2d 139 [2009], *lv. denied* 13 N.Y.3d 709, 2009 WL 3349901 [2009]).

Although the trial court correctly calculated the amount of the vacancy, longevity and renovations increases that defendant would otherwise have been entitled to, we nevertheless conclude that defendant's intentional filing of two knowingly false rent registration statements was not a "proper" filing as required by § 26–517[e] of the Rent Stabilization Law of 1969 [Administrative Code of City of N.Y. § 26–517(e)] and bars defendant in this case from collecting any rent in excess of the legal regulated rent in

effect as of the date of the last preceding rent registration statement (*id.*).

Owners of rent stabilized apartments are required to file annual rent registration statements with DHCR listing, among other things, the name of the tenant in each regulated apartment along with the current rent on the registration date (*see* Administrative Code § 26–517[a], [f]; Rent Stabilization Code [9 NYCRR] § 2528.3 Rent Stabilization Code [9 NYCRR] § 2528.3). An owner's failure to file a "proper and timely" annual rent registration statement bars the owner from collecting "any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement" until such time as a proper registration is filed (Administrative Code § 26–517[e]; *see also* 9 NYCRR § 2528.4[a]). Where an owner fails to file a "proper and timely" registration, until such registration is filed, the rent is frozen at the legal regulated rent listed in the preceding registration statement (*see Jazilek v. Abart Holdings, LLC,* 72 A.D.3d 529, 531, 899 N.Y.S.2d 198 [2010]).

Here, although defendant filed rent registration statements in 2002 and 2003 listing the purported legal regulated rent as $2,000, the trial court's findings, which we now affirm, establish that those filings were intentionally false. The trial court concluded that defendant willfully and intentionally charged plaintiff the incorrect rent of $2,000 and that the maximum allowable rent was $1,390.87. The court further found that defendant's entire case was "a sham, filled with perjury, forgery, [and] fabrications" and was "designed ... to raise the rent of the apartment ... to an unlawful level," a level that would remove the unit from the protections of rent stabilization.

In light of these findings, we conclude that defendant's 2002 and 2003 DHCR filings were not "proper" within the meaning of Administrative Code § 26–517(e). This Court recently upheld the imposition of a rent freeze in a similar situation (*see Jazilek v. Abart Holdings, LLC,* 72 A.D.3d 529, 899 N.Y.S.2d 198 [2010], *supra* [rent registration statement listing a legal rent in excess of the highest possible legal rent was defective and not a "proper" filing]; *see also Thornton v. Baron,* 5 N.Y.3d 175, 181, 800 N.Y.S.2d 118, 833 N.E.2d 261 [2005] [rent registration statement listing illegal rent was a nullity]). Because defendant failed to file proper statements in 2002 and 2003, and because the record does not show that any such proper statements were subsequently filed, defendant was barred from collecting any rent in excess of the last properly registered rent, i.e., the $402.43 rent listed in the 2001

> registration. Accordingly, the matter should be remanded for a recalculation of the amount of the money judgment.

It seems that the Appellate Division clarified the modern role of *Jazilek/Bradbury* in *Enriquez v. DHCR*, 166 AD3d 404 [1st Dept 2018], holding:

> DHCR correctly calculated the legal regulated rent by taking the base rent (as of four years before the rent overcharge petition) and adding thereto all "subsequent lawful increases and adjustments" (Rent Stabilization Code [9 NYCRR] § 2526.1[a][3][i]). Contrary to the court's finding, the subject rent registration statements were "proper" within the meaning of Rent Stabilization Law (RSL) (Administrative Code of City of NY) § 26–517(e). **That provision requires landlords to "file a proper and timely initial or annual rent registration statement," which means a statement of the "rent charged on the registration date" (*id.* § 26–517[a]), or "current rent" (*id.* § 26–517[f]), rather than the technically legally collectible rent (*see Dodd v. 98 Riverside Dr., LLC,* 2012 N.Y. Slip Op 31653 [U], 2012 WL 2502774 [Sup. Ct., N.Y. County 2012]). The rent registration statements recorded the actual amount of rent charged to the tenant and were not the product of fraudulent leases or otherwise legal "nullities" (*see Bradbury v. 342 W. 30th St. Corp.,* 84 A.D.3d 681, 683–684, 924 N.Y.S.2d 349 [1st Dept. 2011]; *Jazilek v. Abart Holdings, LLC,* 72 A.D.3d 529, 531, 899 N.Y.S.2d 198 [1st Dept. 2010]).**
>
> [Emphasis supplied.]

IV. Where there was no fraud and there is a reliable rent, the lookback rule and standard method of calculating legal regulated rent govern.

Where there was no fraud and there is a reliable rent, the lookback rule and standard method of calculating legal regulated rent govern. *Matter of Regina Metro Co., LLC v. DHCR*, 35 NY3d 332 [2020].

A. Regina

Matter of Regina Metro Co., LLC v. DHCR, 35 NY3d 332 [2020], states:

> …The tenants and DHCR urge several bases for creating an exception to the standard pre-HSTPA overcharge calculation method that would enable courts to use these alternative approaches, but their arguments do not withstand scrutiny. First, an exception predicated on the fact that the base date rent was higher than what would have been permitted under the RSL for a stabilized apartment would swallow the four-year lookback rule. In

every overcharge case, the rent charged was, by definition, illegally inflated – otherwise there would be no overcharge. Prior to the HSTPA, nothing in the rent stabilization scheme suggested that where an unrecoverable overcharge occurred before the base date, thus resulting in a higher base date rent, the four-year lookback rule operated differently. To the contrary, the limitations provisions – in order to promote repose – precluded consideration of overcharges prior to the recovery period (former RSL § 26–516[a][2]; former CPLR 213–a), and it is clear from *Boyd* that use of a potentially inflated base date rent, flowing from an overcharge predating the limitations and lookback period, was proper in the absence of fraud. Likewise, no exception is justified by the fact that the inflated base date rent in *Roberts* cases resulted from improper deregulation, as opposed to an improperly high increase to a stabilized rent. The RSL makes no such distinction, and there is no indication that, under the pre-HSTPA law, an overcharge resulting from improper (but non-fraudulent) luxury deregulation warranted anything but the application of the standard lookback provisions…

Civil liability is always bounded by the public policy of repose embodied in statutes of limitations [citations omitted]… Overcharge liability under the RSL is no different. That *Roberts* revealed particular conduct to be illegal does not mean that tenants must be able to recover a certain measure of monetary damages for associated rent increases despite their failure to seek recovery within the limitations and lookback periods. Critically, our decision in *Roberts* has led to the return of many apartments to the rent stabilization scheme, including those at issue in these appeals; one amicus estimates the number of *Roberts* apartments at upwards of 50,000. While the statute of limitations and lookback period preclude tenants in those apartments from recovering certain damages they could have recovered if their claims had been initiated earlier, as a result of *Roberts* they may now enjoy rent stabilization protection…

We therefore decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud. Applying the correct interpretation of the pre-HSTPA law to the present cases, in *Regina Metro.* the Appellate Division properly annulled DHCRs overcharge determination, which violated the lookback rule by relying on a reconstructed rent, despite finding that the overcharge was not willful (and there was no colorable fraud claim).

Still, *Regina* needed to emphasize to the Agency in *AEJ 534 East 88th, LLC v. DHCR*, 194 AD3d 464 [1st Dept 2021]:

> The Deputy Commissioner's observation that "some methodology is required to be used" to set the rent, rather than "simply validating a deregulated rent and calling it regulated," is a result carefully considered by the Court in *Regina.* The Court noted that although particular conduct is illegal, this "does not mean that tenants must be able to recover a certain measure of monetary damages for associated rent increases despite their failure to seek recovery within the limitations and lookback periods" (*Regina* at 360, 130 N.Y.S.3d 759, 154 N.E.3d 972). Applying that principle here, Hayes was not the tenant in 2005 and her tenancy did not commence until 2010. She could not have filed an overcharge complaint because she was not a tenant at that time, but she also did not take any action with respect to the rent until AEJ filed its [DHCR Administrative Determination] request with DHCR in December 2015. Although the parties disagree over whether this is a status case or an overcharge claim, in actuality it is both.
>
> Hayes has prevailed in obtaining valuable protections under the rent-stabilization laws because her status has been confirmed, her damages are whatever is allowed during the statutory look back period. The Court in *Regina* recognized that some overcharges calculated using the lookback rule might be de minimus (*Regina* at 362, 130 N.Y.S.3d 759, 154 N.E.3d 972), or even nonexistent (*id.*), but an exception predicated on the fact that the base date rent was higher than what the landlord could have charged under the RSL "would swallow the four-year lookback rule" because by definition the rent in every overcharge case is "illegally inflated —otherwise there would be no overcharge" (*Regina* at 359, 130 N.Y.S.3d 759, 154 N.E.3d 972).

Regina was reaffirmed by the Court of Appeals in *Casey v. Whitehouse Estates, Inc.*, 39 NY3d 1104 [2023]:

> Defendants' deregulation of the apartments was based on this same "misinterpretation of the law" involved in *Regina* and therefore that conduct did not constitute fraud (*id.*). Defendants' subsequent re-registering of the apartments occurred after the four-year lookback period, and plaintiffs have failed to offer evidence that it somehow affected the reliability of the actual rent plaintiffs paid on the base date.

> For purposes of calculating overcharges, where it is possible to determine the rent "actually charged on the base date"—here October 14, 2007—that amount should be used and rent increases legally available to defendants pursuant to the RSL during the four-year period should be added (*id.* at 355–56, 130 N.Y.S.3d 759, 154 N.E.3d 972).

B. <u>No Fraud</u>

There are many examples of cases where the decision maker found an improper deregulation but did NOT find fraud. Here I am including appellate cases that contain detailed explanations for their findings.

Park v. DHCR, 150 AD3d 105 [1st Dept 2017], held that the record amply supported DHCR's conclusion that tenants were not Rent Stabilized. Tenants did not take occupancy of the apartment until after expiration of the building's J-51 tax benefits, at which point all the circumstances permitting luxury decontrol were present and satisfied. After a long-term Rent Controlled tenant died, the apartment became subject to Rent Stabilization. The vacancy allowed a rent increase which brought the rent above the luxury decontrol threshold. The owner's post-vacancy improvements would also have entitled the owner to increase the rent over the threshold amount. In reliance on DHCR's interpretation of the relevant laws and regulations at that time, the owner then decontrolled the apartment on the basis that the rent exceeded the high rent vacancy threshold for luxury decontrol, and entered into an unregulated lease with a new tenant. During that tenancy, the J-51 benefits expired, and later, petitioners took occupancy under a new unregulated lease. When the owner learned that decontrol had been improper, it filed amended registration forms with DHCR, retroactively restoring the apartment to Rent Stabilization. Petitioners then filed a fair market rent appeal. As the owner was still receiving J-51 tax exemption benefits after the expiration of the Rent Controlled tenants lease, the owner had no right to return the apartment to the free market by relying on the luxury decontrol laws. However, by the time petitioners took occupancy, the J-51 benefits had expired and, as the attendant conditions were then met, the owner was permitted to rely on the luxury decontrol laws and deregulate the apartment. Petitioners could not rely on the fact that the apartment was not registered with DHCR for a period of time during their occupancy since the owner had discontinued rent registrations with DHCR based on a justifiable and good faith belief at the time that the apartment was no longer subject to rent regulation and such filings were unnecessary.

Breen v. 330 East 50th Partners, L.P., 154 AD3d 583 [1st Dept 2017]: "Neither the sizeable increase in the apartment rent between 1990 and 1991, based in part on apartment improvements, nor plaintiff's mere skepticism about the quality or extent of those improvements, were sufficient to establish a colorable claim of fraud."

Trainer v. DHCR, 162 AD3d 461 [1st Dept 2018]:

> As DHCR concluded, the legal regulated rent on the base date of December 15, 2006 was $1,722.23 for the period from March 1, 2006 to February 28, 2007. Tenants Rachels and Brooks then

> rented the apartment from June 1, 2007 to February 19, 2008, and received a Notice to First Tenant of Apartment Deregulated After Vacancy Due to a Rent of $2,000 or More, which showed that when the statutory vacancy allowance of $292.78 was added to the then legal regulated rent of $1,722.23, the legal regulated rent rose to $2,015.01 (*see* Rent Stabilization Law [RSL] § 26–516(a)(2); Rent Stabilization Code [RSC] § 2520.6[f][1]Rent Stabilization Code [RSC] § 2520.6[f][1]; 2526.1(a)(2). Thus, by the time petitioner took occupancy, the apartment was deregulated (RSC § 2520.11[r][4]). In these circumstances, DHCR was not required to inquire further past the base date to ascertain whether the apartment in question was lawfully deregulated.

Corcoran v. Narrows Bayview Company, LLC, 183 AD3d 511 [1st Dept 2020]:

> Plaintiffs' rent-stabilized apartment could not be deregulated pursuant to luxury decontrol laws during the period the building was receiving J–51 tax benefits [citations omitted throughout]. Given the lack of evidence that defendant engaged in fraud in deregulating the apartment, plaintiffs' claims for rent overcharge and to calculate the legal regulated rent are subject to a four-year look back period…
>
> The parties agree that the applicable base date is April 2006, four years prior to the April 2010 date of the complaint, and we reject plaintiffs' suggestion that the lack of DHCR filings contemporaneous with the base date requires one to look beyond the four-year period to an earlier legal regulated rent reported in a DHCR filing. This Court has held that "rental history," as that term is used in CPLR 213–a, is not restrained to DHCR records and may include the records of the landlord and the tenant [*Regina*]. Accordingly, the correct base rent is $2,000, which is the rent actually paid by the prior tenants in April 2006.
>
> When the prior tenants vacated on or about May 31, 2006 and plaintiff executed a two-year lease effective July 1, 2006, defendant was entitled to a 20% vacancy increase equal to $400 (20% of $2,000), bringing the legal regulated rent to $2,400...Additionally, defendant was entitled to a 5.75% rent guidelines increase of $138.00 (5.75% of $2,400) when plaintiffs executed a two-year renewal lease effective from July 1, 2008 through June 30, 2010. This resulted in a legal regulated rent of $2,538.

Goldfeder v. Cenpark Realty LLC, 187 AD3d 572 [1st Dept 2020]:

> Concerning plaintiffs' initial rent, the fair market rent agreed upon in plaintiffs' initial lease comported with applicable law [citations omitted throughout], as the unit became rent-stabilized by operation of law when the previous rent-controlled tenant vacated the prior year…;. Plaintiffs concede that they were served with an Initial Apartment Registration Form, but did not bring a Fair Market Rent Appeal before the Division of Housing and Community Renewal...
>
> As to the alleged rent overcharges, plaintiffs do not show that "a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date"…"[T]he fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims," where the landlord relied on pre-*Roberts* administrative guidance to deregulate…
>
> Plaintiffs failed to demonstrate that individual apartment improvements between the tenancies were not performed (*compare* [*Nolte*]). While defendants' condominium conversion plan should have identified the unit as rent-stabilized, and defendants should not have waited until 2015 to register the unit, their application for high-income deregulation was not improper, as the J–51 tax benefits had long expired…Further, their action seeking to declare the unit deregulated due to their reliance on the pre-*Roberts* regulations, though unsuccessful, was not fraudulent…fraud requires "representation of material fact, falsity, scienter, reliance and injury"...

Kostic v. DHCR, 188 AD3d 569 [1st Dept 2020]:

> [Appellant-tenant seeks] to annul the [Supreme Court] [d]etermination to the extent it utilized an allegedly improper base date for calculation of the legal regulated rent and failed to impose treble damages…
>
> The agency rationally found that [landlord's] failure to prove that J–51 riders were included in all of the tenant's renewal leases was not proof of a fraudulent scheme to deregulate the apartment. Under the circumstances, the fact that the owner filed an erroneous exit registration on the ground of high-rent vacancy, does not compel a finding of fraud. The error was plain on its face, since Kostic never vacated the apartment. Therefore, she could not have reasonably relied on the exit registration. Reasonable reliance is an

> element of fraud for purposes of evading the four-year lookback restriction for pre-HSTPA overcharge claims [*Regina*].

Bazan v. DHCR, 189 AD3d 495 [1st Dept 2020]:

> DHCR also rationally concluded that there was insufficient indicia of fraud requiring it to inquire beyond the base date [citations omitted throughout]. Contrary to petitioner's claim, DHCR rationally concluded that the landlord's alleged failure to comply with certain Department of Buildings requirements when the renovation work was performed did not establish a sufficient indicia of fraud.

Fuentes v. Kwik Realty LLC, 186 AD3d 435 [1st Dept 2020]:

> Here, plaintiff failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period from January 2014 [citations omitted throughout]. The motion court improperly concluded that defendant's failure to maintain any records of the alleged individual apartment improvements (IAIs) and its failure to provide notices under the Rent Stabilization Code relating to the last legal, regulated rent, were evidence of "an attempt to circumvent the Rent Stabilization Law." While defendant failed to provide notices, defendant registered the apartment with DHCR. And, although, defendant concededly failed to maintain records of the alleged IAIs, there is no requirement under the statute that such records be maintained indefinitely...

Gridley v. Turnbury Village, LLC, 196 AD3d 95 [2d Dept 2021], *lv denied,* 2021 WL 5898137 [2021]:

> Turnbury purchased the subject building in 2006, and was granted a so-called J–51 tax abatement in 2008. At that time, the apartments in the building were rent-stabilized or rent-controlled [citations omitted throughout]. In years after it purchased the subject building, Turnbury registered 26 apartments, including the apartment later rented by the plaintiff, with…DHCR…as exempt from rent stabilization regulation, on the ground that the rent under rent stabilization reached the high-rent, vacancy decontrol amount.
>
> By letter dated January 6, 2016, the DHCR notified Turnbury and approximately 4,000 other property owners that the New York courts had determined that "any apartment that was subject to Rent Stabilization at the date of the receipt of the J–51 benefits must register those units as rent stabilized with the DHCR." Pursuant to

that directive, Turnbury registered each of its rent-stabilized apartments with the DHCR, and the plaintiff was offered a rent-stabilized renewal lease on or about February 28, 2016, which he accepted.

In January 2019, the plaintiff commenced the instant action, alleging that Turnbury's failure to register his apartment as a rent-stabilized apartment with the DHCR in the years prior to 2016 was part of a fraudulent scheme to deregulate the apartment…

Thereafter, Turnbury moved, in effect, for summary judgment dismissing the complaint…

In opposition, the plaintiff admitted that Turnbury was correct that, had it followed the law, and charged rents permissible for rent-stabilized apartments during the period when the apartments were not registered, "the legal regulated rent would be higher than Plaintiff Gridley's current rent, which is calculated based on market conditions in the Building's neighborhood." However, according to the plaintiff, Turnbury was required to compute his rent pursuant to the "default formula"…

Supreme Court granted Turnbury's motion, in effect, for summary judgment dismissing the complaint. The court determined that the plaintiff was never charged more than the legal regulated rent that would have been charged if the rent stabilization regulations had been complied with, and Turnbury never engaged in a fraudulent scheme to deregulate the apartment…

Turnbury registered the plaintiff's apartment and the other apartments in the subject building with the DHCR in 2016 and in subsequent years. The registration of the plaintiff's apartment indicated that he was charged a "preferential rent," which was substantially less than the "legal regulated rent."

Here, the deregulation of the plaintiff's apartment was made in good faith (*see Matter of Park v. New York State Div. of Hous. & Community Renewal,* 150 A.D.3d 105, 50 N.Y.S.3d 377). Further, the late registration of the apartment as rent-stabilized, only after notification by the DHCR of a change in the law several years in the making, does not indicate that Turnbury was engaged in a fraudulent scheme to deregulate the apartment.

"Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury' ". *[Regina]*. The elements of

> fraud must be pleaded, and each element must be set forth in detail...That requirement was not met in this case.
>
> There are instances in which failure to timely register an apartment as rent stabilized could constitute evidence of fraud. Prior to 2016, and the DHCRs blanket notification to landlords of the change in the law, there were landlords involved in litigation over failure to register apartments as rent stabilized who nevertheless persisted in that practice (*see* [*Kreisler*]; [*Townsend*]; [*Butterworth*] …[*Nolte*] ...It is clear that the plaintiff's apartment was in fact rent stabilized, but that fact was not evidence of fraud, and allegations of fraud based upon speculation are insufficient…
>
> Further, there is no evidence here that the plaintiff was overcharged. As previously noted, the plaintiff acknowledged that "the legal regulated rent would be higher than Plaintiff Gridley's current rent, which is calculated based on market conditions in the Building's neighborhood." The plaintiff argues that since the subject apartment was improperly deregulated, there was no "legal regulated rent," but Turnbury could have raised the rent to a "false legal regulated rent." Although rent spikes or unexplained increases in rent could be evidence of fraud…there is no evidence of that in this case.
>
> An increase in rent alone is insufficient to establish a colorable claim of fraud…
>
> Moreover, in this case, a rental history of the subject apartment was available to the DHCR, and there is no evidence of any misrepresentations by Turnbury…

Kreloff v. DHCR, 191 AD3d 531 [1st Dept 2021]: "It was not irrational for DHCR to distinguish the facts of this case from those in other cases finding such a scheme [*Thornton, Conason*], as [tenant]'s apartment would have been deregulated by operation of law, but for her previous landlord's failure to provide notice in all renewal leases that its J–51 benefits were set to expire (Administrative Code of City of N.Y. § 26–504[c])."

Zitman v. Sutton LLC, 195 AD3d 483 [1st Dept 2021]:

> …the record does not support plaintiff's contention that the landlord engaged in a fraudulent overcharge scheme. It shows that although plaintiff was initially charged an unregulated rent of $1,800 per month, shortly thereafter, the landlord agreed, as plaintiff admits, to reduce his rent to $1,200 per month, which was then registered with [DHCR] as the legal regulated rent for the apartment in October 1988. There is no evidence that any

> subsequent increase was the result of fraud or was otherwise improper. The DHCR rent history for the four-year lookback period shows that the rent increases were within the rates permitted by the relevant Rent Guidelines Board orders and the DHCR-approved major capital improvement increase for repairs to the building. A single increase in rent, without more, is insufficient to establish fraud warranting review beyond the lookback period.

Sandlow v. 305 Riverside Corp., 201 AD3d 418 [1st Dept 2022]:

> Defendant's failure to provide plaintiff's predecessor with notice of the last legal regulated rent, although a violation of law, was not fraudulent [citations omitted throughout], especially since, as Supreme Court found, the deregulation of the apartment in 1997 was proper…Defendant's agent, whose credibility is not addressed in the order under review, testified that he relied on the 1996 advisory opinion by the Division of Housing and Community Renewal to support his belief that the receipt of J–51 benefits would not affect apartment regulation. Though the agent's reliance proved to be misplaced (*see* [*Roberts*]*…),* his testimony does not show a conscious and knowing violation…
>
> That defendant did not file retroactive rent registrations until 2011, and, even then, only back to 2007, also does not demonstrate fraud, since "the retroactivity of *Roberts* was not settled until 2012," when an appeal of this Court's decision finding retroactivity was withdrawn…Nor does defendant's decision not to file additional registrations retroactively show fraud, given defendant's reliance on the four-year statutory lookback period…
>
> Further, the 2004 apartment renovation does not demonstrate fraud. On the contrary, defendant "sufficiently documented the apartment improvements" by proffering the estimate, invoices, checks showing payment of all the sums charged, and testimony from its own agents and the general contractor that the work was done…Plaintiff's expert's credible testimony as to the amount the contractor should have charged, how much of the renovation would have qualified as individual apartment improvements, and the contractor's subpar work or failure to install crown molding does not prove that the work was not performed...

In *Aras v. B-U Realty Corp.*, 221 AD3d 5 [1st 2023], the Appellate Division was utterly unwilling to find fraud under a number of presented scenarios:

- Pre-*Roberts* deregulations
- Tenants failed to take Fair Market Rent Appeals within four years of Rent Control predecessor leaving
- Small inconsistencies in very old registrations

Aras held*:* "To reiterate, the filing of late or incorrect registrations does not support fraud as a matter of law (*Casey*, 39 N.Y.3d at 1107, 186 N.Y.S.3d 599, 207 N.E.3d 565; *see also Gridley*, 196 A.D.3d at 101, 149 N.Y.S.3d 243). Similarly, the fact that there are inconsistencies between the rent on the base date and what was filed on the amended DHCR registrations is not enough to establish fraud…"

Woodson v. Convent 1 LLC, 216 AD3d 585 [1st Dept 2023]:

> However, with respect to the rent increases for 3A, 4B, 4F and 5E, while defendants concede that they may have made some overcharges, the motion court correctly determined that the record on plaintiffs' summary judgment motion does not establish as a matter of law that such overcharges were part of a "fraudulent scheme to remove an apartment from the protections of rent stabilization .... [which] tainted the reliability of the rent on the base date" [*Grimm* and *Regina*.] In particular, plaintiffs did not establish that defendants made any misrepresentation of material fact in connection with the rent increases for these units [citation omitted]. That the increases were not justified by any major capital improvements (MCI) or individual apartment improvements (IAI) does not establish fraud, as there is no evidence that defendants ever made a statement justifying the increases based on any MCI or IAI and, in fact, defendants, in their interrogatory responses, affirmatively denied making any such statement.

Gassana v. DHCR, 226 AD3d 589 [1st Dept 2024]:

> There is evidence to support DHCR's finding that respondent landlord performed significant individual apartment improvements (IAIs) in 2010, having " 'sufficiently documented the apartment improvements' by proffering ... invoices, checks showing payment of all the sums charged," its Department of Buildings (DOB) permit filing indicating the work to be done, and the DOB's acknowledgement of completion [citations omitted throughout]. Moreover, contrary to [tenant's] contention, the length of a prior tenancy, on which the landlord-based vacancy increases in 2010, is clear from registration records showing that the prior tenant in

> question commenced occupancy on July 1, 1990 and his last lease expired on June 30, 2009.
>
> The record also supports DHCR's conclusion that the landlord's failure to register the apartment between 2014 and 2017 does not evince a fraudulent scheme to deregulate. Not only did the landlord correct this error by retroactively reducing petitioner's rent to match his initial rent and filing late registrations, thus effectively freezing the rent (*see* Administrative Code § 26–517[e]), but also the failure to register and retroactive registrations had no bearing on the reliability of the base date rent four years before petitioner filed his claim (*see Casey,* 39 N.Y.3d at 1107, 186 N.Y.S.3d 599, 207 N.E.3d 565; *see also Aras v. B–U Realty Corp.,* 221 A.D.3d 5, 15, 197 N.Y.S.3d 148 [1st Dept. 2023]).
>
> We note that, at the outset of the tenancy, the landlord gave petitioner a purported license to "temporarily use" the apartment, rather than a rent-stabilized lease. The landlord subsequently attempted to evict petitioner in a holdover proceeding, representing to the Housing Court that the apartment was not rent stabilized. The landlord's licensure scheme was unlawful. Nonetheless, the landlord's conduct post-dated the base date and, in this regard, did not taint the reliability of the base date rent…

Gourin v. 72A Realty Associates, L.P., 226 AD3d 475 [1st Dept 2024]:

> Contrary to [tenant]'s contention, the documents describe in substantial detail the work performed, including, among other things, a complete kitchen renovation, replacement of woodwork such as windowsills, baseboard, and crown molding, and the addition of a new closet (*compare Nolte v. Bridgestone Assoc. LLC,* 167 A.D.3d 498, 499, 90 N.Y.S.3d 159 [1st Dept. 2018]; *Matter of Pechock v. New York State Div. of Hous. & Community Renewal,* 253 A.D.2d 655, 655, 677 N.Y.S.2d 554 [1st Dept. 1998]). The resulting allowable rent increases applicable to the tenant who moved into the unit in December 2000 raised the rent to above $2,000 per month (*see* former 9 NYCRR 2520.11[r][4], [r][10][i]; former 9 NYCRR 2522.8).
>
> Plaintiff correctly notes that the unit remained rent stabilized in 2000 because defendant's building was receiving J–51 tax benefits [citations omitted]. However, once the J–51 benefits expired in 2003 and a new tenancy commenced in April 2004, "all the circumstances permitting luxury decontrol were present and satisfied" (*Matter of Park,* 150 A.D.3d at 108, 112–113, 50 N.Y.S.3d 377), and the apartment was "deregulated by operation

> of law" (*Matter of Kreloff v. New York State Div. of Hous. & Community Renewal,* 191 A.D.3d 531, 532, 138 N.Y.S.3d 333 [1st Dept. 2021], *lv denied* 37 N.Y.3d 915, 2021 WL 5898736 [2021]).
>
> Plaintiff contends that the apartment nonetheless remained rent stabilized because defendant was required to correct its unit registrations after it erroneously registered the unit as exempt in 2001. However, it was not until "March 2012" — almost nine years after the J–51 benefits expired — that "controlling authority ... required that owners who had previously luxury decontrolled apartments while still receiving J–51 tax benefits must register those apartments and retroactively restore them to rent stabilization" (*Matter of Park,* 150 A.D.3d at 110, 50 N.Y.S.3d 377). To the extent that defendant should have filed retroactive registration statements after 2012, there was no requirement to do so for more than the then-applicable "four-year statutory lookback period" (*Sandlow,* 201 A.D.3d at 419, 159 N.Y.S.3d 415, citing former CPLR 213–a and former Administrative Code of City of N.Y. § 26–516[a][2]). Further, contrary to [tenant]'s contention, "rent freezing is inapplicable in *Roberts* cases where the failure to timely register resulted directly from DHCR's endorsement of a misunderstanding of the law," which is the case here [*Regina]*…

310 East 74 LLC v. Mirea, 226 AD3d 547 [1st Dept 2024]:

> Supreme Court properly found that defendants have failed to raise a material issue of fact as to the alleged fraudulent deregulation of the apartment so as to invoke the lookback rule exception. "[T]he undisputed disclosure" of the rent increases in the Division of Housing and Community Renewal registrations "negates any inference of fraud as a matter of law" (*Burrows v. 75–25 153rd St., LLC,* 215 A.D.3d 105, 113, 189 N.Y.S.3d 1 [1st Dept. 2023]).
>
> Defendants' assertion that the excessive rent included in the parties' lease renewal breached the parties' agreement and constitutes a fraudulent scheme to collect excessive rent is unavailing (*see e.g. East Midtown Plaza Hous. Co. v. City of New York,* 218 A.D.2d 628, 629, 631 N.Y.S.2d 38 [1st Dept. 1995]).

V. So…how do you know if there was a fraudulent scheme?

As discussed in the introduction, reading any random case in isolation fails to produce a rule for determining when a set of circumstances rises to the level of a fraudulent scheme. But when examined as a whole, guidance emerges from this body of caselaw.

Attempting to conclude with some guidance from these cases, might go like this:

(1) If landlord attempts to base the post-improper-deregulation rents upon something legal and rational, then it is less likely to be fraud. If landlord makes the rent up out of thin air to suit its own purposes, then it is more likely to be fraud.

(2) If landlord quickly attempts to self-correct an improper deregulation, then it is less likely to be fraud. If landlord needs to be dragged kicking and screaming back into Rent Stabilization, then it is more likely to be fraud.

(3) If tenants depended to their detriment upon the knowingly false statements of landlord, then it is more likely to be fraud. But if the tenant is claiming to rely upon something which it could have obviously seen was in error, then it is less likely to be fraud.

(4) If tenants were ultimately not harmed by landlord's actions and their rents came out close to where they would be if the improper deregulation had not taken place, then it is less likely to be fraud.

(5) If landlord can support IAI's, then it is less likely to be fraud. If landlord lied about the IAI's and cannot substantiate them, then it is more likely to be fraud.

VI. Even if the decision maker does not find fraud, if there is no reliable legal rent, then the decision maker can resort to the DHCR default method for setting the base rent (RSC § 2522.6(b)).

Even if the decision maker does not find fraud, if there is no reliable legal rent, then the decision maker can resort to the **"DHCR Default Method"** (defined by the statute directly below) for setting the base rent.

RSC § 2522.6(b) (Orders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed), in relevant part, states:

> (2) Where either:
>
> (i) the rent charged on the base date cannot be determined; or
>
> (ii) a full rental history from the base date is not provided; or

(iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; **or**

(iv) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title [conditional rentals] has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision.

(3) These amounts are:

(i) the lowest rent registered pursuant to section 2528.3 of this Title [annual registration requirements] for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or

(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title [rent adjustments upon vacancy or succession]; or

(iii) the last registered rent paid by the prior tenant (if within the four year period of review); or

(iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations.

[Emphasis supplied.]

This is where it gets tricky, because the lead case in this area, *Grimm v. DHCR*, 15 NY3d 358 [2010], is often cited as a fraud case. But the court in *Grimm* did not conclude that there was (or was not) fraud in *Grimm*. Rather, the court in *Grimm* determined that there was an allegation that there was no reliable rent upon which to set the base rent, thus triggering the factfinder to investigate whether the rent on the base date is reliable. *Grimm v. DHCR*, 15 NY3d 358 [2010] holds:

> We…conclude that, where the overcharge complaint **alleges** fraud, as here, DHCR has an obligation to ascertain whether the rent on the base date is a lawful rent. Accordingly, here, as the Appellate Division concluded, DHCR acted arbitrarily and capriciously in failing to meet that obligation where there existed substantial indicia of fraud on the record.

In particular, here it is alleged that the tenants immediately preceding petitioner paid significantly more than the previously registered rent, and were not given a rent-stabilized lease rider. Moreover those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense. Almost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements (*see* Rent Stabilization Code [9 NYCRR] § 2528.3[a] [requiring annual registration statements be filed with DHCR]) and later filed several years' registration statements retroactively after receiving petitioner's overcharge complaint. Finally, petitioner's initial lease did not contain a rent-stabilized rider. **The combination of these factors should have led DHCR to investigate the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim.**

Our holding should not be construed as concluding that fraud exists, or that the default formula should be used in this case. Rather, we merely conclude that DHCR acted arbitrarily in disregarding the nature of petitioner's allegations and in using a base date without, at a minimum, **examining its own records to ascertain the reliability and the legality of the rent charged on that date.**

DHCR also argues that, under the Appellate Division's holding, any "bump" in an apartment's rent—even those authorized without prior DHCR approval, such as rent increases upon installation of improvements to an apartment (see Rent Stabilization Law § 26–511[c][13])—will establish a colorable claim of fraud requiring DHCR investigation. Again, we disagree. Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton,* the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

[Emphasis supplied.]

In *Simpson v 16-26 E. 105, LLC*, 176 AD3d 418 [1st Dept 2019], this rule is more explicitly stated, **"…the default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable."** [Emphasis supplied.]

160 East 84th Street Associates LLC v. DHCR, 160 AD3d 474 [1st Dept 2018] also found no fraud, but approved of the utilization of the default formula:

> DHCR's use of a sampling method to determine the legal regulated rent on intervenor tenant's apartment based on the average stabilized rents for studio apartments in the 2006 registration of the subject building is rationally based in the record and not arbitrary and capricious [citation omitted]. DHCR providently exercised its broad equity discretion to fashion an equitable solution to the question of the appropriate rent for an apartment that was improperly treated as deregulated for years (*see* Rent Stabilization Code [RSC] [9 NYCRR] § 2522.7; RSC former § 2522.6[b][2]; *Matter of W 54–7 LLC v. New York State Div. of Hous. & Community Renewal,* 39 A.D.3d 312, 313, 835 N.Y.S.2d 38 [1st Dept. 2007]).
>
> The market rent of $2,200 per month, established by lease, in effect on the "base date" (RSC § 2520.6[f][1]) was the result of improper deregulation by petitioner and thus may not be adopted as the proper base date rent [citation omitted]. However, because petitioner's actions were based upon a mistaken pre-*Roberts* belief that the apartment had been deregulated, and there is no evidence of fraud, resort to the punitive default formula set forth in *Thornton* …is inappropriate.

More support is found farther back in First Department jurisprudence, which is still good and widely cited law, for the concept that the DHCR Default Method can and should be utilized where there is no finding of a landlord' fraudulent scheme. *Levinson v. 390 West End Associates, L.L.C.*, 22 AD3d 397 [1st Dept 2005] explains that particularly when there is no fraud look-back, the default method may apply if there is no reliable base rent, holding, "Here, as in *Thornton,* a default formula must be used to determine the current legal rent, since it is conceded that the rent actually charged on the base date was unlawful, and the statute of limitations does not permit us to use any rental history prior to the base date in setting the current legal rent."

Wasserman v. Gordon, 24 AD3d 201 [1st Dept 2005], was a case where the rent might have been decided by a fair market rent appeal upon the apartment leaving Rent Control, but the appeal was never made. Therefore, in a case where no fraud was alleged, because there was no reliable base rent, the appellate court approved of the lower court employing the DHCR Default Method.

215 W 88th Street Holdings LLC v. DHCR, 143 AD3d 652 [1st Dept 2016], alludes to a "fraudulent nonprimary residence rider", rendering tenants' initial lease…a legal nullity", but stops short of finding a fraudulent scheme to deregulate. Nevertheless the appellate court in *215 W 88th Street* approved of the requirement, "that the base date rent, for purposes of calculating the rent overcharge, be arrived at using the 'default method'".

The rule is expressed well also in *Lexford Properties, L.P. v. Alter Realty Co., Inc.*, 31 Misc.3d 142(A) [App Term, 1st Dept, 2011]:

> Contrary to tenant's contention, the cited Code section, not the *Thornton* default formula (*see Thornton v. Baron,* 5 NY3d 175 [2005]) provides a proper basis to fix the legal rent in the matter at hand, in which **no tenable showing was made that the landlord or its predecessor attempted to evade or circumvent the rent regulatory scheme and where the difficulty in establishing the base date rent arises not from any alleged illegality-the rent actually charged tenant on the March 12, 2005 base date was $0–but because such rent "cannot be established"…**
>
> [Emphasis supplied.]

See also, 215 W 88th Street Holdings LLC v. DHCR, 143 AD3d 652 [1st Dept 2016]:

> The court properly upheld DHCR's determination that the inclusion of a fraudulent nonprimary residence rider in the tenants' initial lease rendered it a legal nullity and required that the base date rent, for purposes of calculating the rent overcharge, be arrived at using the "default method" (*see Thornton v. Baron,* 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 [2005]; *Levinson v. 390 W. End Assoc., L.L.C.,* 22 A.D.3d 397, 802 N.Y.S.2d 659 [1st Dept.2005]). The court also correctly upheld DHCR's determination that the owner—which purchased the building twelve years after the initial illegal lease, and could not reasonably be deemed to have been aware of it—did not act willfully, and thus treble damages were not warranted…

VII. Other Procedural Things Relating to Rent Stabilization Fraud Cases

Fraud cases are almost never susceptible to summary judgment unless it is to find no fraud. *Austin v. 25 Grove Street LLC*, 202 AD3d 429 [1st Dept 2022]:

> [Tenants] argue that…the illegal conduct of defendant and their predecessor warrants a finding of fraud as a matter of law, permitting review of the entire rent history. They cite to the initial improper offer of a market rate lease during the period that the landlord was receiving J–51 benefits, followed by an offer two

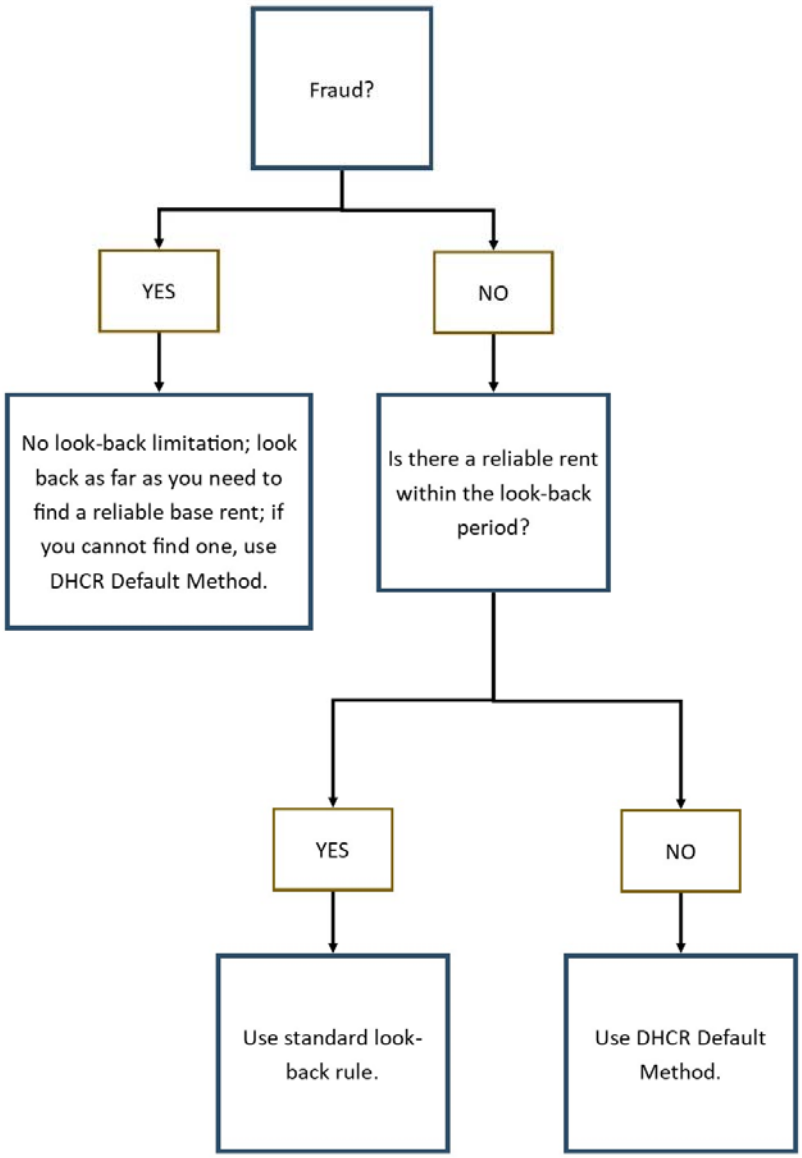
> years later of a rent-stabilized renewal lease that was not registered, and the failure to offer any subsequent renewal lease and the registration of a purportedly "fictitious" lease in 2018, which defendant contends was merely an error. While these irregularities in the DHCR rent history and defendant's failure to provide proper rent-stabilized renewal leases **raise questions of fact as to defendants adherence to the rent stabilization laws, summary judgment in plaintiff's favor based on a finding of fraud is not warranted at this stage, given the parties' competing contentions as to the reasons for the discrepancies in the DHCR history and questions of scienter**.
>
> [Emphasis supplied.]

Fraud must be affirmatively pleaded to be included in a case. *Decock v. DHCR*, 226 AD3d 473 [1st Dept 2024] ("While DHCR properly reviewed the unit's rent history back to 1994 in order to determine the regulatory status of the unit [citations omitted throughout], it properly declined to review the rent history preceding the date of deregulation. Petitioner did not raise the issue of a fraudulent scheme to deregulate the unit before the Rent Administrator, nor did he set forth good cause for failing to do so…")

Discovery can play a big role in these types of cases. *Montera v. KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021]. *But see Cain v. 42 West 65th LLC*, 2024 WL 4438243 [1st Dept 2024] ("The mere possibility that discovery might result in evidence that undermines the documentary evidence here showing a valid deregulation is not sufficient to warrant [discovery].") *See also Chang v. Westside 309 LLC*, 222 AD3d 550 [1st Dept 2023].

VIII. Conclusion and Handy Chart.

Decision-makers should not conflate fraud-and-overcoming-the-look-back with no-fraud-but-no-reliable-rent. The following diagram suggests a framework for deciding these matters:



IX. Forget everything above?

A. November 2023 – DHCR rewrote the Rent Stabilization Code

In November 2023, the Rent Stabilization Code was finally updated to conform to the 2019 Housing Stability and Tenant Protection Act. RSC § 2526.7 (Determination of legal regulated rents; penalties; fines; assessment of costs; attorney's fees; rent credits; where the proceeding is commenced on or after June 14, 2019; Effective: November 8, 2023)

> (a) Definitions.
>
> (1) *Base Date:* For the purposes of this section, the Base Date shall be the date of the most recent reliable annual rent registration statement, filed and served upon a tenant six or more years prior to the filing of a complaint of overcharge or the initiation of a proceeding to determine the legal regulated rent of an apartment. Any registration statement filed contemporaneously with a certification of service shall be presumed to have been served upon the tenant in occupancy. In no event shall the base date be prior to June 14, 2015.
>
> Absent an exception set forth in section 2526.1 of this Part, if no base date can be determined subsequent to June 14, 2015, the base date shall be June 14, 2015.
>
> (2) *Reliable rent registration statement:* A rent registration shall be considered to be reliable if, prior to the filing of such registration statement, and subsequent to June 14, 2015, the rent history contains no unexplained increases in the rent.
>
> (b) The DHCR shall consider all available reasonably necessary evidence when making a determination as to the reliability of a rent registration statement, including but not limited to:
>
> (1) any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers;
>
> (2) any order issued by any state, municipal or federal agency;
>
> (3) any records maintained by the owner or tenants; and
>
> (4) any public record kept in the regular course of business by any state, municipal or federal agency.

(c) The DHCR shall set the legal regulated rent by adding any lawful rent increases and adjustments to the rent on the base date.

(d) The DHCR shall examine the rent prior to the base date and subsequent to June 14, 2015 to make a determination as to:

(1) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including, but not limited to, whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable.

(2) whether an accommodation is subject to the emergency tenant protection act or the rent stabilization law;

(3) whether an order issued by the division of housing and community renewal or by a court, including, but not limited to an order issued pursuant to section 2523.4(a) of this title [failure to maintain services], or any regulatory agreement or other contract with any governmental agency, and remaining in effect within six years of the filing of a complaint pursuant to this section, affects or limits the amount of rent that may be charged or collected;

(4) whether an overcharge was or was not willful;

(5) whether a rent adjustment that requires information regarding the length of occupancy by a present or prior tenant was lawful;

(6) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged a preferential rent;

(7) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or

(8) the amount of the legal regulated rent where the apartment was vacant or temporarily exempt on the date six years prior to a tenant's complaint.

(e) The DHCR shall examine the rent prior to June 14 15, 2015, pursuant to 9 NYCRR § 2526.1.

(f) A tenant may file a complaint of overcharge at any time.

(g) An owner may, prior to the issuance of an order determining the existence of an overcharge, file late registration statements. Provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration.

(h)

(1) Any affected tenant shall be given notice of and an opportunity to commence a subsequent proceeding or an opportunity to join in any proceeding commenced by the DHCR pursuant to this section.

(2) Where a complainant pursuant to this subdivision vacates the housing accommodation, and the DHCR continues the proceeding, the DHCR shall give any affected tenant notice of and an opportunity to commence a subsequent proceeding or an opportunity to join in such proceeding.

(i) Damages

(1) Any owner who is found by the DHCR, after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the collectable rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess, except as provided under subdivision (f) of this section. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the DHCR shall establish the penalty as the amount of the overcharge plus interest, which interest shall accrue from the date of the first overcharge on or after the base date, at the rate of interest payable on a judgment pursuant to section 5004 of the Civil Practice Law and Rules, and the order shall direct such a payment to be made to the tenant.

(2) Any recovery of overcharge penalties, including treble damages, where appropriate, shall be limited to the six years preceding the complaint, provided, however, that there shall be no recovery of treble damages for overcharges that occurred prior to June 15, 2017, and no recovery of damages for overcharges that occurred prior to June 15, 2015. After a complaint of rent overcharge has been filed and served on an owner, the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered by

the division of housing and community renewal as evidence that the overcharge was not willful.

(3) a penalty of three times the overcharge may not be based upon an overcharge having occurred prior to April 1, 1984.

(4)

(i) Complaints filed prior to April 1, 1984 shall be determined in accordance with the RSL and Code provisions in effect on March 31, 1984, except that an overcharge collected on or after April 1, 1984 may be subject to treble damages pursuant to this section.

(ii) Complaints filed on or after April 1, 1984 and prior to June 14, 2019 shall be determined pursuant to 9 NYCRR § 2526.1.

(5) The DHCR shall determine the owner's liability between or among two or more tenants found to have been overcharged during their particular occupancy of a housing accommodation, and at its discretion, may require the owner to make diligent efforts to locate prior tenants who are not parties to the proceeding, and to make refunds to such tenants or pay the amount of such penalty as a fine.

(6) An owner who is found to have overcharged by the DHCR shall be assessed and ordered to pay as an additional penalty the reasonable costs and attorney's fees of the proceeding, and except where treble damages are awarded, interest from the date of the overcharge occurring on or after April 1, 1984, at the rate of interest payable on a judgment pursuant to section 5004 of the Civil Practice Law and Rules.

(7) A tenant may recover any overcharge penalty established by the DHCR by deducting it from the rent due to the present owner at a rate not in excess of 20 percent of the amount of the penalty for any one month's rent. If no such rent credit has been taken, the order of the DHCR awarding penalties may be entered, filed and enforced by a tenant in the same manner as a judgment of the Supreme Court, on a form prescribed by the DHCR, provided that the amount of the penalty exceeds $1,000 or the tenant is no longer in possession. Neither of these remedies are available until the expiration of the period in which the owner may institute a proceeding pursuant to Part 2530 of this Title.

(8) Responsibility for overcharges.

(i). For overcharges collected prior to April 1, 1984, an owner will be held responsible only for his or her portion of the overcharges, in the absence of collusion or any relationship between such owner and any prior owners.

(ii).

(*a*) For overcharge complaints filed or overcharges collected on or after April 1, 1984, a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner. However, in the absence of collusion or any relationship between such owner and any prior owner, where no records sufficient to establish the legal regulated rent were provided at a judicial sale, or such other sale effected in connection with, or to resolve, in whole or in part, a bankruptcy proceeding, mortgage foreclosure action or other judicial proceeding, an owner who purchases upon or subsequent to such sale shall not be liable for overcharges collected by any owner prior to such sale, and treble damages upon overcharges that he or she collects which result from overcharges collected by any owner prior to such sale. An owner who did not purchase at such sale, but who purchased subsequent to such sale, shall also not be liable for overcharges collected by any prior owner subsequent to such sale to the extent that such overcharges are the result of overcharges collected prior to such sale.

(*b*) Court-appointed receivers. A receiver who is appointed by a court of competent jurisdiction to receive rent for the use or occupation of a housing accommodation shall not, in the absence of collusion or any relationship between such receiver and any owner or other receiver, be liable for overcharges collected by any owner or other receiver, and treble damages upon overcharges that he or she collects which result from overcharges collected by any owner or other receiver, where records sufficient to establish the legal regulated rent have not been made available to such receiver. Penalties pursuant to this paragraph shall be subject to the time limitations set forth in paragraph (a)(2) of this section.

(9) This subdivision shall not be construed to entitle a tenant to more than one refund for the same overcharge.

> (j) Where no rent history for the housing accommodation is available, the rent shall be determined in the manner set forth in Section 2522.6 of this title.

B. <u>March 1, 2024 – the Legislature redefines "Rent Stabilization Fraud".</u>

On March 1, 2024, New York State Assembly bill A. 08506 (S. 08011) was passed into law. The purpose of this statute is to define, "clearly the scope of the fraud exception to the pre-HSTPA four-year rule for calculating rents…" **("New Fraud Law")**. The New Fraud Law states:

> § 2-a. When a colorable claim that an owner has engaged in a fraudulent scheme to deregulate a unit is properly raised as part of a proceeding before a court of competent jurisdiction or the state division of housing and community renewal, a court of competent jurisdiction or the state division of housing and community renewal shall issue a determination as to whether the owner knowingly engaged in such fraudulent scheme **after a consideration of the totality of the circumstances.**
>
> In making such determination, the court or the division shall consider all of the relevant facts and all applicable statutory and regulatory law and controlling authorities, **provided that there need not be a finding that all of the elements of common law fraud**, including evidence of a misrepresentation of material fact, falsity, scienter, reliance and injury, were satisfied in order to make a determination that a fraudulent scheme to deregulate a unit was committed **if the totality of the circumstances nonetheless indicate that such fraudulent scheme to deregulate a unit was committed.**
>
> **[Emphasis supplied.]**

Here is the first case utilizing the New Fraud Law (that I know of). *Buffo v. East 7th LLC*, 2024 WL 3221222 [New York State Supreme Court 2024], where Justice Lyle utilized the new definition of fraud-not-fraud and still found…wait for it…no fraud, holding:

> Plaintiff Keith Buffo (hereafter "Plaintiff") brings this action alleging that Defendants 208-10 East 176 LLC and Birchwood Properties, LLC's predecessor fraudulent raised the rent of his apartment in January 2001 to remove the apartment from the rent regulation program pursuant to the law in effect at that time. [Footnote omitted.] Plaintiff seeks to challenge the deregulated status of his apartment and damages for rent overcharges.

The Court of Appeals has made clear that for complaints based on upon an alleged fraudulent rent originating prior to June 14, 2019, enactment of the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), the law in effect prior to HSTPA applies (*Regina Metro Co LLC v DHCR,* 35 NY3d 332, 130 NYS3d 759 [2020]["the law in effect at the time the overcharges occurred" applied to any fraudulent rent increase originating prior to June 14,2019]). Since the allegations regarding fraudulent deregulation in this case all occurred prior to June 14, 2019, pre-HSTPA law applies.

Though "an apartment's rent history is always subject to review to determine whether a unit is rent-stabilized" (*Matter of Kostic v NY State Div. of Hous. & Community Renewal,* 188 AD3d 569, 569 [1st Dept 2020]), the party challenging the status must assert a legal basis for that challenge. Similarly, "review of rental history, outside the four-year lookback period is only permitted where the tenant produced evidence of a fraudulent scheme to deregulate" (*Burrows v 75-25 153rd St., LLC,* 215 AD3d 105, 109, 189 N.Y.S.3d 1 [1st Dept 2023] *[quoting Casey v Whitehouse Estates, Inc.,* 39 NY3d 1104, 1106, 186 N.Y.S.3d 599, 207 N.E.3d 565 [2023]).

On December 23, 2023, Governor Hochul signed into law Chapter 760 of the Laws of New York of 2023,…

After a consideration of the totality of the circumstances and all the relevant pleaded facts (and those in the proposed pleading) and all applicable statutory and regulatory law and controlling authorities, this Court finds that Plaintiff has not alleged facts which fit either the Defendants or their predecessors conduct into a fraudulent scheme to deregulate Plaintiff's apartment. The facts alleged by the Plaintiff, which are wholly conclusory, are that Defendants' predecessors improperly deregulated the apartment by claiming to have made improvements that were either not made or exaggerated. Plaintiff's affidavit in opposition to this motion merely states he does not believe that the improvements were performed without providing any basis for his belief. This is insufficient, even under the new, more lenient, standard to allege a fraudulent scheme to deregulate a unit.

Accordingly, it is hereby ORDERED that, Plaintiff's motion to amend the complaint is denied as futile; and it is further ORDERED that Defendants 208-10 East 176 LLC and Birchwood Properties, LLC's motion for summary judgment is granted and this action is dismissed.

X. CONCLUSION

You could take the class that accompanies this book on November 15, 2024, and by November 16, 2024, things could be different. That is how the law is. Please make sure to check all the statutes herein and key cite all the cases before you use them.

ABOUT THE AUTHOR

Michelle Itkowitz is the founder of Itkowitz PLLC and she has been practicing commercial and complex-residential landlord and tenant litigation in the City of New York for over 25 years. Michelle represents both landlords and tenants as a litigator and a consultant.

Michelle works on pretty much anything having to do with Rent Stabilization, including but not limited to: Rent Stabilization coverage issues; non-primary residence; succession rights; owner's use proceedings; chronic non-payment of rent; rent overcharges; substantial rehabilitation; preferential rents; illegal sublets; and 421-a and J-51 Rent Stabilization. Michelle does extensive co-living consulting. Michelle works on commercial landlord and tenant litigation, including good guy guaranty enforcement and defense, Yellowstone Injunctions, and commercial lease build out disputes. Michelle handles the landlord and tenant aspects of development projects. Michelle represents residential tenants in buyouts. Michelle helps to clean up "hairy" buildings and apartments with chronic landlord and tenant problems. Michelle works on matters having to do with short-term leasing problems (like Airbnb). Michelle works on matters involving special types of apartments, such as SRO's (single room occupancy), luxury apartments, co-op apartments, and Loft Law (interim multiple dwelling) apartments. Michelle deals with all kinds of occupancy issues, regarding roommates, family members, subtenants, and running a business in an apartment.

Michelle creates and shares original and useful content on landlord and tenant law in the City of New York, through numerous articles, books, lectures, and continuing legal education presentations. Michelle is one of three co-authors of the New York State Bar Association's 423-page, 2,668-footnote *New York Residential Landlord-Tenant Law and Procedure* treatise with the Hon. Gerald Lebovitz and Damon Howard, Esq. Michelle writes the commercial lease remedies and good guy guaranty litigation chapters for the New York State Bar Association's Commercial Leasing treatise. Michelle is frequently quoted in the press on a variety of landlord and tenant issues. Every three years, Michelle develops a fresh seven-part continuing legal education curriculum for Lawline entitled "Landlord and Tenant Litigation in New York". Lawline named Michelle as one of their top faculty.

Michelle is the host of the very popular Tenant Law Podcast, which can be heard on Spotify, Apple, YouTube, or wherever you get your podcasts.

Michelle is a pioneer of Legal Project Management, a system by which project management principles are imposed upon the practice of law.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corporation. Michelle's eponymous law firm is one of the largest women-owned law firms, by revenue, in the state.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

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